Roberts v Corwin
2012 NY Slip Op 32403(U)
September 10, 2012
Supreme Court, New York County
Docket Number: 115370-2009
Judge: Marcy S. Friedman
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SCANNED ON 9/19/2012

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN, *Justice* PART 57

ALLEN B. ROBERTS,

Plaintiff,

-against-

LESLIE D. CORWIN and GREENBERG TRAURIG, LLP,

Defendants.

INDEX NO. 115370-2009

MOTION DATE 09/10/12

Motion Seq. No. 001

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this letter motion to reargue ~~motion to~~ sequence 001

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon the foregoing papers, it is ordered that this motion is determined pursuant to the the decision on the record on July 5, 2012, the transcript of which was so-ordered on September 7, 2012, and this court's decision dated September 10, 2012.

Dated: September 10, 2012

J.S.C. MARCY S. FRIEDMAN, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

☐ DO NOT POST [ ] REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

——————————————————————— x

ALLEN B. ROBERTS,

Plaintiff(s),

- against -

LESLIE D. CORWIN and GREENBERG TRAURIG, LLP,

Defendant(s).

——————————————————————— x

Index No.: 115370/2009

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DECISION/ORDER

In this legal malpractice action, plaintiff Allen B. Roberts alleges that defendants Leslie D. Corwin and Greenberg Traurig, LLP (collectively Greenberg Traurig), his attorneys in an underlying arbitration proceeding against his former firm, Roberts & Finger, LLP (Roberts & Finger), committed legal malpractice by failing to designate an expert to testify on the value of plaintiff's partnership interest. Greenberg Traurig moves for reargument of its prior motion for an order compelling plaintiff's attorneys, Barry Cozier and John Sachs of Epstein Becker & Green, P.C. (Epstein Becker), to produce various documents that plaintiff alleged were undiscoverable due to the attorney-client privilege.[1] This motion was determined by the court's decision and order on the record on May 14, 2012, the transcript of which was so-ordered on May 21, 2012 (Prior Decision). Plaintiff also seeks a determination of the discoverability of two additional documents.

In moving for reargument, Greenberg Traurig seeks to set aside only that part of the

[1]This reargument motion is made by letter, as agreed by the parties by stipulation dated June 13, 2012.

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court's Prior Decision that held that document no. 7 on plaintiff's privilege log is privileged and therefore not subject to disclosure. Document no. 7 was identified on the log as plaintiff's handwritten notes, dated May 2, 2007, "memorializing communications with J. Sachs." (Ex. L to Aff. of Roy L. Reardon, dated Dec. 14, 2011 [Reardon Aff.].) In holding the document privileged, the court reasoned that the notes concerned a conversation between plaintiff and Mr. Sachs "with respect to a potential malpractice lawsuit." (May 14, 2012 Tr. at 30.)

Plaintiff argues on this reargument motion that there is no basis for a privilege claim until August 6, 2007, and that the subject notes, made in May 2007, must therefore be produced. (See Letter of Roy L. Reardon, dated June 6, 2012, at 2.) This argument is apparently based on the court's finding in its Prior Decision that Mr. Sachs and Epstein Becker were formally retained for the instant malpractice action after the underlying arbitration was resolved on August 6, 2007, but that, before that resolution, Mr. Sachs and Mr. Cozier and through them, Epstein Becker, were co-counsel with Greenberg Traurig in the underlying arbitration. (See May 14, 2012 Tr. at 22-25.)

By decision on the record on July 5, 2012, the transcript of which was so-ordered on September 7, 2012, the court granted leave to re-argue, and directed supplemental briefing on the relevance to this malpractice action of an accounting action brought by Greenberg Traurig after the final award was rendered in the arbitration proceeding. This briefing has now been received.

As a threshold matter, the court rejects Greenberg Traurig's contention that Mr. Roberts, simply by bringing a malpractice action against defendants, waived his attorney-client privilege with Epstein Becker. (Reardon Aff., ¶¶ 20-24; Memo. of Law in Support of Prior Motion at 8-10.) The attorney-client privilege is waived "where a party affirmatively places the subject

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matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of the party's claim or defense, and application of the privilege would deprive the opposing party of vital information." (Veras Invs. Partners, LLC v Akin Gump Strauss Hauer & Feld LLP, 52 AD3d 370, 373 [1st Dept 2008].) "[T]hat a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself 'at issue' in the lawsuit; if that were the case, a privilege would have little effect. . . . Rather, 'at issue' waiver occurs when the party has asserted a claim or defense that he intends to prove by the use of privileged materials." (Deutsche Bank Trust Co. of Americas v Tri-Links Inv. Trust, 43 AD3d 56, 64 [1st Dept 2007] [internal quotation marks and citations omitted].)

Here, however, in moving for production of Epstein Becker's documents, Greenberg Traurig has not made any showing that Mr. Roberts has placed at issue the legal advice that he received from Epstein Becker with respect to the malpractice action.

The court further rejects Greenberg Traurig's assertion that no document may be found to be privileged if made on or before August 6, 2007. The Prior Decision effectively accepted August 7, 2007 as the earliest date as of which plaintiff retained Epstein Becker to represent him in the malpractice litigation. The court accepted this date based on plaintiff's testimony that he "formally retained" Mr. Sachs after the August resolution of the arbitration (see Prior Decision at 23-24), and on Greenberg Traurig's apparent acknowledgment, for purposes of the prior motion, that the retention occurred, at the earliest, as of that date. (See Reardon Aff., ¶¶ 5, 27-34.)

Upon further consideration, the court recognizes that the August 7, 2007 date is unduly restrictive. It is well settled that "an attorney-client relationship is established where there is an

explicit undertaking to perform a specific task. While the existence of the relationship is not dependent upon the payment of a fee or an explicit agreement, a party cannot create the relationship based on his or her own beliefs or actions." (Pellegrino v Oppenheimer & Co., 49 AD3d 94, 99 [1st Dept 2008]; Jane St. Co. v. Rosenberg & Estis, P.C., 192 AD2d 451 [1st Dept.], lv denied 82 NY2d 654 [1993].) An attorney-client relationship may thus exist prior to execution of a formal retainer. Indeed, an attorney-client relationship "can encompass a preliminary consultation even where the prospective client does not ultimately retain the attorney." (Pellegrino, 49 AD3d at 99.)

In the instant action, however, plaintiff does not show that his preliminary consultations with Mr. Sachs gave rise to an attorney-client relationship with respect to a malpractice action. Plaintiff has declined to submit an affidavit stating when or for what purpose he initially retained Mr. Sachs. Rather, he relies on Mr. Sachs' affirmation which asserts that all communications between him and plaintiff, dating back to mid-2006, were for the purpose of providing legal advice with respect to Mr. Roberts' remedies against Greenberg Traurig. (Prior Decision at 22; Aff. of John Sachs, dated Jan. 6, 2012, ¶¶ 3-4.) This court previously rejected plaintiff's contention, based on this conclusory affirmation, that plaintiff's retention of Mr. Sachs for the malpractice representation occurred in 2006. (Prior Decision at 22-23.) The court adheres to that determination. As previously held, after Greenberg Traurig's alleged malpractice in the arbitration proceeding, Mr. Roberts retained Epstein Becker (both Mr. Cozier and Mr. Sachs) to co-counsel with Greenberg Traurig in that proceeding. (Prior Decision at 21-24.) Plaintiff did not formally retain Epstein Becker to represent it in this malpractice litigation until after the allegedly unsuccessful resolution of the arbitration – approximately one year after the

consultations with Mr. Sachs began. Under these circumstances, in which plaintiff retained Epstein Becker to correct Greenberg Traurig's malpractice and thereby to attempt to avoid a malpractice action, the court cannot find that preliminary consultations, in which malpractice may have been discussed, were undertaken "with a view toward retention" of Epstein Becker for malpractice litigation. (See generally Pellegrino, 49 AD3d at 99.)

The court finds, however, that the documentary evidence, including that reviewed in camera, shows that plaintiff began to consider a malpractice action in earnest after plaintiff's motion to vacate the unfavorable award was denied by order of this Court (Moskowitz, J.), dated April 3, 2007. It is undisputed that Mr. Roberts circulated a conflicts check at Epstein Becker, dated May 30, 2007, with himself as the client, and sought to have a client-matter number assigned. (July 5, 2012 Tr. at 13-14; P.'s Privilege Log [Ex. L to Reardon Aff.].) As plaintiff acknowledges, these events coincide with Epstein Becker having "switched" from giving advice consistent with the continuing arbitration to "direct strategic advice about what to do about a malpractice claim." (See July 5, 2012 Tr. at 13-14.)

Thus, there is a period between April 2007 and the August 6, 2007 resolution of the arbitration proceeding when Epstein Becker was continuing to co-counsel with Greenberg Traurig in the arbitration, but plaintiff was also consulting with Mr. Sachs about a possible malpractice action against Greenberg Traurig, with a view to retaining Epstein Becker to represent him in the action. During this period, documents memorializing plaintiff's communications with Mr. Sachs could bear on co-counseling efforts to minimize loss in the arbitration, but could also relate to strategy in developing a malpractice action. The latter communications regarding the malpractice action may therefore be subject to a claim of

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privilege. As held in the July 5, 2012 decision, and now clarified to apply to any documents memorializing communications with or advice from Mr. Sachs regarding the malpractice action (Sachs documents), made in the period between April 2007 and August 6, 2007 (subject period), "Mr. Roberts' notes of his conversations with Mr. Sachs and documents that Mr. Sachs may have addressed to Mr. Roberts can and must be parsed so that communications with respect to the malpractice action remain privileged but that communications with respect to the arbitration are discoverable." (July 5, 2012 Tr. at 34.) (See generally Soiefer v Soiefer, 17 AD3d 268, 269 [1st Dept. 2005] [holding redaction proper to safeguard attorney-client privilege].)

In determining whether specific Sachs documents from the subject period are discoverable, the court will also be guided by the following precepts. "That nonprivileged information is included in an otherwise privileged lawyer's communication to its client – while influencing whether the document would be protected in whole or only in part – does not destroy the immunity. In transmitting legal advice . . . it will often be necessary for a lawyer to refer to nonprivileged matter." (Spectrum Sys. Intl. Corp. v Chemical Bank, 78 NY2d 371, 378 [1991].) Significantly also, the court must determine, "from reviewing the full content and context of the communication, [whether] its purpose was to convey legal advice to the client" (id. at 379) – here, regarding the malpractice action. If so, the "entire document [will be] exempt from discovery." (Id.) In contrast, if the document conveys legal advice rendered in co-counseling on the arbitration, as well as legal advice regarding the malpractice action, then the document may be redacted.

Applying these precepts, the court turns to review of the individual documents.

Document No. 7. This document is Mr. Roberts' notes, dated May 2, 2007, of a

conference with Mr. Sachs. Contrary to defendant's contention, the privilege is not lost due to the fact that the document is Mr. Roberts' notes, as opposed to Mr. Sach's, memorializing the legal advice. The attorney-client privilege attaches to a client's communications to an attorney as well as to communications from attorney to client. (Spectrum Sys. Intl. Corp., 78 NY2d at 378.)

While the entries are largely sentence fragments and are not always fully comprehensible, the court finds that the notes do contain some entries that clearly refer solely to advice given by Epstein Becker in connection with its continuing co-counseling with Greenberg Traurig on the arbitration proceeding. The notes also contain entries regarding a contemplated malpractice action. With respect to the co-counseling, document no. 7 refers to a number of issues, including strategy in connection with the accounting proceeding that was filed by Greenberg Traurig after rendition of the final arbitration award, in order to gain leverage in resolving the arbitration proceeding. While the court finds that the accounting proceeding was part of the continuing co-counseling, the particular entries in document no. 7 regarding the accounting, when reviewed in the full context of the notes, are part of and inseparable from the communication whose purpose was to convey legal advice on the malpractice action.

The following portions of document no. 7 shall accordingly be disclosed: The line beginning with "Jannuzzo" and ending with "strengthening." All other entries may be redacted.

Exhibit A to Plaintiff's June 12, 2012 Letter.[2] As set forth by plaintiff on the record, this is an e-mail to Mr. Roberts from Mr. Sachs, dated April 16, 2007, and "is a discussion of options and issues involved in proceeding to a malpractice complaint raised by having Mr. Roberts

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[2]This document and Exhibit B to Plaintiff's June 12, 2012 Letter were marked as Court's Exhibits A & B for use during the July 5, 2012 argument and in camera review. (July 5, 2012 Tr. at 20-21.)

having been transmitted a draft complaint for accounting by Mr. Corwin." (July 5, 2012 Tr. at 20.)

This email discusses the accounting in the context of a communication, the overall purpose of which was to convey advice with respect to a contemplated malpractice action. This document is therefore not discoverable. The transmittal emails that are part of the document – from Mr. Robert to Sachs, attaching the draft accounting complaint, and from Mr. Corwin's secretary to Mr. Roberts – should be disclosed.

Exhibit B to Plaintiff's June 12 , 2012 Letter. This document is an e-mail from Mr. Sachs to Mr. Roberts dated July 25, 2007, with a subject line that reads "settlement agreement." As set forth by plaintiff on the record, this document discusses the issues and strategy involved in a malpractice claim arising out of the settlement agreement draft that was proposed for globally settling the dispute with Roberts & Finger. (July 5, 2012 Tr. at 21.)

The first paragraph of this document discusses the settlement agreement as part of an overall discussion of a contemplated malpractice action. It is therefore not discoverable. The second paragraph of the e-mail, beginning with the words "As far as," sets forth suggestions for terms of the settlement agreement. It is discoverable, as conceded by plaintiff on the record. (July 5, 2012 Tr. at 14, 21-22.)

It is accordingly hereby ORDERED that defendant's motion for reargument is granted to the extent set forth in this court's decision on the record on July 5, 2012 and as further provided in this order; and it is further

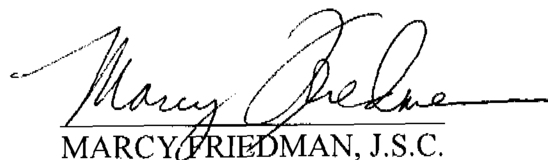
ORDERED that document no. 7 on plaintiff's privilege log shall be provided to defendant forthwith, redacted as provided in this decision; and the court otherwise adheres to its decision on

the record on May 14, 2012; and it is further

ORDERED that Exhibits A and B to plaintiff's June 12, 2012 letter shall be provided to defendant forthwith, redacted as provided in this decision.

This constitutes the decision and order of the court.

Dated: New York, New York
September 10, 2012



MARCY FRIEDMAN, J.S.C.

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