

**Hieber Reade St., LLC v Taverna**

2023 NY Slip Op 30530(U)

February 21, 2023

Supreme Court, New York County

Docket Number: Index No. 655454/2021

Judge: Andrew Borrok

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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 53

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HIEBER READE STREET, LLC, CHRISTINA J HIEBER,  
JENNIFER M. HIEBER,

Plaintiff,

- v -

FRED TAVERNA, NY INTERIOR CONSTRUCTION OF  
NY, INC., DOWNTOWN DEVELOPMENT OF NY  
LLC, JEANETTE TAVERNA

Defendant.

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INDEX NO. 655454/2021

MOTION DATE N/A

MOTION SEQ. NO. 007

**DECISION + ORDER ON  
MOTION**

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 185, 186, 187, 188, 189, 190, 191, 192, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 212

were read on this motion to/for ORDER OF PROTECTION.

The Plaintiffs’ motion to (i) deem the communications in NYSCEF Doc. No. 180 as privileged, (ii) seal NYSCEF Doc. No. 180 and the documents that reference those communications (NYSCEF Doc. Nos. 177 and 182), (iii) direct the Defendants to return and destroy NYSCEF Doc. No. 180 and prohibit the Defendants from relying on those communications must be granted. The Plaintiffs in this case are entitled to clawback and destruction of any copies of the communications. The background memo written for the purpose of obtaining legal advice and other communications are protected under the attorney client privilege (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 93 AD3d 574, 574 [1st Dept 2012]). It is clear from the substance of the communications that various legal defenses and strategies are being discussed which are now the subject of this litigation. This is classic work product. It does not matter that the advice was sought 18 months prior to the commencement of this lawsuit. This is a family business and the fact that one of the partners included her spouse and her mother who is a former

partner only highlights that this was a family run business and otherwise does not cause a waiver of the privilege because there was a reasonable expectation of confidentiality such that their inclusion on these emails does not mean that the parties could no longer expect that the communications would be sent to unrelated third parties (*Gama Aviation Inc. v Sandton Capital Partners, L.P.*, 99 AD3d 423, 424 [1st Dept 2012]). That these family members are also fact witnesses means that they are agents of the principles as their input on the factual issues discussed in the communications may be necessary for the provision of legal advice. It also does not destroy the privilege that a lawyer who was not giving legal advice was included in the emails. The lawyer was a trustee of a Plaintiff trust. Under the circumstances, the lawyer is within the circle of the privilege. It also does not matter that the privilege log has not been produced yet because the parties did not agree that clawback is contingent upon a privilege log having been produced and the Court gave them permission to deliver their privilege log after this issue was resolved. If there are other documents which appear on the privilege log that the Defendants wish to challenge, they can do so when they receive the privilege log (which was supposed to be delivered after this motion was fully briefed). Those other communications are thus not being hidden from challenge or review from the Court. Moreover, it does not matter that the Defendants wish to use these documents to argue that they stand for a certain proposition including that they think the communications demonstrate that the Plaintiffs are perpetrating a fraud on this court. The privileged communications do not facially suggest any such thing. Lastly, it can not be said on the record before the Court that, because a few communications were inadvertently produced, the Plaintiffs lacked care in their preservation of the privileged communications. Were the Court to come to this conclusion, clawback would never be appropriate. For the avoidance of doubt, common interest privilege is an exception to the rule

that the presence of a third-party in the communication breaks privilege where (i) the underlying material qualifies for protection under attorney-client privilege, (ii) the parties to the disclosure have a common legal interest, and (iii) the material pertains to a pending or reasonably anticipated litigation (*Kindred Healthcare, Inc. v SAI Global Compliance, Inc.*, 169 AD3d 517, 517 [1st Dept 2019]). Based on the above, there is no need for the Court to reach the issue of the common interest privilege, although there are sound grounds for its application in this case. Accordingly, the communications are privileged and they must be immediately clawed back. All copies of such communications shall be destroyed and may not be used for any purpose whatsoever.

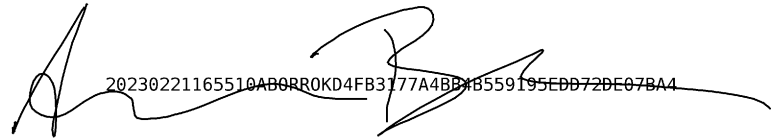
It is hereby ORDERED that the motion is granted; and it is further

ORDERED that the Defendants are directed to return or destroy all copies of the communications in NYSCEF Doc. No. 180 and are prohibited from using or relying on them; and it is further

ORDERED that the Clerk of the Court is directed, upon service on him of a copy of this order with notice of entry, to seal NYSCEF Doc. Nos. 177, 180, and 182 and to separate these documents and to keep them separate from the balance of the file in this action; and it is further

ORDERED that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the said sealed documents to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this case and any party; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website).

  
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2/21/2023  
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE