

**Sprecher v Miller**

2023 NY Slip Op 31451(U)

April 27, 2023

Supreme Court, New York County

Docket Number: Index No. 655888/2020

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 41

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BENNETT SPRECHER and PROMENADE THEATRE  
CORPORATION,

Index No. 655888/2020

Plaintiff

- against -

DECISION AND ORDER

WILLIAM P. MILLER and CADOGAN  
CORPORATION,

Defendants  
-----x

LUCY BILLINGS, J.S.C.:

Plaintiff Sprecher and defendant Miller jointly own plaintiff Promenade Theatre Corporation (PTC). Plaintiffs allege that Miller breached his fiduciary duties when he unilaterally commenced an arbitration against nonparty Larry Friedman and subsequently settled the arbitration without the approval of Sprecher as a member of PTC's board of directors.

After plaintiffs commenced this action, they served a subpoena duces tecum on nonparty Lawrence Lowen, the attorney who represented PTC in the arbitration. Defendants move to quash plaintiffs' subpoena to the extent it seeks: (1) invoices related to attorney Lowen's representation, (2) evidence of payment for Lowen's services, (3) Lowen's communications with Miller regarding the arbitration, (4) Lowen's communications with Friedman's attorneys, and (5) the executed settlement agreement

between PTC and Friedman and all draft agreements. C.P.L.R. § 2304. The parties agree, however, that, if the settlement agreement plaintiffs received from Friedman is a complete and accurate copy, Lowen need not produce a duplicate. Miller contends that the remaining documents are irrelevant to plaintiffs' claims, shielded by the attorney-client privilege, or already in plaintiffs' possession. Miller also contends that his conduct must be reviewed with deference to his business judgment, and therefore plaintiffs are not entitled to scrutinize his transactions as closely as plaintiffs seek.

I. RELEVANCE

"A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is 'material and necessary' . . . regardless of whether discovery is sought from another party." Forman v. Henkin, 30 N.Y.3d 656, 661 (2018) (quoting C.P.L.R. § 3101(a)). See C.P.L.R. § 3101(a)(4). Plaintiffs' demands to attorney Lowen are relevant to plaintiffs' claim against Miller for breach of his fiduciary duties, since plaintiffs allege that Miller commenced an arbitration against PTC's best interests. Thus plaintiffs are entitled to Lowen's invoices, as they may show what tasks Lowen performed for PTC, along with documents that show payment for these invoices, which may establish plaintiffs' damages if Lowen provided unauthorized services. Plaintiffs are

entitled further to an unredacted version of the settlement agreement that shows where the settlement funds were distributed to determine whether Miller paid the full settlement to PTC and did not use the funds for his personal or other business purposes. Although the complaint does not currently include a claim against defendants for siphoning the settlement proceeds, distinct from other PTC funds, plaintiffs may supplement their complaint or any bill of particulars. C.P.L.R. §§ 3025(b), 3043(c).

Lowen's draft settlement agreements as well as his version of the final agreement also may demonstrate whether Miller failed to negotiate in PTC's best interests, could have made settlement proposals more beneficial to PTC, and could have accepted a higher settlement. Although Miller insists that draft settlement agreements are irrelevant to the current claims because the drafts were written before the settlement, the complaint's first cause of action plainly arises from the allegedly unauthorized arbitration before any settlement. Draft agreements may establish plaintiffs' damages from Miller's conduct, particularly if Friedman offered a settlement before or during the arbitration that was higher than the offer Miller ultimately accepted. Finally, plaintiffs question the genesis of a provision in the settlement that PTC's shareholders and directors approved it, which plaintiffs strenuously dispute. In sum, if Miller is

relying on his business judgment in defense of his conduct, plaintiffs are entitled to disclosure of the evidence showing how he exercised his judgment. See People v. Greenberg, 50 A.D.3d 195, 202 (1st Dep't 2008).

