

**Loreti v Lorcress Enters., Inc.**

2022 NY Slip Op 35013(U)

June 22, 2022

Supreme Court, Westchester County

Docket Number: Index No. 53885/2019

Judge: Damaris E. Torrent

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
JOHN M. LORETI as Administrator of the Estate of  
JOHN LORETI,

Petitioner,

-against-

LORCRESS ENTERPRISES, INC., MARIA LORETI,  
MARIA LORETI as Custodian for SEBASTIAN  
LORETI, MARIA LORETI as Custodian for ANDREW  
LORETI, and GINA LORETI FORGIONE,

Respondent.

-----X  
DAMARIS E. TORRENT, A.J.S.C.

**DECISION AND ORDER**

**Index No.: 53885/2019**

**Motion Date: 03/22/2022**

**Seq. Nos. 21 - 23**

The following papers numbered 1 to 47 were read on the motion (Seq. No. 21) by respondent Maria Loreti, in her various capacities (Maria) for an order prohibiting inquiry at the deposition of Lee David Auerbach, Esq. (the "Auerbach deposition") into matters which invade Maria's individual attorney-client privilege, and determining that Maria is not required to pay hourly legal fees to Mr. Auerbach in connection with his compliance with subpoenas issued by petitioner; and the respective cross-motions by respondent Gina Loreti Forgione (Gina) (Seq. No. 22) and by petitioner John M. Loreti (John) (Seq. No. 23), each seeking sanctions against Maria:

<u>PAPERS</u>	<u>NUMBERED</u>
(Seq. No. 21) Notice of Motion / Affirmation (Furia) / Exhibits A – N / Affidavit (Maria) / Exhibit A	1 – 18
Affirmation in Opposition (Auerbach)	19
(Seq. No. 22) Notice of Cross-Motion / Affirmation (Nicotera) / Exhibits A – G	20 – 28
(Seq. No. 23) Notice of Cross-Motion / Affirmation (Berkey) / Exhibits 1 – 8 / Memorandum of Law	29 – 39

Affirmation in Reply and in Opposition to Cross-Motions (Furia) /  
Affidavit (Maria) / Exhibits A – F 40 – 47

Upon the foregoing papers, the motions are denied.

In this proceeding seeking, inter alia, judicial dissolution of the respondent corporation, by Notice of Motion filed on February 24, 2022, respondent Maria seeks an order prohibiting inquiry at the Auerbach deposition into matters which invade the attorney-client privilege, which Maria in her individual capacity has not waived, and determining that Maria is not required to pay legal fees to Mr. Auerbach in connection with his compliance with subpoenas issued to him by petitioner. Petitioner and respondent Gina each cross-move for an order imposing sanctions on Maria for frivolous conduct.

Motion Seq. No. 21

Maria seeks an order prohibiting inquiry into matters which invade the individual attorney-client relationship. Maria's papers do not identify any particular matter into which inquiry should be prohibited. In the absence of any such particularity, the Court is unable to make any determination as to the scope of the privilege and whether any hypothetical inquiry would violate same. The Court's intention in issuing a briefing schedule for the filing of a motion for a protective order was to allow the parties an opportunity to obtain rulings as to particular matters which Maria asserts are privileged, which rulings might be helpful in guiding the course of the Auerbach deposition. Unfortunately, Maria's motion contains no information which would permit the Court to provide such guidance. The motion for a protective order thus is denied.

The Court notes, as the parties all are surely aware, that Maria in her individual capacity has not waived the attorney-client privilege. Thus, to the extent that any party has taken the position that Maria's counsel is precluded from asserting the privilege in objecting to any question at the Auerbach deposition, that position is patently incorrect. The Court notes also that the issue

of Maria's assertion of the privilege in connection with certain e-mails produced by Mr. Auerbach in response to a document subpoena was analyzed in the Decision and Order dated November 12, 2021 (Hon. Terry Jane Ruderman, J.S.C.). Justice Ruderman determined that the e-mails turned over by Mr. Auerbach involve matters relating to the respondent corporation which are within the scope of the corporation's waiver of the attorney-client privilege, and that Maria failed to meet her burden of establishing her entitlement to a protective order on the ground that any of those e-mails reflect communications between Mr. Auerbach and Maria in her personal capacity. Questions relating to those e-mails thus do not implicate Maria's privilege, and this Court will not issue an Order prohibiting counsel from making such inquiries.

The tenor of the pre-motion conference, and of the submissions in opposition to Maria's motion, is that questioning at the Auerbach deposition is expected to be related to the affirmative defense of reliance on the advice of counsel asserted by the respondent corporation, and to the e-mails which Justice Ruderman previously determined do not implicate Maria's individual privilege. Questions along those lines are permissible. However, the parties are cautioned that if the deposition devolves into a fishing expedition in which adverse parties seek to abuse the deposition process to inquire into matters which implicate Maria's individual attorney-client privilege, the Court will entertain an emergency application to terminate the deposition.

The branch of the motion seeking an order determining that Maria is not required to pay hourly legal fees to Mr. Auerbach in connection with his compliance with subpoenas issued by petitioner also is denied. As an initial matter, Maria's motion papers reference certain invoices previously delivered to her by Mr. Auerbach in connection with a prior subpoena. That issue was not the subject of the pre-motion conference and thus is not determined herein. The Court

authorized motion practice on the issue of what fees Mr. Auerbach may charge in connection with his deposition, and which party or parties would be responsible for payment of such fees.

Maria asserts that petitioner, as the party issuing the subpoena, should be required to pay the costs and expenses in connection therewith. Ordinarily, “any person subpoenaed shall be paid or tendered in advance authorized traveling expenses and one day’s witness fee” (CPLR 2303[a]). Petitioner, as the party issuing the subpoena, thus is responsible for tendering to Mr. Auerbach within a reasonable time prior to his deposition the statutory expenses and fees. However, as all parties are aware, Mr. Auerbach is no ordinary non-party witness. The circumstances giving rise to the instant motion are such that the parties cite, and the Court’s research revealed, no case squarely addressing whether Mr. Auerbach may charge his former client an hourly rate to appear for this deposition.

It is apparent from this Court’s review of the history of this matter, and the many related matters, that Mr. Auerbach’s deposition has become necessary due to the conduct of one individual: Maria Loreti. This Court will not recite in detail the tortured history of the litigation between these parties. The document subpoena which resulted in Mr. Auerbach turning over the e-mails which were the subject of the Court’s November 12, 2021 Decision and Order, and which evidently are the intended subject of the Auerbach deposition, was necessitated by Maria’s history of attempts to foil the discovery process together with her decision, as the sole director of the corporations, to waive the corporations’ attorney-client privilege in these matters. Maria has, inter alia, failed or refused to turn over financial records of the corporations, refused to admit that she authored or created certain e-mails which were the subject of the November 12, 2021 Decision and Order (after having moved for a protective order asserting those e-mails implicated her attorney-client privilege), and refused to answer questions at her depositions relating to the

corporations' communications with Mr. Auerbach, at a time when neither the corporations nor Maria individually had withdrawn their defense of reliance on the advice of counsel.

The Court thus declines to issue an Order which would, in effect, preclude Mr. Auerbach and his firm from bringing an action for breach of contract in connection with a former client's failure to pay legal fees. In the event that such an action eventuates, Maria of course is entitled to litigate that matter in due course. Maria's motion for an order determining that she is not required to pay fees to Mr. Auerbach in connection with the issues raised herein thus is denied.

Motion Seq. Nos. 22 and 23

Gina and John separately cross-move for an order imposing penalties and sanctions on Maria, asserting that the bringing of the instant motion is frivolous and is part of a pattern of frivolous and dilatory conduct for which Maria has previously been sanctioned. The Court disagrees.

At the pre-motion conference, Maria's counsel represented to the Court that John's counsel had indicated that he intended to seek rulings from the Court in the event that any objection grounded in Maria's assertion of attorney-client privilege was raised at the Auerbach deposition. As such a blanket refusal to recognize Maria's right to assert the privilege, which has not been waived, is plainly improper, Maria's conduct in seeking a ruling on that issue cannot be said to be frivolous. While the Court is disappointed that Maria's papers provided no details which might aid the Court in determining whether inquiry into particular matters would implicate the attorney-client privilege, the Court is satisfied that motion practice was necessary based on what was at that time a potentially broad refusal to recognize that any such privilege exists. The motions for sanctions thus are denied.

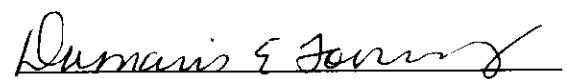
Accordingly, it is hereby

ORDERED that the instant motions (Seq. Nos. 21, 22 and 23) all are denied in their entirety.

The foregoing constitutes the Decision and Order of the Court.

Dated: June 22, 2022  
White Plains, New York

**ENTER:**

  
HON. DAMARIS E. TORRENT, A.J.S.C.

FILED VIA NYSCEF