

CWCapital Cobalt VR Ltd. v CWCapital Invs. LLC

2024 NY Slip Op 30274(U)

January 20, 2024

Supreme Court, New York County

Docket Number: Index No. 653277/2018

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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<p>CWCAPITAL COBALT VR LTD.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>CWCAPITAL INVESTMENTS LLC and CWCAPITAL ASSET MANAGEMENT LLC,</p> <p style="text-align: center;">Defendants.</p>	<p>INDEX NO. <u>653277/2018</u></p> <p>MOTION DATE _____</p> <p>MOTION SEQ. NO. <u>013</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 013) 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 400, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 424, 425, 426, 427, 428, 429, 430, 431, 455 were read on this motion to/for DISCOVERY.

Upon the foregoing documents, it is

In motion 013 (653277/2018) and 011 (652092/2018), CWCapital Cobalt VR Ltd. (Cobalt) moves pursuant to CPLR 3104(d), for an order vacating the referee’s March 22, 2023 Order denying Cobalt’s motion for in camera review of documents from defendants CWCapital Investments LLC (CWCI) and CWCapital Asset Management LLC (CWCA) and ordering such in camera review. (NYSCEF Doc. No. [NYSCEF] 382, Notice of Motion.) The motion is granted.

Cobalt alleges CWCA foreclosed on Stuy Town four years after the borrower’s 2010 default during which time, penalty interest accumulated in an amount of over \$600 million, payable to CWCA upon sale of Stuy Town as compensation to CWCA. (NYSCEF 190, Am Complaint ¶¶6, 67, 68, 96, 97, 104.) Colbalt alleges that CWCA structured the settlement with Stuy Town’s junior lenders –the Mezzco plaintiffs – to protect CWCA’s penalty interest and pay the Mezzco plaintiffs at the expense of Cobalt.

(*Id.* ¶¶104, 105.) With this motion, Cobalt seeks discovery on the subject of the internal analysis of the Stuy Town settlement.

Cobalt “seeks in camera review of 35 of the more than 200 emails on the basis that these 35 emails were exchanged between non-lawyers with counsel copied on the emails but not actively participating in the discussion.” (NYSCEF 418, Ref. Gold’s March 22, 2023 Order at 3.)

“CW . . . has provided to Cobalt in this litigation a privilege log listing more than two hundred emails sent during the approximately four weeks during which the Stuy Town settlement negotiations were taking place. The privilege descriptions set forth in the log state only ‘Attorney-client email chain with in-house counsel advising on MezzCo litigation;’ ‘Attorney-client email chain with outside counsel advising on MezzCo litigation;’ and ‘Attorney-client email chain with in-house counsel and outside counsel advising on MezzCo litigation.’ Cobalt contends that these are rote, inadequate descriptions and seeks an order directing CW to produce a revised log with additional information.”

(*Id.*)

Referee Gold¹ denied in camera review on the record after argument. (NYSCEF 386, tr 133:12-134:13.) He explained in a written opinion “[the] facts strongly suggest that the attorney-client privilege and work-product protection were properly invoked.” (NYSCEF 418, Ref. Gold’s March 22, 2023 Order at 6.) “The emails were created during a brief time period by a discrete group of individuals all involved in the same challenging project: the settlement of a complex commercial litigation, an essentially legal undertaking.” (*Id.*) At argument, an attorney for CW in the prior litigation at issue and this litigation, told Referee Gold that “he remembers these conversations and participated in them,” and Referee Gold relied upon this statement. (NYSCEF 386, tr

¹ Honorable Steven M. Gold (Ret.) was appointed as Discovery Referee by September 10, 2021 Stipulation Regarding Appointment of Discovery Master. (NYSCEF 292, Stipulation.)

133:22-134:3, 133:1-22.) Referee Gold credited CW's second review as a "demonstration of good faith." (NYSCEF 418, Ref. Gold's March 22, 2023 Order at 6.) Referee Gold also considered that alternative discovery would be available to Cobalt because it could depose CW's witnesses about the settlement. (NYSCEF 418, Ref. Gold's March 22, 2023 Order at 5.) Finally, Referee Gold acknowledged "[a]lthough it seems reasonable to infer that there may have been business considerations that informed the settlement discussions, that is not fatal to CW's assertion of privilege; even when non-legal matters are discussed, a communication remains privileged if its 'predominant purpose' is to obtain or provide legal advice," relying on *Pearlstein v BlackBerry Ltd.*, 2019 WL 1259382, *4 (SD NY, Mar. 19, 2019, No. 13-CV-07060 [CM] [KHP]), an SDNY case that does not reference *Spectrum*. (NYSCEF 418, Ref. Gold's March 22, 2023 Order at 6.)

The standard of review of a discovery referee's decision is whether the decision is clearly erroneous or contrary to law. (*CIT Project Fin. v Credit Sussie First Boston LLC.*, 7 Misc 3d 1002[A], 2005 NY Slip Op 50406[U], *2 [Sup Ct, NY County 2005].)

Here, the applicable law is "whether a particular document is or is not protected is necessarily a fact-specific determination most often requiring in camera review." (*Spectrum Sys. Intern. Corp. v Chem. Bank*, 78 NY2d 371, 378 [1991] [citation omitted].)² "[A] court is not required to accept a party's characterization of material as privileged or confidential." *Rickard v New York Cent. Mut. Fire Ins. Co.*, 164 AD3d 1590, 1592 [4th Dept 2018].) A communication "does not become privileged merely

² Despite its age, *Spectrum* remains good law, contrary to CW's aspersions. (See *Bronstein v Omega Constr. Group, Inc.*, 221 AD3d 577 [2d Dept 2023].)

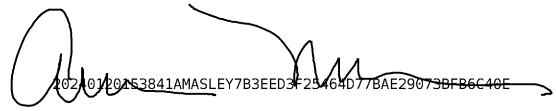
because it was sent to an attorney.” (*Id.* at 379.) CW has the burden, as the proponent of the privilege, to show “that the communication is predominantly of a legal character.” (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 [2016].) However, “[t]he burden cannot be satisfied by counsel’s conclusory assertions of privilege and competent evidence establishing the privilege must be set forth by the party asserting the privilege.” (*OMNI Health & Fitness Complex of Pelham, Inc. v PIA-Acadia Pelham Manor, LLC*, 33 Misc 3d 1211[A], 2011 NY Slip Op 51895[U], *2 [Sup Ct, Westchester County 2011].)

While the court finds that Referee Gold’s decision is obviously well reasoned, there has been a change in circumstances since the decision. Cobalt subsequently took the relevant depositions, but the witnesses had no recollection beyond what the documents said. (NYSCEF 455, tr 17:23-18:9.) Accordingly, if even one of the 35 emails is discoverable, its absence could be prejudicial; one such email is already known. Referee Gold identified one of the 35 emails on which counsel was not copied. (*Id.* at 3, fn 1.) The court finds that CW’s review and re-review are not reliable. CW inconsistently redacted for privilege an email that was initially produced as nonprivileged; scheduling a meeting is not privileged. (NYSCEF 390, Non-privileged email produced as CW0571209; NYSCEF 391, CW0571192; NYSCEF 392 CW0571240.) Moreover, the current practice in the Commercial Division favors performing reasonable in camera reviews, when permitted under *Spectrum*, particularly when a discovery referee is in place. (See *Commercial Litigation in New York State Courts*, 4th ed., 2023, § 30:47, CPLR 3122(b) and Commercial Division Rule 11-b, n 29.) This is so when the issue is one of the most intricate in commercial practice:

whether settlement discussions among attorneys and businesspeople are predominantly legal or business in nature. (See *OMNI Health & Fitness Complex of Pelham, Inc.*, 33 Misc 3d 1211[A], 2011 NY Slip Op 51895[U], *3; *In re Bekins Rec. Storage Co., Inc.*, 62 NY2d 324, 327 [1984].)

Accordingly,

ORDERED that the Referee’s March 22, 2023 Order denying Cobalt’s motion for in camera review of CW’s documents is vacated and the Referee is directed to perform an camera review of the 35 documents within 30 days of this order.



1/20/2024
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: