

G.Willi-Food Intl. Ltd. v Herzfeld & Rubin. P.C.

2019 NY Slip Op 31410(U)

May 17, 2019

Supreme Court, New York County

Docket Number: 159040/2016

Judge: Kelly A. O'Neill Levy

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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G.WILLI-FOOD INTERNATIONAL LTD.,

Plaintiff,

- v -

HERZFELD & RUBIN, P.C., PETER KURSHAN,

Defendants.

INDEX NO. 159040/2016

MOTION DATE 02/27/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

-----X

HON. KELLY O'NEILL LEVY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 67, 68, 70, 71

were read on this motion to/for

COMPEL DISCOVERY

Defendants move to compel non-party compliance with a subpoena duces tecum and ad testificandum pursuant to CPLR § 3101 and 3124. Plaintiff and third-party Shibolet LLP oppose.

Background

Plaintiff formally retained Defendant Herzfeld & Rubin, P.C., a law firm, in September 18, 2008 to represent them and their wholly-owned subsidiary, WF Kosher Food Distributors, Ltd. (“WF Kosher”),¹ in two consolidated actions *WF Kosher Food Distributors, Ltd. v. Laish Israeli Food Company, Ltd., et al.* (Index No. 602005/2008) and *860 Nostrand Associates, LLC v. G. Willi-Food International, Ltd.* (Index No. 602504/2008) (together, “the Underlying Actions”). Defendant Peter J. Kurshan was a handling attorney for Plaintiff’s case.

On April 23, 2014, the Court presiding over the Underlying Actions issued a preclusion order after repeated non-compliance with a discovery order. Plaintiff brought this malpractice action arguing that the preclusion order was a result of Defendant’s inaction and a more

¹ WF Kosher formally retained Defendants on July 3, 2008.

satisfactory result would have been obtained had the order not been issued. Defendants contest these assertions.

As part of this legal malpractice action, Defendants deposed Plaintiff's Chief Executive Officer on July 26, 2018. The relevant portion of that deposition is as follows:

- Q. ...the guarantee claim, they really thought that it was a loser for you, correct, the lawyers?
- A. So what if they thought that? I thought differently.
- Q. Were you talking to other lawyers at the time that were giving you different advice?
- A. I believe in the truth.
- Mr. Wilck: Strike that as unresponsive.
- Q. Were you talking to other lawyers at the time?
- A. After the fact.
- Mr. Wilck: Strike that as unresponsive.
- Q. Were you, in fact, talking to other lawyers that were providing you with advice different than what Herzfeld & Rubin were advising you?
- A. The advisers that I had taken advice from regarding all of this case, told us that we have an excellent case, and we can prevail in this trial.
- Q. Which advisers?
- A. Part in Israel, part here. I don't remember exactly what we had taken advice from.
- Q. Who; if you know?
- A. I think that we took advice here from another attorney's office. I don't remember which. As well as attorneys in Israel.
- Q. Can you please provide me with any information that you possibly have concerning which lawyers you consulted who told you that you should go to trial on this claim?
- A. Surely, our attorneys in Israel, and I am sure some of the attorneys we had consulted with in the United States.
- Mr. Wilck: I would demand by Counsel, information pertaining to exactly which attorneys were consulted in Israel and New York, concerning recommendations to take this trial, and anything else regarding the underlying matters.
- Mr. Neuman: We will take it under advisement.

Deposition of Z. Williger, 174:13 – 176:17. Following this testimony, Defendants served a First Supplemental Notice for Discovery and Inspection requesting, in relevant part, that Plaintiff identify “all attorneys with whom Plaintiff consulted, as per Williger’s deposition testimony on July 26, 2018, regarding the WF Kosher Action and/or the Nostrand Action.” Plaintiff responded

to this request via email, stating that “[o]ther than any attorney identified at the deposition, the only attorneys my clients recall having any discussions with were Oren Heiman and some of his associates (whose names my client cannot recall) from Shibolet LLP.”

Following this exchange, Defendants served a Subpoena Duces Tecum and Ad Testificandum upon non-party Shibolet LLP requesting a deposition of Mr. Heiman, Esq. and the following documents:

1. All communications between any attorney at Shibolet LLP and Williger and/or Hochboim regarding the merits, strategy, or likelihood that WF Kosher would prevail on its claims in the WF Kosher Action.
2. All communications between any attorney at Shibolet LLP and Williger and/or Hochboim regarding the merits, strategy, or likelihood that G. Willi would prevail on its defenses in the Nostrand Action.
3. All documents reviewed, analyzed, or considered by any attorney at Shibolet LLP in providing advice to Williger and/or Hochboim regarding the WF Kosher Action or the Nostrand Action.

In response, Shibolet LLP indicated that they would not produce Mr. Heiman, Esq. and also objected to each and every request, arguing that the requested documents are protected by attorney-client privilege, attorney work-product privilege, or statutory privilege. Defendants subsequently filed the motion now before the Court.

Defendants have since clarified, in motion papers and at oral argument, that they are only seeking communications that occurred before the preclusion order was issued in the Underlying Actions on April 23, 2014 or an affidavit indicating that there are no such communications.² Accordingly, there is no need for this Court to determine whether seeking communications from a “successor counsel” would have been appropriate.

Analysis

The Subpoena Duces Tecum

It is uncontested that, but for the question of attorney-client privilege, Defendants would be entitled to these communications under CPLR § 3101(a).³ However, at least some of the communications requested by Defendants in the subpoena duces tecum are privileged attorney-

² See, e.g., Defendant’s Reply ¶ 5 (“Nor are Defendants seeking any communications between Plaintiff and Shibolet following the settlement of the Underlying Actions concerning Plaintiff’s assertion of a malpractice claim against Defendants. Rather, Defendants’ request is limited to resolving the question of whether Shibolet gave Plaintiff any advice regarding its likelihood of success or whether it should settle the Underlying Actions concurrently with Defendants’ representation and before the pre-trial rulings that are the basis of Plaintiff’s malpractice claim.”).

³ CPLR § 3101(a) provides that “[t]here shall be full disclosure of all matters material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by . . . (4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.”

client communications that are “not discoverable unless the privilege is deemed to have been waived by the client.” *See, e.g., Veras Inv. Partners, LLC v. Akin Gump Strauss Hauer & Feld LLP*, 52 A.D.3d 370, 373, 860 N.Y.S.2d 78, 82 (1st Dep’t, 2008); *see also* CPLR § 4503. The question presented is whether the privilege has been waived for these communications under either of Defendants’ two theories: (1) the “at issue” waiver and (2) the “selective disclosure” waiver.

“At Issue” Waiver

“‘At issue’ waiver of privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information.” *Deutsche Bank Trust Company of Americas v. Tri-Links Investment Trust, et al.*, 43 A.D.3d 56, 63 (NY App. 1st Dep’t, 2007). The “at issue” waiver can be traced back to the case of *Hearn v. Rhay* which established a straightforward three-pronged⁴ test. 68 F.R.D. 574 (E.D.Wash. 1975). While the general logic of *Hearns* has been adopted by New York, its test has not and the “precise limits of the *Hearns* doctrine continue to perplex both courts and commentators.” *Pereira v. United Jersey Bank*, 1997 WL 773716 (S.D.N.Y. 1997); *see also In re County of Erie*, 546 F.3d 222, 229 (2nd Cir. 2008) (preferring a “reliance” test).

Nonetheless, if there is anything resembling clarity in the thicket that has grown out of *Hearns* and its New York progeny, it is the treatment of “concurrent representation” in legal malpractice actions whereby the attorney-client privilege is waived for communications between plaintiffs and third-party attorneys that took place during the underlying action and were regarding the underlying action. *See, e.g., Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 210 F.R.D. 506, 511 (S.D.N.Y. 2002) (“Furthermore, in malpractice actions against a law firm, where its representation of the client overlaps and is simultaneous to another firm’s representation of that client in the same matter, New York courts have found the client’s communications with the non-defendant law firm to lose its privilege as to the defendant law

⁴ “The factors common to each exception may be summarized as follows: (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.” *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D.Wash. 1975).

firm.”); *IMO Industries, Inc. v. Anderson Kill & Olick, P.C.*, 746 N.Y.S.2d 572 (“The waiver in this case is clearer still, because IMO claims that Farella and Anderson Kill concurrently represented it in the California Action, the outcome of which is the basis for IMO’s alleged harm.”); *In re Gaming Lottery Securities Litigation*, 2000 WL 340897 (S.D.N.Y. 2000) (“Any relevant advice the defendants received from their own lawyer or other persons ... bears on the issue of their reasonable reliance ... [and] the legal advice they received from any other lawyers on that subject relates to the reasonableness of defendants’ reliance and is not subject to the attorney/client privilege.”); *Valutron, N. v. Pennie & Edmonds*, 800 N.Y.S.2d 358 (N.Y. Sup. Ct. 2004) (“The court therefore finds that the attorney-client privilege has been waived with respect to information relating to plaintiffs’ communications with other attorneys about any potential laches defense.”); *Bolton v. Weil, Gotshal & Manges LLP*, 798 N.Y.S.2d 343 (Sup.Ct. N.Y. 2004) (“[W]hen a plaintiff in legal malpractice action obtain[s] advice from another lawyer in connection with the underlying action, [] the communications with the other lawyer [a]re no longer privileged since such communications [a]re relevant as to the extent of the plaintiff’s reliance on the advice of the defendant law firm, and whether such advice resulted in damages to the plaintiff.”); *Goldberg v. Hirschberg*, 806 N.Y.S.2d 333 (Sup.Ct. N.Y. 2005) (“Here, since plaintiffs claim that their problems were caused by the actions or inactions of defendants, any legal advice they received from any other lawyer including LeBoeuf on or about October 2001 on any subject related to the reasonableness of their reliance on defendants’ advice is not subject to the attorney-client privilege”).⁵

There is no authority for the proposition that the attorney-client privilege was ever *not* waived, in a legal malpractice action, for communications between the plaintiffs and third-party attorneys that took place during the underlying action and were regarding the underlying action.⁶

⁵ It is important to emphasize that the analysis would be quite different if we were dealing with communications with “successor counsel” occurring after the representation of the defendants in a malpractice action. The analysis would be complicated further still if Shibolet LLP still represented Plaintiffs, thereby making them “present counsel” and implicating their ability to communicate in the present. *See generally Jakobleff v. Cerrato*, 97 A.D.2d 834 (2nd App. N.Y., 1983); *see also Corrieri v. Schwartz & Fang, P.C.*, 106 A.D.3d 644 (1st App. Div. N.Y. 2013) (“Defendants seek to defend against plaintiffs’ claims of negligent representation in a probate and accounting proceeding by compelling discovery of privileged communications between plaintiffs and the counsel who substituted for defendants in that proceeding and who represents plaintiffs in this legal malpractice action. The court properly denied the motion...”). Neither of these more complicated situations are present here now that Defendants have clarified that they are only seeking communications prior to April 23, 2014.

⁶ A noteworthy aberration is *Windsor Securities, LLC v. Arent Fox LLP*, 273 F.Supp.3d 512 (S.D.N.Y. 2017). In *Windsor*, the defendant was sued for malpractice relating to Change of Ownership agreements drafted “[b]etween

This is because at the core of malpractice actions is plaintiff's implied reliance on the defendants. In this case, Plaintiff may have been concurrently represented by separate counsel and Plaintiff may have heeded the separate counsel's advice to not settle over the Defendants' advice to settle. The substance of those communications go to the reasonableness of the reliance, the extent of the reliance, the outcome of the Underlying Actions, the extent of damages, and more.

Therefore, the Court finds that Plaintiff has waived the attorney-client privilege by placing the subject matter of counsel's advice at issue. Third-party Shibolet shall produce those documents responsive to the Defendants' revised requests – namely communications with Plaintiff regarding the Underlying Actions prior to April 23, 2014 and any other documents relating to the Underlying Actions from prior to April 23, 2014, or a signed affidavit indicating that no such communications or documents exist.

While other privileges were not specifically argued in papers, it is worth noting that the “at issue” doctrine applies to work product protections in addition to attorney-client privilege. *See, e.g., Goldberg*, 806 N.Y.S.2d at 337; *see also Royal Indem. Co. v. Saloman Smith Barney, Inc.*, 791 N.Y.S.2d 873 (“Under the ‘at issue’ doctrine, the attorney-client privilege *and* the work product doctrine can be deemed to be waived...”).

“Selective Disclosure” Waiver

As it has been determined that the privilege has been waived under the “at issue” waiver, a discussion of “selective disclosure” waiver is not strictly necessary. However, it is worth noting that “selective disclosure” has always been connected to the “at issue” waiver and this bond has only grown with the evolution of “at issue” analysis in recent decades. The leading “selective

February 2010 and February 2011”. *Windsor*, at 515. When the COOs proved potentially faulty, the plaintiff retained a separate firm to investigate malpractice by the defendants sometime after December 2012. *Id.* Thus the defendants and the new firm were working at completely different times on completely different subjects (COOs and legal malpractice, respectively). However, the Court referred to these two firms as “concurrent” representation because the plaintiffs did not actually stop using the defendants, despite suspecting them of malpractice, until September 2014. *Id.* at 523. Indeed, the Court recognized the significance of concurrent representation in its analysis. *Id.* (“We treat as a separate category what the defendants have referred to as the period of ‘concurrent’ representation.”). The Court then finds that the sort of concurrent representation present in *Windsor* can be differentiated from the cases that dealt with concurrent representation in the past. We agree. The representation in *Windsor* was functionally identical to successor counsel in every respect, except the aberrant decision by plaintiff to continue retaining the attorneys accused of malpractice for years. By contrast, if plaintiffs had retained counsel during the critical period of February 2010 and February 2011, and defendants sought discovery of communications related to the underlying action from that counsel, then it would fit into a traditional concurrent representation analysis. Another noteworthy contrast is *Deutsche Bank Trust Co. of Ams. v. Tri-Links Inv. Trust*, 43 A.D.3d 56 (1st App. Div. 2007) but that case involved indemnity rather than legal malpractice and we confine our analysis to legal malpractice actions, which present unique considerations.

disclosure” case of *Orco Bank v. Proteinias Del Pacifico* expressly used phraseology that has now been incorporated into the “at issue” analyses:

[P]laintiff *relied upon* the advice of its lawyers who informed it, for example, ‘we had a good security’. Plaintiff has withheld more detailed testimony, and documents, on grounds of attorney-client privilege. In these circumstances, Supreme Court properly found plaintiff had waived the attorney-client privilege by placing the subject matter of counsel’s advice *in issue and by making selective disclosure of such advice*. 179 A.D.2d 390, 390 (1st App. Div. N.Y. 1992) (emphasis added). There is a long line of cases, where selective disclosure is an extension of or factor in “at issue” analysis rather than a separate waiver altogether. *See, e.g., Metropolitan Bridge & Scaffolds Corp. v. New York City Housing Authority*, 168 A.D.3d 248, 250 (1st App. Div. N.Y. 2019) (“The court correctly found that having placed the knowledge of its law department *at issue*, NYCHA waived attorney-client privilege with respect to the subject documents... *Further*, NYCHA may not rely on attorney-client privilege while selectively disclosing other self-serving privileged communications.”) (emphasis added); *Village Bd. of Village of Pleasantville v. Rattner*, 130 A.D.2d 654, 655 (2nd App. Div. N.Y. 1987) (“Where a party asserts as an affirmative defense the *reliance* upon the advice of counsel, the party waives the attorney-client privilege with respect to all communications to or from counsel concerning the transactions for which counsel’s advice was sought. *Moreover*, selective disclosure is not permitted...” (citations omitted) (emphasis added); *American Re-Insurance Co. v. U.S. Fidelity & Guar. Co.*, 40 A.D.3d 486, 492 (1st App. Div. N.Y. 2007) (“*Under the “at issue” doctrine*, where a party places legal advice or other privileged facts or communication *at issue*, it is deemed to have waived the privilege with respect to such facts or communications and can be compelled to produce them. *This doctrine applies* where a party, through its affirmative acts, *places privileged material at issue and has selectively disclosed the advice.*”) (emphasis added); *Melcher v. Apollo Medical Fund Management L.L.C.*, 829 N.Y.S.2d 483, 485 (1st App. Div. N.Y. 2007); *Banach v. Dedalus Foundation, Inc.*, 132 A.D.3d 543, 544 (1st App. Div. N.Y. 2015) (“Defendant waived its attorney-client privilege regarding the requested minutes of a board meeting, by *using portions* of those minutes during a deposition *and by placing the contents of the minutes at issue.*”) (emphasis added). Here, however, it is sufficient to note that Mr. Williger’s selective disclosure that “[t]he advisers that I had taken advice from regarding all of this case, told us that we have an excellent case, and we can prevail in this trial” contributed to that advice being at issue in this matter.

The Subpoena Ad Testificandum

In a subpoena ad testificandum, the above analysis is unnecessary as privilege cannot be asserted to avoid an appearance. *Matter of Empire Wine & Spirits LLC v. Colon*, 145 A.D.3d 1157, 1158, 43 N.Y.S.3d 542, 544 (3d Dep't 2016) ("Where, as here, a witness has been served with a subpoena ad testificandum, a claim of privilege cannot be asserted until the witness appears before the requisite tribunal and is presented with a question that implicates protected information."). See also *Norddeutsche Landesbank Girozentrale v. Tilton*, 2018 NY Slip Op 31004(U) (Sup. Ct. New York 2018) ("the invocation of the attorney-client privilege may not be used as a blanket privilege to avoid deposition"); *Parisi v. Leppard*, 172 Misc. 2d 951, 660 N.Y.S.2d 307 (Sup. Ct. Nassau 1997) (subpoenaed non-party witnesses, defendant's former attorneys, could not simply rely on attorney-client privilege as basis for a flat refusal to appear for a deposition, when some items and information sought were not protected by the attorney-client privilege).

However, CPLR § 2303(a) clearly states that a "subpoena requiring attendance or a subpoena duces tecum shall be served in the same manner as a summons." Here, Defendants wish to compel Mr. Heiman to appear but served the subpoena on Shibolet LLP. Mr. Heiman has not worked for Shibolet LLP nor has he lived in the United States for at least three years. Defendants admitted at oral argument that they were not aware of this and do not contest in papers that service was improper. Thus the Court need not consider the merits of this subpoena as Defendants must first properly serve their subpoena on Mr. Heiman in order to compel his appearance.

It is noteworthy, however, that a physical appearance by Mr. Heiman would be quite burdensome considering he is no longer in the country and Defendants have indicated that written responses or video deposition may be as effective with less burden on Mr. Heiman. See *Lewis v. Baker*, 279 A.D.2d 380 (1st Dep't 2001) (holding it was an improvident exercise of discretion and beyond the court's authority to direct a non-resident non-party to appear in New York for a deposition).

Expenses to Produce

Pursuant to CPLR 3122(d), the reasonable production expenses of a non-party witness "shall be defrayed by the party seeking discovery." These can include the costs for locating documents, reviewing for privilege, and producing documents. See *Tener v. Cremer*, 89 A.D.3d

75, 82 (1st Dep't 2011) ("CPLR 3111 and 3122(d) require the requesting party to defray the reasonable production expenses of a nonparty. Accordingly . . . the [trial] court should allocate the costs of this production to [the requesting party]."). Therefore, Defendants shall defray Shibolet LLP's reasonable costs in preparing documents responsive to the subpoena duces tecum.

However, what costs are reasonable in producing those documents is a matter of continued dispute between the parties. The Court therefore encourages the parties to agree upon a reasonable scope, schedule, and cost. Shibolet LLP's request that Defendants defray the costs of defending against the production of documents prior to this ruling is unpersuasive. Shibolet LLP's request that Defendants defray the costs affiliated with arranging and defending Mr. Heiman's requested deposition is now moot as the subpoena ad testificandum was not properly served.

Upon the foregoing, it is hereby

ORDERED, that the motion of Herzfeld & Rubin, P.C. and Peter Kurshan is granted to the extent that Third-Party Shibolet LLP shall produce those documents responsive to Defendants' revised request for communications with Plaintiff and related documents regarding the Underlying Actions prior to April 23, 2014, or a signed affidavit indicating that no such communications or documents exist; and it is further

ORDERED, that Herzfeld & Rubin, P.C. and Peter Kurshan shall defray Shibolet LLP's reasonable costs in preparing the documents responsive to the subpoena duces tecum.

This constitutes the decision and order of the court.

5-17-19
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE