

Jarmuth v Leonard

2018 NY Slip Op 32155(U)

August 31, 2018

Supreme Court, New York County

Docket Number: 152754/2014

Judge: Kelly A. O'Neill Levy

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**KELLY O'NEILL LEVY
JSC**

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19**

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SANDRA JARMUTH, individually and as a shareholder of 36 East 69 Corp., and on behalf of all other shareholders of said corporation similarly situated,

Plaintiff,

- v -

NEAL LEONARD, Executor of the Estate of Michael Leonard, Deceased, JORGE ELIAS, SANDRA NUNNERLEY, and 36 EAST 69TH CORP.,

Defendants.

INDEX NO. 152754/2014

MOTION DATE 05/02/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 103, 104

were read on this motion to/for DISCOVERY.

HON. KELLY O'NEILL LEVY:

This is an action where the plaintiff, as a shareholder, alleges breach of fiduciary duty and corporate waste on the part of her cooperative housing corporation.

Plaintiff Sandra Jarmuth moves for an order: (1) for leave to introduce certain documents at further depositions, (2) for leave to examine defendant Sandra Nunnerley and non-party Bradley Cohen regarding those certain documents, and (3), pursuant to CPLR § 3124, compelling defendants' compliance with discovery.

Defendants Jorge Elias, Sandra Nunnerley, and 36 East 69th Corp. cross-move: (1) pursuant to CPLR § 3103, for a protective order preventing plaintiff from taking a further deposition of defendant Sandra Nunnerley and non-party Bradley Cohen, (2) alternatively, pursuant to CPLR § 3103, for a protective order preventing plaintiff from taking a further deposition of defendant Sandra Nunnerley and non-party Bradley Cohen unless an appropriate stipulation of confidentiality is so-ordered by the court, (3) to the extent that the court permits

plaintiff to introduce certain contested exhibits at continuing depositions of Nunnerley and Cohen and to depose Nunnerley and Cohen concerning the content of those exhibits and the communications memorialized therein and to otherwise use those contested exhibits thereafter, for a protective order to ensure that such use may not otherwise be deemed to be any other form of waiver of the privilege concerning any other legal advice provided by counsel to the Board of Directors of defendant 36 East 69th Corp., and (4) in the event that the continuing depositions of Nunnerley and Cohen are ordered to proceed, before said depositions shall be held, for an order pursuant to CPLR § 3124, first compelling the further deposition of plaintiff.

BACKGROUND

This is an action where the plaintiff, individually and as a shareholder of 39 East 69th Corp. (hereinafter, the co-op), alleges breach of fiduciary duty and corporate waste on the part of the cooperative housing corporation. Plaintiff commenced this action on her own behalf and on behalf of all similarly situated shareholders. The co-op is the owner of a six-story building located at 36 East 69th Street in Manhattan (hereinafter, the building). The co-op has eight shareholders each of whom owns stock in the co-op that is allocated to an apartment in the building and has executed a proprietary lease for that apartment, with the co-op as lessor and the shareholder as lessee. A five-member Board of Directors of the co-op (hereinafter, the Board) governs the affairs of the co-op. During all time periods set forth in the complaint, Nunnerley served on the Board and plaintiff served intermittently on the Board and Cohen was the account executive assigned to the building by the managing agent of the co-op.

The present discovery dispute arises out of objections to the introduction of certain documents during the depositions of Nunnerley and Cohen. The documents relate to the co-op's decision to settle a property damage case brought by then-shareholder of the co-op, Virginia

Witbeck, in a Civil Court action entitled *Witbeck v. Sandra Nunnerley, 36 East 69 Corp., Alexander Wolf and Company, Inc., and TDC Construction, Inc.* (Index No.: 300137TS07) (hereinafter, the underlying litigation). At their depositions in the present action, plaintiff's counsel confronted Nunnerley and Cohen with a series of alleged attorney-client communications created during the course of the underlying action. These documents included: (1) a January 24, 2013 email from Bonnie R. Berkow, counsel for the co-op in the underlying litigation, to members of the Board (hereinafter, the January 24, 2013 email) [January 24, 2013 email (ex. B to the Brett aff.)], (2) a January 18, 2013 email from Steven Wagner, counsel for the co-op in the underlying litigation, to plaintiff and other members of the Board (hereinafter, the January 18, 2013 email) [January 18, 2013 email (ex. D to the Brett aff.)], (3) a January 17, 2013 email from Bonnie R. Berkow to plaintiff and Michael Leonard, a former co-defendant and member of the Board (hereinafter, the January 17, 2013 email) [January 17, 2013 email (ex. E to the Brett aff.)], (4) a December 4, 2012 Annual Shareholder Meeting Litigation Report which was available to all shareholders of the co-op (hereinafter, the Litigation Report) [Litigation Report (ex. F to the Brett aff.)], and (5) the July 22, 2015 Board of Directors meeting minutes (hereinafter, the meeting minutes) [Meeting Minutes (ex. G to the Brett aff.)]. Defendants' counsel objected to the introduction of the aforementioned documents during the depositions. Plaintiff's counsel ended the depositions and the present motion has ensued with the stipulated understanding that the court will review the disputed communications in camera to resolve the discovery dispute.

In the underlying litigation, Witbeck alleged that during Nunnerley's alteration project for her apartment, Witbeck's apartment was damaged. The co-op settled the underlying litigation and did not pay damages as part of the settlement, as the settlement was paid solely by

insurers for the co-defendant contractor and for Nunnerley. At a July 22, 2015 Board of Directors meeting, the Board ratified the settlement and assumed the co-op's legal fees for the underlying litigation. Plaintiff alleges that Nunnerley improperly participated in and influenced the vote to ratify the settlement because it contained a forgiveness of legal fees that could have been collected from her in her individual capacity as a co-defendant in the underlying litigation rather than from the co-op. Plaintiff contends that the co-op's counsel in the underlying litigation shared information with an adverse party, as there was a cross-claim against Nunnerley, and shared other information with all shareholders of the co-op. Plaintiff asserts that the Board should be motivated by the interests of the shareholders and not by the interests of Nunnerley and the co-op's counsel in the underlying litigation.

DISCUSSION

For a communication to be protected by the attorney-client privilege, the party asserting the privilege must show: (a) the communication occurred between an attorney and a client to obtain legal advice (*See Spectrum Systems Intern. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377-378 [1991]), (b) the communication was of a confidential nature, in that the client intended to speak in confidence and expected that the communication would remain confidential (*See People v. Osorio*, 75 N.Y.2d 80, 84 [1989]), (c) the communication related to the matter for which the attorney-client relationship was sought (*See Spectrum Systems Intern. Corp.*, 78 N.Y.2d at 379), and (d) no one outside the confidential relationship was present when the communication was made (*See Doe v. Poe*, 92 N.Y.2d 864, 867 [1998]). Generally, communications made before third parties, whose presence is known to the client, are not privileged because they are not deemed confidential. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016).

The January 24, 2013 Email

The January 24, 2013 email from Bonnie R. Berkow, counsel for the co-op in the underlying litigation, to Michael Leonard, Nunnerley, plaintiff, and Elias, all members of the Board, regarding invoicing for counsel's representation of the co-op in the underlying litigation is not protected by the attorney-client privilege, with the exception of the sections of the email concerning Invoice # 47227 and Invoice # 47228, which detail certain events in the underlying litigation. Communications concerning attorneys' fee arrangements and bills are not privileged. *Margolin v. Grossman*, 254 A.D.2d 158, 158 (1st Dep't 1998); *Priest v. Hennessy*, 51 N.Y.2d 62, 69 (1980). The email is between an attorney and her client, the co-op, regarding invoices for the underlying litigation. Thus, the January 24, 2013 email is not privileged, except for the portion of the email concerning Invoice # 47227 and Invoice # 47228, which is privileged and shall be redacted for the purposes of this case.

The January 18, 2013 Email

The January 18, 2013 email from Steven Wagner, counsel for the co-op in the underlying litigation, to plaintiff, and copied to co-counsel Bonnie R. Berkow, Michael Leonard, Elias, and Kelly Jessop, the managing agent of the co-op, regarding the co-op's role and the status of the claims in the underlying litigation is protected by the attorney-client privilege. The email is between an attorney and her client, the co-op, regarding its legal representation in a certain matter. The email is of a confidential nature because it is regarding specific details of the legal representation. The email is related to the underlying litigation, for which the attorney-client relationship was sought. The only parties included in the email are the attorney, members of the Board, which were the attorney's clients, and the co-op's managing agent. The presence of the managing agent in the email does not trigger a waiver of the privilege. *Compare, Ross v. UKI*

Ltd., 2004 WL 67221 (S.D.N.Y. 2004) (the court held that the presence of a financial services contractor and accountant at a meeting at which counsel gave the corporate client legal advice about the tax consequences of proposed real estate transactions did not constitute a waiver of the privilege under New York law). Therefore, the January 18, 2013 email is privileged.

The January 17, 2013 Email

The January 17, 2013 email from Bonnie R. Berkow, counsel for the co-op in the underlying litigation, to Nunnerley and Michael Leonard, in their capacity as members of the Board, regarding the Litigation Report for the underlying litigation is protected by the attorney-client privilege. The email is between an attorney and her client, the co-op, regarding its legal representation in a certain matter. The email is of a confidential nature because it was regarding its legal representation and is related to the underlying litigation, for which the attorney-client relationship was sought. The only parties involved in the email are the attorney and members of the Board, which were the attorney's clients, so again, no one outside of the confidential relationship was included in the email. Plaintiff objects to the co-op's counsel openly discussing the underlying litigation with Nunnerley since there was a cross-claim against her for contribution. There is no content in the January 17, 2013 email that would have created a conflict for the co-op's counsel in sending the email to Nunnerley in her capacity as a member of the Board. Thus, the January 17, 2013 email is privileged.

The Litigation Report

The Litigation Report which was presented at the 2012 annual shareholders meeting for the co-op is not protected by the attorney-client privilege. The Litigation Report was prepared for the 2012 annual shareholders meeting and was presented at the meeting to the shareholders of the co-op. It was not intended to be a confidential attorney-client communication, as it was

prepared for the shareholders of the co-op, not exclusively for the Board. Also, the presence of shareholders at the meeting waived any attorney-client privilege that may have existed over the Litigation Report. Therefore, the Litigation Report is not privileged and may be introduced at further depositions.

The Meeting Minutes

The July 22, 2015 Board of Directors meeting minutes are not protected by the attorney-client privilege. These minutes are available to all shareholders of the co-op, and thus are not intended to be confidential attorney-client communications. Moreover, shareholders have both statutory and common-law rights to inspect a corporation's books and records so long as the shareholders seek the inspection in good faith and for a valid purpose. *Pokoik v. 575 Realties, Inc.*, 143 A.D.3d 487, 488 (1st Dep't 2016); Business Corporation Law § 624. Since shareholders not on the Board have access to the meeting minutes, they are not privileged and may be introduced at further depositions. The portion of the meeting minutes in which the present litigation is discussed shall remain redacted.

The Fiduciary Exception

Plaintiff asserts that the fiduciary exception to the attorney-client privilege applies here. In the corporate context, where a shareholder sues corporate management for breach of fiduciary duty, the fiduciary exception to the privilege attaches to communications between management and corporate counsel. *NAMA Holdings, LLC v. Greenberg Traurig LLP*, 133 A.D.3d 46, 52 (1st Dep't 2015). To establish whether the fiduciary exception applies, the Appellate Division applies the "good cause" test in *Garner v. Wolfenbarger*, which considers several factors:

"(1) the number of shareholders and the percentage of stock they represent, (2) the bona fides of the shareholders, (3) the nature of the shareholders' claim and whether it is obviously colorable, (4) the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources,

(5) whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality, (6) whether the communication related to past or to prospective actions, (7) whether the communication is of advice concerning the litigation itself, (8) the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing, and (9) the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.”

Id. at 61 (footnote 6) (internal quotations omitted); *Garner v. Wolfenbarger*, 430 F.2d 1093, 1104 (5th Cir. 1970).

