Dempsey v Chaves & Perlowitz LLP
2017 NY Slip Op 32797(U)
July 24, 2017
Supreme Court, Suffolk County
Docket Number: 601938-15
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 601938-15

ORIGINAL

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5/17/17
SUBMIT DATE 6/23/17
Mot. Seq. # 002 - MotD
Mot. Seq. # 003 - XMotD
CDISP Y____ N X

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RICHARD DEMPSEY,

Plaintiff,

-against-

CHAVES & PERLOWITZ LLP and ANDREW LUFTIG,

Defendants.

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ROBINSON, BROG, LEINWAND
Attys. For Plaintiff
875 Third Ave.
New York, NY 10022

FURMAN, KORNFELD et al
Attys. For Defendants
61 Broadway
New York, NY 10006

Upon the following papers numbered 1 to 63 read on this motion by plaintiff to quash a subpoena and to compel production of information and documents and the cross motion by defendants to enforce the challenged subpoena; E-Filed Notice of Motion and supporting papers: 34-48; ; Notice of Cross Motion and supporting papers: 49-58 ; Opposition papers: 50-58 ; Reply papers 59-63 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that those portions of this motion (#002) by the plaintiff for an order quashing the subpoena served by the defendants mandating that attorney Neil Goldstein, Esq., appear for a deposition is considered under CPLR 2304 and is granted; and it is further

ORDERED that the remaining portions of the plaintiff's motion (#002) wherein he seeks an order compelling the defendants to provide responses to the plaintiff's Second Notice for Discovery and Inspections considered under CPLR 3124 and is denied except with respect to items numbered 19 and 20 in the plaintiff's Second Demand for Discovery and Inspection dated December 22, 2016; and it is further

ORDERED that those portions of the cross motion (#003) by the defendants for an order "denying the plaintiff's motion to compel" is granted except with respect to items numbered 19 and 20 in the plaintiff's Second Demand for Discovery and Inspection dated December 22, 2016; and it is further

ORDERED that the remaining portions of the defendant's cross motion (#003) for an order directing the enforcement of the subpoena issued by the defendants to attorney Neil Goldstein, Esq., is denied.

The plaintiff commenced this action to recover damages allegedly sustained by acts of legal malpractice purportedly committed by the defendants during their representation of the plaintiff in connection with the sale of a leased co-operative apartment in Manhattan in August of 2013. The defendants are charged with acts of negligence in failing to follow the plaintiff's instructions to properly structure and complete the sale of these premises in such a manner that it would qualify as a tax deferred sale in accordance with the provision of 26 USC § 1031, entitled, *Exchange of Property Held for Productive Use*. A successful "like-kind exchange" under this statute and the federal regulations promulgated thereunder results in the deferment of capital gains taxes otherwise payable on the sale of the first property until the sale of an identified replacement property that is purchased within 180 days of the initial sale.

The beneficial tax deference available for qualified sales under Section 1031 was lost when the total consideration paid by the purchaser in the amount of $2,713,028.99 was paid to the plaintiff rather than to a qualified intermediary as required by that section of the tax code. Following the discovery of these circumstances, the defendant law firm considered ways to obtain a qualified Section 1031 sale, post-closing, and advised that the sale could be rescinded and re-sold in a manner consistent with Section 1031. Indeed, the defendants contacted the purchaser's principals who advised that they would co-operate in redoing the sale in exchange for payment of $75,000.00. However, Mr. Perlowitz, a partner of the defendant law firm, ultimately advised the plaintiff against this recision and re-sale fix fearing it would have detrimental tax consequences. On January 15, 2014, the plaintiff paid $520,000.00 in federal income taxes and $250,000.00 in state income taxes, which amounts are allegedly attributable to the defendants' negligence in failing to properly place the proceeds of the sale in the hands of a qualified intermediary. This action was thereafter commenced.

Following the completion of the depositions of the plaintiff, his wife, Mary Dinaburg, the individually named defendant and two other members of the defendant law firm, the plaintiff served a Second Demand for Discovery and Inspection upon the defendants. The defendants' March 13, 2017 response thereto was deemed insufficient in correspondence from the defendants' counsel dated March 24, 2017 to which the defendants did not respond. On March 29, 2017, the defendants issued a subpoena duces tecum and ad testificandum upon attorney, Neil Goldstein, Esq., with whom the plaintiff and/or his wife consulted after learning that the sale did not qualify for Section 1031

treatment. Like others with whom the plaintiff and/or his wife consulted regarding the risk associated with the recision/re-sale proposal, attorney Goldstein advised that a rescission of the sale followed by a properly structured Section 1031 sale was risky or dicey and a bad idea.

By the instant motion (#002), the plaintiff seeks an order quashing the subpoena served by the defendants mandating that attorney Neil Goldstein, Esq. appear for a deposition and an order compelling the defendants to provide responses to the plaintiff's Second Notice for Discovery and Inspections. The motion is opposed by the defendants in cross moving papers in which they seek a denial of all relief demanded by the plaintiff and an order directing that the deposition of Neil Goldstein, Esq. go forward as contemplated by the subpoena issued by the defendants. For the reasons stated, the plaintiff's motion to quash is granted while his application to compel the defendants to respond to the outstanding discovery demands is granted only with respect to items numbered 19 and 20 in the December 22, 2016 Second Notice for Discovery and Inspection.

