SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** 12

Justice

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JOHN RIORDAN and KIRK BIGELOW,

Plaintiffs,

- v -

ALBERTO GARCES, ALBERTO GARCES, LOCAL 3369 SSA, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,

Defendants.

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INDEX NO. 161142/2017

MOTION DATE

MOTION SEQ. NO. 012 012 013

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 012) 201-213 were read on this motion for discovery.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 214, 215 were read on this motion to extend time.

Defendant American Federation of Government Employees, AFL-CIO, Local 3369 SSA moves pursuant to CPLR 3103 for an order preventing disclosure to plaintiffs of the email communications set forth in its first amended privilege log, dated August 14, 2020, as protected by the attorney-client privilege or attorney work product (mot. seq. 12). Plaintiffs oppose and move pursuant to CPLR 2004 and 22 NYCRR § 202.21(d) for an order extending their time to submit the note of issue until the resolution of motion sequence 12 or, in the alternative, an order permitting them to file a conditional note of issue contingent on the outcome of motion sequence 12 (mot. seq. 13).

I. CONTENTIONS

A. Defendant (NYSCEF 208)

According to defendant, each email chain listed in the privilege log at issue concerns communications between and among defendant Garces, several other union officers, and a legal advisor to defendant, and all contain discussions of pending or potential legal matters, including matters involving the interpretation of defendant's Constitution and by-laws, pending or potential legal matters involving the filing of grievances, and the settlement of ongoing litigation. Certain items in the log are identified as containing direct communications between the advisor and union officers on such matters, and the advisor is copied on items involving discussions of these matters. Defendant thus claims that the email chains are privileged confidential communications between an attorney and client made for the purpose of obtaining or facilitating legal advice in the course of a professional relationship.

Although defendant acknowledges that the advisor's license to practice law was long expired without being renewed at the time pertinent to this motion, and that the privilege is typically restricted to communications with licensed attorneys, it maintains that an attorney-client relationship existed between it and the advisor when the communications were made. And, while defendant also acknowledges that a client's subjective belief that an individual is its attorney, without more, is insufficient to show the existence of an attorney-client relationship, it contends that communications with non-attorneys may be privileged where a client seeks legal advice from an individual whom or she reasonably, but mistakenly, believes is a licensed attorney.

Defendant relies on the advisor's deposition testimony as supporting the reasonableness of its belief that he was licensed to practice law and/or able to provide legal advice, as he was a

law school graduate with a long history as a union attorney, performed some legal tasks, and provided it with legal advice. In describing his relationship with defendant, the advisor testified that he had an oral agreement with defendant Garces, then defendant's president, whereby he would "help out." The advisor characterized his duties as "sketchy" in that he occasionally reviewed grievances to determine their arbitrability and reviewed investigative reports in Equal Employment Opportunity matters. Essentially, he stated, defendant wanted to discuss issues with him, mainly about grievances. (NYSCEF 205).

Although the advisor recounted representing defendant at grievance arbitrations, and in the instant case, acting as an attorney in the early stages of the litigation and, at Garces's specific request, representing defendant at a pre-litigation settlement negotiation, he also testified that he always makes it clear that while he was an attorney, he was not a licensed attorney, "just as I made it clear with [plaintiffs'] firm when we initiated contact." (NYSCEF 205). Defendant's counsel nonetheless observes that plaintiffs' counsel had apparently believed that the advisor was a licensed attorney. (NYSCEF 207).

When Garces's term of office ended, the advisor began assisting the new president in reviewing grievances and in reading documents for him. The new president knows that the advisor is not an attorney. (NYSCEF 211).

When asked at his deposition whether, upon being approached about representing defendant in the instant litigation, the advisor recommended that defendant retain legal counsel, he replied that he had not, as defendant sought to resolve the instant case without the expense of retaining legal counsel. (NYSCEF 205). Apart from the attorney-client privilege, defendant also invokes the emails as attorney work product and suggests, without supporting authority, that an attorney-consultant need not be licensed for the protection of the work product privilege.

B. Plaintiffs (NYSCEF 209)

Plaintiffs take issue with defendant's contention that a reasonable belief that an individual is an attorney when in fact she is not is sufficient to invoke the privilege. In any event, they maintain, defendant does not meet its burden of proving that it, Garces or his successor diligently investigated or reasonably believed that the advisor was a member of the bar at the time of the communications at issue. Rather, plaintiffs observe, there is no dispute that the advisor was not a licensed attorney or member of a bar of a court of any state when the communications at issue were conveyed, had not been licensed by a bar since 1995, had no written retainer agreement with defendant, and was not retained as an attorney. Moreover, the advisor's description of his duties reveals that they were not legal in nature.

Plaintiffs observe that defendant claims that it reasonably believed that the advisor could provide it with legal advice and services even though the advisor and Garces's successor each acknowledged being aware that the advisor was not defendant's attorney, and they assert that the advisor acted as defendant's attorney because Garces and defendant believed that he was able to provide licensed legal representation. They point out that Garces offers no testimony or affidavit attesting to his belief that the advisor was able to provide legal advice and services in this state when he engaged him.

Consequently, plaintiffs observe, the advisor's participation in the email correspondence set forth in the first privilege log proves that defendant waived the privilege.

C. Defendant's reply (NYSCEF 213)

In reply, defendant relies on the advisor's characterization of the services he furnished to it and accuses plaintiffs of selecting those facts in its favor and ignoring others. It argues that to the extent that plaintiffs rely on the testimony of Garces's successor as defendant's president,

such testimony has no bearing on the advisor's engagement by Garces to provide legal advice, which it relies on as a significant factor in demonstrating defendant's reasonable belief that the advisor was a licensed attorney.

II. ANALYSIS

The attorney-client privilege, "the oldest among the common law evidentiary privileges," serves the vital interest in fostering open communications between attorney and client which "is essential to effective representation." (*See Ambac Assur. Corp. v Country-Wide Home Loans Inc.*, 27 NY3d 616, 624 [2016]). Notwithstanding this interest, the privilege must be narrowly construed given the policy of this state "favoring liberal discovery." (*Id.*). The party claiming the protection of the privilege bears the burden of demonstrating entitlement to it by showing, among other things, that the communication at issue was "between an attorney and a client 'for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship . . .'" (*Id.*).

While the privilege is ordinarily restricted to a client's communications with a licensed attorney, federal courts have found that, as a matter of New York State law, "in limited circumstances where a client seeks or obtains legal advice from an individual whom she "reasonably, but mistakenly" believes to be a licensed attorney, the privilege will attach. (*Charlestown Cap. Advisors, LLC v Acero Junction, Inc.*, 2020 WL 757840, at *3 [SD NY 2020], quoting *Kleeberg v Eber*, 2019 WL 2085412, *13 [SD NY 2019]).

Assuming that the reasonable but mistaken belief standard applies, absent an affidavit or testimony from Garces, one can only speculate about his beliefs. What is known from the advisor's testimony, however, is that he always makes it clear that he was not licensed, and it is reasonable to infer that he made it clear to Garces, the person who hired him. That Garces may

have believed that someone with the advisor's experience must be licensed, absent evidence from him, is fatally speculative and, in any event, another inference reasonably arises from the advisor's testimony that defendant preferred not hiring a licensed attorney due to the expense, namely, that Garces sought to hire the advisor to save money. To the extent that Garces may have believed that the advisor was a licensed attorney because he performed some tasks ordinarily performed by a licensed attorney, such reasoning would be too circular to credit and it is just as reasonably inferred that the advisor may have been practicing law without a license.

Even if defendant proved that Garces actually believed that the advisor was a licensed attorney, the reasonableness of that belief is eroded by their oral agreement reflecting none of the hallmarks of a legal retainer agreement. Moreover, the advisor's assertion that he always makes it clear that he is not a licensed attorney is inconsistent with the suggestion that the advisor held himself out to Garces as a licensed attorney.

For all of these reasons, *Gucci America, Inc. v Guess?, Inc.*, 2011 WL 9375 (SDNY 2011), is distinguishable and it relies, in any event, on federal law.

As the privilege must be narrowly construed and based on the totality of the circumstances as alleged by the parties, defendant does not sustain its burden of proving that Garces reasonably believed that the advisor was a licensed attorney. The communications set forth in the first amended privilege log are thus not privileged. The same holds true for the defendant's claim of entitlement to protection under the attorney work product privilege.

Accordingly, it is hereby

ORDERED, that defendant Union's motion for a protective order is denied in its entirety; and it is further

ORDERED, that plaintiffs' motion for an extension of time to file their note of issue is

granted to the extent that they do so within 30 days of the date of this decision.

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12/6/2021
DATE

BARBARA JAFFE, J.S.C.

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