

**Cruz-Herr v BHH Affiliates, LLC**

2025 NY Slip Op 33268(U)

September 2, 2025

Supreme Court, Kings County

Docket Number: Index No. 528533/2022

Judge: Heela D. Capell

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At an IAS Term, Part 19 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2 day of September, 2025.

P R E S E N T:

HON. HEELA D. CAPELL,

Justice.

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STERLING CRUZ-HERR and SHANNON CRUZ-HERR,

Plaintiffs,

-against-

Index No.: 528533/2022  
Motion Sequence: 5,6

BHH AFFILIATES, LLC, NUTSHELL REALTY, INC. d/b/a BERKSHIRE HATHAWAY HOMESERVICES NUTSHELL REALTY, LAURA SWEENEY, PROFESSIONAL COMPUTER ASSOCIATES, INC., ARIANA BUSBY, BUSBY LAW GROUP, PLLC, JPMORGAN CHASE BANK, N.A., SMALL WORLD SMALLWORLD ENT INC., OLUMUYIWA TAJUDEEN and JOHN DOES NO. "1" through "10" said individuals or entities being unknown to Plaintiffs and having participated in, facilitated or conspired to defraud Plaintiffs by virtue of their involvement in the activities alleged by Plaintiffs in the instant action,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed \_\_\_\_\_

100-107 112, 114-128

Opposing Affidavits (Affirmations) \_\_\_\_\_

114-128 134-135, 137-138

Upon the foregoing papers in this fraud action, plaintiffs Sterling and Shannon Cruz-Herr ("Plaintiffs") move (in motion sequence [mot. seq.] five), by order to show cause, for an order quashing the February 4, 2025, subpoena that defendants BHH Affiliates, LLC ("BHH"), Nutshell Realty, Inc. d/b/a Berkshire Hathaway HomeServices Nutshell Realty

(“Nutshell”) and Laura Sweeney (“Sweeney”) (collectively, “Defendants”) served upon Plaintiffs’ former counsel, Christine Wong, Esq. (“Attorney Wong” and “Wong Subpoena”), or, alternatively, limiting the scope of the Wong Subpoena, pursuant to CPLR 2304, and/or granting Plaintiffs a protective order, pursuant to CPLR 3103, and preventing Defendants from engaging in further abusive discovery practices towards Attorney Wong<sup>1</sup> (NYSCEF Doc No. 107).

Defendants BHH, Nutshell and Sweeney collectively cross-move (in mot. seq. six) for an order enforcing the Wong Subpoena and providing that:

“all objections of relevance, privilege, work product, litigation material, burden and overbreadth be overruled and the Subpoena be enforced as written (subject to Point VIII of the memorandum of law) and that privileges or immunities from discovery identified by plaintiffs be held to be waived, or in the alternative, if complete waiver is not found, all allegedly privileged or other material withheld and all redactions to any document produced shall be ordered to be identified promptly on a complete, thorough and detailed item-by-item privilege log with (ii) the items detailed in CPLR 3122 (b), including but not limited to a statement of the legal ground for withholding or redacting the document and providing the following information for each document: the type of document; the general subject matter of the document; the date of the document, other information sufficient to identify the document and allow assessment of any privilege asserted, and (ii) to the extent email chains are withheld or redacted, uninterrupted email chains may be logged as a single entry but such entry shall include: an indication that the entry is an uninterrupted email dialogue; the beginning and ending dates and times of the dialogue; the number of emails in the chain; the names of all authors and recipients, with sufficient identifying information (such as employer, job title, or role in

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<sup>1</sup> Plaintiffs also move for leave to amend the complaint to add Professional Computer Associates, Inc. as an additional defendant. This branch of the motion was granted by order dated May 8, 2024, which directed Plaintiffs to remove Bank of America as a defendant and to delete the cause of action asserted against Bank of America (NYSCEF Doc No. 129).

the case) to allow assessment of privilege, with plaintiffs to bear the cost of such log . . .” (NYSCEF Doc No. 112).

### **Background**

Plaintiffs sought to purchase a house in Kingston, New York, and hired Attorney Wong, a real estate attorney, to assist them. Plaintiffs also sought the help of Sweeney, a licensed real estate broker associated with Nutshell, a real estate brokerage firm. Plaintiffs subsequently sold their apartment in Park Slope, Brooklyn, and eventually entered into a June 28, 2021, contract to purchase a house in Kingston for \$500,000.00. In accordance with the terms of the sales contract, Plaintiffs wired a \$50,000.00 down payment to the seller’s attorney leaving a balance of \$449,500.00.<sup>2</sup>

After the contract of sale was executed, and prior to the closing, Plaintiffs received a series of emails from a fraudster posing as Attorney Wong, and Sweeney was copied in the email chain. Pursuant to the instructions purportedly sent by the fraudster posing as Attorney Wong by email, Plaintiffs wired the balance of the purchase price, \$449,500.00, to the Chase bank account of “Busby Law Christine Wong.” The complaint alleges that a hacker, and not Attorney Wong, sent the emails instructing Plaintiffs to wire the funds by modifying Attorney Wong’s contact information to give the appearance that the emails were from Attorney Wong. On July 19, 2021, Plaintiffs discovered that they were defrauded after speaking with Attorney Wong by telephone. The complaint alleges that Sweeney, who was copied on the emails, failed to warn Plaintiffs of the potentially

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<sup>2</sup> According to Plaintiffs’ counsel, the \$500.00 discrepancy between the contract price and funds due to seller is a result of Plaintiffs’ receipt of a credit in lieu of the seller providing a property condition disclosure statement, pursuant to New York State Real Property Law § 462.

fraudulent wire transfer. Once advised of the fraud, Sweeney disclosed that she was familiar with similar real estate scams.

After speaking with law enforcement, Sweeney informed Plaintiffs that the hacker was able to obtain the information needed to impersonate Attorney Wong by hacking Sweeney's business email account. Plaintiffs subsequently commenced the instant action. Defendants BHH, Nutshell, and Sweeney served Attorney Wong with the Wong Subpoena directing her to appear for a deposition and produce documents, and Plaintiffs filed the instant motion to quash. Defendants cross-moved seeking to enforce the Wong Subpoena.

#### Discussion

CPLR 3103 (a) provides that the court may “make a protective order denying, limiting, conditioning or regulating the use of any disclosure device” and that “[s]uch order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.” A subpoena should be quashed when it is being used as a fishing expedition for the purpose of discovery or to ascertain the existence of evidence (*see People v Gissendanner*, 48 NY2d 543, 551 [1979]; *see also In re Off. of Attorney Gen. of State of New York*, 269 AD2d 1, 13 [1st Dept 2000]). “The standard to be applied on a motion to quash a subpoena duces tecum is whether the requested information is utterly irrelevant to any proper inquiry” (*Ayubo v Eastman Kodak Co., Inc.*, 158 AD2d 641, 642 [2d Dept 1990] [internal quotation omitted]).

CPLR 3101 provides “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . .” CPLR 3101 (b), however, carves out an exception for privileged information, which is not discoverable upon objection by a person entitled to assert the privilege. Where a party is

seeking to quash a subpoena on the basis of attorney-client privilege, the moving party must demonstrate that the “information sought to be protected from disclosure was a confidential communication made to attorney for purpose of obtaining legal advice or services” because not all communications to an attorney are privileged (*People v Mitchell*, 58 NY2d 368, 373 [1983]). Thus, “[t]he mere statement by an attorney that a person is a client does not satisfy the burden” (*In re Confidential Invest. into R#03-103*, 9 AD3d 491, 492 [2d Dept 2004]).

CPLR 3101 (c) protects attorney work product from disclosure. “Additionally, pursuant to CPLR 3101 (d) (2), material that is prepared in anticipation of trial is subject to a conditional privilege, and, thus, is subject to disclosure only by a party’s showing that he or she is in substantial need of the material and is unable to obtain the substantial equivalent of the material by other means without undue hardship” (*Teran v Ast*, 164 AD3d 1496, 1498 [2d Dept 2018]). Significantly, even if a party makes the requisite showing to obtain litigation materials, “the court shall protect against disclosure of mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation” (CPLR 3101 [d] [2]).

Plaintiffs do not object to Document Requests 4, 8, 10, 11, 13, 15-21, 24, and 26-28 in the Wong Subpoena. In addition, Defendants have withdrawn Document Request 25 and have changed the definition of “Requesting Parties” to refer only to Nutshell and Sweeney (and not BHH) for Document Requests 19 and 20.

Plaintiffs oppose the Defendants’ Document Requests for the retainer agreement between Plaintiffs and Attorney Wong (Document Request 1); documents concerning billing, fees and time records regarding Attorney Wong’s representation of Plaintiffs

(Document Request 2); documents concerning proposed or actual transfers of funds or payments by Plaintiffs in connection with their purchase of the Kingston house (Document Request 3); documents concerning mortgages obtained by Plaintiffs in connection with their purchase of the Kingston house (Document Request 5); documents concerning Plaintiffs' tax deductions with respect to the Kingston house (Document Requests 6-7); documents concerning communications by Attorney Wong with accountants or tax attorney retained by Plaintiffs (Document Request 9); all emails, documents and communications exchanged between Attorney Wong and Plaintiffs (Document Request 12); all summaries, analyses, projections, calculations, charts, reports, memoranda and other documents or presentation materials prepared by or for Attorney Wong concerning the Kingston house or any financial transactions concerning the Kingston house (Document Request 14); and all documents concerning Plaintiffs' decision to relocate from Brooklyn and their motivation for doing so (Document Request 22-23).

While Plaintiffs have the right to assert attorney-client privilege in appropriate circumstances, generally "communications made in the presence of third parties, whose presence is known to the [client], are not privileged from disclosure" (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 [2016]). Furthermore, retainer agreements and fee arrangements, to the extent they do not reveal confidential information, are discoverable. "Communications regarding 'the identity of a client and information about fees paid by the client' are not generally protected under the privilege, nor are communications regarding the payment of legal fees by a third person" (*In re Nassau County Grand Jury Subpoena Duces Tecum Dated June 24, 2003*, 4 NY3d 665, 679 [2005], quoting *Matter of Priest v Hennessey*, 51 NY2d 62, 69 [1980]). Thus, Document Requests

1 and 2 regarding Plaintiffs' retainer agreement and fee arrangement with Attorney Wong do not fall within the protected category of attorney-client privilege. Document Request 3 regarding proposed and actual transfers of funds regarding the Kingston house and Document Requests 5, 6 and 7 seeking mortgage and tax documents related to the Kingston house are discoverable since they have been shared with third parties and may be relevant to the alleged fraud and damages sought.

The remaining Document Requests (9, 12, 14, 22 and 23) seeking emails, documents and communications exchanged between Attorney Wong and Plaintiffs, and summaries, analyses, projections, calculations, charts, reports, memoranda and other documents or presentation materials prepared by or for Attorney Wong, lack the necessary specificity, are overbroad and infringe upon attorney-client and work product privilege. Moreover, Defendants will have the opportunity to investigate Plaintiffs' level of sophistication and knowledge regarding the alleged fraud during their depositions. As such, Plaintiffs' motion to quash the Wong Subpoena with regards to the foregoing Document Requests is granted. On consent, Defendants have withdrawn Document Request 25. Accordingly, it is

**ORDERED** that Plaintiffs' motion to quash the Wong Subpoena (mot. seq. five) is granted to the extent that Document Requests 9, 12, 14, 22 and 23 are hereby quashed. The motion is otherwise denied; and it is further

**ORDERED** that Defendants' cross-motion to enforce the Wong Subpoena (mot. seq. six) is granted to the extent that Plaintiffs shall respond to Defendants' remaining Document Requests within 30 days after electronic service of this decision and order with notice of entry thereof. Defendants' cross-motion is otherwise denied.

This constitutes the decision and order of the Court.

ENTER,



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J. S. C.

**HON. HEELA D. CAPELL, JSC**