Defendants similarly insist that the communications between Friedman and Lowen are irrelevant to plaintiff's current claims. Again, however, plaintiffs' first cause of action challenges the commencement of the arbitration and Miller's failure to consult with Sprecher during the arbitration. Even though the arbitration was not settled before plaintiffs filed the complaint, the terms on which the arbitration settled may demonstrate whether Miller acted against PTC's best interests in commencing the arbitration, which warrants disclosure of all communications between Friedman and Lowen regarding the arbitration.

## II. ATTORNEY-CLIENT PRIVILEGE

Miller next maintains that Lowen's communications with Miller and with Friedman's attorneys include privileged attorney-client communications, C.P.L.R. § 4503(a)(1), but Lowen represented PTC in the arbitration, not Miller, and Sprecher may waive PTC's privilege since their interests are aligned in this action. Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 132 (1996). Miller contends that Sprecher may not waive PTC's privilege because he is no longer an officer or director, but

provides no evidence that Sprecher has been formally removed from the corporation. Sprecher's request to be compensated for his time assisting in the arbitration of which he disapproved does not amount to removing himself from PTC's management as Miller contends, nor render Sprecher adverse to PTC so as to negate his standing to claim or waive PTC's attorney-client privilege. Similarly, his allegations that it would be futile to demand that Miller undertake action on PTC's behalf for the relief plaintiffs seek against Miller and his corporation do not position Sprecher against PTC. See Barasch v. Williams Real Estate Co., Inc., 104 A.D.3d 490, 493 (1st Dep't 2008).

Miller's lack of evidence of Sprecher's removal also undermines his contention that his actions are entitled to business judgment deference, as this contention rests on the unsubstantiated assumption that Miller maintained sole control over PTC during the arbitration. If defendants challenge Sprecher's standing, they may pursue this defense in a motion for summary judgment.

In the event any communications between Lowen and Miller are unrelated to the arbitration or involve Miller personally, Lowen may claim a privilege and serve a privilege log. C.P.L.R. §§ 3122(a)(1) and (b); Kozel v. Kozel, 145 A.D.3d 530, 532 (1st Dep't 2016). The mere potential that such communications may be implicated is not grounds to bar the document request altogether.

Moreover, defendants have never indicated any attorney-client relationship between them and Lowen. Nor did Lowen himself move to quash plaintiffs' subpoena, which suggests that Miller's concerns are speculative.

### III. RETAINER AGREEMENTS

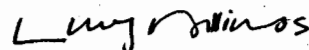
Finally, during oral argument, defendants opposed production of the retainer agreement between PTC and Lowen on the grounds that it is duplicative of documents already produced. Defendants did not raise the retainer agreement in their motion, so the court need not consider this request. Nevertheless, were the court to consider defendants' newly raised claim, PTC still would be entitled to the retainer agreement in Lowen's possession, as his version may differ from plaintiffs' version, particularly because plaintiffs retained Lowen to pursue distributions owed from nonparty Broadway Phoenix Co., LLC, not to represent PTC in any arbitration. In fact, plaintiffs' retainer agreement does not mention "arbitration" and expressly provides that PTC "has not engaged the Firm, nor has the Firm agreed, to represent Client regarding any other matter." Aff. of Bennett Sprecher Ex. C. Yet, despite that limited engagement, Lowen ("the Firm") proceeded to represent PTC ("Client") in an arbitration with Friedman, which indicates that Lowen entered a subsequent agreement with PTC. Since Lowen's actions exceeded the scope of plaintiffs' retainer agreement, plaintiffs may investigate

whether Lowen entered a second retainer agreement for him to commence the arbitration against Friedman.

IV. CONCLUSION

For the reasons explained above, the court denies defendants' motion to quash plaintiffs' subpoena duces tecum to Lawrence Lowen Esq. C.P.L.R. § 2304. Lawrence Lowen shall respond to plaintiffs' subpoena duces tecum within 20 days after service of this order with notice of entry. If plaintiffs seek to amend or supplement their complaint, they shall do so also within 20 days after service of this order with notice of entry. This decision constitutes the court's order.

DATED: April 27, 2023



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C.