

14 LLC v J & R 240 LLC
2021 NY Slip Op 31394(U)
April 18, 2021
Supreme Court, New York County
Docket Number: 653063/2019
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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14 LLC,	INDEX NO.	<u>653063/2019</u>
Plaintiff,	MOTION DATE	<u>02/19/2021</u>
- v -	MOTION SEQ. NO.	<u>002</u>
J & R 240 LLC A/K/A J&R 240 LLC, 240-242 LLC, JR FAMILY LLC, HERSNAG LLC, WILLIAM RADMIN, and MILROSE CONSULTANTS, INC.,	DECISION + ORDER ON MOTION	
Defendants.		

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, it is

In motion sequence number 002, plaintiff 14 LLC seeks to compel defendants J&R 240 LLC (J&R), 240-242 LLC, JR Family LLC, Hersnag LLC, and William Radmin¹ to produce all documents withheld pursuant to the attorney-client privilege or work product doctrine identified in the privilege log for an in-camera review (NYSCEF Doc. No. 65, Privilege Log) and produce any documents not protected by the privilege to plaintiff. The first prong of plaintiff's motion is granted.

In-Camera Review

Plaintiff challenges defendants' claim of attorney-client privilege or privileged attorney work product for 52 documents comprised of emails between defendants'

¹ Plaintiff is not moving for relief against defendant Milrose Consultants Inc.; thus, when the court uses the term defendants, it is only referring to the five defendants subject to this motion.

counsel and defendants, as well as emails among defendants' counsel. At the November 17, 2020 argument on this motion, the parties agreed that an in-camera review was needed; however, defendants disputed the challenge to their privilege designations and did not agree to produce the documents in question without a determination of the privilege. On November 25, 2020, defendants' counsel furnished the court with a revised list of 39 documents over which defendants claim privilege.

Attorney-Client Privilege

"The attorney-client privilege shields from disclosure any confidential communications between an attorney and his or her client made for the purpose of obtaining or facilitating legal advice in the course of a professional relationship. The oldest among the common-law evidentiary privileges, the attorney-client privilege fosters the open dialogue between lawyer and client that is deemed essential to effective representation. It exists to ensure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his embarrassment or legal detriment"

(*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 623 [2016] [internal quotation marks and citations]). "In order to make a valid claim of privilege, it must be shown that the information sought to be protected from disclosure was a 'confidential communication' made to the attorney for the purpose of obtaining legal advice or services" (*Priest v Hennessy*, 51 NY2d 62, 69 [1980] [citations omitted]). "The communication itself must be primarily or predominantly of a legal character" (*Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 378 [1991] [citation omitted]).

Further, a communication "does not become privileged merely because it was sent to an attorney" (*id.* at 379). However, when information is conveyed from a client to an attorney, "the communication need not specifically ask for legal advice in order to maintain the document's privileged status, so long as the information is sent to counsel

in order for counsel to provide legal advice” (*U.S. Bank N.A. v Lightstone Holdings KLLC*, 2016 NY Slip Op 30644(U), *6 [Sup Ct, NY County 2016] [internal quotation marks and citations omitted]). While the privilege does not protect communications intended to assist counsel in performing nonlegal services, such as the provision of business advice, the fact that an attorney’s advice includes business as well as legal considerations does not vitiate the privilege (*see Note Funding Corp. v Bobian Inc. Co., NV*, 1995 US Dist. LEXIS 16605, *7 [SDNY 1995]). In pursuing transactions, commercial entities often seek the advice of counsel who, acting in that capacity, “are not limited to offering their client purely abstract advice as to the rules of law that may apply to their situation” (*id.* at *6).

Here, several of the documents over which defendants claim privilege consist of communications from client to counsel regarding factual information and terms of ongoing negotiations pertaining to pursuing the transaction at issue in this action. As counsel was retained for the purpose of advising defendants with respect to that transaction, this court differentiates between those emails, and others in which the information provided is to assist counsel in performing a nonlegal function (*see Steinovich v Wachtel, Lipton, Rosen & Katz*, 195 Misc 2d 99 [Sup Ct, NY County 2003] [holding that, where counsel was retained to provide legal advice concerning the negotiation, execution, and closing of a merger agreement, the documents pertaining to that advice were of a primarily legal character]).

Documents 9, 11, 12, and 13

The majority of communications in these documents are protected by the attorney-client privilege. These communications between the attorney and client involve

the rendering of legal advice, solicitation of legal advice, or information provided for the purpose of receiving legal advice in response.

Document 9 includes emails between Joel Radmin, a member of defendant JR Family LLC, and defendants' attorneys Andrew Albstein, Esq. and Gillian Kessler, Esq. These emails contain legal advice. The only email in this exchange that must be disclosed, as it is not protected by attorney-client privilege, is Joel Radmin's email dated November 21, 2014, time stamped 4:02PM.

Documents 11 and 12 are emails from Joel Radmin to Kessler. Document 13 is an email from Joel Radmin to Kessler copying Herman Gans, a member of defendant Hersnag LLC. Each of these communications pertains to the rendering of legal services.

Accordingly, defendants properly assert privilege with respect to the documents discussed above and need not produce these documents to plaintiff.

Document 15

The communications in this document are partially protected by the attorney-client privilege. The November 13, 2013 email sent at 10:19AM from Joel Radmin to Kessler, copying defendant William Radmin, contains information conveyed for the purpose of obtaining legal advice and representation, and thus, may be redacted. Defendants are directed to produce the remaining two emails contained in the documents.

Documents 17 and 18

The communications in these documents are partially protected by the attorney-client privilege. These documents contain communications from the same chain of

emails, which does not contain any question or advice of a legal nature, except the November 4, 2013 email sent at 12:22PM from Joel Radmin to Kessler and Albstein. This email contains information related to seeking legal advice and indicates previously rendered legal advice. Defendants may redact this email and are directed to produce the other emails in the chain unreacted.

Documents 19 and 20

The communications in these documents are partially protected by the attorney-client privilege. These documents contain communications from the same chain of emails. The first email in both documents is from Jared Wachtler, attorney for plaintiff with respect to the transaction at issue in this litigation, to Kessler, sent on October 29, 2013 at 6:03pm. This email is not privileged as it is from a third party, and further does not contain confidential information. Defendants are directed to produce this email in unredacted form. The subsequent emails in this chain, are between Kessler, Joel Radmin, and Albstein in response to the draft agreement attached to Wachtler's October 29th email; those emails pertain to the seeking and rendering of legal advice with respect to the transaction and are protected by attorney-client privilege.

Documents 21, 22, 23, and 24

The communications in these documents are partially protected by the attorney-client privilege. These documents contain communications from the same chain of emails.

The following emails contain legal advice or information conveyed for the purpose of obtaining legal advice or services, and may thus be redacted: the October 24, 2013 email sent at 10:09AM from Joel Radmin to Kessler and Albstein; the October

24, 2013 email sent at 15:24 from Joel Radmin to Kessler and Albstein; the October 24, 2013 email sent at 11:19AM from Kessler to Joel Radmin, copying Albstein; the October 29, 2013 email sent at 5:32PM from Kessler to Joel Radmin, copying Albstein; and the October 29, 2013 email sent at 5:40PM from Joel Radmin to Kessler and Albstein.

Defendants are directed to produce the remaining emails contained in these documents.

Documents 26, 27, 28, 29, 30, and 31

The communications in these documents are partially protected by the attorney-client privilege. These documents contain communications from the same chain of emails.

The first email in the chain was sent on October 14, 2013 at 6:22PM from Wachtler and also copies third party David Pfeffer. This email is, therefore, not confidential and is not protected by attorney-client privilege. Defendants are directed to produce this email in unredacted form.

The remaining emails in the chain are between Kessler, Albstein, and Joel Radmin pertaining to the October 14th email from Wachtler.

The following emails contain legal advice, or information provided for the purpose of obtaining legal advice and are thus protected by attorney-client privilege: the October 16, 2013 email sent at 1:58PM from Joel Radmin to Kessler and Albstein; the October 16, 2013 email sent at 2:09PM from Kessler to Joel Radmin and Albstein; the October 16, 2013 email sent at 3:10PM from Joel Radmin to Kessler and Albstein; the October 16, 2103 email sent at 5:36PM from Kessler to Radmin; the October 16, 2013 email sent at 5:42PM from Joel Radmin to Kessler; the October 16, 2013 email sent at 17:58

from Joel Radmin to Kessler and Albstein; the October 16, 2013 email sent at 11:43PM from Albstein to Kessler and Joel Radmin; the October 17, 2013 email sent at 12:15AM from Albstein to Kessler and Joel Radmin the October 21, 2013 email sent at 5:22PM from Kessler to Joel Radmin; the October 21, 2013 email sent at 5:24PM from Joel Radmin to Kessler. The aforementioned emails may be redacted. The remaining emails in this chain do not pertain to obtaining or rendering of legal advice, and defendants are directed to produce those emails unredacted.

Documents 33, 35, and 36

The communications in these documents are protected by the attorney-client privilege. These documents contain communications from the same chain of emails. The emails pertain to the rendering of legal advice or to information provided in order to obtain legal advice and are protected by attorney-client privilege. They are as follows: the October 7, 2013 email sent at 10:11AM from Joel Radmin to Albstein, copying Kessler, Gans and James Guarino, a member of defendant 240-242 LLC; the October 7, 2013 6:13PM email sent from Kessler to all copied on the October 7, 2013 10:11AM email; the October 7, 2013 email sent at 6:44PM from Gans to Kessler; the October 9, 2013 email sent at 3:25PM from Kessler to Gans; the October 9, 2013 email sent at 4:20PM from Herman Gans to Gillian Kessler; and the October 9, 2013 email sent at 4:29PM from Kessler to Gans. The only email in these exchanges that shall be produced is the October 9, 2013 email sent at 4:35PM from Gans to Kessler to the extent it contains an address.

Work Product Doctrine

CPLR 3013 (c) provides that “[t]he work product of an attorney shall not be obtainable.” “An attorney's work product encompasses materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy. Such material may consist of interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible things” (*Acwoo Intl. Steel Corp. v Frenkel & Co.*, 165 AD2d 752, 753 [1st Dept 1990] [internal quotation marks and citations omitted]).

Document 25

Document 25 includes an email exchange between Albstein and Kessler and contains a discussion reflecting the attorneys' legal analysis of the transaction at issue. Thus, this document is privileged.

Documents 32

The communications in Document 32 are protected by both the attorney-client privileged and attorney work product doctrine. The emails protected by the attorney-client privilege are the same emails contained in Document 33 and will not be repeated here. The additional emails in this Document between Kessler and Sergio Tuero, also an associate in the law firm representing defendants, are protected by the doctrine of work product. Specifically, the court is referring to the following emails: the October 9, 2013 email sent at 5:10PM from Kessler to Tuero and the October 9, 2013 email sent at 5:28PM from Tuero to Kessler.

Document 37

The communications in Document 37 are protected by both the attorney-client privileged and attorney work product doctrine. The emails protected by the attorney-client privilege are the same emails contained in Documents 33 and 35 and will not be repeated here. The additional emails in this Document are protected by the work product doctrine. The October 7, 2013 email sent at 19:07 from Kessler to Albstein and the October 7, 2013 email sent at 7:10PM from Albstein to Kessler contain the attorneys' legal analysis and their conclusions as to this transaction.

Document 39

Document 39 includes an email from Joel Radmin to Albstein, dated and time stamped September 26, 2013 12:00PM, in which Joel Radmin, then a prospective client, seeks legal advice from Albstein. This communication, seeking legal advice, is privileged even though defendants were prospective clients at the time (*see Priest v Hennessy*, 51 NY2d 62, 68-69 [1980] [citations omitted] [holding that “no attorney-client privilege arises unless an attorney-client relationship has been established”, but such a relationship arises “when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services”]). The remaining email submitted under Document 39, an email from Albstein to Kessler and copying Albstein's secretary Leslie Giasi advising Kessler as to how to proceed with respect to Radmin's request for legal advice and representation is protected by the work product doctrine.

Document 38

The communications in this document contain nonlegal and logistical replies to the emails in Document 39 and the emails contained in Document 39. Defendants may redact from Document 38 the entirety of both communications contained in Document 39 only.

Nonprivileged Documents

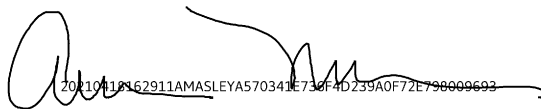
Documents 1, 2, 3, 4, 5, 6, 7, 8, 10, 14, 16, and 34

The communications in these emails do not contain the solicitation or rendering of legal advice, nor do they contain confidential information conveyed for the purpose of receiving legal advice. Rather, these emails contain nonprivileged communications such as logistical coordination, requests for nonconfidential and nonlegal facts, requests for status updates, requests to furnish specified documents, and nonconfidential emails copying third parties. Defendants are directed to produce these documents unredacted.

Accordingly, it is

ORDERED that within 30 days of this order, defendants J&R 240 LLC, 240-242 LLC, JR Family LLC, Hersnag LLC, and William Radmin are to produce the documents detailed above in unredacted form, or partially redacted form as specified, to plaintiff 14 LLC.; and it is further

ORDERED if either party wishes to challenge this unappealable order, either party must move pursuant to CPLR 2221 within 30 days of this order.



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4/18/2021
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
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