SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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MARIANA DIMITROVA ALEKNA, BEATRIZ DA COSTA, SAMUEL GILCHRIST, RACHEL OLSON, JOSE SANTAMARIA, LAURA MAHLER, KELLY HOLLAND, MAX HOLLAND, MICHAEL TIVE, JOHN COLE, MARY ELLEN COLE, KRISTIN MANNONI, JOSEPH DEBART, WILLIAM DEBART, ALEX BERRICK, ASHAN SINGH, LAMAR SMALL, RACHEL PERKINS, SARA MUSE, KYUNG CHAN ZOH, JIHOE KOO

Plaintiff,

- v -

207-217 WEST 110 PORTFOLIO OWNER LLC,207 REALTY ASSOCIATES L.L.C., MANN REALTY ASSOCIATES, GFB MANAGEMENT LLC,

Defendant.

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INDEX NO. 156847/2016

MOTION DATE N/A

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 162, 163, 164, 165, 166, 167, 168, 169

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, it is

ORDERED that Buyer Defendants shall provide to all parties, by close of business on February 25, 2020, copies of the Due Diligence Report, redacted pursuant to the directives of this memorandum decision; and it is further

ORDERED that the Buyer Defendants shall provide redacted and unredacted copies of the Due Diligence Report to the Court by Febraury 25, 2020; to the extent that the Court requires alterations to the redactions, it will advise the parties of such; and it is further

ORDERED that the plaintiffs shall serve a copy of this order, along with notice of entry, on all parties within 3 days of entry.

NON-FINAL DISPOSITION

Plaintiffs move, pursuant to CPLR 3124, to compel defendants 207-217 West Portfolio Owner LLC and GFB Management (Buyer Defendants) to produce a "due-diligence" email with attached "due diligence report"[1] (together, Due Diligence Report) Buyer Defendants oppose the motion on the basis that the Due Diligence Report is privileged, and has not been waived.[2]

BACKGROUND

This is a rental overcharge action, stemming from allegations that defendants failed to honor their obligations stemming from their receipt of J-51 tax benefits. The Buyer Defendants bought the subject property from defendants 207 Realty Associates LLC and Mann Realty Associates (Seller Defendants) in April 2016.

By order dated October 31, 2019, the Court permitted plaintiffs to submit an amended complaint (NYSCEF doc No. 142). In their amended answer and cross-claims, dated November 20, 2019, Buyer Defendants allege that they did not willfully overcharge plaintiffs, as Buyer Defendants relied on misrepresentations as to plaintiffs' rental status in the rent rolls provided by Seller Defendants (NYSCEF doc No. 157 at ¶¶ 211-212). Moreover, Buyer Defendants allege that they "could not reasonably have discovered" plaintiffs' rental status (NYSCEF doc No. 157 at ¶ 236). These allegations go to the issue of damages, as Buyer Defendants can be charged with treble damages if a finding is made that they wilfully overcharged plaintiffs (*see Smoke v Windermere Owners*, 173 AD3d 500 [1st Dept 2019]).

The parties agree that the Due Diligence Report, prepared by Buyer Defendants' former counsel, would, in the absence of an applicable exception or waiver, be protected by the attorney-client privilege. However, plaintiffs argue that the Due Diligence Report is

[1] These documents have been identified as bearing Bates Stamp number 0000045-0000046 and 0000139-000014).
[2] After being notified of the subject evidentiary dispute, the Court directed in a discovery order that Plaintiffs make this motion (NYSCEF doc No. 147).

discoverable, as the at-issue and fairness doctrines each provide an applicable waiver, such that the Due Diligence Report should be turned over. The Buyer Defendants argue that the at-issue and fairness doctrines are not separate, but two ways of describing a single doctrine that does not apply here, as Buyer Defendants do not plan to use the Due Diligence Report at the dispositive motion or trial stages of this action.

ANALYSIS

Plaintiffs describe the at-issue and fairness doctrines as being closely related but separate. As to the former, plaintiffs and Buyer Defendants both cite to *Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, in which the First Department held:

> " '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"

(43 AD3d 56, 63 [1st Dept 2007] [internal quotation marks and citation omitted]).

The Court also quoted a federal court case which held that an at-issue waiver "occurs where the party asserting privilege performs an affirmative act that put(s) the protected information at issue by making it relevant to the case under circumstances where application of the privilege would have denied the opposing party access to information vital to his defense (*id.* at 64, quoting *Chase Manhattan Bank N.A. v Drysdale Sec. Corp.*, 587 F Supp 57, 58 [SD NY, 1984]).

