SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

KEITH STOCK,	:	
Plaintiff,	:	Index No. 651250/13
vs.	:	INTERIM ORDER
SCHNADER HARRISON SEGAL & LEWIS LLP, et al,	:	
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

The Court has reviewed letters from counsel for the parties regarding defendants' withholding of 24 documents listed on defendants' privilege log as attorney-client communications, and as to one document, attorney work product. Plaintiff argues that the documents are not privileged as to him because defendants were representing him at the time, the subject of the communications was that very representation, the participants did not consider the communications to be confidential as to plaintiff, and they were aware that the continued representation would be conflicted. Defendants oppose, arguing that the communications are protected by the in-house attorney-client privilege. The court finds that the attorney-client and work product privileges do not protect any of the documents.

Stock is suing law firm Schnader Harrison Segal & Lewis LLP. (Schnader), and partner Christine Carty (Carty) for malpractice and breach of fiduciary duty. The lawsuit arises from defendants' representation of Stock in connection with his departure from employment with MasterCard International Incorporated (MasterCard) in 2008. Stock alleges that defendants failed to advise him that his departure would accelerate the expiration date for his stock options worth $5 Million from ten years to between ninety and one hundred and twenty days.

According to Stock, after his options expired, defendants advised him to assert claims against MasterCard and its options plan administrator Morgan Stanley Smith Barney (MSSB). During the ensuing arbitration, at which Schnader attorneys other than Carty represented Stock, MSSB's counsel notified Schnader that it planned to call Carty as a fact witness concerning whether Schnader's failures in its representation of Stock contributed to the monetary losses he was seeking from MSSB. Carty consulted with Schnader partner and General Counsel Wilbur Kipnes regarding her anticipated testimony, and possible ethical issues. She was prepared for the arbitration by Schnader attorney Cynthia Murray (Murray). Murray and Schnader attorney Thomas Hecht (Hecht) were assigned to simultaneously represent Stock in the arbitration.

The deposition transcript excerpts, attorney notes, and additional exhibits submitted by plaintiff show that when Carty, Kipnes, Hecht and Murray were communicating about Carty's upcoming testimony, they did not expect their communications to be confidential as to their current client, Stock. Carty testified at her deposition that: she understood that anything she stated to Murray would be disclosed to Stock; and she had no expectation one way or the other that Hecht would keep her forwarded e-mail with Kipnes confidential as to Stock. The issue of a conflict between Schnader and Stock was not discussed by Hecht or Murray, nor did Carty seek legal advice from them. Murray acknowledged that the firm was representing Stock, and they were protecting privileged communications on his behalf.

Stock also has a right to disclosure from his fiduciaries of communications that directly correlate to his claims of self-dealing and conflict of interest. *See In re Bank of New York Mellon*, 42 Misc3d 1237(A) (Sup Ct, New York County 2013) [analyzing applicable law and citing *Hoopes v Carota*, 142 AD2d 906, 909-910 (3rd Dept), *affd* 74 NY2d 716 (1989)]. In

Hoopes v Carota, the Third Department compelled disclosure of the "content of communications between defendant [trustee] and his attorneys regarding the transactions and proposals which [we]re the subject matter of the complaint." 142 AD2d at 910. Stock's claim of malpractice is based on the negligent representation, and the cover-up of the firm's negligence and conflict with Stock so as to ensure their continued representation in the arbitration with MSSB, which was unsuccessful. His fiduciaries were further obligated to inform him of the facts underlying MSSB's accusation that his attorneys' "failures" might have caused his losses, the existence of a potential conflict, and that he should seek independent counsel for advice. *See* New York Rules Prof. Conduct 1.7, 1.10(a) (22 NYCRR 1200.0).

Stock's current claims are colorable. For example, prior to Carty's examination at the arbitration, Schnader knew that MSSB's accusation could be considered credible by the arbitration panel. Murray obtained a transcript of the arbitrators' inadvertently recorded conversation during a break, in which one of them expressed the belief that Carty should have negotiated an enlargement of the expiration period for the options. Carty then testified to facts supporting the conclusion that she could have, but did not negotiate an enlargement of the options expiration date. It is not credible for defendants to argue that they did not have a basis to conclude there was a conflict.

Finally, the documents fall under the "at issue" waiver, and defendants cannot selectively disclose self-serving documents regarding the same subject matter. The "at issue" waiver of the privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege

would deprive the adversary of vital information. *Credit Suisse First Boston v Utrecht-America Fin. Co.*, 27 AD3d 253, 254 (1st Dept 2006).

Schnader's continued representation of Stock has been placed at issue by both plaintiff and defendants. The latter have asserted a counterclaim for attorney's fees, which they would not be entitled to recover if Stock shows they were incurred through improper conduct. Communications regarding Schnader's continued representation during the arbitration are therefore material to Stock's defense. Schnader must disclose as well because the firm has already disclosed selective communications regarding consultations between Carty and Kipnes regarding that same issue. *See Deutsche Bank Trust Co. of Americas v Tri-Links Inv. Trust*, 43 AD3d 56, 64 (1st Dept 2007) (finding selective disclosure impermissible). Accordingly, it is hereby

ORDERED that by December 22, 2014, defendants shall produce to plaintiff copies of all the documents listed on the privilege log produced by defendants, and attached as Exh. 1 to the November 14, 2014 letter from plaintiff's counsel.

DATED: December 5, 2014

ENTER:

J.S.C.
MELVIN L. SCHWEITZER