

**Siras Partners LLC v Activity Kuafu Hudson Yards
LLC**

2017 NY Slip Op 31216(U)

June 5, 2017

Supreme Court, New York County

Docket Number: 650868/2015

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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SIRAS PARTNERS LLC, SAIF SUMAIDA, and
ASHWIN VERMA,

Plaintiffs,

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-against-

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ACTIVITY KUAFU HUDSON YARDS LLC,
462-470 11TH AVENUE LLC, SHANG DAI,
ZENGLIANG "DENIS" SHAN, QILING
YUAN, DANIEL DWYER, and DAI &
ASSOCIATES, P.C.,

DECISION AND ORDER

Defendants,

-and-

REEDROCK KUAFU DEVELOPMENT
COMPANY LLC, SIRAS KUAFU LP,
ATHENA KUAFU LP, SIRAS KUAFU LAND
HOLDINGS LLC, and BIFROST LAND LLC,

Nominal Defendants.

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JEFFREY K. OING, J.:

Relief Sought

Plaintiffs, Siras Partners LLC, Saif Sumaida, and Ashwin Verma (collectively, "Siras" or "plaintiffs"), move to compel production of communications and documents withheld and redacted on the one hand by defendants, Activity Kuafu Hudson Yards, LLC ("Kuafu"), 462-470 11th Avenue LLC ("462-470"), Shang Dai ("Dai"), Zengliang "Denis" Shan ("Shan"), Qiling Yuan ("Yuan") (collectively, the "Kuafu defendants"), and on the other hand by Dai (on the fourth, fifth, and sixth cause of action), Daniel

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Dwyer ("Dwyer") and Dai & Associates, P.C. ("D&A") (collectively, the "D&A defendants") (the Kuafu defendants and the D&A defendants are collectively hereinafter referred to as "defendants"), based on the attorney-client privilege. In the alternative, Siras seeks to compel defendants to produce all withheld and redacted communications and documents for an in camera review.

The underlying facts and allegations of this action are set forth in this Court's March 22, 2016 transcript for mtn seq. no. 003 (NYSCEF Doc. No. 180) and the March 29, 2017 decision and order for mtn seq. no. 007 (NYSCEF Doc. No. 416). Familiarity is presumed.

Discussion

I. "WeChat" Communications¹

Siras begins by arguing that defendants have failed to produce their responsive "WeChat" communications even though discovery thus far has shown that Dai used WeChat to communicate with other individuals regarding the project. In response to the WeChat communications at issue, Dai claims "[m]y cellular phone was replaced earlier this year, and my current phone does not contain any relevant WeChat messages" (Dai Aff., 1/4/17, ¶ 21).

¹According to Siras, "WeChat is a widely-used Chinese mobile-messaging service providing free international messaging and email alternatives" (Pls.' Mem. of Law, p. 9).

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Shan provides "I do not currently have any devices that contain any WeChat messages. My cellular phone was damaged earlier this year, and I had to have it replaced" (Shan Aff., 1/4/16, ¶ 4).

Siras argues that Dai's and Shan's admissions demonstrate that they failed to preserve, and, instead, destroyed their WeChat communications. In their reply, Siras raises the issues of spoliation and an adverse inference instruction at trial in response to defendants' failure to produce any WeChat communications (see Reply Mem. of Law, pp. 2-5). Given that these arguments were raised in the reply, the issue of spoliation or an adverse inference instruction is not properly before the Court at this time. Siras may seek relief concerning the WeChat communications through the appropriate motion.

II. Dai's Waiver of the Attorney-Client Privilege

Next, Siras proffers an email dated March 24, 2016 from Dai to a third-party investor, Lou Ceruzzi, concerning the UBS loan:

I was about to write to you this email last Friday but I decided to wait until we all sit down with attorneys this morning. It is concluded by legal counsels that we have no choice but buying the note from UBS immediately to clean up the mess at Hudson Rise. Otherwise, all the equity we invested is at risk to be wiped out.

(Leyva Affirm., 11/1/16, Ex. L). Siras contends that this communication is a waiver of the attorney-client privilege regarding 462-470's acquisition of the UBS loan.