As to the fairness doctrine, the plaintiffs cite to *John Doe v United States*, a federal action from the Second Circuit, which held that "[i]t is well established doctrine that in certain circumstances a party's assertion of factual claims can, out of consideration of fairness to the

party's adversary, result in the involuntary forfeiture of privileges for matters pertinent to the claims asserted" (350 F3d 299, 302 [2d Cir 2008]).

The Buyer Defendants note that plaintiffs are unable to find any cases explicitly adopting the fairness doctrine in New York, and argue that it is, in fact, another way of describing the at-issue doctrine. Moreover, the Buyer defendants argue that the at-issue doctrine contains a bright-line rule excluding any documents that the party asserting the privilege does not intend to rely upon. In support of this argument, Buyer Defendants cite to *Veras Inv. Partners, LLC v Akin Gump Strauss Hauer & Feld LLP*, which held, quoting *Deutsche Bank*, that the fact " '[t]hat a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself 'at issue' in the in the lawsuit'" (52 AD3d 370, 374, quoting *Deutsche Bank*, 43 AD3d at 64). The Court in *Veras* added that an at issue waiver "occurs when a party has asserted a claim or defense that he or she intends to prove by use of the privileged material" (*id*., citing Deutsche Bank at 64).

The Court need not resolve the rhetorical dispute as to whether there are two doctrines at play or one. To the extent that plaintiffs are unable to find a case in which New York courts explicitly adopt the fairness doctrine, the only doctrine the court needs to analyze is the at-issue doctrine. However, the Court declines to adopt the narrow reading of that doctrine urged by Buyer Defendants. The case that Buyer Defendants rely upon, *Veras*, does not impose a bright-line rule that the at-issue doctrine only applies to documents a party asserting the privilege intends to rely upon at some point in the litigation. Such a holding would constitute a narrowing of the doctrine, as it was articulated in *Deutsche Bank*, which held that the doctrine applied to the "subject matter" of a party's "own privileged communication" (43 AD3d at 63).

However, instead of narrowing *Deutsche Bank*, *Veras* repeatedly cites to it, and explicitly adopts the broad view of the doctrine outlined in the earlier case. The First Department in *Veras* writes:

> "The privilege is waived where a party affirmatively places the subject matter of its own privileged communication at issue in the litigation, so that invasion of the privilege is required to determine the validity of the party's claim or defense, and application of the privilege would deprive the opposing party of vital information"

(52 AD3d 370, 373, citing *Deutsche Bank,* 43 AD3d at 63-64).

Whether this doctrine applies where a landlord alleges that its overcharge of tenants was unwilful, and that it had no way of discerning, at the time it bought the subject property, whether the prior receipt of J-51 benefits placed the subject units within the ambit of rent stabilization, is a novel question of law. The Court finds that the at-issue doctrine does apply in these circumstances.

The sale of the subject property was in April 2016, nearly seven years after the Court of Appeals landmark decision in *Roberts v Tishman Speyer* (13 NY3d 270 [2009] [holding that landlords receiving J-51 benefits may not luxury deregulate units within buildings receiving such benefits]). Moreover, *Roberts*' progeny had, by the time of the subject sale, made it clear that the *Roberts* decision applied retroactively (*see Gersten v 56 7th Ave*, 88 AD3d 189 [1st Dept 2011]).

Thus, it is reasonable to conclude that the Buyer Defendants' Due Diligence Report may contain statements as to the legal status of plaintiffs' apartments. To the extent that it does, plaintiffs are entitled to a redacted copy of the Due Diligence Report, as this evidence would rebut the Buyer Defendants' allegations regarding their own ignorance. Failing to order the Buyer Defendants' to turn over portions of the Due Diligence Report that relate to the legal status of the apartments within the subject property would deprive plaintiffs of vital information

relating to an issue that Buyer Defendants have brought into play. Portions of the Due Diligence Report that do not relate to the regulatory status of the apartments remain privileged and are properly redacted.

Accordingly, it is

ORDERED that Buyer Defendants shall provide to all parties, by close of business on February 25, 2020, copies of the Due Diligence Report, redacted pursuant to the directives of this memorandum decision; and it is further

ORDERED that the Buyer Defendants shall provide redacted and unredacted copies of the Due Diligence Report to the Court by Febraury 25, 2020; to the extent that the Court requires alterations to the redactions, it will advise the parties of such; and it is further

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2/25/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE