SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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ALROSE STEINWAY, LLC,

Plaintiff,

- v -

JASPAN SCHLESINGER, LLP and STEPHEN EPSTEIN,

Defendants.

INDEX NO. 151482/2017

MOTION DATE 01/03/2020

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

----------X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 278, 279, 280, 281, 282, 283, 284, 285

were read on this motion to/for ORDER OF PROTECTION.

In motion sequence number 007, defendant Jaspan Schlesinger, LLP (JS LLP) and Stephen Epstein move, pursuant to CPLR 3103, for a protective order (1) directing plaintiff to return and destroy duplicate copies of an inadvertently produced February 9, 2016 email from JS LLP's general counsel, David E. Paseltiner, to Epstein (2/9 Email), (2) prohibiting plaintiff from using the 2/9 Email, (3) striking any references to the 2/9 Email from plaintiff's summary judgment papers, and (4) striking questions, answers, and references to the 2/9 Email from Epstein's deposition transcript. Defendants also move to seal NYSCEF Doc. Nos. 208 (2/9 Email), 232 (2/9 Email), 234 (duplicate copy of 2/9 Email), 252 (2/9 Email), and 254 (duplicate copy of 2/9 Email). (*See* NYSCEF Doc. No. [NYSCEF] 276, Interim Order; NYSCEF 280, Rice aff.)[1]

[1] Although not specifically requested in Rice's affirmation, this Order to Show Cause (NYSCEF 247) is also filed under temporary seal/restricted access, as well as Epstein's deposition pp 270-280 (NYSCEF 253.)

Background

Plaintiff commenced this action for legal malpractice against JS, LLP, a law firm, and Epstein, a partner at JS LLP. (NYSCEF 265, Complaint ¶¶ 1-2.) Plaintiff alleges that JS LLP and Epstein negligently advised plaintiff to enter into an amendment to a lease. (*Id.* ¶ 2.)

On November 27, 2018, defendants produced two copies of the 2/9 Email to plaintiff. (NYSCEF 229, Rice aff ¶¶ 3, 11.) The 2/9 Email contained a draft letter from Paseltiner to JS LLP's insurer in which Paseltiner notified the insurer of plaintiff's potential malpractice claim. (*Id.* ¶ 3.) Paseltiner asked Epstein to review the letter. (*Id.*)

On January 30, 2019, at Epstein's deposition, defendants allegedly learned for the first time that two copies of the 2/9 Email were inadvertently produced. (*Id.* ¶ 13.) Defendants' counsel objected that the 2/9 Email was protected by the attorney-client privilege and inadvertently produced. (*Id.*) The deposition transcript, in relevant part, provides as follows:

> [Plaintiff's counsel]: I'm going to ask the reporter to mark as 72 an e-mail from David Paseltiner to Stephen Epstein dated February 9, 2016, attaching a letter from David Paseltiner to Stanley Morris … Have you seen the letter to Mr. Morris previously?
>
> [Defendants' counsel]: Before you answer the question, this is a letter and e-mail that was inadvertently produced and should have been evident upon review of it by counsel that it was inadvertently produced
>
> [Plaintiff's counsel]: Reviewed by our counsel?
>
> [Defendants' counsel]: By you, yes. By you, yes.
>
> [Plaintiff's counsel]: It was produced, it has a document number It has -

> [Defendants' counsel]: Right. And upon reviewing it you should have realized it was inadvertently produced.
>
> [Plaintiff's counsel]: How could I have realized it was inadvertently produced?
>
> [Defendant's counsel]: By the content of who it's directed to, the timing of it, and the content of it. So I'm just saying that while I'm going to allow some questioning on it, it is something we should have been on notice of when you realized you had it …"

(NYSCEF 233, Epstein deposition tr at 270:14-271:19.)

On February 1, 2019, two days after learning of the alleged inadvertent production, defense counsel requested that plaintiff return the 2/9 Email. (NYSCEF 229, Rice aff ¶ 15.) On February 8, 2019, plaintiff denied this request. (*Id.* ¶ 16.) On March 21, 2019, the parties appeared for a status conference and raised the issue of the alleged inadvertent production; no resolution was reached (*Id.* ¶ 17.) The court issued an order permitting defense counsel to file an Order to Show Cause to resolve the dispute. (NYSCEF 238, Status Conference Order.)

On October 31, 2019, the parties attended mediation, at which time plaintiff's counsel affirms that he informed defense counsel of plaintiff's intent to rely on the 2/9 Email to oppose defendants' summary judgment motion. (NYSCEF 264, Butler aff ¶ 12.) Plaintiff subsequently filed the 2/9 Email on the docket in opposition to defendants' summary judgment motion. (NYSCEF 229, Rice aff ¶ 18.) At that time, defendants still had not moved for a protective order.

By letter dated November 26, 2019, defense counsel demanded that plaintiff "withdraw Exhibit 13 [2/9 Email] to your Affirmation in Opposition to Defendants' Motion for Summary Judgment … ." (NYSCEF 239, 11/26/19 Letter.) On November 27, 2019, defendants filed this Order to Show Cause. (NYSCEF 228, OSC 007.)

