

**2138747 Ontario Inc. v Lehman Bros. Holdings, Inc.**

2024 NY Slip Op 30089(U)

January 9, 2024

Supreme Court, New York County

Docket Number: Index No. 156759/2017

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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2138747 ONTARIO INC. and KERRY ADLER,

INDEX NO. 156759/2017

Plaintiff,

MOTION DATE \_\_\_\_\_

- v -

LEHMAN BROTHERS HOLDINGS, INC.,

MOTION SEQ. NO. 008

Defendant.

**DECISION + ORDER ON  
MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449

were read on this motion to/for ENFORCEMENT.

Upon the foregoing documents, it is

In motion sequence number 008, defendant Lehman Brothers Holdings Inc. (LBHI) moves to compel plaintiff 2138747 Ontario Inc. (Ontario) to produce a complete privilege log that complies with CPLR 3122 (b); collect and produce responsive nonprivileged documents from Kerry Adler, Ontario's President and Director, and log the purportedly privileged ones, and produce all nonprivileged documents regarding the assignment at issue including documents over which Ontario has waived attorney-client privilege. LBHI also seeks to preclude Ontario from relying on the testimony of its counsel, Ellen Werther, Esq. or Bruce Ressler, Esq., related to topics on which Werther and Ressler refused to testify pursuant to the subpoenas *duces tecum* and *ad testificandum* served on them on March 7, 2023 (Subpoenas). Ontario cross-moves to

quash the Subpoenas pursuant to CPLR 3103 (a) and to sanction LBHI and its counsel under 22 NYCRR 130-1.1 for frivolous conduct.

### Background and Procedural History

The court's prior decision on motion sequence numbers 002, 003 and 004, provides a detailed background of the dispute, which will be supplemented as necessary for this motion.<sup>1</sup> (NYSCEF Doc. No. [NYSCEF] 190, Decision and Order [mot. seq. nos. 002, 003, 004].)

LBHI served its first request for production of documents upon Ontario on September 15, 2020 (First Production Request). (NYSCEF 215, Defendant's First Request for Production of Documents [September 15, 2020].) Ontario objected to LBHI's document requests and characterized them as vague, ambiguous, overly broad, unduly burdensome and seeking documents and information containing privileged communications, attorney-work product and trial preparation material. (NYSCEF 354, Ontario Responses to LBHI First Document Requests [October 14, 2020].) Subject to its general objections, Ontario agreed to produce nonprivileged documents responsive to 6 of the total 21 document requests. (*Id.*) On April 5, 2021, Ontario produced 61 documents in response to LBHI's First Production Request. (NYSCEF 352, Lee aff ¶¶ 6-7 [May 26, 2023].) According to LBHI, a number of these documents were missing attachments, 20 of the 61 documents produced by Ontario were duplicate documents, and none of the documents contained communications that pre-dated the assignment

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<sup>1</sup> The court presumes familiarity with the case and adopts all capitalized terms as used in the court's prior decision.

agreement at issue or any communication with Goodmans, the Canadian law firm that advised Ontario on the assignment transaction. (*Id.* ¶¶ 7-8.)

LBHI moved pursuant to CPLR 3124 to compel Ontario to produce all documents responsive to LBHI's First Production Request which had been withheld as purportedly privileged. (NYSCEF 212, Notice of Motion [mot. seq. no. 005].) Specifically, LBHI sought to compel Ontario to produce documents and communications between Ontario and its former counsel Goodmans and current counsel Ressler & Ressler (Ressler) that pertain to (a) the assignment of the LB Cause of Action, including advice related to the effectiveness of the assignment and Ontario's determination not to seek amendment or reformation of the assignment, and (b) Ontario's litigation strategy in the Samsung Action, including Ontario's decision to appeal and ultimately abandon the appeal of an August 29, 2016 Decision and Order. (NYSCEF 213, Defendant's Memo of Law at 4 [mot. seq. no. 005].) LBHI argued that Ontario waived its attorney-client privilege through the claims it made in this action.

In its order dated June 29, 2021, this court held that, by intentionally placing the subject matter of its lawyers' advice in issue in its complaint and selectively disclosing such advice, Ontario effected a subject matter waiver under New York law. (NYSCEF 298, Decision and Order on Motion [mot. seq. nos. 005, 006].) This court granted LBHI's motion to compel. (*Id.* at 4.) Ontario appealed that decision. (NYSCEF 304, Notice of Appeal.)

The Appellate Division, First Department reversed to the extent this court's decision granted LBHI's motion to compel disclosure of documents and communications between Ontario and its current and former counsel relating to an assignment of the LB

Cause of Action and Ontario's litigation strategy in the Samsung Action. (2138747 *Ontario Inc. v. Lehman Bros. Holdings, Inc.*, 210 AD3d 412, 413 [1st Dept 2022].) The First Department held that "[w]hile plaintiff has waived the attorney-client privilege as to any information that has already been revealed in the pleadings of the malpractice claims against Goodmans, there is no subject matter waiver as a result of these limited disclosures." (*Id.*)

While its motion to compel was pending, LBHI requested Ontario's confirmation that it had only 61 nonprivileged responsive documents in its possession, custody or control. (NYSCEF 352, Lee aff ¶ 9 [May 26, 2023].) Ontario's counsel confirmed that the 61 documents constituted all nonprivileged responsive documents in Ontario's possession and Ontario would supplement its document production if more documents were found later. (NYSCEF 356, Werther Email [April 9, 2021].) Ontario also refused to produce a privilege log while the court's decision on mot. seq. no. 005 was pending. (*Id.*)

In response, LBHI moved to compel Ontario to produce a privilege log identifying all responsive documents withheld on account of privilege. (NYSCEF 288, Notice of Motion [mot. seq. no. 007].) Ontario cross-moved<sup>2</sup> to compel LBHI to (a) "produce all documents ... by which LB SkyPower authorized LBHI to assign the LB Cause of Action" or produce a "sworn representation that no such documents exist and/or they cannot be located after a thorough review of LBHI's files;" (b) "serve amended Objections and Responses to Ontario's First Document Requests;" and (c) "produce a

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<sup>2</sup> Ontario filed its cross-motion on November 30, 2022, after the First Department rendered its decision in *2138747 Ontario Inc. v. Lehman Bros. Holdings, Inc.*, 210 AD3d 412.

categorical privilege log reflecting all documents withheld from production and/or redacted.” (NYSCEF 333, Notice of Cross-Motion [mot. seq. no. 007].)

On February 6, 2023, this court granted LBHI’s motion and directed Ontario to produce a privilege log and all nonprivileged documents relating to the assignment by March 10, 2023. (NYSCEF 347, Decision and Order [mot. seq. no. 007]; NYSCEF 349, So-Ordered Transcript [mot. seq. no. 007].)<sup>3</sup> This court also directed Adler, Ontario’s corporate representative, to appear for a deposition in New York and for all depositions to be completed by April 7, 2023. (*Id.*)

On March 10, 2023, Ontario served a privilege log and a supplemental document production bates-stamped ONTARIO001323-014401. (NYSCEF 352, Lee aff ¶ 24 [May 26, 2023]; NYSCEF 364, Ontario Privilege Log.) LBHI claims that the privilege log produced by Ontario was deficient as the items on Ontario’s privilege log were not numbered, and of the 606 items on the log, 605 had been completely withheld. (NYSCEF 352, Lee aff ¶ 25 [May 26, 2023].) LBHI also claims that the supplemental document production consisted of 1,464 documents, 605 of which were 1-page bates-stamped slipsheets for the documents completely withheld on Ontario’s privilege log and the remaining 859 documents were produced in unredacted or partially redacted form. (*Id.* ¶ 27.) Further, ‘Ontario’ was identified as the ‘custodian’ for all 859 documents, leading LBHI to believe that Ontario did not collect any of the documents produced from Adler’s files. (*Id.* ¶¶ 29, 34, 38.) LBHI asserts that the Ontario privilege

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<sup>3</sup> In its March 15, 2023 order, this court also granted Ontario’s cross-motion in part and directed LBHI to produce the LB Skypower corporate resolution authorizing LBHI to assign the LB Cause of Action and a privilege log reflecting all documents withheld from production and/or redacted by March 10, 2023. (NYSCEF 347, Decision and Order [mot. seq. no. 007].)

log did not comply with CPLR 3122 (b) as it did not mention the legal ground for withholding or the document's general subject matter or a description of the document; it also failed to indicate whether any of the emails, which appeared to be most of the documents on the Ontario privilege log, had attachments and whether the attachments had been produced.

On June 16, 2023, Ontario produced 390 documents and an amended privilege log. (NYSCEF 406, Lee aff ¶¶ 4-5 [June 29, 2023]; NYSCEF 407, Ontario June 16, 2023 Production Email.) On June 23, 2023, after LBHI identified several redacted documents that were not privileged and improperly redacted, Ontario produced these documents and served a subsequent amended privilege log (Ontario Amended Privilege Log). (NYSCEF 406, Lee aff ¶ 5 [June 29, 2023]; NYSCEF 408, Ontario Amended Privilege Log.) On June 23, 2023, Ontario also produced an additional 575 documents purportedly collected from Adler's files. (NYSCEF 406, Lee aff ¶ 6 [June 29, 2023]; NYSCEF 409, Ontario June 23, 2023 Production Email.) Ontario also shared a privilege log for the documents purportedly collected and produced from Adler's files. (NYSCEF 406, Lee aff ¶ 8 [June 29, 2023]; NYSCEF 410, Privilege Log for Adler Production.) LBHI asserts that this was the first time Ontario produced documents purportedly collected from Adler. LBHI claims that many of these documents reveal facts not previously known and the belated production deprived LBHI of its right to review these documents prior to Adler's deposition. LBHI further asserts that these documents appears to contradict Adler's prior testimony, which deprived LBHI of an opportunity to question Adler at his deposition about the inconsistencies.

## Discussion

### Amended Privilege Log

On July 17, 2023, at argument on this motion, LBHI's counsel informed the court that it had received an amended privilege log along with additional documents on that morning, and thus, its request for an amended privilege log was moot and/or not ripe. (NYSCEF 445, tr at 4:15-25; 5:1-2 [mot. seq. no. 008].) As Ontario's previous privilege logs designated 'Ontario' as the custodian for all documents despite many of the documents being admittedly collected from other sources including Adler, this court directed Ontario to reissue the privilege logs accurately identifying the custodian for each document by July 24, 2023. (*Id.* at 25:4-26:2.) Ontario's counsel filed an affirmation stating that an amended privilege log identifying Adler as the custodian for the relevant documents has been shared with LBHI. (NYSCEF 434, Werther aff ¶ 8 [July 24, 2023].) Considering the foregoing, LBHI's request for an order compelling Ontario to produce an amended privilege log is denied as moot.

### Adler Deposition

LBHI deposed Adler on April 3, 2023. (NYSCEF 363, Adler deposition [April 3, 2023].) At the time Adler was deposed, Ontario had produced a total of 920 documents (61 documents on April 5, 2021 and 859 documents on March 10, 2023). Notably, the privilege log as of that date designated 'Ontario' as the custodian for all these documents leading LBHI to reasonably believe that none of these documents had been collected from Adler's possession or custody. Due to the issues with the custodian identification on the privilege logs and post-deposition production, LBHI requests a second deposition of Adler and for reimbursement of its costs in conducting the prior

deposition. The court granted LBHI's request that Adler appear for further deposition. (NYSCEF 445, tr at 24:22-25:3, 37:6-8 [mot. seq. no. 008].) Ontario only objected to any repetitive questioning. (*Id.* at 38:14-17), which the court made clear will not be permitted. (*Id.* at 38:18-21).

Prior to the Adler deposition on April 3, 2023, Ontario had not produced a single document collected from Adler's custody or possession with such documents only being produced for the first time on June 23, 2023. (NYSCEF 406, Lee aff ¶ 6 [June 29, 2023]; NYSCEF 409, Ontario June 23, 2023 Production Email.) Despite this court directing Ontario to produce all nonprivileged documents relating to the assignment by March 10, 2023, Ontario produced additional responsive documents after the expiration of this deadline. (NYSCEF 347, Decision and Order [mot. seq no. 007].) Ontario explains that the delay in production was due to the First Department's stay on discovery of privileged information from August 4, 2021 to November 1, 2022 and "[g]iven the shortness of time between the expiration of the First Department stay of discovery and the deadlines fixed by this Court's March 15, 2023 Order, it was impossible for Mr. Adler to complete his exhaustive search of records before his April 4, 2023 deposition." (NYSCEF 434, Werther aff ¶¶ 15, 18 [July 24, 2023].)

As the stay on discovery only applied to privileged information, Ontario was at liberty to produce nonprivileged documents from Adler during the time the stay was in effect. Further, Ontario has failed to exercise the requisite level of diligence in responding to LBHI's document production requests even after November 1, 2022. For instance, after this court directed Ontario to produce all nonprivileged documents in its possession along with a privilege log so its claims of privilege could be tested, Ontario

produced 859 responsive non-privileged documents on March 10, 2023, and thereafter produced 390 additional documents on June 16, 2023 claiming that these documents had been “inadvertently designated as privileged.” (NYSCEF 432, Werther aff ¶ 4 [July 14, 2023].) Many of these documents are communications with third parties -- evidently nonprivileged (see *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 [2016]) -- and could have been produced by Ontario much earlier. Ontario’s belated production of documents, including documents collected from Adler, deprived LBHI of its right to effectively depose Adler the first time, and therefore, Ontario is responsible for the LBHI’s costs in re-deposing Adler.

CPLR 3126 provides that if a party “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed..., the court may make such orders with regard to the failure or refusal as are just.” A court may impose a monetary sanction of an award of reasonable attorneys’ fees and costs “to compensate counsel or a party for the time expended and costs incurred in connection with an offending party’s failure to fully and timely comply with court-ordered disclosure.” (*Maxim, Inc. v Feifer*, 161 AD3d 551, 554 [1st Dept 2018], [citation omitted].)

Since Ontario’s belated document production long after March 10, 2023 and subsequent to Adler’s deposition coupled with its lack of diligence in responding to discovery requests has contributed to the need for a second deposition of Adler, Ontario’s conduct warrants a monetary sanction pursuant to CPLR 3126. Ontario is directed to reimburse the cost of the court reporter’s services for the first deposition to the party who paid for these services. Ontario is also directed to reimburse LBHI for

reasonable attorneys' fees incurred by LBHI in conducting the second Adler deposition. LBHI's request seeking costs and attorneys' fees in bringing this motion is denied.

#### Adler's Notes

At his deposition, Adler testified that he takes and keeps notes of important events. (NYSCEF 363, tr at 103:22-104:7, 104:15-22 [Adler Deposition].) Adler has not produced any notes in response to LBHI's production requests. (NYSCEF 445, tr at 9:11-15 [mot. seq. no. 008].) Ontario claims that despite an extensive search, Adler has not been able to locate these notes. (*Id.* at 9:21-10:8.) Ontario has produced an affidavit from Adler attesting to this fact. (NYSCEF 433, Adler aff [July 5, 2023].) Since Adler testified that he regularly takes and keeps notes pertaining to "important things", Ontario was directed to produce an affidavit from Adler explaining how he usually deals with these notes. (NYSCEF 445, tr at 10:7-9 [mot. seq. no. 008].) Since then, Adler filed an affirmation stating that his regular business practice during the period in question was to take handwritten notes of discussions on any documents being discussed and/or take handwritten notes on separate pads or notebooks. (NYSCEF 449, Adler aff ¶ 7 [August 5, 2023].) Adler affirms that his handwritten notes on separate pads/notebooks were stored in a separate storage facility (along with other papers and personal property) and most of his property in the storage facility including all his handwritten notes was destroyed by rats and other vermin. (*Id.* ¶¶ 7-8.) Adler states that the loss of his notes and other personal property in the storage facility is the subject of an ongoing insurance coverage assessment in Ontario, Canada. (*Id.* ¶ 7.)

Ontario is directed to produce the insurance claim for the loss of Adler's property within 30 days of this decision.

### Production of Nonprivileged Documents

LBHI seeks production of all nonprivileged documents regarding the assignment at issue in this action, including documents over which Ontario has waived attorney-client privilege. LBHI seeks specific communications referenced in Ontario's pleadings, including paragraphs 25 and 38 of the amended complaint. The First Department held "[w]hile plaintiff has waived the attorney-client privilege as to any information that has already been revealed in the pleadings of the malpractice claims against Goodmans, there is no subject matter waiver as a result of these limited disclosures." (2138747 Ontario, 210 AD3d at 413.) Therefore, Ontario can withhold communications with its attorneys pertaining to the assignment at issue if these communications have not been "revealed in the pleadings." Ontario is directed to produce all other nonprivileged documents pertaining to the assignment at issue in this action, including the documents filed by Goodmans in this action, within 14 days of the date of this order.

### Subpoenas served on Ellen Werther and Bruce Ressler

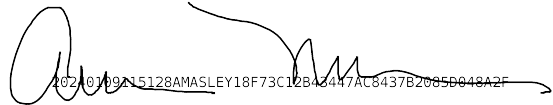
LBHI served the Subpoenas on Werther and Ressler, commanding Werther and Ressler to appear for a deposition and to produce documents as requested in the subpoenas. (NYSCEF 359, Subpoena to Ellen Werther [March 7, 2023]; NYSCEF 360, Subpoena to Bruce Ressler [March 7, 2023].) Ontario cross-moves to quash the Subpoenas. LBHI seeks to preclude Ontario from relying on the testimony of Werther and Ressler in this action. On August 7, 2023, Werther and Ressler filed a joint affirmation stating that they will not testify at any trial held in this action. (NYSCEF 448, Werther & Ressler Joint aff [August 7, 2023].)

LBHI’s request for an order to preclude Ontario from relying on the testimony of Werther and Ressler is denied as moot. As LBHI is not seeking to enforce the Subpoenas, but rather, opted to preclude potential testimony of Werther and Ressler (NYSCEF 405, Defendant’s Memo of Law [June 29, 2023] at pg.10; NYSCEF 445, tr at 44:19-25 [mot. seq. no. 008]), the joint affirmation resolves this issue. Ontario’s cross-motion to quash the subpoenas is denied as moot. The court has considered Ontario’s arguments for imposing sanctions against LBHI and its counsel under 22 NYCRR 130-1.1 and considers them unavailing. Ontario’s cross-motion to impose sanctions against LBHI and its counsel is denied.

Accordingly, it is

ORDERED that LBHI’s motion to compel is granted, in part, in accordance with this court’s decision above; and it is further

ORDERED that Ontario’s cross-motion is denied.



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<u>1/9/2024</u> DATE					<u>ANDREA MASLEY, J.S.C.</u>			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
APPLICATION:	<input type="checkbox"/>	GRANTED			<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE