Perella Weinberg Partners LLC v Kramer
2025 NY Slip Op 30433(U)
January 23, 2025
Supreme Court, New York County
Docket Number: Index No. 653488/2015
Judge: Robert R. Reed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 43

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PERELLA WEINBERG PARTNERS LLC, PWP MC LP, PWP EQUITY I LP, PERELLA WEINBERG PARTNERS GROUP LP,

Plaintiff,

- v -

MICHAEL A. KRAMER, DERRON S. SLONECKER, JOSHUA S. SCHERER, ADAM W. VEROST, DUCERA PARTNERS LLC,

Defendant.

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INDEX NO. 653488/2015

MOTION DATE 04/10/2024

MOTION SEQ. NO. 020

DECISION + ORDER ON MOTION

MICHAEL KRAMER, DERRON SLONECKER, JOSHUA SCHERER, ADAM VEROST

Plaintiff,

-against-

JOSEPH PERELLA, PETER WEINBERG, KEVIN COFSKY

Defendant.

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Third-Party
Index No. 595812/2015

HON. ROBERT R. REED:

The following e-filed documents, listed by NYSCEF document number (Motion 020) 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1051, 1074, 1075, 1076, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119

were read on this motion to QUASH SUBPOENA, FIX CONDITIONS.

This breach of contract dispute arises out of defendants' departure from plaintiff investment firm. Trial is scheduled to commence on January 24, 2025.

In motion sequence 020, nonparty Weil, Gotshal & Manges LLP (Weil Gotshal) moves, pursuant to CPLR 2304, to quash a judicial subpoena duces tecum and ad testificandum served by defendants on nonparties Weil Gotshal, Jeffrey S. Klein (Klein) and A. Millie Warner (Warner). Counsel also moves, pursuant to CPLR 3103, for a protective order precluding

defendants from requesting documents or testimony from the nonparty witnesses. For the foregoing reasons, the motion to quash is granted.

At the commencement of this suit, Weil, Gotshal & Manges LLP, by counsel Jeffrey S. Klein and A. Millie Warner, served as counsel representing the interests of plaintiffs Perella Weinberg Partners LLC, PWP MC LP, PWP Equity I LP, and Perella Weinberg Partners Group LP (NYSCEF doc. no. 1). Counsel participated in the litigation for four (4) years, and were relieved, on consent, in 2019 (NYSCEF doc. nos. 324, 332, 335).

In preparation for trial, counsel for defendants served three judicial subpoenas duces tecum and ad testificandum on former counsel for plaintiffs. The subpoenas demanded the appearance of the nonparties to give testimony at trial, and demanded the production of memoranda, notes, and communications "regarding compliance errors made in connection with Perella Weinberg's deferral of compensation owed to Michael A. Kramer and Derron S. Slonecker" (NYSCEF doc. nos. 1041-1043). The request purportedly relates to a memorandum referenced in a *New York Post* article dated August 22, 2019 titled, "Top Law Firm Weil Gotshal Botched Millions in Pay for Bankers." The subpoena seeks the disclosure of internal notes and communications prepared by attorneys Klein and Warner purportedly following the filing of this action and during the pendency of the suit (NYSCEF doc. no. 1038, pg. 13).

Weil Gotshal, Klein, and Warner move to quash defendants trial subpoenas on the grounds that the information sought is protected by the attorney/client privilege and prohibited from disclosure by the attorney work product doctrine. The parties submit that the thoughts, impressions, and strategy of counsel constitute the quintessential example of protected attorney work product and client communications, and are immune from disclosure (*Rossi v Blue Cross & Blue Shield of Greater NY,* 140 Ad2d 198 [1st Dept 1988]).

