Black Diamond Capital Mgt., L.L.C. v Oppenheimer Master Loan Fund, LLC
2017 NY Slip Op 31176(U)
May 31, 2017
Supreme Court, New York County
Docket Number: 652519/2015
Judge: Jeffrey K. Oing

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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BLACK DIAMOND CAPITAL MANAGEMENT, L.L.C., BD IAP HOLDINGS LLC, and GSC PARTNERS CDO FUND IV, LTD.,

Plaintiffs,

-against-

OPPENHEIMER MASTER LOAN FUND, LLC, OPPENHEIMER SENIOR FLOATING RATE FUND, EATON VANCE CORP., EATON VANCE FLOATING RATE PORTFOLIO, and IAP GLOBAL SERVICES, LLC,

Defendants.

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Index No.: 652519/2015

Mtn. Seq. No. 008

DECISION AND ORDER

JEFFREY K. OING, J.:

Preliminary Statement

This action arises out of an alleged repudiation of an agreement to sell ownership interests in defendant IAP Global Services, LLC ("IAP"), a limited liability corporation. IAP is a government contractor that provides facilities management and other services internationally. Similar to a corporation, IAP has a board of directors, although dissimilar to a corporation, its owners have direct control rights and can effectively veto a board decision if they obtain 40% ownership, or negative control rights (Second Amended Compl., ¶ 1). Plaintiffs', Black Diamond Capital Management, L.L.C., BD IAP Holdings LLC, and GSC Partners CDO Fund IV, Ltd. (collectively, "Black Diamond"), lawsuit alleges that several of the defendants, fearful that Black Diamond would obtain negative control rights in IAP, reneged on

an agreement to sell Black Diamond IAP membership units (Id., ¶¶ 5-7). Black Diamond alleges that these defendants fabricated a right of first refusal to justify the repudiation.

Relief Sought

Black Diamond moves to compel the production of two email chains from defendants Eaton Vance Corp. and Eaton Vance Floating Rate Portfolio (collectively, "Eaton Vance") which were sent during the time period leading up to this litigation and which may impact the issues in this litigation. Eaton Vance asserts that these emails are protected from disclosure as they are attorney-client privileged communications.

Factual Background

IAP borrowed funds from syndicates of lenders under various loan agreements, with membership of the IAP loan syndicate evolving over time. The interested parties appointed an administrative and collateral agent (the "Agent") to administer the facility and the loan's security interest, and, upon the event of a default, to exercise any secured lender rights with respect to the collateral. Deutsche Bank Trust Company Americas ("Deutsche Bank"), a non-party, was appointed to serve as the initial Agent on the senior secured loan.

In or around 2013, IAP defaulted on certain loan obligations. On September 3, 2013, Deutsche Bank retained the law firm of Kaye Scholer, LLP ("Kaye Scholer") to represent it in

connection with the credit facility. Michael Messersmith, Esq. ("Messersmith") was the Kaye Scholer partner responsible for the engagement. Deutsche Bank, with the help of Kaye Scholer and Messersmith, facilitated a voluntary restructuring of IAP's debts.

During the restructuring process, some of the first lien lenders, including Eaton Vance, formed a committee, i.e., the Steering Committee, to aid in the restructuring and to coordinate their efforts. In addition to Eaton Vance, the Steering Committee included Invesco Management S.A., Invesco Senior Secured Management, Inc., Credit Suisse Securities (USA) LLC, and defendants Oppenheimer Master Loan Fund, LLC and Oppenheimer Senior Floating Rate Fund (collectively, "Oppenheimer"). Deutsche Bank served as Agent until the restructuring agreement was finalized, effective on July 18, 2014. At that point Cortland Capital Markets Services, LLC ("Cortland") assumed the Agent role. Kaye Scholer continued in its representation of the Agent.

Under the restructuring agreement, the parties agreed that IAP would issue equity, in the form of membership units, to specific lenders as consideration for the restructuring of their loans. Eaton Vance, Black Diamond, Oppenheimer, Credit Suisse, and the other first lien lenders each received equity in consideration for the restructuring, in accordance with their

operating agreement -- the Amended and Restated Limited Liability Company Agreement of IAP Global Services, LLC, dated July 18, 2014.

On or about April 20, 2015, Oppenheimer offered for sale its 1,627.38 membership units through a public auction. Black Diamond, whose identity was unbeknownst to Oppenheimer at the time, submitted a bid for all of Oppenheimer's 1,627.38 units (Second Amended Compl., ¶¶ 3-4). Black Diamond asserts that OppenheimerFunds, Inc. ("OppenheimerFunds") acting as the agent of Oppenheimer, accepted the bid, confirming that the trade was "good," and thus created a binding agreement between the parties (Id., ¶ 4). However, on April 27, 2015, OppenheimerFunds contacted Black Diamond's broker and informed him that Oppenheimer would not sell the shares to Black Diamond (Id., ¶ 6). Oppenheimer instead sold its shares to Eaton Vance, who exercised a right of first refusal to which the trade was allegedly subject. On or around May 7, 2015 Eaton Vance retained the law firm of Orrick, Herrington & Sutcliffe, LLP ("Orrick") to represent it in the transfer of Oppenheimer's shares (Christensen 9/29/16 EBT, p. 248). On July 30, 2015 Oppenheimer closed the transfer of shares to Eaton Vance (Id., ¶ 7).

In the case at bar, Black Diamond argues that OppenheimerFunds and Eaton Vance convinced Oppenheimer to renege on its agreement, and that they fabricated a right of first

refusal to keep Black Diamond from obtaining negative control rights (Id., ¶¶ 5-7).

Motion to Compel

In this motion to compel, Black Diamond seeks the production of two sets of emails, which defendant Eaton Vance asserts are protected from disclosure under attorney-client privilege. The first set of contested emails were sent on April 24, 2015 (the "4/24/15 emails") (Kelley Affirm., Ex. I, Privilege Log, No. 29). The authors and recipients listed on this email chain are Heath Christensen, Eaton Vance Corp.'s Vice President and Senior Credit Analyst, and two Kaye Scholer attorneys, Messersmith and Kathryn Schmanski, Esq. The 4/24/15 emails consist of "[f]our emails of uninterrupted dialogue concerning the purchase of IAP equity" (Id.).

The second set of contested emails were sent on May 11, 2015 (the "5/11/15 emails") and consist of "seven emails of uninterrupted dialogue concerning the purchase of IAP equity" (Id., No. 22). The listed authors and recipients are Schmanski; Amy G. Pasacreta, Esq., an attorney at Orrick; Michael Botthof, head of the operations group at Eaton Vance; and Steve Levielle, an employee in the operations group at Eaton Vance (Id.).

Eaton Vance asserts that these two sets of email communications between itself and Kaye Scholer are privileged for several reasons. First, Eaton Vance argues that Kaye Scholer

represented it in its capacity as a member of the Steering Committee. To support this contention, Eaton Vance points to a Kaye Scholer press release in which Kaye Scholer claims to have represented both Deutsche Bank and the IAP's lender group in the IAP restructuring (NYSCEF Doc. No. 187). Christensen similarly contends that Messersmith and Kaye Scholer advised Eaton Vance as an individual lender "throughout the process of the restructuring" (Christensen 9/29/16 EBT, p. 62).

Second, Eaton Vance argues that its communications with Messersmith and Kaye Scholer post restructuring, but pre-transfer, of Oppenheimer's shares are privileged because those communications were that of a prospective client seeking legal advice. In his affidavit, Christensen explains the nature of the relationship as follows:

> [I] have (always on behalf of Eaton Vance) obtained the legal services of Mr. Messersmith and [Kaye Scholer] before, during and after the IAP restructuring was concluded. All of my dealings with Mr. Messersmith, which have extended across several legal matters and have occurred over several years, have been in the context of an attorney-client relationship. He has consistently undertaken to provide me with the legal services I requested on behalf of Eaton Vance. I always understood that he would provide advice consistent with the interests of Eaton Vance. On my side, I further understood that our communications were to be confidential. I have no reason to think that Mr. Messersmith had a different view.

(Christensen Aff., ¶ 21)(NYSCEF Doc. No. 184).

As a result of this alleged longstanding professional relationship with Messersmith, Christensen further explained in

his affidavit that he chose to consult with him regarding the transfer of shares. In that regard, he provides:

> After Oppenheimer honored the [right of first refusal], on or about April 24, 2015, I sought legal assistance from Mr. Messersmith with regard to the transfer of the IAP LLC Interests from Oppenheimer to Eaton Vance. I chose among my various options to contact Mr. Messersmith because I believed he had the specific legal information I was seeking with regard to the IAP situation at that time. The Plaintiffs' Motion to Compel is directed to my email communications with Mr. Messersmith regarding the transfer of IAP LLC Interests.

(Christensen Aff., ¶ 20).

In further support of its privilege claim, Eaton Vance argues that although it had no formal retainer agreement with Kaye Scholer, an attorney-client relationship can, in certain circumstances, encompass preliminary consultation with a prospective client (see Pellegrino v Oppenheimer & Co., Inc., 49 AD3d 94, 99 [1st Dept 2008]).

In response, Black Diamond argues that Eaton Vance was never a client of Kaye Scholer during or after the restructuring and that Eaton Vance has failed to produce evidence of any such attorney-client relationship. In that regard, Black Diamond points to the fact that Eaton Vance has failed to establish that there existed between the parties a fee arrangement, a formal contract or retainer agreement, an informal relationship of representation, an actual representation in one aspect or matter,

or a reasonable belief that Messersmith and Kaye Scholer represented it.

Black Diamond also argues that Eaton Vance cannot claim that it was under the impression that Kaye Scholer represented it in its capacity as an individual lender of the Steering Committee, and that this relationship extended post restructuring. To support that argument, Black Diamond points to the engagement letter signed by Deutsche Bank, the Agent at the time of the restructuring, which shows that the Agent was Kaye Scholer's client, not the Steering Committee (Kelley Affirm., Ex. C). Black Diamond also refers to a letter sent by Messersmith to IAP's attorneys and forwarded to the first lien lenders, including Eaton Vance, which stated that Kaye Scholer represented the Agent (Kelley Affirm., Ex. D) and points to the "Restructuring Support Agreement" in which the first lien lenders acknowledged that Kaye Scholer represented the Agent (Kelley Affirm., Ex. E at § 5.01). Black Diamond argues that if Eaton Vance was truly under the impression that Kaye Scholer represented it Eaton Vance would not have retained Orrick in the transfer of the IAP equity trade with Oppenheimer.

Discussion

The attorney-client privilege applies to communications made "[f]or the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose" (Rossi v Blue

Cross & Blue Shield of Greater N.Y., 73 NY2d 588, 593 [1989] [internal quotations and citations omitted]). The burden of establishing a right of protection based on attorney-client privilege falls upon the party claiming the existence of privilege (Spectrum Sys. Intl. Corp. v Chemical Bank, 78 NY2d 371, 377 [1991]; China Privatization Fund (Del.), L.P. v Galaxy Entertainment Group Ltd., 139 AD3d 449, 449 [1st Dept 2016]).

In order to establish attorney-client privilege, the party asserting the privilege must first establish the existence of this requisite professional relationship as that between attorney and client (Ambac Assur. Corp. v Countrywide Home Loans, Inc., 27 NY3d 616, 624 [2016]). Formality is not necessary to create a legal services contract, but the words and actions of the parties must be analyzed to assess whether an attorney-client relationship was formed (Talansky v Schulman, 2 AD3d 355, 358 [1st Dept 2003]). Although an attorney-client relationship can arise only when "[o]ne contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services" (Id. [internal quotations and citations omitted]), a plaintiff's unilateral actions and beliefs are insufficient to form an attorney-client relationship (Jane St. Co. v Rosenberg & Estis, 192 AD2d 451 [1st Dept 1993]; see Pellegrino v Oppenheimer & Co., Inc., 49 AD3d 94, 99 [1st Dept 2008]). When there is nothing in the record to indicate that a law firm either "[a]ffirmatively

led plaintiff to believe it was acting on plaintiff's behalf or knowingly allowed plaintiff to proceed under this misconception" (Jane St. Co. v Rosenberg & Estis, 192 AD2d at 451), a client's belief as to the existence of the professional relationship is not dispositive (Weadick v Herlihy, 16 AD3d 223, 224 [1st Dept 2005] [internal citations omitted]).

Here, the record demonstrates that Eaton Vance has failed to establish the existence of the requisite attorney-client relationship between itself, and Messersmith and Kaye Scholer. Although Eaton Vance argues that it had a long-standing relationship with Messersmith, it fails to provide any evidence of such. Besides the self-serving conclusory assertions made by Christensen in his affidavit, Eaton Vance fails to provide any evidence regarding Kaye Scholer's or Messersmith's perception of the relationship. There is no indication in the record that Kaye Scholer and Messersmith affirmatively led Eaton Vance to believe they were acting on its behalf, or, for that matter, allowed Eaton Vance to proceed under this misconception. In that regard, the press release that Eaton Vance relies on to demonstrate an attorney-client relationship is simply insufficient to establish Kaye Scholer's belief that it represented Eaton Vance in its capacity as a first lien lender, particularly in the absence of any supplemental affirmation from Messersmith or any Kaye Scholer

attorney. In fact, the record is devoid of any explanation from Eaton Vance concerning the absence of such documentary evidence.

In any event, even if Eaton Vance believed Kaye Scholer was representing it as part of the Steering Committee during the restructuring process, and not just representing the Agent, that fact is of no moment. Here, the restructuring was finalized on July 18, 2014. The 4/24/15 emails and 5/11/2015 emails were sent nine and ten months, respectively, after the restructuring. Further, Christensen's claim in his affidavit that Eaton Vance sought the advice of Kaye Scholer regarding the transfer of Oppenheimer's IAP shares is inconsistent with, and contrary to, his earlier September 29, 2016 EBT. When asked at his deposition if he was aware of any work that Kaye Scholer did that "specifically was directed at Eaton Vance," Christensen responded only in regards to Kaye Scholer representing Eaton Vance in the restructuring, stating, "[I] generally view Kaye Scholer as representing us with respect to IAP [as a member of the first lien lenders]" (Christensen 9/29/16 EBT, pp. 59, 53-58). When asked about when he secured advice from Kaye Scholer, and specifically Messersmith, Christian responded that it was "[t]hroughout the restructuring," the 2014 time-frame, and "[s]ince then" (Id., 63). Thus, although Christensen briefly alludes to some form of post restructuring communication with Messersmith, he makes no mention of the IAP share transaction.

Christensen confirmed in his EBT that Orrick was "[Eaton Vance's] outside counsel on the trade documentation" (Id., pp. 248-249). When asked if it was correct that no other lawyers other than Orrick attorneys helped represent Eaton Vance in the transaction with Oppenheimer, Christensen replied "[t]hat's correct" and "[t]hat's right" (Id., p. 250).

In addition, with respect to the 5/11/15 emails, at the time they were sent, Eaton Vance had already retained Orrick to represent it in the IAP share transaction with Oppenheimer. Thus, Kaye Scholer was merely a third party, outside the scope of Orrick and Eaton Vance's attorney-client relationship. The principle is well settled that communications made in the presence of third parties, whose presence is known to the client, are not privileged communications and can be disclosed, subject to few exceptions (Ambac. Assur., 27 NY3d at 624 ["[s]tatements made to the agents or employees of the attorney or client ... retain their confidential (and therefore, privileged) character, where the presence of such third parties is deemed necessary .... So too, when one attorney represents multiple clients concerning a matter of common interest"] [internal citations omitted]). Those exceptions are not present in this case as no communications were made by an agent to an attorney, nor was there a common interest amongst clients. As such, the attorney-client privilege does not attach to the 5/11/15 emails sent

between Eaton Vance, Orrick and Kaye Scholer. The presence of third-party Kaye Scholer effectively waived the privilege.

Accordingly, it is hereby

ORDERED that plaintiff's motion to compel is granted; and it is further

ORDERED that defendant Eaton Vance shall produce to Black Diamond the following documents: Numbers 22 & 29 from its privilege log within twenty (20) days after service of a copy of this order with notice of entry.

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

Dated: 5/31/17

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

JEFFREY K. OING
J.S.C.