Defendants argue that they are entitled to a protective order because the 2/9 Email is privileged insofar as it is a communication from JS LLP's general counsel to Epstein. Defendants maintain that the inadvertent production was not a waiver of the privilege because (1) JS LLP intended to maintain the privilege, especially by implementing adequate precautions; (2) JS LLP promptly objected to use of the 2/9 Email once it learned of the inadvertent production; and (3) plaintiff will not be prejudiced by a protective order. Additionally, defendants assert that Epstein's deposition testimony regarding the 2/9 Email was limited and did not waive the privilege.

Plaintiff argues that the 2/9 Email is not privileged, but in any event, the privilege was waived.

Discussion

CPLR 3103 provides that "[t]he court may … make a protective order denying, limiting, conditioning, or regulating the use of any disclosure device. Such order shall be designated to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

Here defendants fail to meet their burden of proving that the attorney-client privilege was not waived. Even assuming that the attorney-client privilege attached to the 2/9 Email, the privilege was waived by defendants' failure to wait until November 27, 2019 to file an OSC seeking a protective order, 10 months after learning of the alleged inadvertent disclosure.

It is the burden of "the proponent of the privilege to prove that the privilege was not waived." (*New York Times Newspaper Div. of N.Y. Times Co. v Lehrer McGovern Bovis.*, 300 AD2d 169, 172 [1st Dept 2002] [citation omitted].) For instance,

> "[d]isclosure of a privileged document generally operates

> as a waiver of the privilege unless it is shown that the client intended to maintain the confidentiality of the document, that reasonable steps were taken to prevent disclosure, *that the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation*, and that the parties who received the documents will not suffer under prejudice if a protective order against use of the document is issued."

(*Id.* [citations omitted] [emphasis added].) Again, "assuming that such a privilege existed, it was waived by the defendants' lack of due diligence." (*Koramblyum v Medvedovsky*, 19 AD3d 651, 652 [2d Dept 2005] [citations omitted].) After plaintiff refused to return the 2/9 Email, defendants waited an unreasonable 10 months to take any action to remedy the situation. Even after this court expressly welcomed defendants to bring an OSC in March 2019, which they could have filed at any time after learning of the disclosure, still no action was taken to remedy the situation until November 2019. The lack of defendants' due diligence to remedy the disclosure of this document cannot be ignored, and thus, any existing privilege was waived.

Nevertheless, even considering the 2/9 Email in connection with plaintiff's opposition to defendants' summary judgment, defendants prevailed on that motion because, as a matter of law, there was no proximate cause or actual damages as the result of defendants' alleged negligence.

Sealing

Because the 2/9 Email is not protected by the attorney-client privilege, good cause does not exist to seal them or references to them.

Section 216.1(a) of the Uniform Rules for Trial Courts empowers courts to seal documents upon a written finding of good cause. It provides:

"(a) [e]xcept where otherwise provided by statute or rule, a

> court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and an opportunity to be heard.
>
> (b) For purposes of this rule, 'court records' shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103 (a)."

Judiciary Law § 4 provides that judicial proceedings shall be public. "The public needs to know that all who seek the court's protection will be treated evenhandedly," and "[t]here is an important societal interest in conducting any court proceeding in an open forum" (*Baidzar Arkun v Farman-Farma*, 2006 NY Slip Op 30724[U],*2 [Sup Ct, NY County 2006] [citation omitted].) The public right of access, however, is not absolute. (*See Danco Lab, Ltd. v Chemical Works of Gedeon Richter, Ltd.,* 274 AD2d 1, 8 [1st Dept 2000].)

The "party seeking to seal court records bears the burden of demonstrating compelling circumstances to justify restricting public access" to the documents (*Mosallem v Berenson*, 76 AD3d 345, 348-349 [1st Dept 2010] [citations omitted].) Good cause must "rest on a sound basis or legitimate need to take judicial action" (*Danco Labs.*, 274 AD2d at 9.)

Here, any attorney-client privilege that allegedly attached to the emails was waived. Accordingly, defendants have not demonstrated compelling circumstances to justify restricting public access to the emails or references to the emails.

The motion to seal is denied in the absence of good cause.

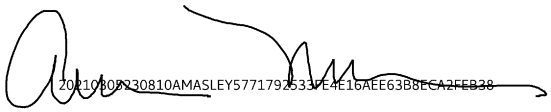
The court has considered the balance of the parties' arguments and they do not yield and alternative result.

Accordingly, it is

ORDERED that motion sequence number 007 is denied; and it is further

ORDERED that movants are directed to serve a copy of this Decision and Order on the County Clerk who is directed to unseal NYSCEF Doc. Nos. 208, 232, 234, 247, 252, 253, and 254; and it is further

ORDERED that such service upon the County Clerk and Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-filing" page on the court's website – www.nycourts.gov/supctmanh).



3/5/2021
DATE

ANDREA MASLEY, J.S.C.

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