Talos Capital Designated Activity Co. v 257 Church Holdings LLC

2023 NY Slip Op 31918(U)

June 5, 2023

Supreme Court, New York County

Docket Number: Index No. 651458/2020

Judge: Andrew Borrok

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Of SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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TALOS CAPITAL DESIGNATED ACTIVITY COMPANY,

Plaintiff,

- v -

257 CHURCH HOLDINGS LLC,BA 616 COLLINS MEMBER LLC,LEEDS CAPITAL LLC,BEN ASHKENAZY,

Defendant.

INDEX NO. 651458/2020

MOTION DATE N/A

MOTION SEQ. NO. 013

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 013) 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 315, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 346, 348, 349, 350, 351, 352, 354, 355, 356

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the fully developed record before the Court, the Plaintiff is entitled to summary judgment because this dispute does not present an issue of material fact for trial — it presents a question of contract interpretation properly decided by the Court. (Previously, the Appellate Division ruled that the Plaintiff was not entitled to summary judgment in lieu of complaint under CPLR 3213 as to Ben Ashkenazy's personal obligation,[1] and the parties now have had an opportunity to develop the factual record fully through discovery).

This dispute amounts to both sides arguing that the language in a fully integrated contract reflects their respective understanding of a business deal. The parties offer competing versions of that business deal. The Plaintiff argues that the five-year pay down obligation reflected the

[1] *Talos Capital Designated Activity Co. v 257 Church Holdings LLC*, 205 AD3d 509 (1st Dept 2022).

need for additional collateral to support a $195 million loan, and Mr. Ashkenazy argues that although the obligation may have been triggered at five years, it is not due until maturity, one year after when rent resets occur. Significantly, however, with respect to understanding the terms of the transaction, the business deal was not limited to the Plaintiff and Mr. Ashkenazy, the Defendant. There was a lender, and there were LLC guarantors other than Defendant Ashkenazy. In assessing the parties' respective positions on the meaning of the contract, the Court now has had an opportunity to consider a full record of documents and testimony, including from contract parties involved in negotiating the transaction other than the Plaintiff and the Defendant.

It should be noted that the Court was informed that on June 2, 2023, the Defendant paid the Plaintiff $20 million—the principal amount of the Defendant's obligation. The Plaintiff, however, also is seeking a $1 million Late Payment Charge, prejudgment interest (the Plaintiff contends the $20 million was paid nearly five years late), and sanctions against the Defendant's lawyers. (The Court also has been informed that the Plaintiff will, by way of supplemental submissions, be seeking enforcement costs). Accordingly, the Plaintiff's pending motion for summary judgment seeks to confirm the Plaintiff's rights under the contract for purposes of these damages, and is not mooted by the Defendant's recent untimely payment.

The fully developed record makes clear that the Plaintiff is entitled to summary judgment pursuant to CPLR 3212. There is not a single document in the record which discusses a difference in timing between when the other LLC guarantors' obligations were due and when Mr. Ashkenazy's personal obligation was due. There also is no document acknowledging a

difference in timing as to when Mr. Ashkenazy's obligation is triggered versus when it is due. The **only** support for Mr. Ashkenazy's current interpretation of the contract comes from after-the-fact testimony by Mr. Ashkenazy and his transaction lawyer, who have testified to a phone call between the parties (the **Now Alleged Oral Agreement**) where Mr. Ashkenazy's interpretation of the contract allegedly was agreed and then reflected in the contract as drafted (*a document Mr. Ashkenazy testified that he never read*).[2]

Transaction counsel to the lender and the lender's principal have testified that this conversation did not occur – *i.e.*, that they have no recollection of any such conversation when asked if they recalled this alleged conversation – and that this is not reflected in the contract. More importantly, Mr. Ashkenazy's current version of events is at odds with the contemporaneous written communications among the parties to the transaction. Those contemporaneous communications undermine Mr. Ashkenazy's after-the-fact version of events in three significant ways.

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[2] Q. Okay. And so – so ***you never read the loan documents or the guarantee for the 625 Madison transaction back in 2013, correct***?

A. ***That's correct***

(NYSCEF Doc. No. 265, at 21-22, lines 22-7 [emphasis added]). The Court notes that Mr. Ashkenazy's litigation position has been (i) the plain text of the Payment Recourse Guaranty provides that his personal obligation is due at maturity or, in the alternative, (ii) the text of the Payment Recourse Guaranty is ambiguous and that the "question of timing of his payment guaranty is best answered by the plain text of the Recourse Guaranty without the need to consider the parties 'subjective intent…." (NYSCEF Doc. No. 106, at 5).

First, no communications with the lender suggest that any difference in the timing of when Mr. Ashkenazy's obligation was triggered and when his obligation actually was due was ever discussed or agreed.

Second, Mr. Ashkenazy's non-privileged communications (which are non-privileged because they either included third parties or otherwise simply conveyed the business terms of the arrangement) *show that Mr. Ashkenazy was relying on his lawyer to explain when his obligation was due* and, in any event, these communications (which include unrelated third parties) never mention a difference in the timing of Mr. Ashkenazy's obligations. This is significant because a difference in timing would have been material. As such, this would have been something which one would expect to have been mentioned by Mr. Ashkenazy's transaction lawyer to other parties in the transaction at the time of the transaction.

Third, to the extent that Mr. Ashkenazy's transaction attorney attempted to make deal comments designed to turn Mr. Ashkenazy's guaranty into a so-called "loss guaranty" (*i.e.*, where the lender would have to wait until after the LLC collateral was executed upon before moving on Mr. Ashkenazy's triggered personal obligation), these comments were expressly rejected as inconsistent with the business deal intended by the other transaction parties. That business deal included the need for additional collateral, and according to both the lender and the lender's lawyer, contemporaneous access to the collateral securing the loan would totally be defeated if, as Mr. Ashkenazy now suggests, the lender had to await maturity for Mr. Ashkenazy's obligation to be due.

Indeed, when faced with the lender's position, Mr. Ashkenazy's transaction counsel responded, "I'm fine so long as it is capped at $20mil" (NYSCEF Doc. No. 302, at 1). Mr. Ashkenazy's transaction counsel said nothing about timing. That response would have been very different were Mr. Ashkenazy's current litigation position true. His counsel would have had to respond: "I'm fine so long as it is capped at $20mil" **and** the documents indicate that in no event shall Mr. Ashkenazy's obligation be due and payable until the maturity of the loan. The documents do not say that or anything like that, and there is no evidence that Mr. Ashkenazy's transaction lawyer said anything like that.

In sum, not a single contemporaneous document or communication reflects any conversation that supports the after-the-fact version of events now offered by Mr. Ashkenazy (which after-the-fact version of events was never mentioned for the first two and half years of this pending action). For completeness, and as previously discussed in prior decisions of this Court, including the Reargument Decision, issued on February 2, 2023, and attached hereto and made a part hereof as **Exhibit A**, the Plaintiff has more than met its burden in coming forward with evidence supporting its position for summary judgment both based on lender's counsel—Robert Sorin's—affirmation (NYSCEF Doc. No. 78)[3] explaining the purpose for the Payment Recourse

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[3] 4. The Payment Recourse Guaranty is a type of guaranty known in the industry as a "bad boy" or "non-recourse carve-out" guaranty and is triggered by certain "bad boy" acts in which the individual who controls the relevant entities may cause the entities to engage. The individual guarantor who does so becomes immediately liable for the secured obligations or for the losses caused by the "bad boy" acts - a consequence that is supposed to serve as a disincentive for the individual to cause "bad boy" acts in the first place.

