Toobian-Sani Enters., Inc. v Bronfman Fisher Real Estate Holdngs, LLC

2018 NY Slip Op 32232(U)

September 10, 2018

Supreme Court, New York County

Docket Number: 651847/2012

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SALIANN SCARPULLA** **PART** **39**
Justice

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TOOBIAN-SANI ENTERPRISES, INC., INDIVIDUALLY AND ON ITS OWN BEHALF AND DERIVATIVELY ON BEHALF OF 210 WEST 91ST STREET OWNER, LLC,

Plaintiff,

- v -

BRONFMAN FISHER REAL ESTATE HOLDNGS, LLC, 210 W 91 ACQUISITION LLC AND, AVI DAN, AS DEFENDANTS, AND 210 WEST 91ST STREET OWNER, LLC AS NOMINAL DEFENDANT

Defendant.

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INDEX NO. 651847/2012

MOTION DATE 2/9/2018

MOTION SEQ. NO. 007, 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 500; 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 338, 346

were read on this application to/for Miscellaneous.

Upon the foregoing documents, it is

In this action arising from the breach of an alleged oral joint-venture agreement regarding the purchase of air rights over a shared community property and synagogue, plaintiff Toobian-Sani Enterprises, Inc. ("Toobian Sani") moves for an order: (i) rejecting the report of Special Referee Joseph P. Burke (the "Referee Report") pursuant to CPLR §4403 and Rule 202.44 of the Uniform Rules of the Supreme Court; and either (ii)

determining, *de novo*, that defendant Joseph Kranzler ("Kranzler") was an agent acting on behalf of defendant Bronfman Fisher Real Estate Holdings, LLC ("Bronfman Fisher") after January 1, 2008, and was not an agent acting on behalf of defendant Avi Dan ("Dan") after January 1, 2008; or (iii) granting a new hearing in front of a new referee. In opposition to Toobian-Sani's motion to reject the Referee Report, Bronfman Fisher and Dan (together the "Defendants") cross-move for an order confirming the referee report.

Toobian-Sani originally moved to compel Bronfman Fisher to produce documents and communications between its attorneys and Kranzler, its alleged agent before January 1, 2008. In response, Bronfman Fisher contended that the requested documents were protected by attorney-client privilege. Bronfman Fisher submitted an affidavit in support of its assertion from Almog Geva ("Geva"), Bronfman Fisher's general counsel. In the affidavit, Geva stated that Kranzler represented Bronfman Fisher on the Air Rights project before January 1, 2008.

Toobian-Sani simultaneously moved to compel Dan to produce documents and communications between his attorneys and Kranzler, Dan's alleged agent between May 1, 2008 and July 31, 2008. In response, Dan contended that the requested documents were protected by attorney-client privilege and submitted a letter agreement that Dan entered into with Kranzler dated July 31, 2008. Dan also submitted an affidavit, in which he states that he hired Wachtel Missry for legal services concerning the Air Rights project.

In an amended decision and order dated March 7, 2017 (the "March 2017 Order"), I found issues of fact to exist over whether (i) Kranzler was Bronfman Fisher's agent and

represented Bronfman Fisher in the Air Rights project prior to January 1, 2008; and (ii) whether Kranzler was Dan's agent and represented Dan in the Air Rights project from May 1, 2008 to July 31, 2008. Accordingly, I directed a hearing to be conducted by a Special Referee to hear and report with recommendations on the two issues. In addition, I held Toobian-Sani's motion to compel, to strike a number of Bronfman Fisher and Dan's answers to interrogatories, and for attorney's fees in abeyance pending receipt of the Special Referee's report after concluding the requested hearing.

The hearing presided over by Referee Burke occurred over the course of three days - from May 1, 2017 through May 3, 2017. On the first day of the hearing, both parties signed and submitted a stipulation confirming that Kranzler was Bronfman Fisher's agent in the Air Rights project until January 1, 2008. Special Referee Burke submitted an order of Partial Determination on January 8, 2018 and recommended that I find that Kranzler's agency relationship with Bronfman Fisher concerning the Air Rights project terminated on January 1, 2008. In the same Order, Referee Burke further recommended that I find that Kranzler was Dan's agent in the Air Rights project from May 1, 2008 through July 31, 2008.

Discussion

The judge has ultimate discretion to confirm or reject the report of a referee under CPLR §4403. However, the report of a Special Referee will be affirmed "'whenever the findings contained therein are supported by the record and the special referee has clearly defined the issues and resolved matters of credibility.'" *Steingart v. Hoffman*, 80 A.D.3d 444, 445 (1st Dept. 2011), citing *Nager v. Panadis*, 238 A.D.2d 135, 136 (1st Dept.

1997); *see also Flanagan & Cooke v. RC 27th Ave. Realty Corp.*, 305 A.D.2d 135, 135 (1st Dept. 2003).

The Referee Report

Toobian-Sani contends that the Referee Report should not be confirmed because Referee Burke erred by (i) omitting the issue of apparent authority; (ii) refusing to accept Kranzler's deposition testimony; and (iii) denying Toobian-Sani a continuance so that Pouya Toobian could appear to testify.

First, Referee Burke's recommendation that the issue of Kranzler's apparent authority was not an issue is supported by the record. The Referee's determination relied on a lack of testimony that Bronfman Fisher or any of its employees misrepresented Kranzler's agency status. Referee Burke further relied on the fact that neither Toobian-Sani nor its employees submitted evidence indicating that Toobian-Sani did in fact rely on Kranzler's apparent authority.

Second, Referee Burke's determination that Kranzler's deposition testimony be excluded from evidence is also supported by the record. Toobian-Sani could have called Kranzler as a witness to rebut the proffered testimony but did not, claiming that efforts to call Kranzler to court had proven futile in the past. Toobian-Sani instead asserted that Kranzler's deposition testimony should be introduced into evidence because it falls within the CPLR 3117(a)(2) and CPLR 3117(a)(3)(ii) hearsay exceptions. Referee Burke correctly found that Toobian-Sani did not meet the requirements of CPLR 3117(a)(2) because the statute allows depositions to come into evidence only when used against the deponent. The Referee also correctly found that Toobian-Sani did not meet the

requirements of CPLR 3117(a)(3)(ii) because Kranzler was not out of the state within the meaning of the CPLR provision. Additionally, Toobian-Sani could have sought a commission from the court to compel Kranzler's appearance to testify as a witness.

Third, as I stated on the record during oral argument on May 2, 2018, Referee Burke did not abuse his discretion when he denied Toobian-Sani's request for a continuance. Toobian-Sani had knowledge of the hearing dates in advance and absented itself for undisclosed reasons. In fact, the dates were set to accommodate Toobian-Sani, who petitioned this court to adjourn the hearing originally scheduled for March 16, 2017.

"[W]here questions of fact are submitted to a referee, it is the function of the referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility." *Kardanis v. Velis,* 90 A.D.2d 727, 727 (1st Dept. 1982). Referee Burke listened to witness testimony first-hand and found the witnesses credible. Moreover, Referee Burke's findings and recommendations are "substantially supported" by the record. *Flanagan & Cooke,* 305 A.D.2d at 135. Accordingly, the Referee Report is confirmed.

<u>The Motion to Compel</u>

As stated above, in motion sequence no. 004, Plaintiff moved for an Order: (a) to compel defendants Bronfman Fisher and Dan to produce documents withheld based on attorney-client privilege; (b) to strike the defendants' answers; and (c) for attorney's fees and expenses. As the Referee Report has now been received, and confirmed, I will address the matters from motion 004 which were held in abeyance by the March 2017 Order.

1. Privilege Asserted by Bronfman Fisher

Bronfman Fisher asserts attorney-client privilege over communications between its attorneys and its agent Kranzler only for the time period prior to January 1, 2008. For the time period subsequent to January 1, 2008, Bronfman Fisher avers that Kranzler no longer represented it in connection with the Air Rights project as its interest in the project terminated.

As the Referee found that "Kranzler ceased to be [Bronfman Fisher's] agent in connection with the Air Rights Project as of January 1, 2008," I find that Bronfman Fisher properly asserted attorney-client privilege over communications between its attorneys and Kranzler that transpired prior to January 1, 2008. *See Gama Aviation Inc. v. Sandton Capital Partners, L.P.*, 99 A.D.3d 423, 424 (1st Dept. 2012) (stating that "[a]lthough attorney-client communications shared with a third-party generally are not privileged, 'an exception exists for 'one serving as an agent of either attorney or client'") (citation omitted); *Bew Parking Corp. v. Apthorp Assocs. LLC*, 141 A.D.3d 425, 425 (1st Dept. 2016). Thus, Toobian-Sani's motion to compel the pre-January 1, 2008 communications between Bronfman Fisher's attorneys and Kranzler is denied.

2. Privilege Asserted by Dan

Dan asserts attorney-client privilege over communications between his attorneys and his agent Kranzler between May 1, 2008 to July 31, 2008. Because the Referee found that Kranzler was Dan's agent in connection with the Air Rights Project between May 1, 2008 to July 31, 2008, Dan's assertion of the attorney-client privilege over communications between his attorneys and Kranzler for this time was proper. *See Bew*

Parking Corp., 141 A.D.3d at 425 (finding that communications between defendant's agent and counsel were privileged). As a result, I deny Toobian-Sani's motion to compel production of these communications.

3. Privilege Exceptions

According to Toobian-Sani, even if the Defendants' documents are protected by attorney-client privilege, the documents should still be produced because: 1) Defendants waived the privilege by selectively producing communications from certain time periods; 2) Defendants waived the privilege by failing to object to production in a timely manner; and 3) the crime-fraud exception is applicable given that the Defendants breached their fiduciary duties to Toobian-Sani, with their attorneys' assistance. Additionally, Toobian-Sani seeks an *in camera* review of the documents listed on Defendants' privilege logs.

Toobian-Sani contends that Defendants waived the attorney-client privilege by "selectively" disclosing emails containing legal advice when they agreed to produce emails dating from January 1, 2008 through April 30, 2008.[1] Defendants counter that there was no waiver because Kranzler was neither Bronfman Fisher's agent nor Dan's agent with respect to the Air Rights Project during the time period of the produced emails (from January 1, 2008 to April 30, 2008) and hence Kranzler's communications with Defendants' attorneys for that time period were not privileged. I agree.

It is true that selective disclosure of privileged material "is not permitted as a party may not rely on the protection of the privilege regarding damaging communications

[1] Defendants agreed to produce emails for the period of January 1-April 30, 2008 at a Court conference in February 2015.

while disclosing other self-serving communications." *Vill. Bd. of Vill. of Pleasantville v. Rattner*, 130 A.D.2d 654, 655 (2d Dept. 1987); *Corrieri v. Schwartz & Fang*, P.C., 106 A.D.3d 644, 645 (1st Dept. 2013). Here, however, Defendants' production was not selective to avoid disclosure but rather reflected the fact that Defendants' assertion of privilege only pertained to communications during the times in which Kranzler served in an agent capacity (i.e. pre-January 1, 2008 or May 1- July 31, 2008). Therefore, Defendants' production of emails between their attorneys and Kranzler for the period in which Kranzler was not their agent did not waive the privilege asserted over email communications which took place while Kranzler acted as Defendants' agent for the Air Rights Project.

Toobian-Sani's contention that Defendants waived the attorney-client privilege by failing to object to production in a timely manner is belied by the record in this case.[2] Defendants created numerous privilege logs and complied with the Court's directives to produce additional documents from the 2013 Database. Thus, Toobian-Sani's waiver argument based on timeliness fails.

Lastly, Toobian-Sani argues that because Defendants were aided by their attorneys in the violation of their fiduciary and contractual duties to Toobian-Sani, the crime-fraud exception compels production of all communications. To invoke the crime-fraud exception, a party must show that "there is a factual basis for a showing of probable

[2] For example, a Stipulation, dated November 20, 2015, stated that "the production of privileged/protected materials pertaining to the Kranzler Mail Accounts in furtherance of the Order dated October 14, 2015 shall not constitute a waiver of privilege/protection(s) applicable to such materials."

cause to believe that a fraud or crime has been committed and that the communications in question were in furtherance of the fraud or crime." *In re New York City Asbestos Litig.*, 109 A.D.3d 7, 10-11 (1st Dept. 2013).

Here, Toobian-Sani's unsupported allegation that "there was an active conspiracy by Mr. Dweck, Mr. Geva, Bronfman Fisher, Mr. Kranzler and Mr. Dan to freeze [Toobian-Sani] out of the project, deprive [Toobian-Sani] of its rights under the CNC Agreement and joint venture" is not sufficient to establish probable cause that the attorney communications furthered a crime or fraud. Moreover, the "evidence" cited to by Toobian-Sani, such as the indemnification clause contained in a letter agreement between Kranzler and Dan, simply does not furnish the requisite probable cause.

At bottom, Toobian-Sani has not demonstrated that an exception to the attorney-client privilege exists in this case. As a result, I deny Toobian-Sani's request that the relevant emails identified on Defendants' Privilege Logs 1, 2 and 3 be submitted for *in camera* inspection to determine if the attorney-client privilege applies. *See Horizon Asset Mgt., Inc. v. Duffy*, 82 A.D.3d 442, 443 (1st Dept. 2011) (citations omitted) (noting that a court may deny in camera review of privileged documents "absent evidence to credit the allegation that the crime-fraud exception to the attorney client privilege applied").

4. Motion to Strike Answers

Toobian-Sani seeks to strike Defendants' answers based on their alleged failure to comply with discovery demands.

Pursuant to CPLR § 3126, a court may issue penalties such as the striking of a pleading against a party who "refuses to obey an order for disclosure or willfully fails to

disclose information which the court finds ought to have been disclosed." However, "the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order or request is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith." *McGilvery v. New York City Tr. Auth.*, 213 A.D.2d 322, 324 (1st Dept. 1995); *see also Cigna Property and Cas. Co. v. Decoration and Design Bldg. Partnership*, 268 A.D.2d 223, 224 (1st Dept. 2000) ("In furtherance of the policy favoring resolution of actions on the merits, the drastic remedy of striking a party's pleadings should only be imposed upon a clear showing of willfulness or bad faith.")

The record does not show that Defendants failed to comply with discovery orders. Rather, it reflects that the parties often met and conferred, attended many Court conferences, and entered stipulations in order to resolve discovery disputes. Indeed, the record shows that from June 5, 2013 through the filing of Toobian-Sani's motion to compel, the parties had at least seventeen in-person conferences with the Court.[3] As a result of the parties' discovery negotiations and conferences with the Court, Defendants created three separate privilege logs and produced documents. Thus, Toobian-Sani has not met the pleading standard for a motion to strike under CPLR 3126 for failure to comply with a discovery order or request.

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[3] The preliminary conference in this matter took place on June 5, 2013. Court compliance conferences prior to the motion to compel, which was filed on April 21, 2016, took place on July 10, 2013, March 19, 2014, May 7, 2014, June 25, 2014, July 16, 2014, November 19, 2014, February 25, 2015, April 8, 2015, May 20, 2015, July 22, 2015, August 12, 2015, September 21, 2015, October 14, 2015, November 10, 2015, December 16, 2015, and January 21, 2016.

Moreover, Defendants' objections raised during the third-party vendor process and at Court discovery conferences do not, as Toobian-Sani posits, establish "willful bad faith." Consequently, I deny Toobian-Sani's motion to strike Defendants' answer. *See Ayala v. Lincoln Med. & Mental Health Ctr.*, 92 A.D.3d 542, 542 (1st Dept. 2012) (holding that striking defendants' answers "would have been inappropriate, given the lack of a clear showing that defendants' failure to comply with discovery orders was willful, contumacious, or in bad faith").

5. Attorneys' Fees and Costs

22 NYCRR § 130-1.1 provides that a court may award sanctions and costs in response to frivolous conduct by a party. Toobian-Sani requests that the Court sanction Defendants and award it the costs incurred in: 1) "fighting for emails" due to the "frivolity" of Defendants' refusal to produce; and 2) identifying Defendants' discovery misconduct and bringing the motion to compel.

In light of the Referee Report's finding that Kranzler was an agent, at different times, for both Bronfman Fisher and Dan, Defendants' conduct in asserting privilege over emails for those periods cannot be deemed frivolous.

And, time spent conferring with Defendants' counsel regarding production or discovery issues is not compensable. Furthermore, Toobian-Sani cannot seek reimbursement for costs associated with the third-party vendor process and review of the 2013 Kranzler database because it agreed "to bear the vendor costs for the [] process."

Absent a showing of bad faith, I decline to award attorney's fees and costs to Toobian-Sani. I have considered the other arguments raised in Toobian-Sani's motion to compel and find them unavailing.

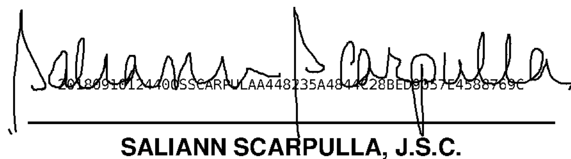
In accordance with the foregoing, it is hereby

ORDERED that Toobian Sani's motion for an order rejecting the referee report is denied and the cross-motion of Bronfman Fisher and Avi Dan for an order confirming the referee report is granted; and it is further

ORDERED that Toobian-Sani's motion to compel, to strike the defendants' answers, and for attorney's fees and costs is denied in its entirety; and it is further

ORDERED that counsel are directed to appear for a compliance conference at 60 Centre Street, Room 208, on September 12, 2018 at 2:15pm;

This constitutes the decision and order of the Court.



9/10/2018
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
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	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
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