

Principia Partners LLC v Swap Fin. Group, LLC

2022 NY Slip Op 32220(U)

July 8, 2022

Supreme Court, New York County

Docket Number: Index No. 656163/2019

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

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

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PRINCIPIA PARTNERS LLC,	INDEX NO.	<u>656163/2019</u>
Plaintiff,	MOTION DATE	<u>04/06/2022</u>
- v -	MOTION SEQ. NO.	<u>004</u>
SWAP FINANCIAL GROUP, LLC, SYNCORA INVESTMENT HOLDINGS LLC, SYNCORA GUARANTEE INC., SYNCORA HOLDINGS US INC., SYNCORA HOLDINGS LTD.	DECISION + ORDER ON MOTION	
Defendant.		

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 132, 133, 134, 147 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

By stipulation, the parties agreed to appoint the Hon. Faith S. Hochberg as Special Master (Special Master). (NYSCEF Doc. No. [NYSCEF] 80, Stipulation and Order to Appoint Special Master.) In motion sequence 004, defendant Swap Financial Group LLC (SFG) moves, pursuant to CPLR 3104(d), to vacate Order No. 5 of Special Master wherein the Special Master ruled that SFG waived attorney-client privilege for certain documents by third-party disclosure. Specifically, SFG seeks review of the Special Master's finding that SFG's disclosure to Principia of the results of an internal investigation was a partial waiver of attorney-client privilege as to the scope of the investigation concerning underpayments and overpayments. (NYSCEF 119, Special Master Order No. 5 at 3.)

The disclosure occurred in a February 22, 2018 letter sent by SFG COO Scott Beinhacker to Principia EVP and CFO Dan Smith (Letter). (NYSCEF 122, Letter.) Although the Letter was signed by Beinhacker, SFG claims the Letter was drafted by SFG's in-house counsel, Tom Amico, who conducted the internal investigation. (NYSCEF 119, Special Master Order No. 5 at 3 ["SFG counsel has stated that prior SFG counsel, Mr. Amico, actually wrote the February 22 Letter."]; NYSCEF 114, SFG's Memo of Law at 8].)

The Letter acknowledges an internal investigation into certain underpayments and overpayments made by SFG. (*Id.* at 1.) The Letter states that, after an internal review of invoices, SFG "found some discrepancies" including "instances of both underpayment and overpayment." (*Id.*) SFG proposed that Principia wait "on the ultimate payment until we have completed our review and can confirm which party owes the other and the amount." (*Id.*)

SFG argued to the Special Master that the draft board minutes, cover emails and attachments sought by Principia were privileged, and the Letter was not a waiver because it was a "compromise offer" by SFG. (NYSCEF 119, Special Master Order No. 5 at 1.) Specifically, SFG argued that "an investigation pursued for a legal purpose and in anticipation of litigation is privileged, and that the privilege has not been waived by partial disclosure." (*Id.* at 1-2.) The Special Master disagreed, finding that the Letter was not an offer of compromise or settlement, and disclosure of the internal investigation waived any privilege. (*Id.* at 2-5.)

Based on SFG's representation that that the Letter was written by Amico and contained his conclusions as in-house counsel, the Special Master decided there was a

partial waiver of attorney-client privilege as to the results of SFG's internal investigation. (*Id.*) The Special Master reviewed deposition transcripts of several SFG witnesses and observed that, when asked about the Letter, the witnesses were cautioned not to answer if it relied on information provided by counsel. (*Id.* at n. 3.) The Special Master ruled that Principia was entitled to seek the disclosure of documents and testimony about SFG's internal investigation methodology and results, including SFG employees' input that was used to derive the results disclosed in the Letter. (*Id.* at 5.)

As noted by the Special Master, the issue before the Special Master was "*not* whether an internal investigation can be privileged, if conducted by counsel. Rather, the issue before the Special Master is whether counsel's investigation was disclosed to third parties." (*Id.* at 3.)

"Disclosure 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 undue prejudice if a protective order against use of the document is issued. The burden is on the proponent of the privilege to prove that the privilege was not waived."

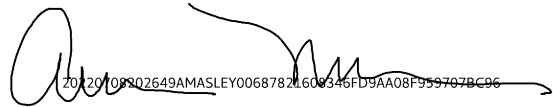
(*New York Times Newspaper Div. of New York Times Co. v Lehrer McGovern Bovis, Inc.*, 300 AD2d 169, 172 [1st Dept 2002] [citation omitted].) A client who publicly discloses a privileged matter waives the privilege. (*Jakobleff v Cerrato, Sweeney & Cohn*, 97 AD2d 834, 835 [2d Dept 1983].) Here, SFG disclosed the findings of its internal investigation to Principia by stating that SFG found both instances of underpayment and overpayment. The court agrees with the Special Master that this disclosure was a partial waiver only to the extent that it covers only the scope of the investigation about underpayments and overpayments.

(See *Matter of Loudon House LLC v Town of Colonie*, 123 AD3d 1409 [3d Dept 2014] [finding waiver where attorney, at the behest of the client, gave an oral presentation at a town meeting regarding a report the attorney drafted for the client.) The court also agrees with the Special Master’s determination that the Letter is not a compromise offer.

Accordingly, it is

ORDERED the defendant’s motion is denied; and it is further

ORDERED the parties are to submit a new stipulation for the extensions of the discovery deadlines.



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7/8/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: