Sandler v Independent Living Aids, LLC
2018 NY Slip Op 31006(U)
May 24, 2018
Supreme Court, New York County
Docket Number: 652154/2013
Judge: Andrea Masley

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

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MARVIN SANDLER, MIMI BERMAN SANDLER, and MIMARV, INC. F/K/A INDEPENDENT LIVING AIDS, INC.,

Plaintiffs,

Index No. 652154/2013

- against -

INDEPENDENT LIVING AIDS, LLC (A NEW YORK LLC), INDEPENDENT LIVING AIDS, LLC, (A DELAWARE LLC), RSS ADVENTURE CAPITAL, LLC, THE CHOW/SPEACH TRUST, ECONOMIC SOLUTIONS, INC., MATTHEW SHEPPARD, PRINCE JOHN RADZIWILL, AND IRWIN SCHNEIDMILL,

Defendants.

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MASLEY, J.:

In motion sequence 006, defendants Independent Living Aids, LLC (a New York LLC) (ILA NY), Independent Living Aids, LLC (a Delaware LLC) (ILA Delaware), RSS Adventure Capital, LLC, The Chow/Speach Trust, Economic Solutions, Inc., Matthew Sheppard, Prince John Radziwill, and Irwin Schneidmill move for an order, pursuant to CPLR 3103 (a) and (b), protecting from disclosure certain categories of documents within the file of defendants' expert including prior drafts of defendants' expert's report and written communications between defendants' expert and defendants' attorney.

Ths action arises out of the sale of plaintiff Mimarv, Inc. f/k/a Independent Living Aids, Inc. to ILA Delaware, and defendants alleged attempt to deprive plaintiffs of the benefits of that transaction.

By a letter of engagement, dated August 31, 2016, defendants' counsel engaged Raich, Ende, Malter & Co., LLP (REM), a certified public accounting firm, to provide "financial analysis with an investigatory predilection in connection with issues that may arise during Counsel's representation of [defendants]." For example, a REM accountant was present and available to assist counsel when defendants deposed

plaintiffs' expert.[1] The engagement letter also stated that REM would provide "information and findings related to the financial condition of Independent Living Aids LLC, a Delaware company, as of May 30, 2012, when it sold/transferred its assets to Independent Living Aids LLC, a New York company."

Consistent with Commercial Division Rule 13,[2] the parties disclosed expert names in May 2017. Defendants' expert Mitchell Sorkin, CPA of REM, issued an unsigned report in June 2017 addressing the financial condition of ILA Delaware on June 1, 2012, the date of its sale to defendant ILA NY. When plaintiffs deposed Sorkin

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[1]The parties called the court from the deposition for a ruling on whether the REM accountant could remain in the room for the deposition. Ultimately, the parties agreed to have the REM accountant sit outside the deposition room and be available to assist defendants' counsel when called upon.

[2]Commercial Division Rule 13 (c) provides:
If any party intends to introduce expert testimony at trial, no later than thirty days prior to the completion of fact discovery, the parties shall confer on a schedule for expert disclosure -- including the identification of experts, exchange of reports, and depositions of testifying experts -- all of which shall be completed no later than four months after the completion of fact discovery. In the event that a party objects to this procedure or timetable, the parties shall request a conference to discuss the objection with the court.

2. Unless otherwise stipulated or ordered by the court, expert disclosure must be accompanied by a written report, prepared and signed by the witness, if either (1) the witness is retained or specially employed to provide expert testimony in the case, or (2) the witness is a party's employee whose duties regularly involve giving expert testimony. The report must contain:

(A) a complete statement of all opinions the witness will express and the basis and the reasons for them;

(B) the data or other information considered by the witness in forming the opinion(s);

(C) any exhibits that will be used to summarize or support the opinion(s);

(D) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(E) a list of all other cases at which the witness testified as an expert at trial or by deposition during the previous four years; and

(F) a statement of the compensation to be paid to the witness for the study and testimony in the case.

on March 16, 2018, they demanded his entire file. When defendants' refused, the parties called the court. When the court was informed of Sorkin's dual role of advisor and expert for trial, case law was requested. Based on the submitted cases, on March 22, 2018, the court ordered defendants to produce their expert's file, hard copy and electronic, with leave for the defendants to seek a protective order. Defendants now seek to protect the expert's prior draft report and email correspondence between defendants' counsel and the expert.

At his deposition, Sorkin testified that he received all the information on which the report is based from defendants' counsel. He testified that he did not draft the final report or any draft reports; rather, they were written by Jackie Peabody and Lily Hui, other employees of his firm. He did not recall making any changes to the report, though he testified to spending hours on the report. At the deposition, he rendered a verbal opinion that was not in the report (Sorkin tr at 47). He admitted that he is a childhood friend of defendant Schneidmill, and has had multiple business dealing with him including ownership of five to six real estate properties (Sorkin tr at 52-54). He testified that Peabody and Hui may have had conversations with Schneidmill concerning the contents of the report (Sorkin tr at 156).

Plaintiffs seek all draft reports, including drafts by Hui and Peabody, and all communications between defendants' attorneys and the expert. Defendants seek to protect these documents and communications, asserting that they must be protected in order to prevent the revelation of counsel's mental impressions.

CPLR 3101 (d) (2) protects "the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." "The attorney-client privilege applies only to confidential communications with counsel,

not to information obtained from or communicated to third parties or to underlying factual information" (*Eisic Trading Corp. v Somerset Marine, Inc.*, 212 AD2d 451, 451 [1st Dept 1995] [citation omitted]). Certainly, any communications between counsel and the expert to aid the attorney in preparing the case would be privileged, and thus, protected (*see 915 2nd Pub Inc. v QBE Ins. Corp.*, 107 AD3d 601 [1st Dept 2013]). However, here, that protection changed when defendants designated Sorkin as an expert for trial. Accordingly, the court rejects defendants' reliance on cases addressing only advisors, and not this dual role.

Defendants have the burden to demonstrate that the material they seek to withhold is immune from discovery by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation (*Friend v SDTC-The Ctr. for Discovery, Inc.*, 13 AD3d 827 [3d Dept 2004]). "[T]his burden cannot be satisfied with wholly conclusory allegations" (*id.* at 829 [internal quotation marks and citations omitted]). If defendants establish protection, then plaintiff has the burden of demonstrating "substantial need" and is unable to obtain a "substantial equivalent" by other means (CPLR 3101 [d] [2]).

Defendants have not met their burden. Defendants' expert is serving in two roles, an advisor and an expert for trial, and "[e]ven where material has been prepared in anticipation of the subject litigation, it nevertheless is discoverable if it has been prepared for mixed or other purposes, as well" (*Barcelar v Pan*, 12 Misc 3d 1162(A), 2006 NY Slip Op 51009 [U] [Sup Ct, Westchester County 2006]).

Defendants have not shown that the draft reports are immune from disclosure because they were prepared solely in anticipation of litigation. Further, if the parties

wanted to limit expert disclosure to bar the exchange of draft reports, they could have done so (*see* Amendment of Expert Discovery Rules: Southern District Civil Practice Roundup, NYLJ, Edward M. Spiro and Judith L. Mogul, Dec. 1, 2010[3]) and did not. Thus, plaintiffs are entitled to all draft expert reports.

As to communications between defendants' counsel and Sorkin, Peabody, and Hui, once again defendants have failed to show that these communications are immune from discovery under the aiding in litigation and/or work product doctrines. Robert Haig, Esq. warns

> "the attorney should be careful to limit [her] discussions with the expert regarding the attorney's legal opinions, strategies or mental impressions. While one can argue that any such strategies or mental impressions are not discoverable because of work product immunity, a judge may require an expert to testify about all communications with the attorneys on the theory that those communications may have affected the expert's opinion. As a result, the safer course is for the attorney to reveal to the expert only those legal strategies that are necessary for the expert to render his opinion. Stated otherwise, the attorney should not discuss with the expert anything that the attorney does not want the expert to disclose from the witness stand"

(Commercial Litigation in New York Courts, §30:7, 4th ed.). Plaintiffs are entitled to the communications between defendants' counsel and Sorkin, Peabody, and Hui, regarding the expert report, starting on the date when Sorkin, Peabody, and Hui initiated preparation of the expert report, including gathering data, receiving instructions from counsel as to the scope of the report and underlying facts. Accordingly, all communications between counsel and accountants Peabody and/or Hui are discoverable and shall be produced. Sorkin's communications are not discoverable until the engagement changed from advisory to expert. The court expects that this

[3]FRCP rule 26, the model for Commercial Division Rule 13.

change occurred around the time that Hui and Peabody became involved. Counsel may not inquire into counsel's mental impressions at depositions, if any.

Accordingly, it is

ORDERED, that the motion is granted in part and denied in part.

Dated: 5/24/18

ENTER:

J.S.C.
HON. ANDREA MASLEY