Plaintiff argues that this exception applies because she is asserting a claim of breach of fiduciary duty, it is a colorable claim, the communications are not concerning the instant litigation (although the meeting minutes discuss the instant litigation), and there is a clear indication of wrongdoing. Defendants assert that the fiduciary exception does not apply because plaintiff is already in receipt of the documents in redacted form; plaintiff's counsel has stated his intent to use the communications for a future action against individuals on the Board; a portion of the documents concerns advice and strategy in the defense of this present litigation; plaintiff is a single shareholder who is questioning the decision-making of the co-op in settling a property damage lawsuit; and this claim is not colorable and is not a bona fide claim of wrongful action by the co-op. The court finds that there is not good cause to apply the fiduciary exception to the attorney-client privilege. It is not obvious whether plaintiff's claim is colorable, there is no apparent necessity or desirability of the shareholders having the information contained in the three privileged emails, it is unlikely that defendants' actions reach an illegal, criminal, or questionably legal level, and the communications relate to a separate action which plaintiff has already commenced against various members of the Board [Summons and Verified Complaint, Index No. 152535/2018 (ex. A to the Brett aff. in opp. to cross-motion)].

Continuing Depositions

Plaintiff moves, pursuant to CPLR § 3124, for an order compelling defendants' compliance with their discovery obligations. Defendants also cross-move, pursuant to CPLR § 3124, for an order compelling a further deposition of plaintiff prior to other continuing depositions of Nunnerley and Cohen. Since the court is permitting the Litigation Report and meeting minutes to be introduced, the court grants defendants' cross-motion for an order compelling a further deposition of plaintiff prior to other continuing depositions and plaintiff's motion for an order compelling defendants' compliance with discovery, including continuing depositions of Nunnerley and Cohen. Accordingly, defendants' cross-motion, pursuant to CPLR § 3103, for a protective order preventing plaintiff from taking further depositions of Nunnerley and Cohen is denied. Also, defendants' cross-motion for a stipulation of confidentiality is denied, as the parties have not agreed on such a stipulation.¹ Furthermore, defendants' cross-motion for a protective order to ensure that such use of the documents in further depositions not be deemed any other form of waiver of the privilege concerning any other legal advice provided by counsel to the Board is denied. Further depositions of plaintiff, Nunnerley, and Cohen shall be held on or before October 1, 2018.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the branch of plaintiff Sandra Jarmuth's motion for leave to introduce certain documents at further depositions is granted in part, as specified above; and it is further

¹ If the parties agree to so-stipulate, they shall present such stipulation to the court to be so ordered.
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ORDERED that the branch of plaintiff Sandra Jarmuth's motion for leave to examine defendant Sandra Nunnerley and non-party Bradley Cohen regarding those certain documents specified above is granted; and it is further

ORDERED that the branch of plaintiff Sandra Jarmuth's motion for an order, pursuant to CPLR § 3124, compelling defendants' compliance with discovery is granted; and it is further

ORDERED that the branch of defendants Jorge Elias, Sandra Nunnerley, and 36 East 69th Corp.'s cross-motion, pursuant to CPLR § 3103, for a protective order preventing plaintiff from taking a further deposition of defendant Sandra Nunnerley and non-party Bradley Cohen is denied; and it is further

ORDERED that the branch of defendants Jorge Elias, Sandra Nunnerley, and 36 East 69th Corp.'s cross-motion, pursuant to CPLR § 3103, for a protective order preventing plaintiff from taking a further deposition of defendant Sandra Nunnerley and non-party Bradley Cohen unless an appropriate stipulation of confidentiality is so-ordered by the court is denied; and it is further

ORDERED that the branch of defendants Jorge Elias, Sandra Nunnerley, and 36 East 69th Corp.'s cross-motion for entry of a protective order to ensure that use of the aforementioned documents may not otherwise be deemed to be any other form of waiver of the privilege concerning any other legal advice provided by counsel to the Board of Directors of defendant 36 East 69th Corp. is denied; and it is further

ORDERED that the branch of defendants Jorge Elias, Sandra Nunnerley, and 36 East 69th Corp.'s cross-motion for an order, pursuant to CPLR § 3124, compelling the further deposition of plaintiff prior to the further depositions of defendant Sandra Nunnerley and non-party Bradley Cohen is granted; and it is further

ORDERED that the further depositions of plaintiff Sandra Jarmuth, defendant Sandra Nunnerley, and non-party Bradley Cohen shall be held on or before October 1, 2018.

This constitutes the decision and order of the court.

8/31/18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

**KELLY O'NEILL LEVY
JSC**

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	DO NOT POST			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: