

Jaber v Elayyan

2019 NY Slip Op 34318(U)

March 6, 2019

Supreme Court, Richmond County

Docket Number: Index No. 151161/2017

Judge: Orlando Marrazzo, Jr.

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

JUBER JABER

DECISION/ORDER

IAS PART 21

HON. ORLANDO MARRAZZO, JR.

Index No.: 151161/2017

Motion No. 3

Plaintiff,

-against-

MUNZER ELAYYAN

Defendant,

and

**FARHOUD JABER and 12 WHITWELL
REALTY CORP.**

Nominal Defendants.

The following numbered 1 through 7 were marked submitted on January 15, 2019

	Papers Numbered
Notice of Defendant Munzer Elayyan and Nominal Defendant 12 Whitwell Realty Corp.'s Motion to Compel Production of Documents, dated November 30, 2018.....	1
Defendant Munzer Elayyan and Nominal Defendant 12 Whitwell Realty Corp.'s Memorandum of Law In Support of Their Motion to Compel Production of Documents, dated November 30, 2018.....	2
Affirmation of James H. Smith, Esq. in Support of Defendants' Motion, with Exhibits, dated November 30, 2018.....	3
Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Compel Production of Documents, dated January 7, 2019.....	4
Affirmation in Opposition, with Exhibits, dated January 7, 2019.....	5

Defendant Munzer Elayyan and Nominal Defendant 12 Whitwell Realty Corp.’s Reply Memorandum of Law in Further Support of Their Motion to Compel Production of Documents, dated January 13, 2019.....6

Affirmation of James H. Smith, Esq. in Further Support of Defendants’ Motion to Compel Production of Documents, with Exhibit, dated January 13, 2019.....7

Defendant Munzer Elayyan (“Elayyan”) and Nominal Defendant 12 Whitwell Realty Corp. (“Whitwell Corp.” and together with Elayyan, “Defendants”) moved this Court to compel production of communications between Plaintiff Juber Jaber (“Juber”) and Nominal Defendant Farhoud Jaber (“Farhoud”) and their agents. The Court hereby grants Defendants’ Motion.

This action concerns a family dispute over the ownership of a piece of property located at 12 Whitwell Place, Staten Island, New York (“Property”) that, according to Defendants, is the sole asset owned by Whitwell Corp. Plaintiff Juber and Nominal Defendant Farhoud are brothers and both are cousins to Defendant Elayyan. In this action, Plaintiff Juber seeks to impose a constructive trust and to obtain a declaratory judgment holding that he is the beneficial and equitable owner of the Property. In Plaintiff’s Complaint, he alleges that while looking for homes for Plaintiff to purchase in October 2011, Defendant agreed that Plaintiff would purchase the Property and that 12 Whitwell Corp. would be created to hold the Property. Plaintiff’s brother, Nominal Defendant Farhoud would be the “legal” owner of 12 Whitwell Corp. and its sole shareholder. Plaintiff underscored that “it was understood that Plaintiff was going to be the true and equitable owner of the Property which the Corporation sought to acquire” and that based on Elayyan’s representations, Plaintiff made an offer to purchase the property. Plaintiff claims that after 12 Whitwell Corp. was formed and Whitwell purchased the Property for \$1,200,000.00, it was agreed that Plaintiff would live at the Property, pay the required taxes and insurance and

receive title. In his Complaint, Plaintiff states that he provided the necessary funds to purchase the Property and transfer the funds to a title company. Plaintiff alleges that since the Property was purchased in 2012, he has maintained possession and provided substantial sums to rehabilitate it.

In 2016, the family relationship among the parties suffered and Farhoud brought an action against Defendant Elayyan regarding the ownership and control of 12 Whitwell Corp. and several other real estate transactions and investments which involve Farhour and Elayyan (“New York County Action”). Plaintiff alleges that Defendant Elayyan now claims to be the sole owner of 12 Whitwell Corp. and the Property. On or around February 25, 2016, Plaintiff states Defendant unlawfully placed a mortgage and lien on the property owned by 12 Whitwell Corp. for \$1,200,000.00 in his favor. On or about January 4, 2017, Defendant purported to send an eviction notice to Plaintiff and his family without authority to do so. Plaintiff alleges Defendant seeks to keep the Property for his own benefit after making Plaintiff pay for it under false representations. Plaintiff brought claims for a constructive trust and declaratory judgment, declaring that he is the beneficial and equitable owner of the Property and requiring transfer of title to the Plaintiff.

In the New York County Action, Juber is not a named party and Defendants argue that Juber has consistently denied having any interest in the action. Farhoud made several claims in the New York County Action concerning the ownership of the Property, including for a declaration that Farhoud and the Corporation are the rightful owners and title holders of the Property. Plaintiff notes that Farhoud brought the New York County Action to assert control of three separate entities involving three different properties, including the property at issue in this Action. Defendants note that Juber, the Plaintiff in this Action, is represented by the firm of

Gabor & Marotta, including firm attorneys Daniel Marotta and Ilyssa Gabor-Florio. Farhoud is represented in both Actions by the Aboushi Law Firm and firm attorney Aymen Aboushi.

On June 27, 2017, Defendants sought to dismiss this Action under CPLR §3211(a)(4) based on the grounds that dismissal is proper where another action is pending between the same parties for the same cause of action. Defendants note “in opposing the motion, Juber vehemently denied participating in the New York County Action, repeatedly claiming that he had ‘no interest’ in that action and that his interests in this action are divergent from those of his brother, nominal defendant Farhoud.” In a decision dated August 22, 2017, Judge Desmond A. Green held that “it has been established that Plaintiff here is not a party to the New York County action, he did not institute the New York County action nor did he oppose consolidation of his action to be heard in New York County and has no interest in the outcome of that action. Further, the corporate issues being litigated in the New York County action is not the subject of the instant action.”

The heart of the current Motion is Defendant Elayyan’s request for disclosure of communications between Juber and Farhoud concerning the Property, 12 Whitwell Corp. and/or the litigations, which Farhoud and Juber both objected to based on the common interest privilege. On May 22, 2018, this Court ordered Juber and Farhoud to provide all non-privileged communications between them and their agents based on Elayyan’s oral application to the Court for such disclosure. This Court also ordered that Juber and Farhoud produce a privilege log and provide the documents to the Court for in-camera review. Juber submitted a five-page privilege log demonstrating communications between Juber and Farhoud’s counsel, Mr. Aymen Aboushi, and communications among Mr. Aboushi and his lawyers at his law firm, Farhoud and Juber. On November 9, 2018, the parties sent letters to this Court concerning Juber’s reliance on the

common interest privilege. In his letter to this Court, Juber argued that the fact that Farhoud is a nominal defendant has no bearing on the claim of common interest privilege.

In support of their Motion, Defendants argue that Juber has not and cannot assert the attorney-client privilege over the withheld communications. According to Defendants, many of the documents being withheld are communications made between Juber and the Aboushi Law Firm, without Farhoud's presence. Since these documents are not communication between counsel and a client, there is no basis to assert an attorney-client privilege and the documents are subject to discovery. Defendants also argue that Plaintiff has not asserted or proven an attorney-client privilege over the documents concerning communications between the Aboushi Law Firm, Juber and Farhoud.¹

Defendants further argue that the common interest privilege is only available to co-litigants or those who reasonable anticipate becoming co-litigants. Defendants emphasize that Plaintiff sued Farhoud in this Action and both parties are on opposite sides of the "v.", demonstrating that they are not co-litigants, but rather adversaries. Even if Plaintiff demonstrated that they were co-litigants, Juber and Farhoud have conflicting, not shared, legal interests, as Juber is seeking to impose a constructive trust in real property that Farhoud claims he is an owner of. Finally, Defendants argue that Juber is estopped from asserting the common interest privilege over communications with Farhoud, as Juber has repeatedly represented to this Court that his and Farhoud's interests are "completely divergent". Defendants point to the representations made by Juber in response to the previous motion that led to the Court's finding that Juber had no interest in the outcome of Farhoud's action. Under the doctrine of judicial

¹ According to Defendants, Plaintiff has failed to include a general description of each document as required by CPLR 3122 and has not provided any other information to show that these documents are confidential communications between an attorney and client made in anticipation of litigation.

estoppel, Defendants argue that Juber is estopped from abandoning that position to shield facially relevant documents from discovery.

In opposition, Plaintiff argues that Defendants falsely characterize his and Farhoud's positions as adverse, since Farhoud is a nominal defendant and one that "has no control over [the action] and has no financial interest in its outcome; . . . a party who . . . is joined in the lawsuit to avoid procedural defects" under the definition given in Black's Law Dictionary. Plaintiff argues that he and Farhoud in fact have a common interest and that Plaintiff is simply attempting to preserve any attorney client communications. Plaintiff claims that the common interest privilege applies since there are two pending litigations at issue, any and all communications between Plaintiff and his brother were in the context of said litigation(s) with Farhoud's attorney being part of each communication and that all communications were in furtherance of the parties' shared legal interest. Plaintiff states in his opposition papers that all of the subject communications involved the attorney for Defendant Farhoud, who was representing him at all times.

The common-interest privilege is an exception to the rule that the attorney-client privilege is waived when a third party is present. *See Saint Annes Dev. Co. v Russ*, 157 A.D.3d 919, 919, 66 N.Y.S.3d 913, 914 (App. Div. 2d Dept., 2018); *Hyatt v State of Cal. Franchise Tax Bd.*, 105 A.D.3d 186, 205, 962 N.Y.S.2d 282, 295-296 (App. Div. 2d Dept., 2013); *Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's London*, 176 Misc. 2d 605, 611, 676 N.Y.S.2d 727 (Sup. Ct. New York County, 1998), *affd* 263 A.D.2d 367, 692 N.Y.S.3d 384 (App. Div. 1st Dept., 1999). It is clearly established that "to fall within that exception, the privileged communication must be for the purpose of furthering a legal, as opposed to a commercial, interest common to the client and the third party." *Saint Annes Dev. Co. v Russ*, 157 A.D.3d 919, 919-920, 66 N.Y.S.3d

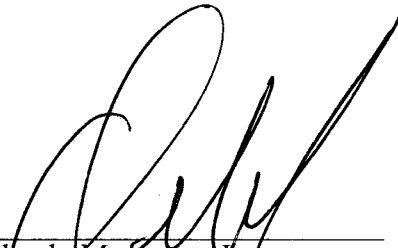
913, 914 (App. Div. 2d Dept., 2018). See *Hyatt v. State of Cal. Franchise Tax Bd.*, 105 A.D.3d 186, 205, 962 N.Y.S.2d 282, 295-296 (App. Div. 2d Dept., 2013); *U.S. Bank N.A. v. App. Intl. Fin. Co.*, 33 A.D.3d 430, 431, 823 N.Y.S.2d 361 (App. Div. 1st Dept., 2006). The Second Department has held that the legal interest between the parties must be identical (or nearly identical) and not merely similar. See *Hyatt v State of Cal. Franchise Tax Bd.*, 105 A.D.3d 186, 205, 962 N.Y.S.2d 282, 296 (App. Div. 2d Dept., 2013). In *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, the Court of Appeals upheld the narrow construction of the common interest privilege and declined to expand the privilege to communications in furtherance of any common legal interest or those not made in relation to pending or anticipated litigation. See *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 631-632, 57 N.E.3d 30, 40, 36 N.Y.S.3d 838, 848 (2016).

The Court finds that Defendants have sufficiently shown that the common interest privilege does not apply in the context of the communication at issue and therefore such communication is not protected by the privilege. Notwithstanding Plaintiff's argument that Farhoud is merely a nominal defendant, Plaintiff has not shown that his legal interest is identically or nearly identical to that of Farhoud. Defendants correctly argue that even if Plaintiff and Farhoud were co-litigants, Plaintiff and Farhoud are still adversarial parties in this Action and Plaintiff is requesting that this Court declare him the equitable owner of the Property to the exclusion of Farhoud and the other named parties.

The Court finds that Plaintiff has not shown that the allegedly privileged communication was for the purpose of furthering a legal interest common to him and Farhoud. Therefore, the Court finds that the common interest privilege does not apply to the communications sought by

Defendants and Plaintiff is hereby required to disclose such. Defendants' Motion to Compel is hereby granted.

Dated: March 6, 2019
Staten Island, New York



Orlando Marrazzo, Jr.,
Justice, Supreme Court

Hon. Orlando Marrazzo, Jr.
Acting Supreme Court Justice