

Barry v Clermont York Assoc., LLC
2014 NY Slip Op 33335(U)
December 19, 2014
Supreme Court, New York County
Docket Number: 650838/2012
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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STANLEY BARRY,

Index No.: 650838/2012

Plaintiff,

DECISION & ORDER

-against-

CLERMONT YORK ASSOCIATES LLC and
JEFFREY J. FEIL,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion Sequences 009 and 010 are consolidated for disposition.

Both plaintiff, Stanley Barry (Barry), and defendants, Clermont York Associates LLC (Clermont) and Jeffrey J. Feil, move to confirm in part and reject in part the January 14, 2014 report of JHO Gammerman (the Report), motion sequences 009 and 010, respectively. Both motions are granted in part and denied in part for the reasons that follow.

I. Procedural History

Plaintiff filed a motion to compel production of documents on defendants' privilege log. See Dkt. 138 at 1-3. The motion sought production of the following categories of documents: (1) communications with employees of The Feil Organization or Broadwall Management Corporation (Broadwall);¹ (2) communications not involving an attorney; (3) communications with the investment fund RCG Longview (Longview)²; (4) communications with attorneys at the

¹ The Privilege Log identifies documents that were shared with Broadwall employees, including Larry Newman, Jay Anderson, Brian Palumbo and Mary Flores. See Dkt. 109 at 4.

² Jay Anderson, the Vice President of Broadwall, also is a principal of Longview. Anderson received email correspondence related to this case through his reglongview.com address instead of his feilorg.com address. See Dkt. 231 at 3.

law firm of Simpson Thacher & Bartlett LLP (Simpson Thacher),³ and (5) communications with anyone on defendants' privilege log that did not concern legal advice. *See* Dkt. 138 at 1-3.

Broadwall, is owned by defendant Feil and is a property manager/brokerage firm that operates and brokers the residential portion of properties owned by defendant Clermont. *See* Dkt. 109 at 5-6. Simpson Thacher represents Feil individually with respect to trust and estate planning, and also represents him in his capacity as a fiduciary of various trusts, of his parents' estates, and of other entities. *See* Dkt. 167 at 1 & 4.

Defendants opposed plaintiff's motion and moved to compel production of documents on his privilege log.⁴ *See* Dkt. 139 at 1-2. Defendants' motion sought documents containing communications with Gettry Marcus Stern & Lehrer, CPA, P.C. (Gettry).⁵ Gettry is an accounting, tax, and consulting service firm in New York that was retained by plaintiff's attorney O'Shea Partners LLP (O'Shea).

The issues raised by the motions were referred to the JHO, who reviewed the parties' documents *in-camera* to determine whether the attorney-client or work-product privileges applied. *See* Dkt. 211 at 3. He recommended upholding plaintiff's assertions of privilege for all communications with Gettry. *See* Dkt. 213 at 3-4. He further recommended upholding the assertions of privilege for most documents, including those between Feil's counsel (including Simpson Thacher) and Broadwall employees, as necessary parties to the communications with

³ The Privilege Log identifies documents that were shared with Pamela Rollins and/or Gena Hatcher, who are trust and estates attorneys at Simpson Thacher. *See* Dkt. 109 at 4.

⁴ Privilege log entry numbers 1-3, 5-9, 16-27, 29-30, and 43-61. *See* Dkt. 139 at 1-2; *See* Dkt 142 at 5-6.

⁵ The portion of the motion regarding communications with a private investigator, Warren Flagg, was determined by the court on the record at oral argument.

counsel for purposes of obtaining legal advice. *Id.* at 4. In regard to defendants, he recommended that the court compel production of defendants' emails which contained "colorful language".⁶ *Id.* at 5.

II. Background

The court assumes familiarity with prior decisions of this case, and limits its recitation of facts to issues related to this motion.

In 2008, plaintiff alleges that he suspected that Feil was improperly withholding distributions from several real estate holding companies in which plaintiff had an interest, including Clermont. *See* Dkt. 143 at 2. On October 16, 2008, plaintiff hired O'Shea, a litigation boutique. *See* Dkt. 143 at 5 & Dkt. 144 at 1. On January 15, 2009, in anticipation of litigation, plaintiff requested an inspection of books and records relating to Clermont and several other entities. *See* Dkt. 229 at 2. The inspection was conducted in phases over several months. *Id.*

On April 6, 2009, plaintiff retained Gettry to provide forensic accounting services in connection with the contemplated litigation. *See* Dkt. 143 at 5-10. The Engagement Letter (Agreement) sets forth the scope of Gettry's services:

CONTRACT TERMS

This letter constitutes the agreement between Stanley L. Barry, herein represented by O'Shea Partners LLP ("O'Shea") and Gettry Marcus Stern & Lehrer, CPA, P.C. ("GMSL"). Pursuant to the terms of this agreement, we will provide forensic accounting services, opinion of value, opinion on accounting aspects of litigation matters, litigation consulting and other services as required in, the referenced litigation. All professional services will be ***directed by the law firm of O'Shea with O'Shea as the attorney of record*** for Stanley L. Barry ("Barry"). It is intended that our work-product will be protected under attorney work-product and other applicable privileges. Consequently, any writings, notes, documents or other extraneous material retained during this engagement are not intended to be subject to discovery.

⁶ The Referee concluded that certain documents using the term 'wimp' were not privileged. *See* Dkt. 277 at 15.

All reports, communications, and work product will be *submitted to O'Shea*. We understand that it may be necessary for O'Shea to share with us mental impressions, analyses, theories, and other thought processes that relate to this matter. It may also be necessary for O'Shea to relate to us communications between O'Shea and Barry. Consequently, we understand that the work performed by us will be *confidential*. By signing this letter we confirm and agree that we will not disclose, distribute, publish or release to any third party any of the documents or information now or hereafter received or obtained by us in relation to this engagement, except as required by law as to which we will give O'Shea and Barry prior written notice.

[emphasis supplied] *Id.* at 5.

In May 2009, Andrew Ross, a Gettry accountant, communicated by email, phone, and in-person with several Broadwall employees. *Id.* Ross requested information pertaining to Clermont's books and records and construction project files. *Id.* On June 10, 2010, O'Shea ceased representing Barry and sent him a final invoice. *See* Dkt. 271, Ex E, at 117. Subsequently, in 2010, 2011, & 2012, Ross continued to obtain financial information on plaintiff's behalf from Clermont by e-mail or letter request. *See* Dkt. 229 at 4.

After termination of O'Shea's representation, plaintiff retained, first, the law firm of K&L Gates, LLP (K&L Gates), and then his current attorneys, Mannatt, Phelps & Phillips, LLP (Mannatt with K&L Gates, Subsequent Counsel). The record contains no agreement to retain Gettry to assist Subsequent Counsel.

III. Discussion

A. Standard of Review

The court has broad discretion to confirm or reject, in whole or in part, the Report. It is well settled that referee reports are not binding and are subject to court review. 8-R4403 Weinstein-Korn-Miller, NY Civ. Prac. ¶ 4403.05.

B. Gettry Documents Are Privileged through the End of O'Shea's Retention

The attorney-client privilege shields confidential communications between an attorney and his client, made during the course of a professional relationship for the purpose of facilitating the rendition of legal services. *Spectrum Sys. Int'l Corp. v Chem. Bank*, 78 NY2d 371, 377-378 (1991); CPLR §4503. The party asserting the privilege has the burden of proving each element of the privilege and that it has not been waived. *Matter of Priest v Hennessy*, 51 NY2d 62, 68-69; *John Blair Communications, Inc. v Reliance Capital Group*, 182 AD2d 578, 579 (1st Dept 1992). Typically, the presence of a third-party destroys the privilege because confidentiality is lacking. *People v Harris*, 57 NY2d 335, 343; *People v Osorio*, 75 NY2d 80, 84 (1989). However, where counsel needs assistance from other experts, the privilege extends to such third parties, hired as an agent of the attorney or client to facilitate the rendition of legal services. *United States v Kovel*, 296 F2d 918, 921-922 (2d Cir 1961). A party asserting a privilege based upon the *Kovel* exception has the burden of proving each element of the privilege (*Matter of Gavin*, 39 AD2d 626, 628 [3d Dept 1972]) and must produce contemporaneous proof of a “*Kovel* agreement”, such as a separate retention agreement or separate billing. *United States v Adlman*, 68 F3d 1495, 1498 (2d Cir 1995).

Accounting concepts can be highly complex-- analogous to that of a foreign language for many attorneys. *Kovel*, 296 F2d at 921-922. The presence of an accountant, whether hired by the lawyer or the client, is often necessary or at least highly useful for the effective consultation between attorney and client. *Id.* However, if the advice sought is the accountant's rather than the lawyer's, the privilege does not apply. *Id.* Consequently, if a client communicates first with his accountant and later consults his attorney on the same matter, there is no privilege. *Kovel*, 296 F2d at 922 citing *Garipey v United States*, 189 F2d 459, 463 (6 Cir 1951).

Applying these principles to the case at bar, the privilege protects only documents containing Gettry's communications from October 16, 2008 through June 10, 2010, when plaintiff was represented by O'Shea. There is no contemporaneous proof of a *Kovel* agreement for communications with Gettry after June 10, 2010. Therefore, communications with Gettry following O'Shea's termination fall outside the scope of privilege and must be disclosed.

C. Simpson Thacher Documents Are Privileged

Several entries on defendants' privilege log reflect communications that involved both Simpson Thacher and Broadwall. After *in-camera* re-review, the court finds that the Report correctly ruled that entries 10, 13, 75, 115, 164, and 207 involve "colorful language," i.e. name calling, and, therefore, were not communications for the purpose of obtaining legal advice. Similarly, the Report correctly ruled that log entry 137 is not protected by privilege because it was a derisive comment by Feil, rather than a communication made for the purpose of obtaining legal advice.

In addition, the court agrees with the JHO with regard to duplicate entries 11 & 73. Those communications were privileged, since Feil could share advice from litigation counsel with his estate and trust attorneys, because a client can consult with more than one lawyer. *Sudarsky v New York*, 1990 U.S. Dist. LEXIS 16045 (SDNY Nov. 27, 1990)(nor)(privilege not destroyed where confidential information for purpose of giving legal advice conveyed between attorneys representing same client).⁷

D. Other Colorful Language on Defendants' Log

⁷ The attachment to the email from litigation counsel David Nathan in his 2/6/12, 6:16 pm, email was not provided to the court.

The JHO correctly recommended that certain other documents on defendants' log were improperly redacted because the redactions consisted of non-privileged, colorful language. *See* Dkt. 270 at 1. Defendants, therefore, must produce privilege log entries 23 & 112. However, log entries 22, 110-111, & 161-162 (duplicates) should be redacted, as was submitted, to eliminate the subject line and portions that relate to legal advice. The remainder of 22, 110-111, & 161-162 are not protected by privilege and must be produced. Entry numbers 53, 95, & 205 (duplicates) are not privileged and must be produced since they do not seek legal advice. Accordingly, it is

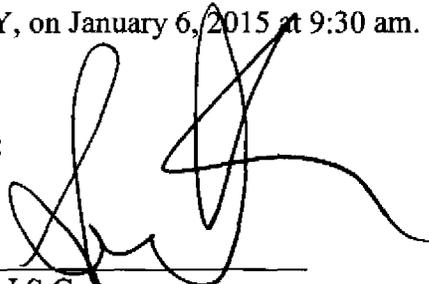
ORDERED that defendants' motion is denied to the extent that it seeks to compel production of documents between plaintiff and Gettry Marcus Stern & Lhrer, CPA, P.C., dated during the period from October 16, 2008 through June 10, 2010, and is granted insofar as it seeks production of documents subsequent to June 11, 2010; and it is further

ORDERED that plaintiff's motion is granted to the extent of compelling defendants to produce privilege log entries 11, 22, 73, 110-111 & 161-162 (redacted to the extent indicated in this decision) and privilege log entries 10, 13, 23, 53, 75, 95, 112, 115, 137, 164, 205, & 207; and is otherwise denied; and it is further

ORDERED that the parties are to appear for a conference in Part 54, New York County Supreme Court, 60 Centre St., rm. 228, New York, NY, on January 6, 2015 at 9:30 am.

Dated: December 19, 2014

ENTER:



J.S.C.