5. ***If called to give testimony at an evidentiary hearing, I would testify truthfully that the intent of the parties at the time the Payment Recourse Guaranty was negotiated and entered into was that Ashkenazy's obligation to pay arose immediately upon a Paydown Default if Ashkenazy caused a violation of either the Collins Pledge or Church Pledge by causing the refinancing of either of the underlying properties. That is the only interpretation of the Payment Recourse Guaranty that makes any sense in the context of the particular business deal the parties entered into. The parties knew and agreed that to have the requisite deterrent effect, the "bad boy"***

Guaranty and squarely addressing the drafting ambiguity identified by the Appellate Division (*Talos Capital Designated Activity Co. v 257 Church Holdings LLC*, 205 AD3d 509 [1st Dept 2022]), and the contemporaneous November 14, 2013 email from Martin Frass-Ehrfied (the person with whom Mr. Ashkenazy now has testified he had the Now Alleged Oral Agreement) to Richard Kelly, cc'ing Avi Feinberg and Robert Sorin bearing bates stamp 001 which suggests that if the five year paydown did not occur, the lender could claim against the collateral for this obligation and against Mr. Ashkenazy personally and immediately:

> If they don't pay down 10 mio by year 5, we are allowed to clim 20 mio against collateral AND a 20 mio personal guarantee from ben Ashkenazy

(NYSCEF Doc No. 304)

> ***guaranty had to require the immediate imposition of liability upon the individual guarantor in the event he caused the entities he controls to engage in one of the enumerated "bad boy" acts, especially since, in the event of a "bad boy" act, the available collateral could be rendered insufficient to repay the amount owed.***
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> 6. ***In other words, the entire purpose of the "bad boy" guaranty would be defeated if Ashkenazy were permitted to engage in a "bad boy" act threatening the lender's security interest in the collateral with no consequence until after the maturity of the loan.***
>
> 7. ***The idea that recourse to the "bad boy" guarantor is immediate was the intent behind the language of Section 1.1 (a) of the Payment Recourse Guaranty, which provides that he guarantees "the payment and performance of the Guaranteed Obligations (as defined below) as and when the same shall be due and payable, whether by lapse of time, by acceleration of maturity or otherwise."***
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> 8. ***I understand that the Appellate Division found it significant that the Payment Recourse Guaranty is not mentioned in the Mezzanine Loan Agreement, unlike the Payment Guaranty by the entity guarantors, which is. But this fact only reflects the intent of the parties that the Payment Guaranty was automatically operative and available as a remedy in the event of any Five Year Paydown Default, whereas the Payment Recourse Guaranty was not automatic, and would only be triggered if there was both a Five Year Paydown Default and a "bad boy" act. Again, it was not the parties' intent to require the lender to exhaust all remedies against the entity guarantors under the Payment Guaranty in the event of a "bad boy" act, but to enable to lender to have immediate recourse to Ashkenazy individually***

(NYSCEF Doc. No. 76, ¶¶ 4-8 [emphasis added]).

The Defendant has failed to raise a material issue of fact in its opposition papers.[4] The record therefore firmly establishes that the Plaintiff's position as to the meaning of the contract and the timing of Mr. Ashkenazy's obligations as to principal and interest is correct and the Plaintiff is entitled to summary judgment. Based on this ruling, the Plaintiff also is entitled to judgment with respect to the payment of late and prejudgment interest, all court costs and reasonable fees of outside counsel actually incurred in the enforcement and preservation of the Plaintiff's rights, and other fees as set forth in Mr. Ashkenazy's Payment Recourse Guaranty.

The branch of the Plaintiff's motion seeking sanctions against Mr. Ashkenazy's counsel is also granted. Pursuant to 22 NYCRR § 1200 Rule 3.3, a lawyer shall not make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by a lawyer. Such conduct warrants sanctions pursuant to 22 NYCRR § 130. As discussed below, the record is permeated with examples as to why the standard is more than met under the circumstances of this case.

By way of background, previously, the Appellate Division held:

> As the motion court did not further explain its reasoning, it failed to articulate a sufficient basis for its finding that Ashkenazy and his counsel committed "fraud on the court," i.e., engaged in "willful conduct that is deceitful and obstructionistic, which injects misrepresentations and false information into the judicial process so serious that it undermines the integrity of the proceeding"

[4] For completeness, it does not matter or create an issue of fact that the original deal did not have a personal obligation from Mr. Ashkenazy. What matters is that the deal ultimately required additional equity, and that additional equity came from certain other properties which Mr. Ashkenazy controlled, and the lender realized that the collateral upon which the lender was relying for this obligation (*i.e.*, the five year paydown) might not be there if Mr. Ashkenazy caused a refinancing of the other properties. To prevent this from occurring and to ensure that the additional equity would be there if Mr. Ashkenazy did refinance these other properties, the lender required Mr. Ashkenazy to personally guaranty this obligation and as described in Mr. Sorin's affirmation, the business need for the additional equity meant that the lender's immediate access to the personal obligation was what was intended and reflected in the documents. That immediate access would be totally defeated if the lender had to wait until maturity as Mr. Ashkenazy now argues.

> (*Bhim v Platz*, 207 AD3d 511, 513 [2d Dept 2022]). Nor was this determination mere dicta, as Talos argues; it underlay the motion court's invitation to Talos to move for sanctions

(NYSCEF Doc. No. 353, at 4). The Appellate Division ruling was dated April 27, 2023. This finding by the Appellate Division was correct because ***at that time*** this Court had not yet made any such finding (as made clear both in the original decision dated October 12, 2022 [discussed below] ordering production of certain documents of both the Plaintiff and the Defendant and subsequently in November 2022).[5] As discussed in the Reargument Decision (which was issued on February 7, 2023 and is attached to this decision as Exhibit A and incorporated in its entirety herein), from the moment the Appellate Division modified this Court's decision in respect of the Plaintiff's motion for summary judgment in lieu of complaint as to Mr. Ashkenazy's personal obligation, the Plaintiff had sought to have a hearing and determination on the issue of when Mr. Ashkenazy's obligation was due.[6] The Plaintiff claims that Mr. Ashkenazy's position has been knowingly taken without merit and that, in sum and substance, Mr. Ashkenazy and his counsel have tried to create a fake record and engage in tactics to obstruct the proceedings.

As discussed more completely in the Reargument Decision, when this Court reviewed certain documents *in camera*, the record confronting the Court was that (i) the Defendant had offered to dump over 700 documents on the Court for *in camera* review, (ii) the Defendant had falsely represented that no documents existed that were relevant to the issue of when the Defendant's obligation was due and (iii) when documents were finally (after extensions granted by this Court)

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[5] *See* fns. 9 and 16.

[6] *See* fn. 6 of the Reargument Decision *noting* "On remand, the Court can easily resolve the ambiguity with an evidentiary hearing. There are no material issues of fact concerning the underlying events; and no matter how cleverly Defendant's counsel argued its appellate issue, the ambiguity-issue is neither deep nor difficult" (NYSCEF Doc. No. 78, Memorandum of Law in Support of Attachment, dated July 11, 2022, at 1-3).

submitted for *in camera* review they included facially non-privileged documents. These included bates stamp document 7474 which conveyed only business terms and not legal advice and bates stamp document 7456-7457 which included third parties—and where no attempt was made by Defendant's counsel to explain how the inclusion of these third parties could preserve privilege.[7]

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[7] As stated in the Reargument Decision:

> With regard to discovery, it also was simply false for counsel to Mr. Ashkenazy to represent to the Court in writing that no documents squarely addressing or relevant to when Mr. Ashkenazy's payment obligation is due had been located[8]. This representation appears to have been an inappropriate attempt to limit discovery and was based on the fact that Mr. Ashkenazy and his attorneys were unable to locate documents or correspondence stating that his payment obligation is not due at maturity (as he contends) or that otherwise discusses a difference in timing between when his obligation was triggered and when he contends it is payable. This was not a valid basis for limiting discovery.
>
> Documents are significant not only for what they do say but also for what they do not. The fact that there were documents discussing when Mr. Ashkenazy's obligation is triggered and do not discuss any difference in timing between when the obligation is triggered and when it is payable is directly relevant to the understanding of the timing issue of when Mr. Ashkenazy's obligation is payable. The Plaintiff is entitled to know that there are communications that do not discuss a difference in timing and use those materials in support of the Plaintiff's position. The Plaintiff is also entitled to know that there were non-privileged communications inquiring as to the operation of the Payment Recourse Guaranty ***after*** the Payment Recourse Guaranty was executed and that those non-privileged communications do not indicate that the Payment Recourse Guaranty is due at maturity.
>
> Put another way, Mr. Ashkenazy's position that documents only are relevant if they specifically discuss a difference in the timing of when his obligation is triggered and when it is payable (if such documents exist) is based on a false premise. Relevant documents also include documents which pre-date the Payment Recourse Guaranty as they may explain why the parties negotiated a Payment Recourse Guaranty in the first place and why the obligation would be either due when triggered or due at maturity. Given that the Court had not (and has not) yet resolved the ambiguity identified by the Appellate Division, full discovery of documents which discuss the business deal, why there was a five year paydown obligation, why it did not cause an event of default under the mezzanine loan, why separate collateral was required, why a Payment Recourse Guaranty was required and how such obligations are intertwined and support the underlying business deal is required. Mr. Ashkenazy did not present authority to this Court to support such a narrow scope of discovery especially in the wake of the Appellate Division decision holding that the contracts at issue were ambiguous.

(Reargument Decision, at 11-13); fn. 8 cites the Affirmation of Nora Bojar (NYSCEF Doc. No. 107 ¶) ["such privileged communication likely did not exist based on a current review of the documents"] and Email, dated October 3, 2022, of Alexander Levi ("Mr. Ashkenazy is aware of no contemporaneous e-mail or other documents squarely addressing the 'timing' issue").

To be clear, given the inability of Defendant's counsel to adequately explain at a hearing before the Court on October 12, 2022 why these documents were privileged and why they had been withheld in the first place,[8] and given the Plaintiff's stated desire to proceed with a summary judgment motion as soon as possible, the Court granted leave for the Plaintiff to bring its summary judgment motion. The Court also permitted briefing[9] on whether the Defendant and his counsel was engaged in vexatious litigation and whether a fraud had been committed on the Court given the foregoing, the unexplained delays in the Defendant's document production, and seemingly wholly meritless positions taken as to various documents withheld on the basis of privilege.[10]

On the fully briefed motion, and given certain subsequent conduct by Defendant's counsel, the Court is **now** making a finding that a number of material misstatements were made to the Court and to the Appellate Division, which misstatements undermined the integrity of these proceedings. Among other things, it was false for Defendant's counsel to argue to the Appellate Division that this Court ordered production of bates stamp document 7474 because of "at issue waiver." As Defendant's counsel knew from the Court's original decision ordering production

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[8] *See* discussion at fn. 3 of the Reargument Decision, *citing* NYSCEF Doc. No. 149, at 8-9, lines 22-25, 1-12.

[9] MR. SMITH: Thank you. And may I – and you will not indulge me to say that I take exception to the accusation of fraud on the Court and to explain why?

THE COURT: No. ***I really think that this should properly be briefed at this point.*** And I'll view it in the papers and that the record will stand as it stands.

But it's very clear, based on the review, that the argument that the documents were ambiguous and that they meant something else, was belied by the express understanding of the lawyers ***and the business deal, including Mr. Ashkenazy's transaction counsel, as codified in 7474***. Thank you very much, sir.

(NYSCEF Doc. No. 114, at 12 lines 7-20 [emphasis added] **from the October 12, 2022 hearing**).

[10] As discussed both in the Court's October 12, 2022 original decision ordering production of non-privileged materials, and later in the Reargument Decision of February 7, 2023, some withheld documents included communications where Tom Glatthaar, counsel to the title company (*i.e.*, a third party) was included in the chain.

of document 7474 (on October 12, 2022),[11] that document was required to be produced for another entirely different reason—because it conveyed only business terms and no legal advice whatsoever:

> Some of the documents in that review went to the very heart of the issue that was identified and argued before the Appellate Division, including Bates stamp 7474. And there were other[12] documents that, in no way, include any legal advice whatsoever…
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> …
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> And there were – like I said, there were documents where Tom Glatthaar, who's a title company agent formerly with First American Title, is included. He's not there anymore. He's moved on to other places. But, were included on the emails for that. I do not understand how any of those could have been, initially, held back given the arguments that were made to the Appellate Division…

(NYSCEF Doc. No. 114, at 5-6 lines 18-22, 7-14). Even if this was not clear at the time of the original decision **on October 12, 2022** when the Court ordered the production of the document bearing bates stamp 7474, the Reargument Decision **issued on February 7, 2023—two months**

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[11]In response to both the Defendant and the Plaintiff arguing for production of each other's communications withheld on privilege (NYSCEF Doc. No. 106, at 5 ["Both parties claim the other has waived privilege with respect to the question of when Ashkenazy is required to make a $20 million payment…"]), by Order dated October 3, 2022, the Court ordered an *in camera* review, explaining:

> The sole issue in this case is the timing of when Mr. Ashkenazy's obligation is due. The Appellate Division decision places contractual meaning as to the timing of the payment at the heart of the case—and discovery—as to both parties is warranted. To the extent that each party's understanding of when payment was intended to be due then relies on communications with their respective counsel, these communications are not necessarily privileged for at least two reasons. First, the communications may relate to business issues and not legal advice. Second, to the extent either party is relying in their understanding on advice of counsel, then any privilege may have been waived. For clarity, to the extent Mr. Ashkenazy has argued that the obligation is due at maturity and that he has a different understanding of what the documents mean than that of the plaintiff, he has placed this is "at issue" and can not now claim privilege over communications with his attorney as to this issue. However, to the extent that the communications involve legal advice having nothing to do with the timing of the obligation, they are privileged and at issue waiver would not apply. This is why in camera review is needed. Both sets of communications must be produced to the Court by noon on Tuesday, October 4, 2022 (NYSCEF Doc. No. 109).

[12] This was an error. The Court indicated that 7474 contained only business terms and not any legal advice. *See also* fn 9, *citing* NYSCEF Doc. No. 114, at 12 lines 18-20 where the Court stated that the business deal was codified in 7474. To the extent there was any confusion about this point, this was addressed in the Reargument Decision which Reargument Decision was issued on February 7, 2023 **more than two months before** the Appellate Division issued the Second Appellate Division Decision in this case on April 27, 2023.

before the Appellate Division issued its decision on April 27, 2023—made this clear and Defendant's counsel was obligated not only to bring the Reargument Decision to the attention of the Appellate Division, but also was obligated not to make a false and misleading argument that the Court ordered production of this document based on "at issue waiver".[13]

For completeness, the Plaintiff also argues that it is entitled to sanctions against the Defendant's counsel because Defendant's counsel has significantly mischaracterized the record, inappropriately and without basis delayed discovery thereby requiring the Plaintiff to file motions, filed meritless motions causing the Plaintiff to have to defend such meritless motions, and otherwise attempted to mislead both this Court and the Appellate Division resulting in significant costs and delays to the Plaintiff.

In actuality, and as the Court **now holds,** the misconduct by Defendant's counsel comprises the following five instances encompassed in three categories, which multiplied and delayed the proceedings: [14]

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[13] Defendant's counsel has stated in a letter to this Court (NYSCEF Doc. No. 357) that their Appellate Division reply papers cited the Reargument Decision, and that, in sum and substance, it is the Plaintiff's fault for not convincing the Appellate Division to take judicial notice of the Reargument Decision. This is obviously wrong and entirely misses the point. Based on the original decision (as discussed herein) ordering production of document 7474 **and** the Reargument Decision, it was knowingly false and deceitful for Defendant's counsel to argue to the Appellate Division that a document was ordered produced based on "at issue" waiver when that was not the basis.