There is no dispute that verbal exchanges and other communications between the plaintiff and/or his wife, Mary Ellen Dinaburg, and attorney Neil Goldstein, Esq., that were engaged in after the sale of the premises on August 6, 2013, are privileged communications under the attorney/client privilege afforded by the law of this state (*see* CPLR 4503). The defendants nevertheless claim that under the "at issue" waiver doctrine, the privilege was lost (*see e.g.,* ***Botlon v Weil, Gotshal, & Manges, LLP.***, 4 Misc3d, 1029[A], 798 NYS2d 343 [Sup. Ct., New York County, Maddon, J]***; IMO Indus., Inc. v Anderson Kill & Olick, P.C.***, 192 Misc2d 605, 746 NYS2d 572 [Sup. Ct., New York County, Solomon, J.).

The court, however, rejects the claim that the "at issue" waiver is applicable here. Controlling appellate case authorities have held that this type of waiver is recognized in two distinct circumstances (*see* ***Green v Montgomery***, 95 NY2d 693, 701, 723 NYS2d 744 [2001]). The first is where the party is in fact invoking the substance of the privileged conversation as a basis for a claim or defense (*see* ***Jakobleff v Cerrato, Sweeney & Cohn***, 97 AD2d 834, 835, 468 NYS2d 895, 897 [2d Dept 1983]; *see also* ***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 62 AD3d 581, 582 [1st Dept 2009]). This waiver theory is generally limited to cases wherein such party's claim or defense rests upon his or her reliance upon the bad advice of his or her attorney (*see* ***Jakobleff v Cerrato, Sweeney & Cohn***, 97 AD2d at 835, *supra*; ***Village Bd. of Vil. of Pleasantville v Rattner***, 130 AD2d 654, 655, 515 NYS2d 585 [1987]; ***TIG Ins. Co. v Yules & Yules***, 1999 WL 1029712 [S.D.N.Y. 1999]). The second circumstance is where the claim or defense is of such a nature that an assessment of its merits requires an examination of the substance of a privileged conversation and application of the privilege would deprive the adversary of vital information" (*see* ***Jakobleff v Cerrato, Sweeney & Cohn***, 97 AD3d at 835, *supra*; *see also* ***Credit Suisse First Boston v Utrecht–America Fin. Co.***, 27 AD3d 253, 254 [1st Dept 2006] ***Botlon v Weil, Gotshal, & Manges, LLP.***, 4 Misc3d, 1029[A], *supra).*

That 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 (*see* ***Long Is. Lighting Co. v Allianz Underwriters Ins. Co.***, 301 AD2d 23, 33, 749

NYS2d 488 [1ST Dept 2002]). Morever, the "at issue" waiver is inapplicable where the privileged communications are not engaged in within the period of the alleged malpractice (*see* ***Jakobleff v Cerrato, Sweeney & Cohn***, 97 AD3d at 835, *supra*).

As pointed out in the plaintiff's moving papers and reply memoranda of law, the at issue waiver doctrine is not applicable here, because the communications between the plaintiff and/or his wife with attorney Goldstein were not engaged in during the alleged period of malpractice, but instead, occurred days afterwards. Even if it were otherwise, there no basis in law or in fact for the application of the as is waiver doctrine to defeat the plaintiff's claim of privilege. No claim of reliance upon the advice of the defendants' operatives is asserted by the plaintiff as the basis of his claim nor has there been any showing of the defendants' need for access to these communications and that such need is vital. The court rejects the defendants' claim that their mitigation of damages defense requires a waiver of the attorney/client privilege (*see* ***Jakobleff v Cerrato, Sweeney & Cohn***, 97 AD3d at 835, *supra*) or that the selective disclosure of attorney Goldstein's advice by Ms. Dinaburg constituted a waiver of the plaintiff's attorney/client privilege. Accordingly, the court grants those portions of the instant motion by the plaintiff wherein he seeks an order quashing the subpoena served by the defendants upon attorney Neil Goldberg, Esq.

The remaining portions of the plaintiff's motion in which he seeks an order compelling the defendants to fully respond to his Second Notice of Discovery and Inspection is denied, except as to items numbered 19 and 20. The court finds that all other items are neither relevant nor material to matters in issue in this action.

Those portions of the defendants' cross motion wherein they seek an order directing the enforcement of the subpoena issued by the defendants to attorney Neil Goldstein, Esq., is denied while the remaining portions of the cross motion wherein the defendants seek, in effect, a protective order against the Second Demand for Discovery and Inspection dated December 22, 2016 is granted except with respect to items numbered 19 and 20 therein.

DATED: 7/24/17

THOMAS F. WHELAN, J.S.C.