

**72 Poplar Townhouse LLC v Board of Mgrs. of the
72 Poplar St. Condominium**

2021 NY Slip Op 32442(U)

November 17, 2021

Supreme Court, Kings County

Docket Number: Index No. 501530/20

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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72 POPLAR TOWNHOUSE LLC,

Plaintiffs, Decision and order

- against -

Index No. 501530/20

BOARD OF MANAGERS OF THE 72 POPLAR
STREET CONDOMINIUM, RON SION, AMY LEE,
MICHAEL ROSNER, RAKESH MANGAT AND
TORA FISHER BUCKWORTH,

Defendants, November 17, 2021

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3124 compelling discovery and pursuant to CPLR §3126 seeking to strike the defendant Board of Manager's answer for their contumacious conduct. The defendants oppose the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, property located at 72 Poplar Street in Kings County is a cooperative that consists of thirteen residential units and a separate townhouse. Two sets of by-laws were adopted which materially differed in the way common charges were assessed against the unit owners. The by-laws presented by the offering plan stated that common expenses would be assessed based upon the percentage of ownership of the common interest. However, the by-laws that were recorded changed the percentage owed by the owner of the townhouse. To resolve the

discrepancy between the two versions of the by-laws the board called a special meeting to resolve the discrepancy. All of the unit owners participated and a vote to reconcile the discrepancy was approved by 82% of the unit owners. The plaintiff was unhappy with the vote and instituted the within lawsuit. The complaint asserts causes of action for a declaratory judgement the vote and subsequent amendment is void, breach of contract, breach of fiduciary duty, fraud and estoppel.

The issue presented in this motion is whether the defendant's reliance upon the advice of counsel as presented in their affirmative defenses served as a waiver of the attorney client privilege and that consequently the defendant must furnish documents they now claim are privileged.

The third and fifth affirmative defenses asserted by the defendants state that "plaintiff's complaint must be dismissed as defendants' actions are protected as defendants relied on the advice of counsel" (Answer, ¶ 31) and "p[la]intiff's complaint must be dismissed as defendants followed advice of counsel in taking the necessary steps to lawfully amend the declaration" (Answer, ¶ 33).

In Paramount Communications Inc., v. Donaghy, 858 F.Supp 391 [S.D.N.Y. 1994] the court explained there are certain factors that must be examined to determine whether a party implicitly

waived the attorney client privilege. Thus, the court must answer whether "the assertion of the privilege was a result of some affirmative act by the asserting party; whether through this affirmative act the asserting party put the protected information at issue by making it relevant to the case; and whether application of the privilege would have denied the opposing party access to information vital to its defense" (id). The reason for this rule was explained in Windsor Securities LLC v. Arent Fox LLP, 273 F.Supp3d 512 [S.D.N.Y. 2017]) where the court noted "it would be unfair for a party who has asserted facts that place privileged communications at issue to deprive the opposing party of the means to test those factual assertions through discovery of those communications" (id). Thus, in Village Board of Village of Pleasantville v. Rattner, 130 AD2d 654, 515 NYS2d 585 [2d Dept., 1987] the court held that "where a party asserts as an affirmative defense the reliance upon the advice of counsel, the party waives the attorney-client privilege with respect to all communications to or from counsel concerning the transactions for which counsel's advice was sought" (id).

The defendants do not really raise any argument why the above rules should not apply and rather argue generally about the importance and primacy of the attorney client privilege. Of course, neither the plaintiff nor the court disputes the

importance of the attorney client privilege, rather, considering the facts of this case such privilege has been waived (see, Scott v. Chipotle Mexican Grill Inc., 67 F.Supp3d 607 [S.D.N.Y. 2014]).

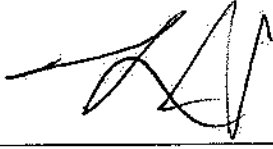
Therefore, the defendants must comply with the discovery that is being sought to which the defendants have asserted a privilege. Such unredacted documents must be furnished to the plaintiff within thirty days of this order. All motions seeking sanctions of the dismissal of any pleadings are denied at this time.

So ordered.

ENTER:

DATED: November 17, 2021

Brooklyn N.Y.



Hon. Leon Ruchelsman

JSC