[14] The Court's ruling on sanctions focuses on Defendant's (and his counsel's) conduct with regard to litigating the contract at issue in this case. This sanctions ruling does not need to consider the frivolous motion brought by Defendant's counsel seeking this Court's recusal. Defendant's counsel was in a position to know that any issue regarding any prior familial relationship by the Court with SL Green had already been vetted and resolved in *Bath & Body Works, LLC v 304 PAS Owner LLC*, Index No. 651836/2020 where, among other things, the Court read emails from Charles Borrok into the record explaining that Charles Borrok had not had dealings with SL Green in the past five years and where the Court had obtained an opinion from the Advisory Committee on Judicial Ethics on the issue. Magnifying the waste of judicial resources, Defendant's counsel continued to pursue the recusal motion after receiving both an affidavit from Neil Kenner, Esq. (of SL Green) stating that Charles Borrok (who is 82 years old) has not been involved in leasing assignments with SL Green for the past 20 years (NYSCEF Doc. No. 163) and a letter from Cushman & Wakefield (NYSCEF Doc. No. 164) confirming that Charles Borrok has not been involved and provides no services to any leasing agencies run by Cushman & Wakefield for SL Green and has not for at least

1. Falsely representing to the Court that no documents existed relevant to the timing of when Mr. Ashkenazy's obligation is due (when in fact, as shown above and as discussed in the Reargument Decision, documents relevant to timing—just not supportive of Defendant's theory as to timing—did in fact exist).

2. Taking positions in bad faith as to Defendant's current interpretation of the contract at issue, which positions were contrary to documents and testimony that were available to Defendant's counsel. These included:

- Improperly asserting that Mr. Ashkenazy had not relied on his attorney as to his understanding of the contract with respect to when his obligations were due when the non-privileged communications demonstrate that after the documents were executed questions still were being asked of Mr. Askenazy's attorney as to when his client's obligation was due and those communications do not discuss any difference in timing between when the obligation is triggered and when it is due or that the timing of Mr. Ashkenazy's personal obligation was in any way tied to rent resets as he now alleges.

- Misleading the Court by arguing that the Defendant did not intend to rely on extrinsic evidence from David Kriss, the Defendant's drafting counsel, in interpreting the contract when in fact they did intend to rely on Mr. Kriss' testimony and interpretation, and then

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10 years, received any share of any agency commissions, and that based on an internal search going back to 2011, Cushman & Wakefield was unable to find any evidence that Charles Borrok had shared in any commissions during that time period. For completeness, the Court notes that as to the issues raised in this lawsuit, the Court sought and obtained a second opinion from the Advisory Committee on Judicial Ethics.

did attempt to hide from the Court non-privileged communications undermining Mr. Kriss' testimony by requesting a Special Master.

- Improperly asserting that the lender and the Defendant agreed that Defendant's obligation would not come due until the maturity of the loan in an oral agreement while failing to mention this Now Alleged Oral Agreement during the first three years of this lawsuit[15]

3. In three discrete ways, misleading the Appellate Division about the status of this case, and then attempting to mislead this Court regarding the holding of the Appellate Division, each of which is sanctionable.

- As discussed above, knowing that the Court was scheduling full briefing on whether a fraud on the Court had occurred, it then was false and misleading to represent to the Appellate Division that the Court had already made a finding on this issue and that this

[15] As discussed in the Reargument Decision:

> In the almost three years that this lawsuit has been pending, the parties have litigated this case based on the premise that **no direct conversation** between the parties took place as to when Mr. Ashkenazy's non-recourse carveout payment obligation is due. In opposition to the Plaintiff's motion for summary judgment in lieu of complaint, Mr. Ashkenazy made no mention of the Now Alleged Oral Agreement. In their motion to reargue the summary judgment in lieu of complaint (which was withdrawn), the Defendants again made no mention of the Now Alleged Oral Agreement and instead only argued that charging both contractual and statutory interest was improper. Following Remittitur from the Appellate Division finding the contracts to be ambiguous, Mr. Ashkenazy again made no mention of the Now Alleged Oral Agreement in opposition to the Plaintiff's motion for an attachment. And finally, in opposition to the motion to compel, Mr. Ashkenazy again made no mention of the Now Alleged Oral Agreement. Now, in his deposition, Mr. Ashkenazy indicates that he both never reviewed the documents at issue in this case and also that he had a conversation with the principal for the lender in which they agreed that his payment obligation was due at maturity (the **Now Alleged Oral Agreement**). In addition, notwithstanding that Robert Smith, his lawyer, argued in opposition to the motion for attachment that there was no dispute that Mr. Ashkenazy's obligation was triggered, Mr. Ashkenazy now also has testified that he disputes that his obligation was triggered (*compare* NYSCEF Doc. No. 79 and NYSCEF Doc. No. 171, at 17).

finding was devoid of merit because the Court did not detail the basis for its finding (*i.e.*, never telling the Appellate Division that full briefing still was underway and that the Court would issue an opinion once there was a fully developed record).[16]

It also was false to argue to the Appellate Division that the basis for the Court's original decision ordering the production of the document bearing bates stamp 7474 was a broad "at issue" waiver when that was not the basis for the Court's ruling as to that document. Compounding this, it then was deceitful to knowingly and falsely assert

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[16] See fn9 and as the Court subsequently explained to the parties in November 2022:

> To the extent the defendant continues to question the Court's concerns regarding the defendant's and defendant's counsel's conduct, it will be for the plaintiff to do with those record facts as they will as part of any motion practice relating to claims of privilege. As discussed in the November 4th Order, defendant's counsel represented to the Court (at conferences and in an affidavit) that documents relevant to the sole issue in this case did not exist and were not being withheld. Ultimately, the Court determined to conduct an in camera review of documents subject to claims of privilege, and then granted multiple extensions so that defendant's counsel could review documents they had already claimed were privileged. Nonetheless, for the in camera review, the Court was confronted with documents that had been withheld for which there did not appear to be any basis for a claim of privilege. This included communications with third parties (*e.g.*, counsel to the title company), deal documents including amendments to governing documents, and other communications not involving the provision of legal advice or involving communications which appeared to this Court to be relevant to matters placed in issue by the defendant. (The plaintiff, by contrast, upon review of their documents, merely suggested some proposed redactions [which the court accepted]). It was that record together with other communications addressed in the November 4th Order which formed the basis for the Court's rulings on privilege and the concerns expressed regarding counsel's conduct (including as to potential sanctions if plaintiff choses to so move). It was this record that also supported the Court deciding against further time extensions. The in camera review confirmed that the special master the defendant had requested was not warranted.

(See NYSCEF Doc. No. 141, dated 11/7/22 ¶ 2)

> ...
> Ultimately, as the Court has now stated in certain case management orders, it is for the Plaintiff to decide whether to bring a further motion and whether to seek sanctions. For completeness, the Plaintiff has been urging this Court to hold a single issue hearing to resolve the ambiguity identified by the Appellate Division[6] since the Remittitur when they brought their motion seeking attachment which this Court denied (NYSCEF Doc. No. 81).

(Reargument Decision, at 9).

positions to the Appellate Division regarding this Court's privilege determinations that ran counter to the Court's actual decision.

- It also was false and misleading for Defendant's counsel then to send a letter to the Court representing that the Appellate Division had held that these documents were privileged. This is not what the Appellate Division held. The Appellate Division held that they were not privileged based on a broad "at issue waiver" but then expressly stated that inasmuch as the record was not complete, the Appellate Division could not issue a decision as to other bases upon which this Court held that the documents were not privileged.

Thus, the Plaintiff is entitled to sanctions.

It is hereby ORDERED that the Plaintiff's motion for summary judgment and for sanctions is granted; and it is further

ORDERED that the Plaintiff shall enter judgment on notice, which judgment shall include the payment of prejudgment interest, all court costs and reasonable fees of outside counsel actually incurred in the enforcement and preservation of the Plaintiff's rights, and other fees as set forth in Mr. Ashkenazy's Payment Recourse Guaranty[17]; and it is further

[17] Plaintiff shall submit a bill for its reasonable fees and costs. If the Defendant disagrees as to the amount, the matter shall be submitted to a Judicial Hearing Officer to hear and determine.

ORDERED that Defendant's counsel, without any charge to their client, is hereby sanctioned in the amount of $10,000 for each instance of frivolous conduct, for a total of $50,000, payable to the Lawyer's Fund for Client Protection, 119 Washington Avenue, Albany, New York 12210; and it is further

ORDERED that written proof of the payment of this sanction be provided to the Clerk of Part 53 and opposing counsel within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that such proof of payment is not provided in a timely manner, the Clerk of the Court, upon service upon him of a copy of this order with notice of entry and an affirmation or affidavit reciting the fact of such non-payment, shall enter a judgment in favor of the Lawyer's Fund and against said counsel in the aforesaid sum; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the Part 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); and it is further

ORDERED that, in accordance with Section 130-1.3, a copy of this order will be sent by the Part to the Lawyer's Fund for Client Protection; and it is further

ORDERED that the Defendant shall reimburse the Plaintiff for actual expenses reasonably incurred and reasonable counsel fees in this case; and it is further

ORDERED that the Plaintiff shall provide a bill of costs to the Defendant within 21 days of the date of this order; and it is further

ORDERED that, if the parties are unable to agree as to the amount of costs owed by the Defendant to the Plaintiff, they shall promptly notify the Court and the matter shall be referred to a JHO/Special Referee.

6/5/2023
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE

Exhibit A

[Reargument Decision Attached]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

TALOS CAPITAL DESIGNATED ACTIVITY COMPANY,

Plaintiff,

- v -

257 CHURCH HOLDINGS LLC,BA 616 COLLINS MEMBER LLC,LEEDS CAPITAL LLC,BEN ASHKENAZY

Defendant.

INDEX NO. 651458/2020

MOTION DATE N/A

MOTION SEQ. NO. 011

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 280 were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

Upon the foregoing documents, Ben Ashkenazy's motion for reargument and renewal of this Court's Prior Decision (hereinafter defined) is denied because he fails to adduce any facts or law that this Court overlooked or misapprehended and does not otherwise provide a reasonable justification for the failure to present the Now Alleged Oral Agreement (hereinafter defined) or any other facts in opposition to the prior motion relating to (i) whether certain documents in the case are privileged and (ii) the Court granting leave to Plaintiff to make certain motions[1] (CPLR 2221[d]; *Jones v City of New York*, 146 AD3d 690, 690-691 [1st Dept 2017]; CPLR 2221[e]).

[1] In the almost three years that this lawsuit has been pending, the parties have litigated this case based on the premise that **no direct conversation** between the parties took place as to when Mr. Ashkenazy's non-recourse carveout payment obligation is due. In opposition to the Plaintiff's motion for summary judgment in lieu of

With respect to Mr. Ashkenazy's claim that certain documents are subject to attorney-client privilege, the Court did not hold that Mr. Ashkenazy had waived the attorney-client privilege because the Appellate Division found the underlying contracts to be ambiguous. This is a mischaracterization of what the parties argued and what this Court held.

The Plaintiff moved (Mtn. Seq. No. 5) to compel arguing that Mr. Ashkenazy had put his attorney's advice as to the timing of when Mr. Ashkenazy's obligation is due under the Guaranty of Recourse Payment Obligations (Mezzanine Loan) (the **Payment Recourse Guaranty**) "at issue" and requested an *in camera* review of relevant documents as to which Mr. Ashkenazy claimed privilege (citing, *inter alia*, *Deutsche Bank Tr. Co. of Americas v Tri-Links Inv. Tr.*, 43 AD3d 56, 63 [1st Dept 2007]; *Bowne of N.Y. City, Inc. v AmBase Corp.*, 150 FRD 465, 488 [SD NY 1993]; *Cicel (Beijing) Sci. & Tech. Co. v Misonix, Inc.*, 331 FRD 218, 228 [ED NY 2019]). The Plaintiff also argued that a party may implicitly waive the privilege when it asserts "a claim that in fairness requires examination of protected communications" (*U.S. v. Bilzerian*, 926 F2d 1285, 1292 [2d Cir 1991]). Given that the parties had sophisticated counsel negotiate the Payment Recourse Guaranty, the Plaintiff argued that Mr. Ashkenazy had placed his lawyers'

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complaint, Mr. Ashkenazy made no mention of the Now Alleged Oral Agreement. In their motion to reargue the summary judgment in lieu of complaint (which was withdrawn), the Defendants again made no mention of the Now Alleged Oral Agreement and instead only argued that charging both contractual and statutory interest was improper. Following Remittitur from the Appellate Division finding the contracts to be ambiguous, Mr. Ashkenazy again made no mention of the Now Alleged Oral Agreement in opposition to the Plaintiff's motion for an attachment. And finally, in opposition to the motion to compel, Mr. Ashkenazy again made no mention of the Now Alleged Oral Agreement. Now, in his deposition, Mr. Ashkenazy indicates that he both never reviewed the documents at issue in this case and also that he had a conversation with the principal for the lender in which they agreed that his payment obligation was due at maturity (the **Now Alleged Oral Agreement**). In addition, notwithstanding that Robert Smith, his lawyer, argued in opposition to the motion for attachment that there was no dispute that Mr. Ashkenazy's obligation was triggered, Mr. Ashkenazy now also has testified that he disputes that his obligation was triggered (*compare* NYSCEF Doc. No. 79 and NYSCEF Doc. No. 171, at 17).

communications with him about that guaranty and the timing of his obligations under the Payment Recourse Guaranty "at issue" (NYSCEF Doc. No. 94, at 9-10).

In his opposition papers and in support of their own motion to compel (Mtn. Seq. No. 6), Mr. Ashkenazy argued that "the question of the timing of his payment guaranty is best answered by the plain text of the Recourse Guaranty without need to consider the parties' subjective intent…" (NYSCEF Doc. No. 106, at 5). Mr. Ashkenazy also argued that whether the Payment Recourse Guaranty is a "bad boy" guaranty is a red herring because that does not go to the timing of the obligation. Mr. Ashkenazy further argued that the relevant privilege cases cited by the Plaintiff were inapplicable and that the requests were overbroad. Mr. Ashkenazy, however, did acknowledge that applicable privileges could be waived under certain circumstances:

> No case has found a privilege waiver by a party who merely argues, as Ashkenazy does, that the best guide to an agreement's interpretation to an agreement's meaning is the text itself. Indeed, as discussed in detail in Ashkenazy's parallel motion to compel, it is *Plaintiff*, not Ashkenazy, who has placed the parties' intent at issue. . . .
>
> The Motion contemplates the production of "all documents and communications [Ashkenazy] contends are privileged that relate to the terms of [the Recourse Guaranty]." That is at best a grossly overbroad demand. To the extent any privileged documents are to be produced for inspection, they should be limited to documents – if they exist – that relate to that timing issue. (Ashkenazy's opposition to Plaintiff's motion should not be taken to imply that there are such privileged documents, or that any that exist are significant.)

(*id.*, at 2-3). Regarding the waiver of privilege, Mr. Ashkenazy acknowledged the issues of waiver, but argued:

> It is well settled that the attorney-client privilege is waived when a party "place[s] the subject matter of counsel's advice in issue and by making selective disclosure of such advice." *Orco Bank, N.V. v. Proteinas Del Pacifico, S.A.*, 179 A.D.2d 390, 390 (1st Dep't 1992) (citing cases). Direct testimony by a contract's drafting attorneys as to their intent and that of their client(s) is the very definition of

placing something at issue. This is because attorney testimony about drafting intent reveals privileged information and thus waives the privilege as to drafting history generally.

New York law treats testimony about contract meaning and negotiation as privileged matters. *See Jones v. Gelles*, 167 A.D.2d 636, 639 (3d Dep't 1990) ("Because plaintiff chose to have her attorney testify about their negotiating intent, she impliedly waived the attorney- client privilege"). Scholars and lower courts applying New York law view attorney testimony as a waiver that precludes claims of privilege to shield documents addressing that subject matter. *See* 8 Wigmore, Evidence § 2327, at 637-38 (Rev. ed. 1961); 1 McCormick on Evidence § 93 (8th ed. 2020); *Jakobleff v. Cerrato, Sweeney & Cohn*, 97 A.D.2d 834, 835 (2d Dep't 1983) ("client ... who permits his attorney to testify regarding the matter ... is deemed to have impliedly waived the attorney-client privilege"); *MBIA Ins. Corp. v. Patriarch Ptnrs. VIII, LLC*, No. 09 Civ. 3255, 2012 WL 2568972, at *6 (S.D.N.Y. July 3, 2012) ("it is well established that a party waives the attorney-client and work product privileges whenever it puts an attorney's opinion into issue, by calling the attorney as an expert witness or otherwise.") (quoting *Herrick Co., Inc. v. Vetta Sports, Inc.*, No. 94 Civ. 905 (RPP), 1998 WL 637468, at *1 (S.D.N.Y. Sept. 17, 1998)). (For this reason, attorney testimony rarely occurs.)

Thus, neither a party nor its lawyers may simultaneously testify as to intent and meaning of a contract and, under the cloak of privilege, withhold documents reflecting that intent and meaning. *See, e.g.*, MBIA, 2012 WL 2568972, at *8 (finding waiver where party submitted affidavits of attorneys and confirmed that attorneys "will testify concerning their 'intent and interpretation of the contracts[,]" and enforcing waiver "against all documents that concern those subject matters").

As Plaintiff points out, even if a party does not attempt to use a privileged communication, it "may waive the privilege if [it] asserts a factual claim the truth of which can only be assessed by examination of a privileged communication." *Bowne of N.Y. City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 488 (S.D.N.Y. 1993); *U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir.1991); *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, 331 F.R.D. 218, 228 (E.D.N.Y. 2019) (waiver may apply when a party avers "material facts at issue related to the privileged communication, and where the validity of those facts can only be accurately determined through an examination of the undisclosed communication")

(NYSCEF Doc. No. 102, at 7-8)[2].

[2] Based on the foregoing, Mr. Ashkenazy argued that by submitting Mr. Sorin's affirmation in support of its motion for attachment, the Plaintiff had put *its* attorney-client communications at issue. For completeness, in Mr. Ashkenazy's motion to compel, Mr. Ashkenazy sought documents related to the Plaintiff's standing. As discussed

To the extent that the Court granted the Plaintiff's motion, Mr. Ashkenazy asked that the documents be reviewed by a Special Master. In the Decision and Order dated October 3, 2022 (NYSCEF Doc. No. 109; the **Prior Decision**) granting both the Plaintiff's motion to compel and Mr. Ashkenazy's motion to compel, this Court held that:

> The sole issue in this case is the timing of when Mr. Ashkenazy's payment obligation is due. The Appellate Division decision places contractual meaning as to the timing of the payment at the heart of the case—and discovery—as to both parties is warranted. To the extent that each party's understanding of when payment was intended to be due then relies on communications with their respective counsel, these communications are not necessarily privileged for at least two reasons. First, the communications may relate to business issues and not legal advice. Second, to the extent either party is relying in their understanding on advice of counsel, then any privilege may have been waived. For clarity, to the extent Mr. Ashkenazy has argued that the obligation is due at maturity and that he has a different understanding of what the documents mean than that of the plaintiff, he has placed this is "at issue" and can not now claim privilege over communications with his attorney as to this issue. However, to the extent that the communications involve legal advice having nothing to do with the timing of the obligation, they are privileged and at issue waiver would not apply. This is why in camera review is needed. Both sets of communications must be produced to the Court by noon on Tuesday, October 4, 2022. Mr. Ashkenazy's request for a special master must be denied. It is wholly irrelevant that the Court may be the fact finder in this case. Judges as triers of fact resolve evidence issues that require them to see evidence that then may be excluded.

Following review of documents produced in camera, this Court concluded that the document bearing bates stamp 7474 by its express contents conveys only the business terms of the proposed transaction and is not legal advice. It is thus not subject to the attorney-client privilege.

The document bearing bates stamp 7456-57 includes Gregg Miller from Haynes Boone and Michael Alpert. These are third-parties whose presence on the communication could affect a

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in the Prior Decision, inasmuch as standing was waived as a defense, the Court denied this portion of Mr. Ashkenazy's motion (see *Talos Capital Designated Activity Co. v 257 Church Holdings LLC*, 205 AD3d 509, 509 [1st Dept 2022]).

waiver. Mr. Miller was not Mr. Ashkenazy's attorney in negotiating the Payment Recourse Guaranty. David Kriss of Kriss & Feurstein LLP was, and Mr. Ashkenazy, in opposition to the motion to compel, made no attempt to explain who Mr. Miller represented or what Mr. Alpert's role was in the transaction, or how their interests were aligned as to the timing of Mr. Ashkenazy's payment obligation. Thus, Mr. Ashkenazy has not established that Mr. Miller or Mr. Alpert are within the scope of his privilege. This is particularly true given that Mr. Ashkenazy's non-payment on his personal payment obligation did not cause an event of default under the mezzanine loan such that the mezzanine borrower would be affected.[3] Nothing in Mr. Ashkenazy's motion seeking reargument attempts to adequately address this either. It also should be noted that Mr. Ashkenazy also never has adequately explained why the subject matter

[3] It appears that Mr. Miller may have represented the borrower. Interestingly, as to any claim of privilege, Mr. Ashkenazy now testifies that he "had no idea" who Mr. Miller was (NYSCEF Doc. No. 171, at 90 and 100). It appears that Mr. Alpert also is not an employee or agent of Mr. Ashkenazy; rather as Mr. Ashkenazy testified "Michael Alpert is a partner of the deal, not a worker. He didn't work for me" (NYSCEF Doc. No. 171, at 67). In fact, Mr. Alpert signed the Guaranty of Payment (Mezzanine) (NYSCEF Doc. No. 6) only on behalf of Leeds Capital LLC which guaranty was ***separately*** executed by Mr. Ashkenazy on behalf of two other entities, BA 616 Collins Member LLC and 257 Church Holdings LLC – *i.e.,* the pledge required by the lender as additional collateral was made up of both Leeds entities and Ashkenazy entities. But again, as the party asserting privilege, once challenged, it was for Mr. Ashkenazy to account for all those on allegedly privileged communications (as well as any other bases of privilege) and to show why any alleged privilege was not waived by Mr. Alpert or Mr. Miller being included on communications regarding Mr. Ashkenazy's individual legal interests and personal obligation. This he has failed to do.

Indeed, when the Court gave Mr. Smith the opportunity to respond to the third parties' documents at the October 12, 2022 conference--where Mr. Smith requested that following the Prior Decision, the Court issue a Supplemental Order ordering the production of the documents—Mr. Smith stated:

> Yes. On Question of the third-party documents, You Honor has, absolutely, correctly stated it went to a third party. It's not privileged.
>
> What I understand to be the fact is the reverse situation. Documents – non-privileged communications to third party, which then become party of an attorney-client communication, is also for the purpose of legal advice. I would add, your Honor, that as I understand the law, if the documents are for the purpose of obtaining legal advice, you can't – you're quite right – and, I agree – that you can't confer privilege on an otherwise unprivileged document just by sending it to a lawyer.

(NYSCEF Doc. No. 149, at 8-9, lines 22-25, 1-12). This is not however what is reflected in document bearing bates stamp 7456-57. All communications in the email chain with Mr. Kriss included both Mr. Alpert and Mr. Miller; hence the issue of their roles and their effect on the privilege remains.

of any attorney-client privilege related to the timing of when his obligation to make payment under the Payment Guaranty was not waived as the Plaintiff had argued (*Deutsche Bank Tr. Co. of Americas v Tri-Links Inv. Tr.*, 43 AD3d 56, 63 [1st Dept 2007]).

Mr. Ashkenazy is also not entitled to reargument and renewal of the Court's decision granting leave to the Plaintiff to bring a motion for summary judgment and sanctions for two reasons. First, the documents adduced *in camera* from both parties appear to support the Plaintiff's position[4], the explanation offered by Robert Sorin of Fried Frank (transaction counsel to Plaintiff) (NYSCEF Doc. No. 76)[5] as to the ambiguity identified by the Appellate Division, and

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[4] The Plaintiff's documents include an email, dated November 14, 2013, from Martin Frass-Ehrfeld (the person with whom Mr. Ashkenazy has now testified he had the Now Alleged Oral Agreement) to Richard Kelly, cc;ing Avi Feinberg and Robert Sorin, bearing bates stamp 001) suggest that if the five year paydown did not occur, the lender could claim against the collateral and Mr. Ashkenazy personally immediately:

> "If they don't pay down 10 mio by year 5, we are allowed to clim 20 mio against collateral AND a 20 mio personal guarantee from ben Ashkenazy"

Not a single document produced by the parties for *in camera* review support the idea that Mr. Ashkenazy's obligation is never due unless a refinancing occurs **and** not until maturity.

[5] 1. I am a partner of the firm Fried, Frank Harris, Shriver & Jacobson LLP with more than 30 years of experience as an attorney handling commercial real estate transactions.

2. I acted as transactional counsel to Plaintiff Talas Capital Designated Activity Company (f/k/a Talas Capital Limited) in drafting and negotiating the interrelated mezzanine loan documents and guaranty agreements memorializing the $195 million mezzanine loan made on November 25, 2013, which are the subject of this action, and I am fully familiar with the contents thereof.

3. I understand that the Guaranty of Recourse Payment Obligations (Mezzanine Loan), (the "Payment Recourse Guaranty"), executed by Ben Ashkenazy ("Ashkenazy") was the subject of an appeal taken from the Court's January 26, 2021 judgment in favor of Plaintiff and against Ashkenazy, and that on May 12, 2022, the Appellate Division vacated so much of the judgment as is against Ashkenazy, finding an ambiguity as to whether Ashkenazy's obligation to pay arose at the time of the Paydown Default, as that term is defined in the Mezzanine Loan Agreement, or upon the maturity of the mezzanine loan.

4. The Payment Recourse Guaranty is a type of guaranty known in the industry as a "bad boy" or "non-recourse carve-out" guaranty and is triggered by certain "bad boy" acts in which the individual who controls the relevant entities may cause the entities to engage. The individual guarantor who does so

also suggest that Mr. Ashkenazy did not have a good faith basis to argue that that there is a difference in timing between when his obligation was triggered and when his obligation is payable – *i.e.*, that his payment obligation is only due at maturity. Second, in response to the Court's order ordering both parties to produce for *in camera* review only documents for which the parties claimed privilege, Mr. Ashkenazy first offered to dump 700 documents on the Court. Then, after the Court granted Mr. Ashkenazy a number of extensions to review documents on which he had already claimed privilege, Mr. Ashkenazy delivered documents to the Court as to

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becomes immediately liable for the secured obligations or for the losses caused by the "bad boy" acts - a consequence that is supposed to serve as a disincentive for the individual to cause "bad boy" acts in the first place.

5. If called to give testimony at an evidentiary hearing, I would testify truthfully that the intent of the parties at the time the Payment Recourse Guaranty was negotiated and entered into was that Ashkenazy's obligation to pay arose immediately upon a Paydown Default if Ashkenazy caused a violation of either the Collins Pledge or Church Pledge by causing the refinancing of either of the underlying properties. That is the only interpretation of the Payment Recourse Guaranty that makes any sense in the context of the particular business deal the parties entered into. ***The parties knew and agreed that to have the requisite deterrent effect, the "bad boy" guaranty had to require the immediate imposition of liability upon the individual guarantor in the event he caused the entities he controls to engage in one of the enumerated "bad boy" acts, especially since, in the event of a "bad boy" act, the available collateral could be rendered insufficient to repay the amount owed.***

6. In other words, the entire purpose of the "bad boy" guaranty would be defeated if Ashkenazy were permitted to engage in a "bad boy" act threatening the lender's security interest in the collateral with no consequence until after the maturity of the loan.

7. ***The idea that recourse to the "bad boy" guarantor is immediate was the intent behind the language of Section 1.1 (a) of the Payment Recourse Guaranty, which provides that he guarantees "the payment and performance of the Guaranteed Obligations (as defined below) as and when the same shall be due and payable, whether by lapse of time, by acceleration of maturity or otherwise."***

8. ***I understand that the Appellate Division found it significant that the Payment Recourse Guaranty is not mentioned in the Mezzanine Loan Agreement, unlike the Payment Guaranty by the entity guarantors, which is. But this fact only reflects the intent of the parties that the Payment Guaranty was automatically operative and available as a remedy in the event of any Five Year Paydown Default, whereas the Payment Recourse Guaranty was not automatic, and would only be triggered if there was both a Five Year Paydown Default and a "bad boy" act. Again, it was not the parties' intent to require the lender to exhaust all remedies against the entity guarantors under the Payment Guaranty in the event of a "bad boy" act, but to enable to lender to have immediate recourse to Ashkenazy individually.***

(NYSCEF Doc. No. 76 [emphasis added]).

which no facial claim for privilege could exist, including because some documents included third-parties not within Mr. Ashkenazy's privilege (*e.g.*, Tom Glathaar, counsel to the title company). Ultimately, as the Court has now stated in certain case management orders, it is for the Plaintiff to decide whether to bring a further motion and whether to seek sanctions. For completeness, the Plaintiff has been urging this Court to hold a single issue hearing to resolve the ambiguity identified by the Appellate Division[6] since the Remittitur when they brought their motion seeking attachment which this Court denied (NYSCEF Doc. No. 81).

That Mr. Ashkenazy would like to argue that the documents do not support the Plaintiff's position can be addressed in his opposition to the Plaintiff's motion for summary judgment or in support of his own cross-motion for summary judgment. As such, reconsideration is not required. It also does not matter that following this Court's Prior Decision, Mr. Ashkenazy has now alleged new facts **that were always known to him**.

To wit, Mr. Ashkenazy has now, approximately three years into this litigation testified about the Now Alleged Oral Agreement. The lender and its counsel do not remember having any conversations about this alleged oral agreement and counsel to the Plaintiff indicates that it is at odds with the documents and urges the Court to hold a credibility hearing.[7] Mr. Ashkenazy also

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[6] "On remand, the Court can easily resolve the ambiguity with an evidentiary hearing. There are no material issues of fact concerning the underlying events; and no matter how cleverly Defendant's counsel argued its appellate issue, the ambiguity-issue is neither deep nor difficult" (NYSCEF Doc. No. 78, at 1-3).

[7] The Plaintiff argues that the testimony of Mr. Ashkenazy and Mr. Kriss is fundamentally at odds with the contemporaneous communications between the parties and in the non-privileged communication from Mr. Kriss (bates stamp 7456-57) which occurred ***after*** the Payment Recourse Guaranty was executed when he explained to Mr. Ashkenazy and a third party that Mr. Ashkenazy would never be liable under the Payment Recourse Guaranty unless he refinanced but did not mention in that communication that the obligation if triggered would only be due at maturity. The fact that this communication occurred after the Payment Recourse Guaranty was executed and that Mr. Ashkenazy was inquiring about how it worked is notable because it belies the notion that Mr. Ashkenazy did not

now claims that he never reviewed the loan documents and only made the business deal. In addition, Mr. Ashkenazy's transaction counsel now has testified that some of the correspondence that the Court reviewed pre-date the lender's requirement for a Payment Recourse Guaranty (ignoring that these emails and the business rationale for the requirement of a Payment Recourse

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rely on advice from counsel as to how the Payment Recourse Guaranty worked. The Plaintiff further argues that the response from Mr. Kriss highlights that the testimony is false because a sophisticated lawyer like Mr. Kriss would have mentioned that the obligation was only due at maturity if in fact this was the case and the "business deal." Indeed, the Plaintiff argues that there is not a single communication on either side indicating a difference in timing between the triggering of Mr Ashkenazy's obligation and that it would be due at a different time. This, according to the Plaintiff, is entirely made up and Mr. Ashkenazy's testimony about a difference in timing amounts to perjury. Mr. Ashkenazy testified that the lender had agreed to have this obligation triggered at maturity because of a reset in the rents:

> Q. So, let me just understand. The business deal was that the Lender could go after the collateral for the 20 million if the five-year paydown wasn't paid, correct?
> A. Correct.
> Q. But if you did something to impair their ability to go after that collateral triggering your guarantee, they would have to wait another five years to collect against you?
> A. Precisely.
> Q. Does that make sense, Mr. Ashkenazy?
> A. Not only does it make sense, it's what's like makes sense on steroids. Is there a word for that in the English vocabulary?
> Q. No.
> A. Well, then, let me explain it to you.
> Q. Okay.
> A. Ben Ashkenazy -- the business deal with Martin was never – was to never have to come out-of-pocket even in the event – in the event that I triggered my recourse until maturity of the loan. Because it was tied to the reset of the rent, and the reset of the rent was going to improve the – much improve the income. Was – the income was supposed to, at reset, be a multiple of many multiples of the current rent. And a year later, assuming I defaulted, and assuming I created recourse for myself for $20 million, which was also capped at $20 million, only at maturity, and only after that nine and a half years came due, and if the one wasn't paid in full, I would owe $20 million, not a penny more.

(NYSCEF Doc. No. 171, at 49-51, lines 24-25, 18-25 and 1-9). The Plaintiff's position appears to be that if the lender were to tie an obligation to increase equity / decrease the debt to equity ratio after five years (which Mr. Ashkenazy acknowledged in his deposition and the parties do not dispute [*id.*, at 35, lines 12-17]), based on the rent resets then the paydown date itself would have been tied to the rent resets – *i.e.*, there would not have been a five year paydown date, the obligation itself would have been due at maturity. This is not what the parties agreed and this is inconsistent with what the Appellate Division identified as ambiguous. It is undisputed that the paydown obligation was a five year obligation and that it was tied to that date. Mr. Ashkenazy also fails to explain why there would need to be a personal obligation at all if it was due at maturity because at maturity the whole loan is either getting paid off or refinanced and the need to increase equity / decrease the debt to equity ratio would seem to be moot. In other words, in sum and substance, and as Mr. Sorin previously explained under Mr. Ashkenazy's theory there would be no point to the Payment Recourse Guaranty at all. As discussed above, this all need not be addressed here by the Court as it is not relevant to this motion and can be addressed in the summary judgment motion and the joint-statement of facts that the Court indicated was appropriate.

Guaranty are relevant to the timing of when Mr. Ashkenazy's payment obligation is due). What does matter is that after the deal was already consummated, including after the Payment Recourse Guaranty was executed, questions were still being asked as to the operation of the Payment Recourse Guaranty and the circumstances under which Mr. Ashkenazy would be liable for the $20 million payment. At bottom these are issues that are appropriately addressed at summary judgment, and in being so addressed will assist the Court in deciding whether issues exist for trial.

Putting aside that the lender may not remember any Now Alleged Oral Agreement, and dispute whether any Now Alleged Oral Agreement occurred, and that the suggestion of any Now Alleged Oral Agreement is irreconcilable with the contemporaneous communications between the parties (as counsel to the Plaintiff has indicated), all of this new material offered by Mr. Ashkenazy can be addressed in the summary judgment briefing and certainly does not moot it.

With regard to discovery, it also was simply false for counsel to Mr. Ashkenazy to represent to the Court in writing that no documents squarely addressing or relevant to when Mr. Ashkenazy's payment obligation is due had been located[8]. This representation appears to have been an inappropriate attempt to limit discovery and was based on the fact that Mr. Ashkenazy and his attorneys were unable to locate documents or correspondence stating that his payment obligation is not due at maturity (as he contends) or that otherwise discusses a difference in timing between

[8] See Affirmation of Nora Bojar (NYSCEF Doc. No.107, ¶ 6) ["such privileged communications likely did not exist based on a current review of documents"]); Email, dated October 3, 2022, of Alexander Levi ("Mr. Ashkenazy is aware of no contemporaneous e- mail or other document squarely addressing the "timing" issue").

when his obligation was triggered and when he contends it is payable. This was not a valid basis for limiting discovery.

Documents are significant not only for what they do say but also for what they do not. The fact that there were documents discussing when Mr. Ashkenazy's obligation is triggered and do not discuss any difference in timing between when the obligation is triggered and when it is payable is directly relevant to the understanding of the timing issue of when Mr. Ashkenazy's obligation is payable. The Plaintiff is entitled to know that there are communications that do not discuss a difference in timing and use those materials in support of the Plaintiff's position. The Plaintiff is also entitled to know that there were non-privileged communications inquiring as to the operation of the Payment Recourse Guaranty ***after*** the Payment Recourse Guaranty was executed and that those non-privileged communications do not indicate that the Payment Recourse Guaranty is due at maturity.

Put another way, Mr. Ashkenazy's position that documents only are relevant if they specifically discuss a difference in the timing of when his obligation is triggered and when it is payable (if such documents exist) is based on a false premise. Relevant documents also include documents which pre-date the Payment Recourse Guaranty as they may explain why the parties negotiated a Payment Recourse Guaranty in the first place and why the obligation would be either due when triggered or due at maturity. Given that the Court had not (and has not) yet resolved the ambiguity identified by the Appellate Division, full discovery of documents which discuss the business deal, why there was a five year paydown obligation, why it did not cause an event of default under the mezzanine loan, why separate collateral was required, why a Payment

Recourse Guaranty was required and how such obligations are intertwined and support the underlying business deal is required. Mr. Ashkenazy did not present authority to this Court to support such a narrow scope of discovery especially in the wake of the Appellate Division decision holding that the contracts at issue were ambiguous.

Finally, with respect to briefing on summary judgment, it will be incumbent on Mr. Ashkenazy to address why, to the extent Mr. Ashkenazy relies on the Now Alleged Oral Agreement, this alleged agreement never was brought to the attention of the Court or the other parties– *i.e.*, in opposition to the motion for summary judgment in lieu of complaint, in opposition to the motion for attachment, or in opposition to the motion to compel. Inasmuch as Mr. Ashkenazy alleges to have had this Now Alleged Oral Agreement (which seemingly is at odds with the November 2013 Martin Frass-Ehrfeld email), this is not a fact learned during discovery and was not unknown when the prior motion, challenged here, was in front of this Court. Thus, the motion for reargument and renewal must be denied in its entirety.

The Court has considered Mr. Ashkenazy's remaining arguments and finds them unavailing.

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2/7/2023
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE