

**Roth v Board of Mgrs. of 299 W. 12th St.
Condominium**

2023 NY Slip Op 33581(U)

October 12, 2023

Supreme Court, New York County

Docket Number: Index No. 154315/2022

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MARY V. ROSADO PART **33M**

Justice

-----X

SCOTT ROTH, THE SCOTT ROTH 2001 TRUST

Plaintiffs,

- v -

BOARD OF MANAGERS OF 299 WEST 12TH ST.
CONDOMINIUM,

Defendant.

-----X

INDEX NO. 154315/2022
MOTION DATE 05/04/2023
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, good cause having been shown, Plaintiffs Scott Roth (“Mr. Roth”) and the Scott Roth 2001 Trust’s (the “Scott Roth Trust”) (together, “Plaintiffs”) motion for (1) an Order pursuant to CPLR 3124 to compel Defendant Board of Managers of 299 West 12th St. Condominium (“Defendant”) to produce all communications and memoranda sent between Defendant and its attorney concerning interpretation of the condominium Bylaws and/or house rules as it relates to the Neidichs’ use of units in the condominium; and (2) requesting an *in camera* review of the twenty-three communications identified as Defendant’s privilege Log and compelling Defendant to produce any unprivileged communications included therein, is granted in part and denied in part.

I. Background

The Scott Roth Trust is the legal owner of Unit 17ABC (the “Unit”) in a residential building located at 299 West 12th Street New York, NY 10014 (the “Building”) (NYSCEF Doc. 2 at ¶14). Mr. Roth is the beneficiary of the Scott Roth Trust (NYSCEF Doc. 2 at ¶14). Prior to

the commencement of this action, Plaintiffs complained to Defendant about excessive noise originating from their neighboring unit, Unit 17D (the “Neighboring Unit”) (NYSCEF Doc. 34 at p. 5). Plaintiff believed that the Neighboring Unit, which is owned by the Neidichs, was not being used for residential purposes and thus violated the bylaws of the Building (NYSCEF Doc. 2).

After Plaintiffs’ complaint, Defendant undertook an investigation and determined that the use of the Neighboring Unit “was proper, and that the activity observed through hours of video footage did not constitute excessive noise” (NYSCEF Doc. 34 at p. 6). Upon this determination, Plaintiffs filed the instant action on May 18, 2022, alleging causes of action for breach of fiduciary duty and private nuisance (NYSCEF Doc. 2).

Defendant withheld from Plaintiffs certain communications between Defendant’s members, their agents, and their attorney Ken Jacobs that “discuss legal advice given from counsel,” (NYSCEF Doc. 34 at pp. 12). as well as “litigation and [a] legal memorandum provided by in-house counsel” (NYSCEF Doc. 23 at p. 5).

Plaintiffs contend that during deposition testimony, Defendant’s agents asserted, *inter alia*, that “the use of the unit in question, Unit 17D, was permissible because [Defendant] received a legal opinion from [their] lawyer,” and that “they relied on the opinion of their lawyer when they concluded that the Neidichs’ use of Unit 17D complie[d] with condo Bylaws and rules” (NYSCEF Doc. 30 at p. 5). Plaintiffs argue that without disclosure of Defendant’s attorney communications and memorandum providing advice regarding Neidichs’ use of units in the condominium, Defendant would be permitted to “justify its actions and rebut Plaintiff[s]’ allegations by relying on an attorney’s opinion without ever disclosing that opinion or the information on which it was premised to Plaintiff[s].” (NYSCEF Doc. 30 at p. 6).

Plaintiffs commenced the instant motion (Mot. Seq. 2) by filing a Notice of Motion (NYSCEF Doc. 21) and Affirmation in Support (NYSCEF Doc. 22) on May 4, 2023. It is Plaintiffs' position that the aforementioned statements placed Defendant's attorney's legal opinion at issue, thereby waiving Defendant's right to claim attorney-client privilege with regard to all communications and memoranda sent between Defendant and its attorney concerning interpretation of the condominium Bylaws and/or house rules. (NYSCEF Doc. 30). Plaintiffs' motion further requests an *in camera* review of the twenty-three communications identified on Defendant's Privilege Log, and to compel Defendant to produce those communications, that do not merit protection (NYSCEF Doc. 30 at p. 14).

On May 17, 2023, Defendant filed an Affirmation (NYSCEF Doc. 31) and Memorandum of Law (NYSCEF Doc. 34) in opposition.

II. Discussion

a. Defendant's Claim of Attorney-Client and Privilege

CPLR 4503(a) protects confidential attorney-client communications from disclosure in most circumstances "unless the client waives the privilege." The First Department has held that the "attorney-client privilege applies to confidential communications between clients and their attorneys made in the course of professional employment, and such privileged communications are absolutely immune from discovery" (*N.Y. Times newspaper Div. v Lehrer McGovern Bovis, Inc.*, 300 AD2d 169, 171 [1st Dept 2002]). However, it is well settled that under the "at-issue" doctrine, "where a party placed legal advice or other privileged facts or communication at issue, it is deemed to have waived the privilege with respect to such facts or communications and can be compelled to produce them" (*American Re-Insurance Co. v United States Fid. & Guar. Co.*, 40 AD3d 486, 492 [1st Dept 2007]). The First Department has ruled that this doctrine "applies

where a party, through its affirmative acts, places privileged material at issue and has selectively disclosed the advice,” and “reflects the principle that privilege is a shield and must not be used as a sword” (*Id.*).

During discovery, Defendant’s managing agent, Mathew Veralli, testified that he assumed the use of the Neidichs’ unit complied with the house rules “because [he] believe[d] that there was a legal opinion by the condominium’s counsel rendered on this” (NYSCEF Doc. 24 at 69:23-70:12). While Defendant contends that Mr. Veralli’s testimony is unavailing because he “would not be involved in the Board’s decision regarding complaints brought by unit owners” (NYSCEF Doc. 34 at 9-10), Mr. Veralli testified that he attends Defendant’s board meetings (NYSCEF Doc. 24 at 111:1-4) and is responsible for resolving disputes on Defendant’s behalf.

Further, Defendant’s board member, Maria Cicero, testified that “[before the Neidichs rented [Unit] 17D, they also rented two other apartments [one of which was Unit 16E] for the same reason” (NYSCEF Doc. 26 at 37:14-19). after their investigation into another unit, Unit 16E, they took their findings to their attorney, Ken Jacobs, who “said that there was no violation of the bylaws and that...this was not a commercial occupancy of the space (NYSCEF Doc. 26 at 72:15 -74:6). Ms. Cicero confirmed that because the Neidichs told Defendant that their use of Unit 17D “would be the same” as it had been in Unit 16E, Defendant “conferred with [their] attorney again and basically did the same things that we did with 16E” (NYSCEF Doc. 26 at 104:19–105:3, 106:19-25).

Lastly, Defendant’s member Steven Foster testified that he assumed that the Neidichs’ use of the Neighboring Unit complied with the Building’s house rules “[b]ased on what [he had] been told by [their] lawyers” (NYSCEF Doc. 27 at 43:13-16).

Each of the above claims by Defendant's agents demonstrate a reliance on the advice of counsel, selectively disclosing otherwise privileged information from Defendant's attorney and placing the contents of that advice at issue. As a result, Defendant has waived their privilege with respect to disclosure of the subject communications and memorandum.¹

b. Plaintiffs' Motion for *In Camera* Review of Communications Identified on Defendant's privilege Log as Taking Place Between Exclusively Non-Lawyers

Given the Court's finding that Defendant's selective disclosure has waived its attorney-client and work-product privileges with respect to communications and memoranda concerning the advice of Defendant's counsel with regard to the Neidichs' use of units in the Building, Plaintiff's motion for an *in camera* review of portions of Defendant's privilege Log is denied as moot.

Accordingly, it is hereby

ORDERED that Defendant Board of Managers of 299 West 12th St. Condominium shall produce all communications and memoranda sent between Defendant and its counsel, and between Defendant's agents concerning Defendant's counsel's interpretation of the condominium Bylaws and/or house rules relating to the Neidichs' use of units in the Building, and it is further

ORDERED that Plaintiff Scott Roth and the Scott Roth 2001 Trust's motion for an Order directing an *in camera* review of the twenty-three communications identified on Defendant's privilege Log as taking place between exclusively non-lawyers is denied as moot, and it is further

¹ As an "at-issue" waiver applies equally to attorney-client privilege and the work-product doctrine, Defendant has also waived its privilege with respect to the work-product doctrine. *See Am. Re-Ins. Co. v U.S. Fidelity & Guar. Co.*, 40 AD3d 486 (1st Dept 2007) (holding that by placing privileged information "at-issue," an insurer thereby waived both attorney-client and work produce privileges).

ORDERED that within ten (10) days of entry, counsel for Plaintiffs Scott Roth and the Scott Roth 2001 Trust shall serve a copy of this Decision and Order, with notice of entry, upon Defendant via first-class mail at their last known business addresses; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

10/12/2023
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, 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