Plaintiffs filed an affirmation in support of Weil Gotshal's request to quash defendants' subpoenas. According to plaintiffs, defendants demanded production of this same information during discovery (NYSCEF doc. no. 320) and made several requests of the court for disclosure (NYSCEF doc. no. 314). Counsel affirms that the disclosure of these documents was discussed with the court on October 15, 2019, and defendants' request was summarily denied (NYSCEF doc. nos. 1074-1075). Plaintiffs submit that the documents and testimony sought by defendants are unquestionably privileged, and are irrelevant to the triable issues before this court, and that defendants' issuance of the subpoenas for this material represents an improper last-ditch effort to reopen discovery.

In opposition, defendants submit that plaintiffs have not adequately established that the information sought is privileged. Defendants challenge the argument that the requested information was prepared for litigation purposes. Defendants submit that the requested notes and memorandum were prepared for the purpose of determining whether Weil Gotshal had exposure to risk of suit from plaintiffs for its failure to have structured plaintiffs' compensation extension properly (NYSCEF doc. no. 1107, pg. 2), and do not reflect legal advice or thoughts and impressions immune from disclosure. Defendants further argue that privilege does not attach because defendants were the possessors of the privilege at the time the document was generated as clients of Weil Gotshal, and submit that, even if the documents were privileged, they still must be disclosed because plaintiffs waived privilege by disclosing the information voluntarily to the New York Post. Finally, defendants allege that the crime fraud exception should apply because the documents at issue were made in furtherance of Weil Gotshal's "fraud" and malpractice, and request that this court review the documents, in camera, prior to disclosure.

The CPLR establishes three categories of protected materials: privileged matter, attorney work product and trial preparation materials (*Spectrum Sys. Int'l Corp. v Chem. Bank*, 78 NY2d 371, 377 [1991]). The attorney-client privilege shields from disclosure confidential communications between an attorney and client made for the purpose of obtaining legal advice (CPLR 4503[a][1]). It is narrowly construed so as to not be in tension with the court's policy favoring liberal discovery (*Spectrum,* 78 NY2d at 377). The party asserting the privilege bears the burden of establishing entitlement to the privilege, as well as the burden of showing confidentiality has not been waived (*id.*).

Communications do not automatically obtain privilege status merely because they were created or communicated by an attorney (*Spectrum v Chem. Bank,* 157 AD2d 444, 447, *citing, Rossi v Blue Cross*, 73 NY2d 588, 594 [1989][where corporations are concerned, caution must be exercised to prevent the mere participation of an attorney in an internal investigation from being used to seal off disclosure]). However, if the communications are transmitted in the course of professional employment, that convey a lawyer's assessment of the client's legal position, the privilege will apply (*Spectrum,* 78 NY2d at 378).

It is alleged that, in 2015, an internal meeting was had regarding actions taken (or not taken) with respect to Perella's DCA filings. Warner and Klein were both employed by Weil Gotshal at that time and worked as counsel for Perella. Therefore, there can be no question that any communication between Weil Gotshal and Perella, including any work product generated by the attorneys acting on behalf of Perella, regarding legal issues faced by Perella, are communications covered by the attorney-client privilege (CPLR 4503; *Rossi v Blue Cross & Blue Shield*, 73 NY2d 588, 593[1989][the test for privilege is whether the client communicates with an attorney, in confidence, for the purpose of obtaining legal advice]).

Similarly, any document generated, or prepared by Warner and Klein, that contains legal analysis, thoughts theory or strategy, is protected work product exempt from disclosure. The filing of the extension forms is an issue directly related to Weil Gotshal's representation of plaintiffs (*Bent-Anderson v Singh*, 209 AD3d 710, 711 [2d Dept 2022]["Attorney work product under CPLR 3101(c), which is subject to an absolute privilege, is generally limited to materials prepared by an attorney, while acting as an attorney, which contain his or her legal analysis, conclusions, theory, or strategy"]). The question, therefore, for this court, is whether the privilege that covers the subject documents and communications, was waived, warranting its disclosure to defendants.

In general, disclosure of a privileged document operates as a waiver of privilege (*New York Times Newspaper Div. of New York Times Co. v Lehrer McGovern Bovis, Inc.*, 300 AD2d 169, 172 [1st Dept 2002]). This is so, unless the party asserting the privilege meets its burden in proving that (1) it intended to maintain confidentiality and took reasonable steps to prevent its disclosure, (2) it promptly sought to remedy the situation after learning of the disclosure, and (3) the party in possession of the materials will not suffer undue prejudice if a protective order is granted (*AFA Protective Sys., Inc. v City of New York*, 13 AD3d 564, 565 [1st Dept 2004]).

The record before the court is insufficient to support a finding of waiver, and to overcome the general presumption that communications with counsel and attorney work product are privileged. The court declines to accept defendants' argument that the mere possession of presumed privileged information by the New York Post supports the finding that the privilege covering the material was intentionally waived. There is no evidence before this court to support the argument that plaintiffs, the holders of the attorney client privilege, waived their right by intentionally disseminating covered information or disclosing information to a third party. The

record does not establish what steps, if any, were taken to prevent disclosure, plaintiffs' intent to maintain confidentiality, or what prejudice, if any, would occur should the documents be disclosed.

Neither is there any evidence that Warner, Klein or Weil Gotshal, waived the work product privilege by exchanging its work materials. Although it appears clear that the New York Post received information from a source regarding the details of a dispute regarding Weil Gotshal's representation of plaintiffs, there is no evidence as to what was disclosed to the New York Post, how it was disclosed, and whether the information provided was, in fact, privileged material. Further, there is no evidence that Perella placed the contents of the memoranda, notes or communications "at issue" warranting invasion of the privilege (*Deutsche Bank Tr. Co. of Americas v Tri-Links Inv. Tr.*, 43 AD3d 56, 63 [1st Dept 2007] citing *Arkwright Mut. Ins. Co. v Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 1994 WL 510043, *11 [SDNY 1994] ["at issue" waiver occurs where the party asserting privilege performs an "affirmative act" that "put(s) the protected information at issue by making it relevant to the case" under circumstances where "application of the privilege would have denied the opposing party access to information vital to his defense"]).

There are no grounds for this court to presume that waiver of a validly asserted privilege occurred, and no evidence that "invasion of the privilege is required to determine the validity of the client's claim or defense and application of the privilege would deprive the adversary of vital information" (*Credit Suisse First Bos. v Utrecht-Am. Fin. Co.*, 27 AD3d 253, 254 [2006]). This is so, especially, where, as here, there is no showing of "prejudice that failure to breach the privilege would cause because there was sufficiently available means of discovery to defendants" on the claims and regarding this issue (*id.*).

Next, defendants argue that the crime-fraud exception justifies disclosure of the privileged material. "The crime/fraud exception to the attorney-client privilege is aimed at serious misconduct, and it can be invoked only if the party seeking to invoke it demonstrates that there is probable cause to believe that a fraud or crime has been committed and that the communications in question were in furtherance of the fraud or crime" (*HSH Nordbank AG New York Branch v Swerdlow*, 259 FRD 64 [SDNY 2009]). This court is not persuaded that Weil Gotshal's communications were undertaken in the furtherance of a crime or criminal enterprise and does not find any evidence of fraud or fraudulent intent sufficient to invoke the crime-fraud exception. The question of the propriety of Weil Gotshal's legal advice and conduct with respect to the timeliness of the DCA extension filings, and any resultant federal tax obligation, is not an issue before this court, on trial, at this time.

Defendants next argue that their status as Perella partners placed them within the cloak of attorney confidentiality and entitles them to disclosure of the subject information. Defendants submit that they were beneficiaries of the legal advice provided by Weil Gotshal at the time the communications and legal advice were prepared. This argument – entitlement to information as the intended beneficiary – is more simply set forth in what is known as the "fiduciary exception" to the general attorney client privilege rule.

"English courts first developed the fiduciary exception as a principle of trust law in the 19th century. The rule was that when a trustee obtained legal advice to guide the administration of the trust, and not for the trustee's own defense in litigation, the beneficiaries were entitled to the production of documents related to that advice. The courts reasoned that the normal attorney-client privilege did not apply in such situation because the legal advice was sought for the beneficiaries' benefit and was obtained at the beneficiaries' expense by using trust funds to pay

the attorney's fees" (*Stock v Schnader Harrison Segal & Lewis LLP*, 142 AD3d 210, 217 [1st Dept 2016], citing, *U.S. v Jicarilla Apache Nation*, 564 U.S. 162 [2011]).

In *Beck v Manufacturers Hanover Trust Co.*, the Appellate Division, in declining to recognize the exception, wrote:

> "[T]o the extent that plaintiffs seek access to communications and documents concededly falling within the protective ambit of the attorney-client privilege, their disclosure request is without merit. While plaintiffs as trust beneficiaries seek access to the materials under the exception to the privilege articulated in *Hoopes v Carota* [i.e. the fiduciary exception], that exception is not applicable here. As the record shows, plaintiffs have been in an adversary relation with the Trustee since the late 1970's and the disclosure plaintiffs apparently seek concerns communications not generally relevant to the administration of the trust, but specifically relevant to the handling of the very issues the plaintiffs had been threatening to litigate. It is precisely where, as here, the trustee consults counsel in order to defend itself against the conflicting claims of beneficiaries that the exception delineated in Hoopes is inapplicable"
>
> (*id.* at 18).

Defendants were terminated by Perella in February of 2015 (NYSCEF doc. no. 1107, pg. 9). This action was commenced in October of 2015. The notes, memoranda, and communications in dispute arose from a December 2015 meeting between attorneys at Weil Gotshal (*id.* at 12). At the time of the creation of the privileged communications and documentation, defendants were no longer employed by Perella, were not clients of Weil Gotshal, were engaged in active litigation with Perella, and in an adversarial position to both Perella and the Weil Gotshal firm. The fiduciary exception does not apply when the fiduciary is in an adversarial relationship with the beneficiary and seeks disclosure of protected information to further interests in litigation (*Beck* 218 AD2d 1). Neither does the fiduciary exception apply to circumstances where the communications sought concern communications that bear on issues at the heart of the litigation (*id.*). The fiduciary exception was designed to enforce disclosure of information generated by a

fiduciary solely in its capacity as custodian, in furtherance of the performance of the fiduciary's duties to the beneficiary (*Stock v Schnader*, 142 AD3d at 220).

Although defendants may have been beneficiaries at the time the purported "mistake" was made regarding the compliance compensation filings, at the time of the alleged discovery of the error, the defendants were in an adversarial position to plaintiff and former counsel, while asserting claims bearing directly on their entitlement to compensation. Defendants seek notes and communications specifically relevant to the purported filing "error," and Weil Gotshal's obligation to its client, Perella. This includes the exact compensation accounts at the heart of the issues defendants are actively litigating.

Whether the fiduciary exception applies depends on whom the communications ultimately served (*Stock v Schnader*, 142 AD3d at 220). The disclosure defendants seek concern communications not simply regarding the administration of compensation benefits, or communications made in Weil Gotshal's role as a simple custodian. The communications at issue here were not in service to defendants, who were no longer clients of Weil Gotshal or employees of Perella. The fiduciary exception to the attorney-client privilege does not compel disclosure of the sought information in this circumstance.

Finally, trial of this matter will proceed on January 24, 2025. The time for discovery has long since passed. It is admitted, by all parties, that the disclosure of the materials was discussed with the court over five (5) years ago. Although the parties disagree as to the outcome of the discovery conference, what remains clear is that the parties had a full and fair opportunity to fully litigate the issues and to compel production of the materials while discovery was still ongoing. The time to request an in-camera review was prior to the filing of the note of issue and

prior to the close of discovery. The court declines to revisit the question of disclosure of the materials now.

Accordingly, it is hereby

ORDERED that plaintiffs' motion to quash the subpoena and for a protective order (motion seq. no. 020) is granted in its entirety.

1/23/2025
DATE

ROBERT R. REED, J.S.C.

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