

PMC Aviation 2012-1 LLC v Jet Midwest Group LLC

2018 NY Slip Op 32142(U)

August 30, 2018

Supreme Court, New York County

Docket Number: 654047/2015

Judge: Jennifer G. Schechter

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54**

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**PMC AVIATION 2012-1 LLC and AMUR FINANCE
IV LLC,**

Plaintiffs,

Index No.: 654047/2015

DECISION & ORDER

-against-

**JET MIDWEST GROUP LLC, PAUL KRAUS, and
KAREN KRAUS,**

Defendants.

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**JET MIDWEST GROUP LLC, individually and
derivatively on behalf of PMC AVIATION 2012-1 LLC,
PAUL KRAUS, and KAREN KRAUS**

Counterclaim Plaintiffs,

-against-

**PMC AVIATION 2012-1 LLC and AMUR FINANCE
IV LLC,**

Counterclaim Defendants,

-and-

MOSTAFIZ SHAHMOHAMMED,

**Additional Counterclaim
Defendant.**

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JENNIFER G. SCHECTER, J.:

Familiarity with this action is assumed.¹

¹ The allegations and issues in this case are extensively addressed in the court's decisions dated May 25, 2016 (Dkt. 113) and June 21, 2017 (Dkt. 214). Capitalized terms not defined herein have the same meaning as in those decisions.

The JMG Parties move to compel Amur to produce 53 documents on their revised privilege log dated January 31, 2018 (the Privilege Log), which Amur contends are protected by attorney-client privilege or as work product. Each of these documents are purportedly immune from disclosure due to the involvement of Elliott Klass, who served as Amur's Vice President and in-house counsel prior to Amur becoming the Company's managing member on August 15, 2015.² The JMG Parties argue that Amur's disclosure of these documents to the Company – which is represented by independent counsel in this action – constitutes a privilege waiver. Amur counters that it shared the documents with the Company's counsel during this case to further their joint legal interest against the JMG Parties and thus no waiver occurred. For the reasons set forth below, the court finds that no waiver occurred. However, after conducting an *in camera* review (*see Kenyon & Kenyon LLP v SightSound Techs., LLC*, 151 AD3d 530, 531 [1st Dept 2017]), the court concludes that only 19 of the 53 documents and a small portion of two others are privileged because the rest involved ordinary business matters in which Klass participated in his capacity as Vice President and not as Amur's lawyer.

The Court of Appeals recently addressed the scope of the common interest exception in *Ambac Assur. Corp. v Countrywide Home Loans, Inc.* (27 NY3d 616, 623-27 [2016]). Where “two or more clients *separately* retain counsel to advise them on matters of common legal interest, the common interest exception allows them to shield

² Because these documents predate Amur becoming managing member, JMG cannot claim a right to them merely by virtue of it being a member of the Company. It appears, both logically and from the court's review of the documents, that any legal advice was to Amur, and not to the Company.

from disclosure certain attorney-client communications that are revealed to one another for the purpose of furthering a common legal interest” (*id.* at 625). The key holding of *Ambac* was that, unlike in other jurisdictions, application of the common interest exception requires that the communications were shared in connection with “pending or anticipated litigation” (*see id.* at 631).

Here, Amur shared the subject documents with the Company *during* this litigation while united in interest against the JMG Parties. This litigation posture is obvious from the court’s prior decisions.³ The only wrinkle here is that the communications that were shared with the Company predate the litigation, and arguably, not all of them were made when litigation was anticipated. The parties agree that this is not the ordinary situation in which the common interest exception is invoked, as the exception usually implicates communications between co-litigants, not disclosure of one side’s pre-litigation privileged communications to a co-litigant.⁴ Nonetheless, it makes sense that co-litigants in an active litigation who share a common interest should be able to share their own pre-litigation privileged communications if that disclosure furthers their common interest in

³ That there are some divergent interests due to the JMG’s Parties’ derivative counterclaims does not vitiate the PMC Parties’ predominantly common interest (*see ACE Secs. Corp., Home Equity Loan Trust, Series 2006-HE4 v DB Structured Prod., Inc.*, 55 Misc 3d 544, 560 [Sup Ct, NY County 2016] [“The doctrine does not require ‘a total identity of interest among’ the parties”]).

⁴ Amur relies on *Matter of Part 60 RMBS Put-Back Lit.* (161 AD3d 436 [1st Dept 2018]), where the court held that communications between RMBS certificateholders and the securities administrator are covered by the common interest exception. That decision is not entirely clear, however, about whether the timing of the disclosure mirrors the subject disclosure between Amur and the Company. Review of the trial court docket, in fact, reveals that the timing of the disclosures is not analogous (*see* Index No. 153945/2013, Dkt. 307 at 4).

the litigation without any fear of waiver. The JMG Parties have not cited any authority to the contrary. The court, therefore, finds that no waiver occurred.

An *in camera* review of the 53 documents, however, revealed that Klass wore multiple hats at Amur. He was a business person looped into many non-legal discussions (e.g., Privilege Log No. 3 [listing business information Amur wanted from the JMG Parties on monthly basis]) and served as in-house counsel involved in legal matters (e.g., Privilege Log No. 34 [draft complaint]). To be sure, it is not always clear whether certain documents are somewhat of a legal nature, even though they are clearly business related. After Amur was already given a mulligan due to its prior failure to properly defend its privilege assertions,⁵ the court resolves all doubts in favor of the JMG Parties because Amur bears the burden of establishing privilege (*see China Privatization Fund (Del.), L.P. v Galaxy Entm't Grp. Ltd.*, 139 AD3d 449 [1st Dept 2016], citing *Spectrum Sys. Int'l Corp. v Chem. Bank*, 78 NY2d 371, 377 [1991]). Amur has only carried that burden with respect to the documents delineated below. Accordingly, it is

ORDERED that the JMG Parties' motion to compel Amur to produce the 53 documents on the Privilege Log is granted only to the extent that, within one week of entry of this order, Amur must produce all such logged documents *except* for the

⁵ By order dated February 16, 2018 (Dkt. 246), rather than outright reject Amur's privilege claims, the court permitted it to submit, among other things, an affidavit from Klass addressing the nature of his legal advice. Klass submitted a 2-page affirmation that did not address any of the documents in detail (*see* Dkt. 249). He merely stated that he was providing legal advice to Amur and not the Company (*see id.* at 2). While it is clear that any legal advice he was providing was for Amur, that does not mean that all of his involvement was of a legal nature.

following, which the court finds to be privileged and need not be produced: Privilege Log Nos. 1, 10, 13-16, 20, 22, 27, 29, 32-34, 36-37, 39, 43-44, and 51; and it is further

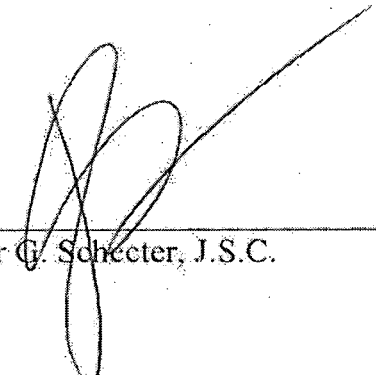
ORDERED that while the emails in Privilege Log Nos. 5 and 23 must be produced, in the May 5, 2015 email from Klass sent at 5:59 pm, Amur may redact the first six words of the third sentence (up until the comma); and it is further

ORDERED that Amur shall retrieve its *in camera* submissions from the part clerk within one week of the e-filing of this decision otherwise they will be destroyed; and it is further

ORDERED that the parties shall promptly meet and confer to set a deposition schedule, which shall be discussed during the next telephone conference on September 6, 2018 at 3:30 pm.

Dated: August 30, 2018

ENTER:



Jennifer G. Schecter, J.S.C.