Mawere v Landau
2020 NY Slip Op 32773(U)
August 17, 2020
Supreme Court, Kings County
Docket Number: 501184/12
Judge: Lawrence S. Knipel

At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of August, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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DR. JONATHAN MAWERE,

Plaintiff,

- against -

JOEL LANDAU, JACK BASCH, LEIBEL RUBIN, MARVIN RUBIN, SOLOMON RUBIN, JUDITH EISEN, GARFUNKEL WILD, P.C., AND JOHN DOES 1-10,

Defendants,

-and-

ALLURE CARE MANAGEMENT LLC, THE ALLURE GROUP INC., THE ALLURE GROUP, LLC, ALLIANCE HEALTH ASSOCIATES, INC., ALLIANCE HEALTH PROPERTY, LLC, ST. MARKS BROOKLYN ASSOCIATES L.L.C., AND ST. MARKS AVENUE PROPERTY LLC,

Nominal Defendants.

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DECISION AND ORDER

Index No. 501184/12

The following e-filed papers read herein:	NYSCEF Doc. Nos.[1]
Notice of Motion/Cross Motion and Affidavits (Affirmations) and Exhibits Annexed	286-287, 299-300
Opposing Affidavits (Affirmations)	300, 302
Reply Affidavits (Affirmations)	302, 303

[1] New York State Courts Electronic Filing Document Numbers

Upon the foregoing papers, plaintiff Dr. Jonathan Mawere moves, in motion (mot.) sequence (seq.) 11, for an order, pursuant to CPLR 4403, rejecting and vacating the May 4, 2020 report and recommendation of the referee, and, upon such rejection and vacatur, that the court set the matter down for further findings or proceedings. By way of a joint cross motion, defendants Judith Eisen and Garfunkel Wild, P.C., (the Law Firm Defendants) and defendants Joel Landau, Jack Basch, Leibel Rubin, Marvin Rubin, Solomon Rubin, Allure Care Management LLC, The Allure Group Inc., The Allure Group, LLC, Alliance Health Associates, Inc., Alliance Health Property, LLC, St. Marks Brooklyn Associates L.L.C., and St. Marks Avenue Property LLC (the Alliance Defendants) cross-move, in mot. seq. 12, for an order, pursuant to CPLR 4403, confirming the May 4, 2020 report and recommendation of the referee (the Report).

Plaintiffs' motion is denied, the joint cross motion by the Law Firm Defendants and the Alliance Defendants is granted and the Report is confirmed.

BACKGROUND

In this action, plaintiff alleges that, in 2011, defendants Joel Landau and Jack Basch breached a joint venture agreement relating to the purchase of two nursing homes located in Brooklyn, New York, known as Ruby Weston Manor and Marcus Garvey Residential Rehab Pavilion, Inc., through their freezing plaintiff out of the purchasing and operating of the nursing homes. Plaintiff further alleges that the Law Firm Defendants committed legal malpractice and breached fiduciary duties owed to plaintiff by representing the interests of

Landau and Basch against plaintiff's by assisting Landau and Basch to consummate the purchase of the nursing homes while freezing-out plaintiff.[2]

The specific dispute at issue relates to all defendants' contention that they may withhold production of certain documents that plaintiff seeks in discovery because the documents are protected by attorney-client privilege. Plaintiff, however, contends that he is entitled to production of the documents because he was also represented by the Law Firm Defendants in an individual capacity during the course of the transaction and may thus waive any attorney-client privilege. In order to determine this preliminary issue related to the parties' discovery dispute, the court, based on two orders, each dated November 9, 2018, referred the issue of whether the Law Firm Defendants represented plaintiff to a referee to hear and report.

Following the reference, the referee held a hearing over the course of several days from May 14, 2019 to November 18, 2019, and, on May 5, 2020, filed the Report dated May 4, 2020. During the hearing, Landau testified that, based on his conversations with the attorneys at Garfunkel Wild, P.C., (Garfunkel), including Judith Eisen, one of its partners, he understood Garfunkel's representation was on behalf of both Intelimed Group (Intelimed), an entity entirely owned by him, that he intended to use to purchase the nursing homes, and later, Alliance, a shell entity that was formed to purchase the nursing home, or act as a receiver of the nursing home until it could be purchased. Eisen also testified to similar effect,

[2] The remaining defendants and nominal defendants are the entities that were created to purchase, own and operate the nursing homes and the persons or entities with ownership interests in those entities.

and, in her testimony, emphasized that the Law Firm Defendants' role was limited to negotiating with the seller of the nursing homes, and obtaining approvals for the purchase and receivership from the Department of Health. Eisen also emphasized that she and Garfinkle played no role in addressing the internal issues and disputes amongst plaintiff, Landau, and Basch, and that, while Garfinkle acted as the scrivener for the draft shareholders' agreement for Alliance that included plaintiff, and for the shareholders' agreement that was ultimately signed that did not include plaintiff, it did so only to further the Department of Health's approval of the receivership for and the ultimate purchase of the nursing homes. To the extent that Eisen became aware that plaintiff had disagreements with Landau and Basch regarding the terms of the shareholders agreements, she was aware that plaintiff had obtained his own counsel.

