

**Vestis Invs. II, LLC v Sportsdirect.com Retail Ltd.**

2019 NY Slip Op 32810(U)

September 19, 2019

Supreme Court, New York County

Docket Number: 653918/2018

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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VESTIS INVESTMENTS II, LLC
Plaintiff,

- v -

SPORTSDIRECT.COM RETAIL LTD.,
Defendant.

INDEX NO. 653918/2018
MOTION DATE N/A, N/A
MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 130, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160

were read on this motion to/for MISCELLANEOUS

Sportsdirect.com Retail Ltd.'s (Sports Direct) motion to compel is granted as the documents and communications sought are not privileged and, even if they were, the privilege has been waived pursuant to the "at issue" waiver doctrine. Vestis Investments II, LLC's (Vestis) motion seeking a Letter of Request for International Judicial Assistance to take the testimony of Michael Ashley, the owner of Sports Direct, is granted as the testimony sought is not pre-trial testimony but is testimony in aid of trial and is therefore permissible under U.K. law, and the inability to take Mr. Ashley's testimony would be severely prejudicial to Vestis.

### **Sports Direct's Motion to Compel**

In motion sequence 002, Sports Direct moves by order to show cause for an order compelling Vestis to produce (I) internal drafts of a certain Letter of Intent (the **LOI**) and documents evidencing Vestis's instruction to counsel regarding the contents thereof, (II) a full and complete copy of the documents Vestis received from nonparty Lincoln International LLC (**Lincoln**) pursuant to a certain Subpoena served upon Lincoln by Vestis dated November 2, 2018 (the **Lincoln Subpoena**), and (III) revised privilege logs in conformance with the CPLR and Commercial Division Rules.

At the very core of this action is Vestis's claim for reformation of the LOI with regard to the definition of the term "Additional Consideration" on the grounds of mutual mistake and scrivener's error. Sports Direct seeks documents relating to the LOI and its drafting history (the **LOI Documents**) and certain emails relating thereto from Lincoln (the **Lincoln Emails**). Vestis has withheld the requested documents on privilege grounds. Sports Direct argues that the LOI Documents and the Lincoln Emails are not privileged, and to the extent that they are privileged, Vestis has placed them directly at issue by seeking reformation of its terms and has therefore waived privilege pursuant to the "at issue" waiver doctrine. The court agrees.

The attorney-client privilege "applies to confidential communications between clients and their attorneys made 'in the course of professional employment'" (*New York Times Newspaper Div. of New York Times Co. v Lehrer McGovern Bovis, Inc.*, 300 AD2d 169, 171 [1st Dept 2002], quoting CPLR § 4503 [a]). Communications subject to the attorney-client privilege are "absolutely immune from discovery" (CPLR § 3101 [b]). The attorney-client privilege applies to

communications from a client to an attorney “made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose” (*Rossi v Blue Cross and Blue Shield of Greater New York*, 73 NY2d 588, 593 [1989]).

As an initial matter, there is no attorney-client relationship here between Lincoln and PLS. In support of its motion, Vestis submits an unsigned engagement letter, dated August 2, 2016, concerning the engagement of Portfolio Legal Services, LLC (**PLS**) by Eastern Outfitters (NYSCEF Doc. No. 91). Eastern Outfitters was wholly-owned by Vestis, and Vestis therefore argues that any communications involving PLS are subject to attorney-client privilege. Putting aside that the letter is unsigned, there are two problems with this argument. First, the letter is a general engagement letter that is expressly limited by its terms to the year 2016. The LOI Documents and Lincoln Emails in question are from 2017. Second, and significantly, even if the letter covered 2017, the scope of the specific legal services concerning the drafting of the LOI exceeds the scope of services contemplated by the engagement letter.

Vestis also argues that the Lincoln Emails are privileged as attorney work product because they were made in anticipation of litigation (CPLR § 3101 [d]). As discussed extensively on the record, the emails in question were sent in February 2017, prior to the commencement of litigation, and there is no evidence that litigation was anticipated at the time the emails were sent. At best, one side requested for clarification as to certain language in the agreement whereby the other side indicated that they thought the agreement was clear but was willing to discuss any perceived ambiguity. Moreover, because both the LOI Documents and Lincoln Emails were shared with Lincoln, a third party with whom Vestis did not share a common legal interest

(*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 625 [2016]), even if they were privileged, the privilege was waived (*People v Harris*, 57 NY2d 335, 343 [1982]).

To the extent that there was an attorney-client relationship, and even if the attorney-client or work product privilege was not waived by sharing the documents and communications with a third party, the privilege was otherwise waived in any event pursuant to the “at issue” waiver doctrine. “‘At issue’ waiver of privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation” (*Deutsche Bank Trust Co. of Americas v Tri-Links Inv. Trust*, 43 AD3d 56, 63 [1st Dept 2007]). At issue waiver has been applied in cases in which the otherwise privileged material is necessary to determine the validity of a claim or defense raised by the party asserting the privilege (*id.*). By asserting a cause of action seeking reformation of the LOI, Vestis has placed any internal drafts and communications regarding the LOI squarely at issue. The asserted privilege must be invaded here to determine the validity of Vestis’s claims of mutual mistake or scrivener’s error in connection with the LOI. To hold otherwise would deprive Sports Direct of vital information necessary to defend the action.

### **Vestis’s Motion for Letters Rogatory**

In motion sequence 003, Vestis seeks a Letter of Request for International Judicial Assistance to the Royal Courts of Justice, Queen’s Bench Division in the United Kingdom to take the testimony of Michael Ashley, the owner of Sports Direct, in aid of trial.

CPLR § 3101 (a) (4) provides a mechanism for parties to take depositions of non-party witnesses. It provides that “[t]here shall be full disclosure of all matter 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.” Mr. Ashley is a resident of the U.K. The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters authorizes a court of one contracting state to request a court of another contracting state to obtain evidence pursuant to a letter of request. However, as Sports Direct argues, U.K. law does not permit courts to compel pre-trial depositions of non-party witnesses (*Rio Tinto Zinc Corp. v. Westinghouse Electric Corp., A.C.* 547 [1978], available at <http://www.uniset.ca/other/cs2/19781AER434.html>). Mr. Ashley is a non-party, but the testimony sought is post-fact discovery testimony in aid of trial and is thus proper under U.K. law.

Sports Direct asserts that, pursuant to the “apex witness” rule, Vestis should not be permitted to take the deposition of a high-level corporate executive, absent a detailed showing that (a) Mr. Ashley has unique knowledge that is material and necessary to the prosecution or defense of this action and (b) that no less intrusive means of obtaining the information is available. The court disagrees.

The “apex witness” rule is a doctrine recognized by federal courts in New York which seeks to limit harassment and disruption to businesses by restricting requests to depose high-ranking corporate executives (*Thomson v Zillow, Inc.*, 51 Misc 3d 1050, 1055 [Sup Ct, NY County 2016]). Sports Direct fails to cite any authority demonstrating adoption of an “apex witness”

rule under New York state law. The only case cited by Sports Direct is *Daou v Huffington*, 2013 WL 6162980, 2013 NY Slip Op. 30372 [U] [Sup Ct, NY County 2013]). *Daou* is inapposite, however, as the court in *Daou* merely held that a party cannot issue a subpoena to take the deposition of high-level corporate executive where the executive has no unique, relevant information (*id.*, at \*7-8). In fact, the court in *Daou* observed that high-level executives are “not immune *per se* from discovery or from depositions” (*id.*, at \*7). As discussed on the record, here, Vestis seeks to obtain crucial information that only Mr. Ashley can impart concerning the logic behind the \$17 million offering price and what he understood to be included for that price as “Additional Consideration” in the LOI.

Sports Direct argues that Vestis should have to exhaust all other less intrusive means of gaining this information. It asserts that Mr. Ashley delegated the responsibility for the negotiation, documentation, and execution of the LOI transaction to a U.S.-based advisor, Howard Moher. It further asserts that Mr. Moher is the person who received the January 25 email from Lincoln that Vestis alleges reflects the actual terms of the parties’ agreement, and he is the one who reviewed and commented on drafts of the LOI. Sports Direct also asserts that a U.K.-based consultant, Justin Barnes, served as a conduit for Mr. Ashley in the negotiations and would have any relevant information that Vestis might hope to obtain from Mr. Ashley. Sports Direct argues that it would be less intrusive to depose Mr. Moher or Mr. Barnes than it would be to depose Mr. Ashley in the United Kingdom and that Vestis cannot take the deposition of Mr. Ashley without first exhausting those less intrusive options. These arguments are unpersuasive.

In *Kapon v Koch*, the Court of Appeals directly addressed the issue of whether a subpoenaing party must demonstrate that the information sought is not available from any other source (23 NY3d 32 [2014]). In *Kapon*, the petitioners commenced a special proceeding to quash non-party subpoenas served upon them in a fraud action filed in California by the respondent, William Koch, relating to the alleged sale of counterfeit wine (*id.*, at 35). One of the petitioners, John Kapon, was the Chief Executive Officer of Acker, Merrall & Condit Company, a New York corporation operating in New York as a retailer and auctioneer of fine and rare wines (*id.*). The petition in the special proceeding sought to quash the subpoenas pursuant to CPLR § 2304 and, in the alternative, sought the imposition of a protective order pursuant to CPLR § 3101 to, *inter alia*, stay the non-party depositions until the completion of party depositions in the California action and limit the scope of the depositions to matters material and necessary to the California action (*id.*).

The Supreme Court denied the motions to quash and for a protective order and the Appellate Division unanimously affirmed (*Matter of Kapon v Koch*, 37 Misc 3d 1211[A] [Sup Ct, NY County 2012], *affd* 105 AD3d 650 [1st Dept 2013]). In affirming the order of the Appellate Division, the Court of Appeals observed: “Section 3101 (a) (4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty” (*Kapon*, 23 NY3d at 38).

In short, Vestis has met its burden in demonstrating that Mr. Ashley has information that is material and necessary to its claims in this action. Vestis seeks to question Mr. Ashley

concerning, among other things, a specific conversation between Mr. Ashley and Mr. Moher in which Mr. Ashley allegedly agreed to include as additional consideration in the LOI exactly the assets that are at issue in this case. To the extent that Sports Direct claims that Mr. Moher may also have this information, Vestis asserts that Mr. Moher indicated in his deposition that he does not recall the conversation in question or the basis for the \$17 million. Thus, Mr. Ashley is the only person who can speak to the nature of the conversation.

The court holds that Vestis is authorized to take the deposition of Mr. Ashley. Therefore, the motion for a Letter of Request for International Judicial Assistance is granted.

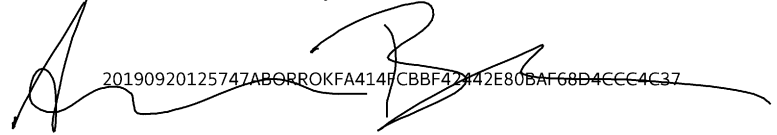
Accordingly, it is

ORDERED that motion sequence no. 002 is granted in its entirety; and it is further

ORDERED that the defendant is ordered to produce to the plaintiff, within thirty (30) days of the date of the order herein: internal drafts of the Letter of Intent and any documents evidencing the defendant's instructions to counsel regarding the contents thereof, a full and complete copy of the documents that the defendant received from nonparty Lincoln International LLC pursuant to the Lincoln Subpoena, including the Lincoln Emails, and revised privilege logs in conformance with the CPLR and Commercial Division Rules; and it is further

ORDERED that motion sequence 003 is granted; and it is further

ORDERED that the defendant is directed to submit hard copies of letters rogatory to the Clerk of Part 53, (60 Centre Street, Room 238), and the court will notify counsel for the defendant when the letters rogatory are ready to be picked up and delivered to the County Clerk.

  
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9/19/2019

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE