

Baha Lounge Corp. v Liz

2021 NY Slip Op 34101(U)

March 15, 2021

Supreme Court, Queens County

Docket Number: Index No. 702862/19

Judge: Robert I. Caloras

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3/15/2021
11:24 AM

Short Form Order
NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HON. ROBERT I. CALORAS
Justice

COUNTY CLERK
QUEENS COUNTY

PART 36

-----X
BAHA LOUNGE CORP. and JUAN A. LIZ,
Plaintiffs,

Index No. 702862/19
Seq. No. 4

-against-

ANA M. LIZ, ANA M. LIZ as receiver, and
FRANCES YETTA NORMAN RUIZ, ESQ.
Defendants.

-----X
The following papers numbered E102-E130 read on this motion by Plaintiffs for an order for the following: 1) pursuant to CPLR 3103, and other applicable law: a) Prohibiting Defendants from making use of certain information and documents they have obtained in violation of movant JUAN LIZ’s attorney-client privilege with his former attorney, Defendant FRANCES YETTA NORMAN RUIZ, ESQ.; and b) pursuant to Rule 3.7 of 22 NYCRR 1200.0, disqualifying the Law Offices of Gordon & Gordon, PC, (hereinafter, “The Gordon Firm”) from continuing to represent Defendants ANA M. LIZ (individually, and as receiver), on the basis that they have been in possession of certain attorney-client information and materials that they never should have had, and never would have had but for the violation of JUAN LIZ’s attorney-client privilege, while simultaneously possessing knowledge or information about movant JUAN LIZ which they never should have had (but obtained through a violation of the attorney-client privilege, and c) staying discovery, depositions, and other proceedings in this action, until such time as this Court issues a decision on the instant motion, pursuant to CPLR 3103(b), and d) directing that the Gordon Law Firm return all materials disclosed to it by Defendant (former attorney) RUIZ, and destroy any copies it may have, on paper, computer files, and the like, and e) directing that the attorneys representing Defendant/Former Attorney RUIZ deliver to the Court (and disclose only to JUAN LIZ’s attorneys), all items from Ms. Ruiz’s attorney-client files with MR. JUAN LIZ, that she might intend to use or confront him with, at any deposition, or other proceeding, so that the Court may hear Mr. LIZ’s objections to the use of same (on the basis of privilege), and may rule on same; and f) to the extent that this Court needs to review the privileged documents at issue, directing that those items be delivered to the Court consistent with the procedures proposed and outlined, above.

	PAPERS
	<u>NUMBERED</u>
Notice of Motion-Affirmation-Affidavit-Exhibits.....	E102-E114
Letter.....	E115
Affirmation in Opposition-Exhibits.....	E116-E117
Affirmation in Opposition-Exhibits.....	E118-E123
Stipulation.....	E124
Reply Affirmation-Exhibits.....	E125-E129
Reply Affirmation.....	E130

Upon the foregoing papers, it is ordered that Plaintiffs’ motion is denied for the following reasons:

In the Amended Verified Complaint, Plaintiff Juan A. Liz (hereinafter “Plaintiff”) alleges the following: On July 26, 2017, he retained Defendant Frances Yetta Norman Ruiz, Esq. (hereinafter “Ruiz”) to represent him in the petition for equitable distribution commenced by Defendant Ana Liz in the action entitled *Ana M. Liz v Juan A. Liz*, under Index Number 9947/16, in Supreme Court, Queens County. On or about July 16, 2018, Ana Liz was appointed receiver of a restaurant called Baha Lounge Corp, DBA Don Tequila (hereinafter “Baha”) in the equitable distribution action. During said receivership, Ana Liz improperly diverted funds belonging to Baha in excess of \$241,860.66. Ruiz committed legal malpractice by, among other things, wrongfully consenting and stipulating to the appointment of Ana Liz as a receiver, failing to move to dismiss or vacate the order appointing Ana Liz as receiver, and failing to advise him that his interest in Baha was not subject to equitable distribution.

It is undisputed that at Plaintiff’s deposition in the instant action on August 24, 2020, Peter Gordon, Esq., attorney for Ana Liz, had in his possession and attempted to question Plaintiff regarding an email, dated August 28, 2018, Plaintiff had sent to Ruiz, his attorney in the equitable distribution action. Plaintiff now moves, pursuant to CPLR 3103, for an order prohibiting Defendants from using certain documents and information they obtained in violation of his attorney-client privilege with his former attorney Ruiz; staying all discovery in this action until this motion is decided; directing Ana Liz’s attorney to return all materials Ruiz disclosed and destroy any copies it may have; and directing Ruiz to deliver to the Court and disclose only to Plaintiff all items from her attorney-client files with Plaintiff that she might intend to use in the instant action for an in camera review along with a log of said materials. Plaintiff has submitted, among other things, the following: his affidavit, redacted copy of the privileged document presented at his deposition; an excerpt from his deposition; and his retainer agreement with Ruiz. Plaintiff claims he first learned Mr. Gordon was in possession of Ruiz’s confidential files, stemming from her representation of him in the equitable distribution action, when Mr. Gordon attempted to question him regarding the email at his deposition. Plaintiff claims he never waived his attorney client privilege, nor did he consent to the release of Ruiz’s legal file. Plaintiff argues this email and any other documents Ruiz disclosed are protected by attorney client privilege, and were improperly disclosed by Ruiz and improperly obtained by Mr. Gordon. Plaintiff requests the Court issue a protective order, prohibiting the use of any materials Ana Liz’s counsel obtained in violation of his attorney client privilege, and prohibiting further exchange of any other attorney client privileged information.

In opposition, Ana Liz argues Plaintiff has waived his attorney client privilege by virtue of his malpractice claim against Ruiz, and claims the subject email was disclosed to Plaintiff prior to his deposition.

In opposition, Ruiz also argues Plaintiff waived his attorney client privilege by placing the subject matter of his attorney’s advice in issue by asserting a malpractice claim. Moreover, Ruiz also claims that, Plaintiff failed to exercise due diligence and reasonable care to protect this privilege. Specifically, Plaintiff filed a motion seeking to compel Defendants to respond to his discovery demands pursuant to CPLR 3124, or in the alternative, preclude Defendants from testifying based upon a willful and contumacious failure to provide discovery and/or otherwise strike their Answer pursuant to CPLR 3126. In an order, dated February 20, 2020, this Court directed, among other things, Ruiz to respond to Plaintiff’s outstanding discovery demands, dated October 15, 2019, by

March 20, 2020. Ruiz has submitted a copy of Plaintiff's discovery demands he served upon all Defendants on October 16, 2019. Included in these demands is Plaintiff's combined demands, dated October 15, 2019, requesting the following documents:

1. Provide a true and accurate copy of the retainer agreement between Plaintiff JUAN A. LIZ and Defendant FRANCES YETTA NORMAN RUIZ, ESQ.
2. Provide true and accurate copies of any and all invoices for work Defendant FRANCES YETTA NORMAN RUIZ, ESQ. performed on behalf of JUAN A. LIZ, including costs and expenses billed to Plaintiff.
3. Provide true and accurate copies of any and all receipts and/or proof of payments made by Plaintiff JUAN A. LIZ to Defendant FRANCES YETTA NORMAN RUIZ, ESQ.
4. Provide a true and accurate copy of Defendant FRANCES YETTA NORMAN RUIZ, ESQ.'s legal file maintained for legal work performed on behalf of Plaintiff JUAN A. LIZ.
5. Provide a true and accurate copies of any and all correspondence, emails, texts between Defendant FRANCES YETTA NORMAN RUIZ, ESQ. and Plaintiff JUAN A. LIZ.
6. Provide a true and accurate copies of any and all correspondence, emails, texts in the possession of Defendant FRANCES YETTA NORMAN RUIZ, ESQ. regarding Plaintiff JUAN A. LIZ and the legal matters alleged of in the Complaint.

Ruiz also submitted her response to said demands on June 9, 2020. In her response she references a separate Flash-Drive device containing a 1,426 page Adobe document, and a cover letter, dated June 9, 2020, addressed to counsel for both Co-Defendant and Plaintiff confirming said disclosure. Ruiz claims Plaintiff did not seek to keep any of these documents confidential, nor did anyone raise an issue regarding privilege or confidentiality. Moreover, the Court did not limit discovery in the February 20, 2020 order. Consequently, Ruiz argues a protective order pursuant to CPLR 3103 is neither justified nor warranted, and an in camera review of the documents she disclosed pursuant to the Court's order is unnecessary. Ruiz argues, among other things, Plaintiff's

motion is baseless and he merely “want[s] this court to undo its order compelling Defendant to turn over all documents responsive to Plaintiff’s demands”.

In reply, Plaintiff argues he did not waive his attorney client privilege with respect to the subject email and Ruiz’s entire legal file for his equitable distribution action by virtue of the subject malpractice action. Rather, the invasion of the privilege is limited to disclosures relevant to the malpractice claim or defense. Plaintiff argues that, in a malpractice action the disclosing attorney should contact the attorney representing the party holding the privilege to see if they can agree to what should be disclosed and, if not, contact the Court for a ruling. Plaintiff argues Ana Liz’s attorney was obligated to return the disclosed documents or seek a Court’s review after receiving Ruiz’s discovery response. Plaintiff further argues his legal file for the equitable distribution action should not have been disclosed to Ana Liz’s attorney, because her attorney did not serve a demand seeking said records. Plaintiff also claims Ruiz did not notify him that said records would be disclosed to Co-Defendant

The attorney-client privilege shields from disclosure any confidential communications between an attorney and a client made for the purpose of obtaining or facilitating legal advice in the course of a professional relationship (CPLR 4503 [a] [1]; see also Ambac Assur. Corp. v Countrywide Home Loans, Inc., 27 NY3d 616, 623-624 [2016]). The privilege must be narrowly construed because it is at odds with the general policy of this state favoring liberal discovery, and the party asserting the privilege bears the burden of establishing that it applies (*id.* at 623-624, citing Spectrum Sys. Intl. Corp. v Chemical Bank, 78 NY2d 371, 377 [1991]). The proponent must establish that the communication was between an attorney and a client, for the purpose of rendering legal advice or services, in the course of a professional relationship, and that the communication was confidential and the privilege was not waived (*Id.*, citing Rossi v Blue Cross & Blue Shield of Greater N.Y., 73 NY2d 588, 593-594 [1989]). “In general, disclosure of a privileged document results in waiver of the privilege unless the party asserting the privilege meets its burden in proving that (1) it intended to maintain confidentiality and took reasonable steps to prevent its disclosure, (2) it promptly sought to remedy the situation after learning of the disclosure, and (3) the party in possession of the materials will not suffer undue prejudice if a protective order is granted” (AFA Protective Sys. v City of New York, 13 AD3d 564 [2d Dept. 2004]; see also Orbit One Communications, Inc. v Numerex Corp., 255 FRD 98 [Southern District New York 2008]).

Here, the Court finds Plaintiff waived his attorney client privilege with respect to Ruiz’s legal file in the equitable distribution action. Although Plaintiff states he intended to maintain confidentiality for any communication (including verbal, written or otherwise) he had with Ruiz in the equitable distribution action, he failed to demonstrate he took reasonable steps to prevent disclosure of these documents. Plaintiff’s counsel not only served unlimited discovery demands requesting Ruiz disclose her legal file, but also subsequently filed an enforcement motion for these documents to be disclosed. Significantly, a request to limit or address any potential privilege issues was not raised with this Court. Consequently, on February 20, 2020 the Court issued an order directing Ruiz to disclose all documents requested in Plaintiff’s discovery demands. Plaintiff’s claims that these documents should not have been disclosed to co-Defendant are without merit. As a matter of course, all discovery is disclosed to all appearing parties and the February 20, 2020 order did not provide co-Defendant was not entitled to these documents. Furthermore, contrary to

Plaintiff's claim Ruiz was not obligated to demonstrate the release of the entire legal file was necessary to aid in her defense and/or confer with Plaintiff prior to disclosing said documents. Ruiz merely complied with the Court's order by responding to Plaintiff's discovery demands and disclosed the legal file. Similarly, contrary to Plaintiff's claims Ana Liz's attorney did not inadvertently acquire these documents, and he is not obligated to immediately return the subject documents or seek Court intervention regarding the disclosure of these documents. Accordingly, the branches of the motion seeking a protective order, staying discovery, directing Ana Liz's attorney to return the subject documents and destroy any copies in their possession, and directing Ruiz to submit the legal file to the Court for an in camera review are denied.

The remaining branch of the motion seeking to disqualify Defendant Ana Liz's counsel pursuant to Rule 3.7 and 4.4(b) is denied. Rule 3.7(a) provides in pertinent part that "a lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on significant issue of fact". Rule 4.4(b) provides that "A lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that it was inadvertently sent shall promptly notify the sender". As set forth above, Ana Liz's attorney did not inadvertently obtain Plaintiff's legal file in the equitable distribution action, nor is her attorney likely to be a witness in on a significant issue in this matter. As such, Plaintiff has failed to set forth a sufficient basis to disqualify Ana Liz's attorney.

Dated: March 15, 2021



ROBERT I. CALORAS, J.S.C.

FILED

**3/15/2021
11:24 AM**

**COUNTY CLERK
QUEENS COUNTY**