Plaintiff testified that, on November 16, 2010, he participated in a conference call with Eisen and Landau that was related to the joint venture's purchase of the nursing homes. Plaintiff asserted that during this call, Eisen informed plaintiff and Landau that she, and her firm, Garfunkel, was representing the joint venture and plaintiff individually and that he thereafter gave Garfunkel personal and sensitive information as part of the application for financial reports submitted to the Department of Health related to the purchase, and for the receivership of the nursing homes, which was sought as an interim step towards the purchase of the nursing homes. At a meeting with the Department of Health, and in the presence of Basch and Landau, plaintiff testified that Eisen stated that Garfunkel represented Basch, Landau and plaintiff. Plaintiff, however, also testified that he saw the unsigned retainer

agreement dated November 16, 2010 that Eisen sent to him and Landau which identified her client and Garfunkel's representation as Intelimed. Finally, with respect to plaintiff's testimony, he admitted that he did not pay the retainer or any of the Law Firm Defendants' bills, and his testimony provides no suggestion that he asked for, or that the Law Firm Defendants gave, any advice as to his individual concerns relating to the joint venture or to the purchase and receivership.

In the Report, the referee summarized the testimony presented at the hearing, noted that the burden of proof was on plaintiff to demonstrate, by the preponderance of credible evidence, that the Law Firm Defendants represented him, and that, based on the evidence at the hearing, plaintiff failed to meet this burden. In reaching this conclusion, the referee emphasized that the retainer was signed by Landau's entity, Intelimed, and that the document itself identified Intelimed as the client. The referee further noted that Garfunkel gave plaintiff no independent legal advice, and, when it became aware that plaintiff's interest might not be aligned with defendants, it advised him to obtain independent counsel. As such, the referee concluded that all relevant factors indicated the absence of an attorney-client relationship and that the Law Firm Defendants did not represent plaintiff.

THE MOTION AND CROSS MOTION

As an initial matter, plaintiff contends that the court should not consider defendants' cross motion because it is untimely under the terms of the parties' stipulation, "so-ordered" by the referee, dated December 10, 2019, in which the parties agreed that any application relating to the Report was required to be made 30 days from the date of the report. Plaintiff

is correct that defendants' cross motion is untimely, given that the motion was not made until July 6, 2020, a date more than 30 days after the Report, which is dated May 4, 2020.

This delay, in and of itself, however, does not require the granting of plaintiff's motion, as a court, even in the absence of a motion, must still confirm or reject the report (*see* CPLR 4403; *Matter of Galiber v Previte*, 40 NY2d 822, 824 [1976]; *Matter of Breland (Motor Veh. Acc. Indem. Corp.)*, 24 AD2d 881, 881 [2d Dept 1965]). Further, unlike cases involving extensive delays or a total failure to address the issue until on appeal (*Sroka v Sroka*, 255 AD2d 897, 898 [4th Dept 1998]), the court finds that defendants' delay here is not fatal to consideration of defendants' arguments supporting the referee's determination. Importantly, in this respect, the parties themselves agreed, in a stipulation, dated June 29, 2020, which adjourned the return date of plaintiff's motion until July 17, 2020, to allow defendants until July 3, 2020 to serve opposition papers to plaintiff's motion. Although the cross motion papers and the attorneys' affirmation were not served until July 6, 2020, the court notes that July 3, 2020, was a Friday on which the July 4th holiday was observed by the court system and other governmental entities, and the delay of only one business day in the service of defendant's service of the papers cannot be deemed fatal in the absence of prejudice to plaintiff, who, by way of the same stipulation, had until July 16, 2020 to serve his reply papers.[3] In any event, the court finds that, even if it must disregard the papers

[3] The court notes that it has not relied on General Construction Law § 25-a in deciding this issue given that Section 25-a does not, by operation of law, extend defendants' time based on any governmental observation of the July 4, 2020 holiday on July 3, 2020, in that such governmental observation is not a public holiday for purposes of section 25-a (*see O'Leary v New York City Tr. Auth.*, 97 AD2d 789, 789 [2d Dept 1983], *affirmed for the reasons stated below* 64 NY2d 813 [1985]; General Construction Law § 24).

submitted by defendants, the reasoning of the referee contained in the Report sufficiently identifies the issues that must be decided by the court and that the Report may be confirmed without considering the arguments raised in defendants' papers.

Turning to the merits of the referee's determination, the "report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility" (*Nationstar Mtge., LLC v Cavallaro*, 181 AD3d 688, 688 [2d Dept 2020], quoting *Citimortgage, Inc. v Kidd*, 148 AD3d 767, 768 [2d Dept 2017]). "The referee's findings and recommendations are advisory only and have no binding effect on the court, which remains the ultimate arbiter of the dispute" (*see Citimortgage, Inc.*, 148 AD3d at 768, citing *Shultis v Woodstock Land Dev. Assoc.*, 195 AD2d 677, 678 [3d Dept 1993]). Ultimately, the court may confirm or reject the report, in whole or part, and may make new findings with or without taking additional testimony (*see* CPLR 4403; *JNG Constr., Ltd. Roussopoulos*, 170 AD3d 1136, 1141 [2d Dept 2019]).

Plaintiff's assertion that he is protected by the attorney-client privilege requires a demonstration that he had an attorney-client relationship with the Law Firm Defendants (*see Matter of Priest v Hennessy*, 51 NY2d 62, 69-70 [1980]; *Klein Varble & Assoc., P.C. v DeCrescenzo*, 119 AD3d 655, 655 [2d Dept 2014]). There are no rigid rules that must be followed to form an attorney-client relationship (*see McLenithan v McLenithan*, 273 AD2d 757, 758 [3d Dept 2000]; *Schlissel v Subramanian*, 25 Misc 3d 1219 [A], 2009 NY Slip Op 52188, *7 [U] [Sup Ct, Kings County 2009]). An attorney-client relationship may exist

without an explicit retainer agreement or payment of fee (*see Tropp v Lumer*, 23 AD3d 550, 551 [2d Dept 2005]). The focus of the attorney-client relationship analysis turns on whether there was "an explicit undertaking to perform a specific task" and, "a court must look to the actions of the parties to ascertain the existence of such a relationship" (*id.*, at 551 [internal quotation marks and citations omitted]; *see Nelson v Kalathara*, 48 AD3d 528, 529 [2d Dept 2008]), bearing in mind that a plaintiff's unilateral belief does not confer upon him or her the status of a client (*see Moran v Hurst*, 32 AD3d 909, 911 [2d Dept 2006]; *Volpe v Canfield*, 237 AD2d 282, 283 [2d Dept 1997], *lv denied* 90 NY2d 802 [1997]).

Here, plaintiff initially contends that the report should be rejected because the referee applied the wrong legal standard in stating that it was plaintiff who bore the burden of demonstrating that he was represented by the Law Firm Defendants. The court finds that the law is somewhat unclear as to who should bear the burden under the circumstances here. Generally, it is the burden of the party claiming the application of the attorney-client privilege who bears the burden of demonstrating the applicability of the privilege (*see Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 [2016]; *Feigham v Feigham*, 180 AD3d 873, 874 [2d Dept 2020]). The party claiming the privilege also bears the burden of demonstrating the existence of an attorney-client relationship, a necessary prerequisite for the attorney-client privilege (*see Matter of Priest*, 51 NY2d at 69-70; *Klein Varble & Assoc., P.C.*, 119 AD3d 655, 655). Here, however, both plaintiff and defendants are relying on attorney-client privilege. Defendants claim that certain documents are covered by the privilege, and plaintiff claims that any such privilege can be waived by him because

he was also a client of the Law Firm Defendants. However, as it is the party opposing a discovery request who generally bears the burden of demonstrating the grounds for barring disclosure (*see Koump v Smith*, 25 NY2d 287, 294 [1969]), and as this issue arises in the context of defendants' opposing plaintiffs' document demands with respect to certain documents claimed to be privileged, it would appear that plaintiff is correct that defendants should have borne the burden before the referee.

Given the findings of the referee, however, the court finds that any error with respect to the burden of proof does not require a different result. Namely, this is not a case where the referee made a determination that the evidence at the hearing presented a close call, and that plaintiff simply failed to establish his burden. Rather, the referee made unequivocal findings that plaintiff did not seek legal advice from the Law Firm Defendants, that the Law Firm Defendants were not paid by plaintiff, that the Law Firm Defendants' clients were Intelimed and Alliance,[4] and that this representation of Intelimed and Alliance related to the venture to purchase the nursing home not plaintiff's individual issues. These findings all support the referee's ultimate determination that plaintiff was not a client of the Law Firm Defendants. In so finding, the referee also necessarily rejected plaintiff's testimony that Eisner informed him that he, individually, was a client of the Law Firm Defendants. As the hearing record substantially supports the referee's conclusions, and the referee clearly defined the issues and determined issues of credibility in making these findings, any error

[4] The court notes that although a written retainer may not be determinative of an attorney-client relationship, a written retainer identifying a law firm's client has been found sufficient to demonstrate a prima facie showing in this respect (*see Moran*, 32 AD3d at 911; *see also Griffin v Ainslow*, 17 AD3d 889, 892 [3d Dept 2005]).

with respect to the burden of proof was harmless (*see Matter of Peters v Peters*, 78 AD2d 996, 996 [4th Dept 1980]).

Plaintiff's assertions that Intelimed itself could not ultimately purchase the nursing homes because of Department of Health requirements and because the Law Firm Defendants never entered into a retainer agreement with Alliance in no way show that Intelimed and Alliance were not the Law Firm Defendants' clients. While Landau's admission in an affidavit that he and Basch were clients of the Law Firm Defendants in addition to Intlimed presents a factual inconsistency, such an admission does not show that plaintiff was, individually, a client and such inconsistency, in and of itself, is insufficient to show that the defendants failed to make out their burden of proof here. While plaintiff also points to proof before the referee that he provided information to the Law Firm Defendants, this information was obtained from plaintiff acting as a potential shareholder of Alliance for the approvals Alliance needed from the Department of Health in order to proceed with the venture and the proof thus does not show the Law Firm Defendants' individual representation of plaintiff (*see Campbell v McKeon*, 75 AD3d 479, 480-481 [1st Dept 2010]; *Coby Group, LLC v Kriss*, 63 AD3d 569, 570 [1st Dept 2009]; *Griffin v Anslow*, 17 AD3d 889, 891-892 [3d Dept 2005]; *Kushner v Herman*, 215 AD2d 633, 633-634 [2d Dept 1995]; *Doe v Poe*, 189 AD2d

132, 135 [2d Dept 1993], *lv denied* 81 NY2d 711 [1993]).[5] Further, to the extent that plaintiff ultimately had a dispute with Landau and Basch regarding plaintiff's participation in the venture and to the extent that the Law Firm Defendants undertook any representation of Landau and Basch's interest in such a dispute, the Law Firm Defendants had advised plaintiff to retain his own counsel and he had already done so by the time their interests were adverse (*see Coby Group, LLC*, 63 AD3d at 570; *Griffin*, 17 AD3d at 892-893).

Accordingly, defendants are entitled to confirmation of the Report.[6]

This constitutes the decision and order of the court.

E N T E R

J. S. C.

Justice Lawrence Knipel

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[5] A closer question would be presented if the alleged joint venture or partnership, involving Mawere, Basch and Landau, was the client, as the courts have split as to whether representation of a partnership or joint venture's interests, in and of itself, also makes the individual partners or joint venturers the client (*see Dembitzer v Chera*, 285 AD2d 525, 525-526 [2d Dept 2001]; *but see Hopper v Frank*, 16 F3d 92, 97-98 [5th Cir 1994]; *Responsible Citizens v Superior Court of Fresno County*, 16 Cal App4th 1717, 1729-1732 , 20 Cal Rptr2d 756, 763-766 [1993]; *Chaiken v Lewis*, 754 So2d 118, 118-119 [Dist Ct Ap Fl 2000]; *see also Eurycleia Partners, LP, v Seward & Kissel, LLP*, 12 NY3d 553, 561-562 [2009]; *Jamie v Jamie*, 309 AD2d 605, 605-606 [1st Dept 2003]).

[6] The court emphasizes that it is making no determination as to whether this finding has any binding effect with respect to the ultimate liability of the Law Firm Defendants. In addition, while defendants may have demonstrated that plaintiff was not a client of the Law Firm Defendants, and that he may not thus waive any attorney client-privilege, the referee and the court have made no determination that any particular document demanded by plaintiff is protected by the attorney-client privilege or that defendants have satisfied their obligation to produce a privilege log with respect to such documents and thereafter provide the documents themselves for any in camera review that is required (*see* CPLR 3122 [b]; *Stephen v State of New York*, 117 AD3d 820, 820-821 [2d Dept 20014]; *see also Abraha v Adams*, 148 AD3d 1730, 1732-1733 [4th Dept 2017]).