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The principle is well settled that "communications between an attorney and a client that are ... subsequently disclosed to third parties are not protected by the attorney-client privilege" (Ambac Assurance Corp. v Countrywide Home Loans, Inc., 27 NY3d 616 [2016]). I find that Dai waived the attorney-client privilege as to any communications and documents dealing with his counsel's advice that "we have no choice but buying the note from UBS immediately to clean up the mess at Hudson Rise. Otherwise, all the equity we invested is at risk to be wiped out" (Leyva Affirm., 11/1/16, Ex. L). Contrary to the cases defendants' rely upon, Dai's communication to Ceruzzi goes beyond a client conveying to a third-party the decision to settle an action or withdraw a claim based on advice of counsel (see Deutsche Bank Trust Co. of the Ams. v Tri-Links Inv. Trust, 43 AD3d 56 [1st Dept 2007]; Soho Generation v Tri-City Ins. Brokers, Inc., 236 AD2d 276 [1st Dept 1997]). Dai's communication provided a detailed description of specific legal advice and the course of action given to him by his attorneys, which he voluntarily divulged to a third party. Accordingly, defendants are directed to produce any communications and documents "pertaining to the subject matter of the email" (Arkin Kaplan Rice LLP v Kaplan, 118 AD3d 492 [1st Dept 2014]).

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III. Defendants' Privilege Logs

In response to Siras' first set of document requests and supplemental requests, defendants made their first production of documents in May 2016, along with categorical privilege logs for documents withheld or redacted based on the attorney-client and work product privileges (Leyva Affirm., 11/1/16, Exs. G and H). The Kuafu defendants identify ten categories of both withheld or redacted items representing "[c]ommunications or documents providing, requesting, reflecting, or in connection with the provision of, legal advice to Kuafu to or from counsel" (Id., Ex. G). The D&A defendants' privilege logs contain eleven categories of withheld documents and six categories of redacted documents (Id., Ex. H). For each category in all the privilege logs Kuafu, or an individual associated with Kuafu, is listed as the client.

D&A began providing legal services to Bifrost Land LLC ("Bifrost") in July 2014. Bifrost is the entity formed by Reedrock to hold title to the property. The engagement letter between D&A and Bifrost is dated August 29, 2014 and provides that Bifrost engaged D&A "to represent [Bifrost] generally" and "in connection with [Bifrost's] investment in the acquisition and development of the real property located at 462, 464, 466 and 470 11th Avenue, New York, NY, including general corporate matters" (Leyva Affirm., 11/1/16, Ex. D).

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A. The Parties' Contentions

Siras sets forth three arguments regarding the privilege logs. First, Siras argues that under the fiduciary exception to the attorney-client privilege Kuafu cannot claim privilege over communications or documents representing legal advice it obtained in carrying out its fiduciary duties to Bifrost. Second, Siras also claims that the New York Rules of Professional Conduct require that the D&A defendants produce everything in Bifrost's client file. And, third, Siras maintains that the communications and documents withheld or redacted are part of defendants unlawful scheme to breach their fiduciary duties and undermine Reedrock and the project. As such, Siras contends that the crime-fraud exception to the attorney-client privilege applies to certain categories of defendants' privilege logs.

With regard to the fiduciary duty exception, Siras argues that when Kuafu, as a member of Bifrost, sought legal advice from D&A concerning Bifrost, it was acting on behalf of Bifrost as its fiduciary, and, as such, is precluded from invoking the attorney-client privilege against Siras, another member of Bifrost. Siras claims that a review of the categorical descriptions of the withheld or redacted documents shows that some of the categories relate to D&A's representation of Bifrost, not Kuafu. Thus, Bifrost's members, including Siras, are also considered the

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client in any legal advice or representation D&A provided to Bifrost, and Siras is entitled to access the withheld or redacted documents. And, to the extent defendants are claiming that the withheld or redacted documents concern D&A's representation of Kuafu, plaintiffs argue that they should be able to pierce the privilege based on the fiduciary duty exception to the attorney-client privilege.

Siras also contends that D&A should have obtained a conflict waiver when deciding to represent two parties involved in the same project. Siras refers to N.Y. Rules of Professional Conduct §§ 1.4, 1.15(c)(4), and 1.16(e), and argues that the Rules of Professional Conduct require D&A produce everything in Bifrost's client file. Siras maintains that D&A never obtained the consent of Bifrost or Siras in the simultaneous representation of Bifrost and Kuafu in violation of N.Y. Rules of Professional Conduct Rule §§ 1.7 and 1.13. And, Kuafu cannot invoke the attorney-client privilege over materials D&A prepared for Bifrost.

Siras claims that the crime-fraud exception also applies, entitling it to any communications or documents withheld or redacted concerning Kuafu's attempt to dissolve Reedrock and 462-470's acquisition of the UBS loan. These documents bear directly on plaintiffs' breach of fiduciary duty claims against Dai, Dwyer, and D&A. Siras takes issue with the inconsistency in the

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way Dai is treated in Kuafu's privilege log compared to D&A's privilege log. Dai is listed as the "client" throughout Kuafu's privilege log and listed as the "attorney" in D&A's privilege log.

Defendants claim that D&A represented both Kuafu and Bifrost, that the Kuafu defendants did not withhold documents concerning D&A's representation of Bifrost, and Siras is not entitled to any documents concerning D&A's representation of Kuafu because they are privileged. Kuafu further claims that both Kuafu and Siras were represented by separate counsel throughout their dealings on the project. Dai provides the following in that regard:

From the inception of discussions between Siras and Kuafu regarding the Project, each party was represented by separate counsel. In the initial discussions regarding the joint venture, Siras was represented by Westerman Ball and Kuafu was represented by Dai & Associates. Despite the fact that each of those firms represented the joint venture partners in entering into the joint venture, neither firm received a conflict of interest waiver from Reedrock or Bifrost, and, with the explicit oral confirmation of the parties, each firm continued to represent their original client, and also represented Bifrost on specific issues.

Thus, Westerman Ball, Siras' counsel, continued to represent Siras as well as Bifrost, and Dai & Associates continued to represent Kuafu, and also represented Bifrost on specific limited issues. In addition, the joint venture retained other counsel for general corporate matters as well as for specialized issues, including Kaye Scholer for general corporate advice as well as loan negotiations and Dai &

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Associates for a specific limited representation regarding landlord/tenant and EB-5 financing issues.

(Dai Aff., 1/4/17, ¶¶ 12 and 13). Dai also claims that D&A always represented him on matters related to the project including legal advice on the Urban Compass agreement, the dissolution of Reedrock, and 462-470's acquisition of the UBS loan (Dai Aff., ¶ 17). Kuafu maintains that it has not violated any of the Rules of Professional Conduct. Kuafu claims that no consent for "dual representation" was necessary because Kuafu and Bifrost were not "opposing clients" at the time of the representation and D&A's representation of Kuafu and Bifrost was never in conflict.

Kuafu also argues that the fiduciary exception to the attorney client privilege does not apply here because the "real client" involved in the communications with D&A was Kuafu, not Bifrost (see Stock v Schnader Harrison Segal & Lewis LLP, 142 AD3d 210 [1st Dept 2016]). Further, even if the communications at issue concern D&A's representation of Bifrost, Siras must show "good cause" for invoking the fiduciary exception (see NAMA Holdings, LLC v Greenberg Traurig LLP, 133 AD3d 46 [1st Dept 2015]).

As for the crime-fraud exception, defendants argue that plaintiffs fail to specify any particular documents for which they are invoking the exception. Also,, defendants argue that the

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crime-fraud exception cannot be invoked based on D&A's alleged breach of its fiduciary duties to Bifrost, but rather the exception applies only to any alleged breach by Kuafu.

B. Privilege Logs Discovery Rulings

To begin, defendants claim that "no emails were withheld or redacted by Kuafu based on D&A's representation of Bifrost; Kuafu only withheld or redacted documents based on its own privilege" (Kuafu Defendants' Mem. of Law, p. 3). This assertion, therefore, addresses, in part, plaintiffs' reliance on the Rules of Professional Conduct to support its claim to D&A's entire client file for Bifrost.

Regarding the fiduciary duty exception, "in the corporate context, where a shareholder (or, as here, an investor in a company) brings suit against corporate management for breach of fiduciary duty or similar wrongdoing, courts have carved out a 'fiduciary exception' to the privilege that otherwise attaches to communications between management and corporate counsel" (NAMA Holdings, LLC v. Greenberg Traurig LLP, 133 AD3d 46 [1st Dept 2015]). "[T]he applicability of the fiduciary exception depends on whether the 'real client' of the attorney rendering counsel was the fiduciary in his or her individual capacity or ... the beneficiaries to whom the fiduciary duty was owed" (Stock v Schnader Harrison Segal & Lewis LLP, 142 AD3d 210, 219-220).

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Upon a showing that the party seeking disclosure of attorney-client communications is the "real client," the court must then determine whether the party invoking the fiduciary exception has shown good cause for applying the exception under the circumstances of a particular case (NAMA Holdings, LLC v Greenberg Traurig LLP, 133 AD3d 46, 55). The burden to show good cause "arises only after it has been determined that the party seeking the disclosure was the 'real client'" (Stock v Schnader Harrison Segal & Lewis LLP, 142 AD3d 210, 225-226).

Here, the fiduciary exception applies to attorney client communications between D&A and Kuafu to the extent the communications concern Bifrost, and Kuafu's fiduciary duties to Bifrost.² Defendants maintain that they produced all communications related to D&A's representation of Bifrost. The remaining issue, therefore, is whether communications between D&A and Kuafu concerning Bifrost fall within the fiduciary exception. As such, I am referring this matter to a Special Referee for an item-by-item in camera review to determine whether the "real client" involved in the communications is Kuafu, as defendants claim, or Bifrost. To the extent the Special Referee determines that the "real client" is Bifrost, plaintiffs are entitled to

²The fiduciary exception does not apply to attorney work product (NAMA Holdings, LLC v Greenberg Traurig LLP, 133 AD3d 46, 60).

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pierce the attorney-client privilege as to those communications upon a showing of "good cause".

Accordingly, defendants are directed to produce for an in camera review all communications concerning Bifrost in category numbers 3, 4, 7, and 10 from Kuafu's privilege log of withheld documents; category numbers 3, 4, 7, and 9 from Kuafu's privilege log of redacted documents; category numbers 3, 4, 5, 9, and 10 from D&A's privilege log of withheld documents; and category numbers 3 and 5 from D&A's privilege log of redacted documents (Leyva Affirm., 11/1/16, Exs. G and H).

Siras also seeks to invoke the crime-fraud exception by claiming that the communications at issue were "made in furtherance of [d]efendants' unlawful scheme to undermine the joint venture, create a distressed situation with UBS, and position the UBS [l]oan for failure and purchase by Kuafu's affiliate" (Pls.' Mem. of Law, pp. 15-16). Siras identifies four categories of documents which it claims bear directly on their claims against defendants (Kuafu's privilege log category numbers 5, 8, and 9; D&A's privilege log number 6) and ten categories which they claim are likely to include documents related to defendants' elicited scheme (Kuafu's privilege log category numbers 3, 4, 6, 7, and 10; D&A's privilege log numbers 2, 3, 8, 9, and 10).

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"A party may not invoke the attorney-client privilege where it involves client communications that may have been in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct" (Art Capital Group LLC v Rose, 54 AD3d 276 [1st Dept 2008]). "A party seeking to invoke the crime-fraud exception must demonstrate that there is a factual basis for a showing of 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" (In the Matter of New York City Asbestos Litigation v Georgia-Pacific LLC, 109 AD3d 7, 10-11 [1st Dept 2013] [internal quotation marks omitted]). A lesser evidentiary showing is required in order to demonstrate the need for an in camera review (Id. at 11). "To permit in camera review of the documents to analyze whether the communications were used in furtherance of such wrongful activity, there need only be a showing of a factual basis adequate to support a good faith belief by a reasonable person that in camera review of materials may reveal evidence to establish the claim that the crime-fraud exception applies" (Id. [internal quotation marks omitted]).

I find that plaintiffs have made the requisite showing of a factual basis for a good faith belief that an in camera review may provide evidence establishing that the crime-fraud exception

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applies. In that regard, I note that the issue of D&A's advice to Kuafu's counsel in the Reedrock dissolution proceeding arose during the oral argument of D&A's motion to dismiss (mtn seq. no. 003). At the time of the D&A's motion to dismiss, I commented that "it would be interesting to know in discovery what exactly did Dai and the law firm ... convey[] to the lawyers who brought the dissolution proceeding" (see Transcript, pp. 12-13). Under this record, there is a factual basis to believe that an examination of the communications and documents concerning the dissolution proceeding may lead to evidence of the Kuafu defendants' breach of their fiduciary duties to Reedrock or Bifrost.

Accordingly, I am referring this matter to the Special Referee for an item-by-item in camera review of category numbers 4, 8, and 9 from Kuafu's privilege log of withheld documents and category numbers 4 and 8 from Kuafu's privilege log of redacted documents and category number 6 from D&A's privilege log of withheld documents to determine if such documents fall within the crime-fraud exception.

Accordingly, based on the foregoing, it is hereby

ORDERED that the branch of plaintiff's motion to compel production of all documents pertaining to defendant Dai's waiver of the attorney-client privilege is granted to the extent of

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directing defendants to produce any documents in accordance with this decision and order within twenty (20) days of service of a copy of this order with notice of entry; and it is further

ORDERED that the branch of plaintiffs' motion for production of all documents contained in defendants' privilege logs based on the fiduciary and crime-fraud exceptions to the attorney-client privilege is respectfully referred to a Special Referee or Judicial Hearing Officer to conduct an in camera review of the documents in accordance with this decision and order to determine whether the fiduciary duty or the crime-fraud exceptions apply to the documents at issue; and it is further

ORDERED that the above-noted reference to the Special Referee or Judicial Hearing Officer is to hear and report with recommendations, or if the parties so-agree, to hear and determine; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "references" link under "Courthouse Procedures") shall assign this matter to an available

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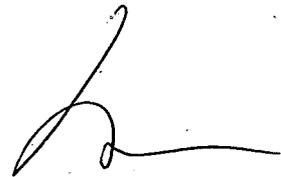
Special Referee or Judicial Hearing Officer to hear and report or hear and determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiffs shall, within fifteen (15) days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referee Part; and it is further

ORDERED that any motion to confirm or reject the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and 22 NYCRR § 202.44.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 6/5/17


HON. JEFFREY K. OING, J.S.C.