SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

HONORABLE LEON RUCHELSMAN

At the Central Compliance Part of The Supreme Court of the State of New York, held in the County of Kings, at the Courthouse located at 360 Adams Street, on the 22nd of January 2025

COUNTY OF KINGS

Index#: 506916/21

NICOLE COMITO,

DECISION & ORDER

Plaintiff,

-against-

ARKLOW-FBF LLC d/b/a AVIATOR SPORTS & EVENTS CENTER,

Defendant

Plaintiff moved for an Order pursuant to CPLR §§ 3122(b), 3124, and §202.20-a(b) of the Uniform Civil Rules compelling Defendant to serve an amended privilege log that complies with CPLR 3122(b), and full email headers and for all previously withheld documents; directing Plaintiff to report to the Court after receiving the amended privilege log and document production if it is believed *in camera* review by the Court is required to assess Defendant's assertions of privilege motion sequence 4). Defendant opposed and plaintiff replied. Plaintiff's reply requested in an "in camera" review of documents withheld by defendant from production.

Initiated by Summons and Complaint on 3/23/21, plaintiff alleges a cause of action for retaliation after she reported sexual assault and other improprieties of minors at defendant's facility Aviator (a sports and event center in Brooklyn, NY), in violation of the New York City Human Rights Law ("NYCHRL"). During the relevant period, Plaintiff was employed as a gymnastics coach by defendant Aviator ("Aviator"). Plaintiff alleges that Aviator retaliated by firing her eight days after Plaintiff reported

corroborated allegations of indecencies against minors. Specifically, plaintiff reported that her fellow gymnastics coach, who is not a party to this lawsuit, sexually abused at least three of Aviator's minor-gymnasts. Plaintiff participated in the criminal investigation. Defendant answered.

In their opposition, Defendant claims plaintiff's motion is moot as they have provided a supplemental privilege log responding to Plaintiff's concerns, reevaluated all documents with redactions contested by Plaintiff, and provided supplemental responses in accordance with these changes. Defendants originally provided a categorical privilege log to support its claims of privilege, pursuant to NYCRR 22 § 202.70.11-b. Additionally, defendant provided a document-by document listing on the privilege log, and reevaluated certain redactions and previously withheld documents from its original disclosure and produced same.

Defendant claims that numerous emails and text messages circulated among Aviator staff and other individuals contain communications that are protected by the attorney/client privilege. Of note, Gregory Shrock ("Shrock") was during the relevant time, Aviator's General Counsel, Managing Member and Chief Financial Officer. On 10/3/19 at 11:50 am, Shrock circulated an email stating as follows***:***

"In order to preserve the attorney/client privilege, please address any emails about [Coach] to me. Do not email each other and do not CC each other on emails that you send me. At the top of the mail, please write, "Attorney client Communication." That does not apply to emails about setting up conference calls, as long as the email confines itself to scheduling and no substantive discussions of the matter."

In New York, the attorney-client privilege protects a communication that is (1) confidential; (2) primarily made to obtain or convey legal advice or services; and (3) between an attorney and a client during a professional relationship. See CPLR 4503(a)(1); *Ambac Assur. Corp. v. Countrywide Home Loans, Inc*., 36 N.Y.S.3d 838, 842 (2016) ("The attorney-client privilege shields from disclosure any confidential communications between an attorney and his or her client made for the purpose of obtaining or facilitating legal advice in the course of a professional relationship."). Nevertheless, the *Ambac* Court counseled that since the privilege is an "obstacle to the truth-finding process" the privilege must be narrowly construed. *Ambac* quoting Matter of Jacqueline F., 47 N.Y.2d 215, 219, 417 N.Y.S.2d 884, 391 N.E.2d 967 [1979]. Current management may waive a corporation's attorney client privilege. Pala Assets Holding Ltd. v Rolta, LLC, 210 AD3d 560 [1st Dept 2022].

Significantly, most of the emails circulated after Shrock's 10/3/19 email failed to follow Shrock's directives. Specifically, the communications lacked the label of Attorney-Client Privilege at the top of each email. Additionally, communications were frequently carbon copied to employees, referenced outside discussions, and were often forwarded. Based on these facts, the court may find that the communications sent to Shrock were not intended to seek his legal advice but rather, to seek his business advice-as managing agent and CFO of Aviator. Cf. Nacos v Nacos, 124 AD3d 462, 462 [1st Dept 2015] ["Even if the requested correspondence is privileged based on the attorney-client relationship between plaintiff and her prior matrimonial counsel, that privilege was waived because the communications were "copied to, sent to, or authored by" appellants"]. Additionally, despite Schrock's admonition, privilege was actually waived when the documents were actually shared with third parties. Cf. In re Bekins Storage Co., 460 N.Y.S.2d 684, 691 (Sup. Ct. N.Y. Co. 1983), amended sub nom. Grand Jury Subpoena Served Upon Bekins Record Storage Co. v. Morgenthau, 463 N.Y.S.2d 349 (1st Dep't 1983), aff'd as modified sub nom. Matter of Bekins Record Storage Co., Inc., 476 N.Y.S.2d 806 (1984).) Further, there is no evidence presented that Schrock immediately objected to the noncompliant communications, nor did he take affirmative steps to remedy the disclosures. Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 556 N.Y.S.2d 763, 764 (2d Dep't 1990); Levy v. Arbor Commercial Funding, LLC, 29 N.Y.S.3d 364, 365 (1st Dep't 2016).

Clearly, Shrock wore multiple hats-including providing business advice to Aviator. It can certainly be alleged that Shrock had an interest in avoiding negative publicity concerning such a sensitive subject as sexual abuse of minor children. Undoubtedly, Aviator staff was concerned about dealing with parents of children who heard about the scandal and looked to Shrock for business/public relations advice. When an attorney is wearing multiple hats and advising on anything and everything other than legal services, whether business, media, public relations, or lobbying, there is no attorney-client privilege. Indeed, the Court of Appeals has found that for the privilege to apply, there are five essential prongs that the proponent must demonstrate: (1) that the communication at issue was between an attorney and a client for the purpose of facilitating the rendition of legal advice or services, (2) in the course of a professional relationship, (3) that the communication is predominantly of a legal character, (4) that the communication was confidential and (5) that the privilege was not waived. Ambac Assur. Corp. v Countrywide Home Loans, Inc., 27 NY3d 616, 624 [2016] (quotations, references omitted); Gottwald v Serbert, 63 N.Y.S.2d818,822 n. 6 (2017) aff'd 161 A.D. 3d 679 (1st Dept 2018), quoting In Re Chevron Corp., 749 F.Supp, 2d 141, 165 n. 142 (S.D.N.Y. 2010), aff'd Lago Agrio Plaintiffs v Chevron Corp., 409 Fed Appx 393 (2d Cir. 2010). In the subject case, Shrock may have acted as general counsel, but he surely had an interest to protect Aviator for his own financial interest as both managing member and Chief Financial Officer. The attorney-client privilege does not apply to communications when the attorney has multiple roles, absent unusual circumstances. In re Chevron Corp., supra at 165. A lawyer's communication is not completely shielded with privilege if the lawyer does the work of a nonlawyer. The decision of whether the communication was of legal character must be viewed in its entire context and content. Spectrum Systems Int'; Corp v Chemical Bank, 78 N.Y.2d 371, 377-79 (1991); Saran v Chelsea GCA Realty Partnership, L.P., 174 AD3d 759 [2d Dept 2019]. Courts will examine the communication to determine if it is primarily for legal purposes, as opposed to, for example, business purposes. Communications are protected only if they are confidential, and the client has not waived the privilege. Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616, 624 (N.Y. 2016). Generally, a party seeking to assert the privilege must show the existence of an attorney-client relationship and that the communication was confidential and made to the attorney for the purpose of obtaining legal advice or services. Significantly, business advice is not protected, even if attorneys are involved in providing the advice. See Grande Prairie Energy LLC v. Alstom Power, Inc., 798 N.Y.S.2d 709, 709 (Sup. Ct. 2004). To wit, given the mixed business and legal roles that in-house counsel may play, the Second Department has counseled that "there is a heightened need to apply the privilege cautiously and narrowly in the case of in-house counsel, lest the mere participation of an attorney be used to seal off disclosure." Saran v Chelsea GCA Realty Partnership, L.P., 174 AD3d 759, 760 [2d Dept 2019].

Defendant has not defined who exactly was Schrock's client here, e.g., if he was representing the interests of the corporation, did he in addition represent any of its officers, directors, employees, or other constituents? Campbell v McKeon, 75 AD3d 479, 480 [1st Dept 2010] ("Counsel for an organizational client is required to act as is reasonably necessary in the best interests of the client when an individual associated with the client may have violated legal duties which are likely to result in substantial injury to the organization."); cf. Gregor v Rossi, 120 AD3d 447 [1st Dept 2014]; Kassenoff v Kassenoff, 213 AD3d 821 [2d Dept 2023]. Additionally, there is no evidence that Schrock provided the employees with an *Upjohn* warning. NY ST RPC Rule 1.13(a) and cmt. 2; Upjohn Co. v United States, 449 US 383 [1981]. Additionally, to the extent that putatively privileged communications that contained legal advice were shared with employees who were not in a position to act or rely on the legal advice (if any) in the communication, the privilege was thusly waived. In re Allergan plc Sec. Litig., 2021 WL 4121300 [SDNY Sept. 9, 2021]; Scott v Chipotle Mexican Grill, Inc., 94 F Supp 3d 585 [SDNY 2015]. Finally, inasmuch as the emails (if deemed protected by the privilege) demonstrate that Defendant (and its constituents) made communications in furtherance of a crime, breach of fiduciary duty or other ignominious conduct as reflected by city, state and federal laws, the privilege does not apply. In re New

York City Asbestos Litig., 109 AD3d 7, 10 [1st Dept 2013] ("[A]dvice in furtherance of a fraudulent or unlawful goal cannot be considered 'sound.' Rather advice in furtherance of such goals is socially perverse, and the client's communications seeking such advice are not worthy of protection" quoting In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1038 [2d Cir.1984]). With all that said, generally the emails at issue here did not concern the Defendant's legal rights and obligations, nor did they evidence the product of a lawyer's judgment and recommended legal strategy. See Rossi v Blue Cross and Blue Shield of Greater New York, 73 NY2d 588 [1989].

While integral to legal system, attorney-client privilege would become counterproductive if it did not have its requisite limits. Consequently, an attorney-client relationship must be adequately formed, communications confidentially made to obtain legal advice or service and the party asserting the attorney-client privilege bears the burden of proving each element. Priest v Hennessy 51 N.Y.2d 62 (N.Y. 1980).

Defendant shall provide all communications in unredacted form by 3/7/25. Additionally, signature blocks should be removed.

Any relief not expressly granted herein has been considered and is denied.

MGSFO

FCP 2/13/2026
NOI 3/27/2026

Dated: 1/22/25

Honorable Leon Ruchelsman
Hon. Leon Ruchelsman
JSC