

Dworkin Constr. Corp. (USA) v Kelly's Sheet Metal, Inc.

2022 NY Slip Op 34406(U)

December 21, 2022

Supreme Court, New York County

Docket Number: Index No. 652974/2022

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

DWORKIN CONSTRUCTION CORP. (USA)

Plaintiff,

- v -

KELLY'S SHEET METAL, INC.,

Defendant.

-----X

INDEX NO. 652974/2022

MOTION DATE N/A

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 56, were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

Plaintiff's motion to claw back privileged material is granted in part as described below.

Background

Plaintiff's attorney sent an email to defendant's attorney and "blind copied" his client. Unfortunately, as too many people do, plaintiff's president, Mr. Dworkin, sent an email to plaintiff's counsel on December 2, 2022 by hitting "reply all" – therefore, defendant's counsel got a copy of it. That email was not a smoking gun about some nefarious scheme – it was a simple email from the client to his attorney asking about both this proceeding and a related proceeding in Civil Court.

Within minutes, plaintiff's counsel reached out to defendant's counsel asking him to delete the email and confirm when it was deleted. Counsel for defendant refused and so plaintiff was forced to bring the instant application.

In opposition, defendant claims that plaintiff's president waived the attorney-client privilege by sending a privileged email to counsel for defendant and failing to take any

precautions to prevent such disclosure. Counsel for defendant claims that he refused to delete the email and argues that the disclosure happened because counsel for plaintiff engaged in the risky practice of bcc'ing his client on an email to opposing counsel. The client, plaintiff's president, then hit reply all. Counsel for defendant added that he demanded that all communications between plaintiff and its counsel be preserved pending a determination about whether the attorney-client privilege had been waived.

Defendant admits that there is no doubt that the communication sought legal advice or services and that the communication was revealed to a third-party (counsel for defendant). It demands that it be allowed to keep the email and use it for any purpose it wants, including the right to seek all other communications between plaintiff and its attorney.

The Court did not consider the letter from plaintiff, which is essentially in impermissible reply (NYSCEF Doc. No. 57).

Discussion

“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” (*New York Times Newspaper Div. of New York Times Co. v Lehrer McGovern Bovis, Inc.*, 300 AD2d 169, 172, 752 NYS2d 642 [1st Dept 2002]).

As an initial matter, it is important to note that defendant does not dispute that the contents of the subject email from plaintiff's president to plaintiff's counsel were privileged. Defendant argues that plaintiff waived its entire right to the attorney-client privilege by sending a

single email which inadvertently copied counsel for defendant. The Court disagrees with such a Draconian result. Cases should be decided on their merits, not with gotcha litigation tactics.

Plaintiff included the affidavit of its president who asserted that he simply made a mistake by including counsel for defendant on the subject email (NYSCEF Doc. No. 43). And there is no dispute that counsel for plaintiff emailed counsel for defendant a mere 15 minutes later about the inadvertent disclosure (NYSCEF Doc. No. 40). Of course, that shows that plaintiff acted promptly to remedy the issue.

While defendant correctly pointed out that there are dangers in bcc'ing parties on emails, the instant situation does not compel defendant's preferred result: that plaintiff waived its right to privileged communications with its attorney. It was the client who inadvertently emailed an unintended recipient, not plaintiff's lawyer, and so the Court is unable to find that plaintiff's counsel somehow failed to take reasonable steps to protect the privileged communication. The subject communication was created and sent before counsel for plaintiff had a chance to do anything. The Court also finds that defendant will obviously not suffer any prejudice now that it is unable to use a clearly privileged email from a client to its attorney inquiring about the status of pending litigation.

Moreover, there is no dispute that plaintiff never intended to waive its privilege or that it routinely engaged in a pattern or practice of failing to safeguard privileged communications. The Court is unable to find that a single email inadvertently sent to opposing counsel constitutes a waiver of privilege under these circumstances. The Court must consider the practical implications of such a ruling. If the Court were to deny the motion, defendant insists it will demand all communications between plaintiff and its counsel. That type of punishment far outweighs the isolated obvious mistake here.

The Court is confident that plaintiff's counsel will no longer blind copy his client on emails with opposing counsel – of course, the best practice going forward is to write an email, send it, and then forward a copy to the client. And before a client sends an email, he should write the email first and then fill in the recipient line – that will minimize the chance of it going where it should not.

But for defendant attempt to capitalize on such an obvious and innocuous mistake is demonstrably worse than both what the plaintiff's lawyer (bcc his client) and his client did (hit "reply all") combined. Defendant's strident position required that plaintiff's lawyer bring this the instant motion. Therefore, the Court will also schedule an in-person hearing for January 31, 2023 at 11 a.m. to assess whether sanctions should be imposed on counsel for defendant pursuant to the "for such other and further relief" clause of the order to show cause.

While counsel for defendant was certainly correct to point out the ways in which bcc'ing a client is not a good idea (NYSCEF Doc. No. 54 [defendant's exhibit containing an article about not bcc'ing a client]), it appears that counsel for defendant confused best practices with the basic common courtesy expected of members of this profession. A hearing is a chance for defendant's attorney to explain to this Court why he didn't simply delete the email and move on, because this Court cannot see a reason in the papers.

The issue for this Court is counsel for defendant's conduct after receiving the email from counsel for plaintiff about the inadvertent email. That email, sent just 15 minutes after the inadvertent communication, should have been the end of the matter. The email and all copies of it should have been deleted. At the very least, counsel for defendant should have taken the time to do some research about the issue before ultimately deleting it. But counsel for defendant refused to do that; instead, he forced plaintiff's attorney to make the instant motion and counsel

for defendant cited no binding case law for the proposition that a single email could somehow justify a total waiver of the attorney client privilege.

Additional factors also compel the Court to hold a hearing about possible sanctions. This is not a situation where the parties have a good faith disagreement about whether the communication was privileged, the contents contained dispositive evidence, or contained evidence that a party previously represented it did not possess. Rather, on this record, it seems that defendant's attorney planned to use this isolated and benign mistake as a battering ram to make plaintiff reveal all of its communications with its attorney. That is not how the practice of law should be conducted. Cases should be decided on the merits, not through underhanded tactics.

The Court observes that the sanctions would only include the cost of making the instant motion and, if there is a hearing, the legal fees associated with that appearance. The parties are free to reach a settlement that would render a hearing unnecessary. Moreover, the sanctions would not include any legal fees expended before plaintiff began drafting the instant motion (that is, the time spent begging defendant to delete the email is on plaintiff, but once defendant refused, then the time spent drafting the motion through the hearing might be chargeable to defendant).

Attorneys have an absolute responsibility to vigorously and zealously represent their clients. But that does not mean they can throw common decency to the wind, and twist the attorney-client privilege into a pretzel, without any consequences.


Accordingly, it is hereby

ORDERED that plaintiff's motion is granted to the extent that counsel for defendant must destroy the subject email immediately (and all copies of it), it may not use this email for any

purpose whatsoever, and counsel for defendant shall upload a confirmation that it has destroyed the email and all copies of it to NYSCEF on or before January 5, 2023; and it is further

ORDERED that an in-person hearing about potential sanctions will be held on January 31, 2023 at 11 a.m.

Conference: March 9, 2023 at 10 a.m. per NYSCEF Doc. No. 48.

<u>12/21/2022</u>						
DATE			ARLENE P. BLUTH, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE