Resurgence Asset Mgt., LLC v Gidumal
2018 NY Slip Op 32845(U)
November 2, 2018
Supreme Court, New York County
Docket Number: 651737/2012
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55
X---X
RESURGENCE ASSET MANAGEMENT, LLC,
RESURGENCE GP III, L.L.C., and M.D. SASS
INVESTORS SERVICES, INC.,

Plaintiffs,

-against-

STEVE GIDUMAL,

Defendant.
X---X

DECISION AND ORDER
Index No.: 651737/2012
Mot. Seq. Nos. 012–015

Hon. James E. d'Auguste

The Court hereby consolidates Motion Sequence Nos. 012, 013, 014, and 015 for disposition. In the within action for breach of contract, plaintiffs Resurgence Asset Management, LLC ("RAM"), Resurgence GP III, L.L.C., and M.D. Sass Investors Services, Inc. ("SASS") seek to recover an unpaid clawback obligation from defendant Steve Gidumal ("Mr. Gidumal") pursuant to a Termination Agreement.

In Motion Sequence No. 012, Mr. Gidumal moves, pursuant to CPLR 3212, for summary judgment dismissing RAM's first cause of action for breach of contract. RAM cross-moves, pursuant to CPLR 3212, for partial summary judgment in its favor on its first cause of action for breach of contract. In Motion Sequence No. 013, Mr. Gidumal moves, pursuant to CPLR 2214(c), to supplement the record on a previous motion he made for sanctions against RAM (Mot. Seq. No. 011). In Motion Sequence No. 014, Mr. Gidumal moves, pursuant to CPLR 3124, to compel counterclaim defendants RAM and Re/Enterprise Asset Management, LLC ("REAM") to produce certain financial documents. Mr. Gidumal also seeks an *in camera* review of certain e-mail communications that were designated privileged and were not produced by plaintiffs. RAM cross-moves for a protective order. In Motion Sequence No. 015, Mr. Gidumal

moves, pursuant to CPLR 2214(c), to strike certain portions of RAM's memorandum of law in opposition to his prior motion for summary judgment (Mot. Seq. No. 012) and in support of cross-motion for partial summary judgment dated January 16, 2017 (NYSCEF Doc. No. 277), and to supplement the record on that motion.

For the reasons stated herein, Mr. Gidumal's motion for summary judgment on the first cause of action for breach of contract (Mot. Seq. No. 012) is denied and RAM's cross-motion for partial summary judgment on the first cause of action is granted to the extent of finding Mr. Gidumal liable to RAM on said cause of action and the amount of damages is to be determined at trial. Mr. Gidumal's motion to supplement the record on his prior motion for sanctions (Mot. Seq. No. 013) is denied. Mr. Gidumal's motion to compel disclosure (Mot. Seq. No. 014) is granted to the extent of permitting nonparties Deloitte & Touche LLP and Berdon LLP to have forty-five (45) days from the date of service of a copy of this decision and order, with notice of entry, to respond to the subpoenas previously served upon them, and the motion is otherwise denied. Mr. Gidumal's motion to supplement the record on his pending motion for summary judgment (Mot. Seq. No. 015) is denied.

Factual and Procedural History

Effective August 7, 2006, Martin D. Sass, Chairman and Chief Executive Officer of SASS ("Mr. Sass"), hired Mr. Gidumal and nonparty Byron Haney ("Mr. Haney") as managing directors and co-chief investment officers of RAM, REAM, and nonparty Resurgence Asset Management International, LLC ("RAMI") (collectively, "the companies"). NYSCEF Doc. No. 269, Ex. 5, at 1 (Joint Term Sheet). Both Mr. Gidumal and Mr. Haney were to receive 20.588% of yearly profits, with an annual advance of $500,000. *Id.* Each was responsible for a "pro rata share of clawback obligations from existing and future [p]rivate [e]quity funds," which was to be

determined "based on the ratio of [p]rofits from incentive fees or allocations from such fund received . . . over the aggregate [p]rofits from incentive fees from such fund received by persons who share in clawback obligations for such fund." *Id.* at 2. Mr. Gidumal avers that this provision shielded him from any "clawback obligations which arose prior to [his] joining the firm." NYSCEF Doc. No. 59, ¶ 3. The Joint Term Sheet was for discussion purposes only and was not binding on the parties thereto. NYSCEF Doc. No. 269, Ex. 5, at 5.

During his time with the companies, relevant to this action, Mr. Gidumal managed, *inter alia*, the investment fund titled M.D. Sass Corporate Resurgence Partners III Holdings, LLC ("Sass Holdings"). NYSCEF Doc. Nos. 59, ¶ 6; 270, Ex. 10. Sass Holdings was created in 2004 when the members of M.D. Sass Corporate Resurgence Partners III, L.P. ("Fund III") were divided between those who wished to continue making new investments in Sass Holdings and those who wished to continue with only their then-current investments. NYSCEF Doc. No. 269, Ex. 7, Tr. 74:8-79:25, 83:20-84:24. To maintain this division, the companies formed Sass Holdings and amended the Fund III Limited Partnership Agreement. *See* NYSCEF Doc. No. 270, Ex. 11, ¶ 1(c). All new investments were to be made through the holding vehicle (*id.*, ¶ 1(d)), Sass Holdings. The clawback calculation was amended to read that, "with respect to each Limited Partner, the General Partner shall return to the Partnership, for distribution to such Limited Partners, an amount of cash" pursuant to a formula set forth in said agreement. *Id.*, ¶ 1(m). Distributions from Sass Holdings were made to Fund III, Sass Holdings' sole member, at Fund III's discretion. *Id.*, Ex. 10, ¶¶ 9, 14.

According to Phillip Sivin, SASS's Chief Financial Officer and Senior Managing Director ("Mr. Sivin") (NYSCEF Doc. No. 293, ¶ 1), clawbacks would be calculated for those Fund III investors who opted out of future investments, but not for those who continued to

invest. NYSCEF Doc. No. 270, Ex. 14, Tr. 296:3-297:8. This description of the clawback calculation for Fund III is supported by internal communications among Mr. Sass, Mr. Sivin, and SASS's other principal, Hugh Lamle ("Mr. Lamle"). *Id.* Ex. 19 (E-mail dated 12/3/10 at 9:57 a.m. from Mr. Sivin to Mr. Sass and Mr. Lamle) ("Step 1 . . . is to review incentive fees by year and calculate on an investor by investor basis the clawback amount"); *see also id.* Ex. 16 (E-mail dated 10/29/10 at 1:49 p.m. from Karl Schwarzfeld ("Mr. Schwarzfeld") to Mr. Sivin) ("[N]ot all investors will be in clawback obligation. For planning, assume $77mm of the $330.25mm have no clawback obligation, and the balance have full clawback obligation."). Prior to Mr. Gidumal joining SASS, Fund III's estimated clawback obligation was $17,297,466.26. NYSCEF Doc. No. 305, at 4 (Fund III Fee Analysis – Inception to Date as of 3/31/06). As of September 30, 2007, that number had been reduced to $12,884,706.39. *Id.* at 2.

During Mr. Gidumal's time managing Fund III, the companies' records show that thirteen investors paid incentive fees. NYSCEF Doc. No. 270, Ex. 13 (Fund III Estimated Clawback Calculation). Over the same time period, those same investors did not owe clawback obligations. *Id.*; *id.* Ex. 16 (E-mail dated 10/29/10 at 1:49 p.m. from Mr. Schwarzfeld to Mr. Sivin). SASS staff approved the incentive fee totals for continuing investors in Fund III, as of June 9, 2008, to be paid out of "distributable proceeds in [Sass Holdings]." *Id.* Ex. 15 (E-mail dated 6/9/08 at 7:13 p.m. from Mr. Schwarzfeld to Mr. Haney).

Effective July 31, 2008, Mr. Gidumal and SASS entered into an agreement dated September 28, 2008 that terminated Mr. Gidumal's employment as a managing director and co-chief investment officer of the companies (the "Termination Agreement"). NYSCEF Doc. No. 271, Ex. 20. The Termination Agreement provided that the companies would continue to pay Mr. Gidumal 20.588% of profits from August 1, 2008 through July 31, 2009, and 10.294% for

the year after, subject to clawback obligations. *Id.*, ¶ 1. Mr. Gidumal would receive $838,662 in "accrued and unpaid [p]rofits as of [7/31/08]." *Id.* In addition, Mr. Gidumal agreed to serve as a consultant to the companies for two months after the effective date of his termination and would receive a $233,719 consulting fee. *Id.*, ¶ 2.[1] The clawback obligation to which these payments were subject was based on "the ratio of [p]rofits from incentive fees or allocations from such fund received by [Mr. Gidumal] over the aggregate [p]rofits from incentive fees or allocations from such fund received by persons who share in clawback obligations for such fund." NYSCEF Doc. No. 271, Ex. 20, ¶ 3.[2] Finally, in the Termination Agreement, SASS represented to Mr. Gidumal that "the compensation payment to you pursuant to paragraph 1 hereof representing your share of the accrued and unpaid [p]rofits . . . is not less than the compensation amount paid or payable to Byron Haney for such period." *Id.* at 5. Mr. Gidumal avers that he specifically

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[1] Mr. Gidumal testified that he did not recall doing any consulting work in spite of receiving this fee. NYSCEF Doc. No. 280, Tr. 256:2-4.

[2] Paragraph 3 of the Termination Agreement sets forth the following explanation of "pro rata share":

> "Pro rata share" of clawback obligations with respect to a private equity fund shall be determined based on the ratio of [p]rofits from incentive fees or allocations from such fund received by you over the aggregate [p]rofits from incentive fees or allocations from such fund received by persons who share in clawback obligations for such fund, in each case regardless of whether such [p]rofits were received prior to or after the Termination Date. For the avoidance of doubt, 50% of any amounts otherwise payable after the Termination Date shall be escrowed to the extent a clawback obligation exists; provided, however, that the accrued and unpaid [p]rofits set forth in the second sentence of [p]aragraph 1 above (which includes $838,662.06 of [p]rofits which are subject to a future clawback obligation) shall be paid to you without any such escrow requirement. Any amounts so escrowed (and any interest earned on such amounts) shall be used to satisfy your clawback obligations or released to you upon the earlier of (i) the winding down of the funds to which clawback relates and (ii) the determination that no clawback obligation exists with respect to you.

Id. (emphasis in original).

bargained for the provision regarding his compensation relative to Mr. Haney's compensation. NYSCEF Doc. No. 267, ¶¶ 2-3. A chart produced by RAM, which compares the payments made to both Mr. Gidumal in accordance with paragraph 1 of the Termination Agreement and Mr. Haney over the same time period, indicates that Mr. Gidumal received more than Mr. Haney in total compensation. NYSCEF Doc. No. 272, Ex. 25 (RAM Profit Participants Comparative Income Chart). In addition, SASS's Controller, Jonathan Chen, affirmed that SASS's ledgers showed total payments of $1,572,381 to Mr. Gidumal and $1,564,806 to Mr. Haney in 2008. NYSCEF Doc. Nos. 306, ¶¶ 1-3; 307.

By letter dated January 31, 2011, the companies informed Mr. Gidumal that the preliminary estimate of his pro rata share of his clawback obligations for Fund III would be $428,072. NYSCEF Doc. No. 288. Fund III officially wound down in December 2011. NYSCEF Doc. No. 293, ¶ 5. Over the life of Fund III, it paid $27,168,919 in total incentive fees. NYSCEF Doc. Nos. 297-303 (Fund III Audited Financials for 2003-2006, 2008, 2010-2011). As set forth above, Mr. Gidumal received $838,662, or 3.08% of that total, pursuant to the Termination Agreement. When Fund III closed, there was a total clawback allocation of $11,784,176. NYSCEF Doc. No. 297 (Fund III Audited Financials for 2011). RAM alleges that Mr. Gidumal has never repaid his share of the clawback obligation.

On May 18, 2012, plaintiffs filed their complaint, which alleged two causes of action for breach of the Termination Agreement and equitable subrogation or constructive trust. NYSCEF Doc. No. 1. In response to Mr. Gidumal's motion to dismiss (Mot. Seq. No. 001), plaintiffs filed an amended complaint on August 17, 2012 that alleged the same causes of action and added a cause of action for unjust enrichment. NYSCEF Doc. No. 12.

On October 11, 2013, RAM moved, pursuant to CPLR 3212, for partial summary

judgment on its first cause of action for breach of contract (Mot. Seq. No. 005), arguing that there were no material issues of fact as to Mr. Gidumal's alleged failure to pay his pro rata share of the clawback obligations set forth in the Termination Agreement. NYSCEF Doc. No. 53. On September 2, 2014, this Court (Singh, J.) granted the motion in Motion Sequence No. 005 and awarded RAM partial summary judgment on the first cause of action. NYSCEF Doc. No. 112. The Court (Singh, J.) also granted plaintiffs leave to file a second amended complaint in Motion Sequence No. 003. NYSCEF Doc. No. 110. The second amended complaint named Mr. Sass and Mr. Lamle as additional plaintiffs, and replaced the third cause of action for unjust enrichment with a cause of action for breach of confidentiality. NYSCEF Doc. No. 269, Ex. 3. In his answer to the second amended complaint, Mr. Gidumal alleged a counterclaim for breach of contract based on RAM's alleged assignment of "indirect expenses" to the companies' revenue calculations, which, in turn, allegedly caused the companies to operate at a net loss and deprived him of his share of profits under the Termination Agreement. NYSCEF Doc. No. 347, at 8-10.

Mr. Gidumal appealed this Court's (Singh, J.) grant of partial summary judgment on the first cause of action in Motion Sequence No. 005. *See* NYSCEF Doc. Nos. 115-16. While Mr. Gidumal's appeal of that decision was pending, plaintiffs voluntarily discontinued, as moot, their second and third causes of action for equitable subrogation, pursuant to CPLR 3217(a)(1). NYSCEF Doc. Nos. 117-18; 124. On December 8, 2015, the Appellate Division, First Department reversed the Court's (Singh, J.) grant of partial summary judgment and denied RAM's motion. *Resurgence Asset Mgmt., LLC v. Gidumal*, 134 A.D.3d 462, 462 (1st Dep't 2015) (NYSCEF Doc. No. 127). The Appellate Division held that "material issues of fact exist with respect to how RAM calculated [Mr. Gidumal's] pro rata share of the clawback obligation."

Id. at 463. Moreover, the Appellate Division also stated that RAM had failed to establish, as a matter of law, that "[Mr. Gidumal's] compensation payment was not less than the compensation amount paid or payable to [Mr. Haney], and . . . that RAM provided complete and accurate documentation showing that it had paid [Mr. Gidumal] all the profits to which he was entitled under the [T]ermination [A]greement." *Id.* The case was remanded to this Court for further proceedings. *See id.*

After the Court restored this case to the calendar, the parties engaged in discovery and additional motion practice regarding issues that have since been resolved. *See* NYSCEF Doc. Nos. 134; 147; 148; 153; 157; 165; 208; 210; 211. On October 19, 2016, Mr. Gidumal moved, pursuant to CPLR 3126 and 22 NYCRR 130-1.1, to sanction RAM for allegedly withholding documents to Mr. Gidumal's detriment (Mot. Seq. No. 011). NYSCEF Doc. No. 217. Specifically, Mr. Gidumal argued that "many of RAM's assertions [were] based on falsehoods, and that RAM [had] been willfully withholding critical information material and necessary to [his] defense of this action." NYSCEF Doc. No. 218, at 1. After the motion for sanctions was fully submitted, Mr. Gidumal moved for summary judgment on the first, and, at this point, only remaining cause of action for breach of contract, and RAM cross-moved for partial summary judgment on the same cause of action (Mot. Seq. No. 012). NYSCEF Doc. Nos. 265; 276. Mr. Gidumal also moved to supplement the record on his pending sanctions motion in Motion Sequence No. 011 (Mot. Seq. No. 013). NYSCEF Doc. No. 308. Before briefing on that motion was complete, however, this Court (Singh, J.) denied the motion for sanctions in Motion Sequence No. 011. *Resurgence Asset Mgmt., LLC v. Gidumal*, 2017 NY Slip Op 30289(U) (Sup. Ct. N.Y. County Feb. 14, 2017) (NYSCEF Doc. No. 312), *aff'd*, 150 A.D.3d 590 (2018). While that appeal was pending, the parties completed briefing on Motion Sequence Nos. 014 and 015.

Discussion

I. Mr. Gidumal's Motion to Supplement the Record on his Previous Motion for Sanctions (Mot. Seq. No. 013)

As an initial matter, in Motion Sequence No. 013, Mr. Gidumal seeks to supplement the record of a motion that has since been decided. Accordingly, Motion Sequence No. 013 is hereby denied as moot. *Mark Hotel LLC v. Madison Seventy-Seventh LLC*, 61 A.D.3d 140, 144 (1st Dep't 2009) ("The court did not abuse its discretion by deciding the summary judgment motions before the hearing date of the motion for leave to supplement the record, rendering the latter moot.")).

II. Mr. Gidumal's Motion for Summary Judgment and RAM's Cross-Motion for Partial Summary Judgment (Mot. Seq. No. 012) & Mr. Gidumal's Motion to Strike Portions of RAM's Memorandum of Law in Opposition to Motion Sequence No. 012 and Supplement the Record (Mot. Seq. No. 015)

Mr. Gidumal makes two arguments for summary judgment in his favor. First, Mr. Gidumal argues that RAM violated the terms of the Termination Agreement because the amount he received pursuant to paragraph 1 of said agreement was less than what Mr. Haney received during the same time period. Mr. Gidumal claims that, in this regard, RAM's failure to perform discharges any obligation he has to pay a share of the clawback. Second, Mr. Gidumal argues that RAM cannot show that he breached the Termination Agreement because he did not receive any overpayment of incentive fees that must now be returned. Specifically, Mr. Gidumal asserts that, during his time with SASS, only thirteen investors in Fund III actually paid him any incentive fees. Those thirteen investors made a profit, and thus are not owed any clawback obligations. Mr. Gidumal asserts that because none of the investors who paid his incentive fees are owed clawbacks he is not liable for any such clawback obligations.

In opposition, with respect to Mr. Gidumal's share of the clawback obligation, RAM

argues that the plain language of the parties' definition of the term "pro rata share" in paragraph 3 of the Termination Agreement refers to a calculation based on the entirety of any relevant fund, not just based on individual investors within such a fund. RAM claims that any different understanding by Mr. Gidumal of the calculation of his pro rata share does not vary the plain language of the Termination Agreement. Based on these arguments, RAM moves for partial summary judgment in its favor, declaring that Mr. Gidumal owes a minimum of $362,952 based upon the calculation set forth in paragraph 3 of the Termination Agreement, with the remainder of RAM's damages, including any potential forfeiture under the contract, to be determined at trial.

With respect to whether the companies breached paragraph 1 of the Termination Agreement regarding Mr. Gidumal's compensation, RAM indicates that Mr. Haney and Mr. Gidumal received the same exact yearly amount and share of incentive fees, and, cumulatively, Mr. Gidumal actually earned slightly more than Mr. Haney in 2008. Moreover, RAM asserts that Mr. Gidumal had all the information he needed to determine the comparative compensation, and thus cannot have materially relied upon the representation. RAM also states that, in any event, Mr. Gidumal has affirmed the Termination Agreement by accepting the funds he received under the agreement, and by bringing a counterclaim for its breach, and, therefore, cannot challenge its terms.

While the parties differ as to the meaning and application of the contractual representation regarding comparative compensation, neither interpretation relieves Mr. Gidumal of his obligation to meet his clawback obligation. Mr. Gidumal argues, relying on *Grant Entertainment v. Lee*, 186 A.D.2d 66 (1st Dep't 1992), that RAM's misrepresentation of his compensation relative to Mr. Haney's is a failure of RAM to perform under the contract, which

relieves him of any liability for RAM's clawback obligations. *Grant Entertainment*, a decision containing little factual detail, holds that the plaintiff's failure to perform in that case was a "failure of consideration that gave defendant the right to rescind." 186 A.D.2d at 66. Mr. Gidumal is not attempting to rescind the Termination Agreement. Rather, he wishes to be relieved of certain obligations under the Termination Agreement while still holding RAM to their obligations. In any event, the Court finds that RAM met its contractual obligation toward Mr. Gidumal on the issue of his comparative compensation to that received by Mr. Haney.

Turning to Mr. Gidumal's alleged breach of the Termination Agreement's clawback provision, RAM has made a prima facie showing that Mr. Gidumal breached this provision by failing to pay his share of the clawback obligations. The Termination Agreement required RAM to pay Mr. Gidumal, subject to a clawback obligation, $838,662. NYSCEF Doc. No. 271, Ex. 20, ¶ 1. RAM's ledgers reflect that it made that payment to Mr. Gidumal (NYSCEF Doc. No. 307), which Mr. Gidumal does not deny. The Termination Agreement states that Mr. Gidumal's share of the clawback obligation is calculated on a fund by fund basis, by dividing the profits received by Mr. Gidumal, in the form of incentive fees or other allocations from a specific fund, by the aggregate profits, from incentive fees or other allocations from such fund received by all persons who are subject to a clawback obligation for that fund. NYSCEF Doc. No. 271, Ex. 20, ¶ 3. Notably, this provision encompasses all such profits regardless of whether they were "received prior to or after" Mr. Gidumal's departure. *Id.* In the face of these unambiguous provisions, Mr. Gidumal has no basis to argue that he should only be liable for those clawbacks owed to certain investors in Fund III, rather than for the aggregate clawback obligation. While Mr. Gidumal submits various pieces of correspondence and excerpts from deposition testimony related to preliminary clawback calculations and how the clawback obligation was set forth

internally within Fund III, none of this evidence is admissible to modify the unambiguous terms of the Termination Agreement and is, therefore, barred by the parol evidence rule. *W.W.W. Assocs., Inc.*, 77 N.Y.2d at 163.

Mr. Gidumal also argues that the investors of Fund III who opted into future investments held by Sass Holdings, who paid his incentive fees, and who were not owed a clawback, should be considered a separate fund for purposes of this calculation because he never received any incentive fees from the investors who opted out. Fund III, however, is the sole member of Sass Holdings, which has no investors. NYSCEF Doc. No. 270, Ex. 10, ¶¶ 9, 14. Sass Holdings exists solely because Fund III's Limited Partnership Agreement requires that new investments be made through a holding vehicle. NYSCEF Doc. No. 270, Ex. 11, ¶ 1(d). As the record reflects, the incentive fee payments were made by Fund III, not by Sass Holdings. NYSCEF Doc. Nos. 297-303. As Fund III is a single fund, Mr. Gidumal cannot separate out certain investors to avoid liability for his pro rata share of the clawback obligation. Mr. Gidumal's reliance on the Joint Term Sheet to limit his liability regarding incentive fees paid before he joined the company is also unavailing. The Joint Term Sheet provides that it is non-binding (NYSCEF Doc. No. 269, Ex. 5, at 5) and, in any case, the Termination Agreement states that the Joint Term Sheet is "null and void" (NYSCEF Doc. No. 271, Ex. 20, at 5). No such temporal limit exists in the Termination Agreement.

Based upon the foregoing, RAM is entitled to summary judgment in its favor as to liability on its first cause of action for breach of contract. However, genuine issues of material fact remain as to damages. The record does not define the complete universe of individuals liable for a share of the clawback obligation. Moreover, the Termination Agreement's pro rata share formula refers to profits from both incentive fees and other allocations. Neither party has

established, as a matter of law, whether any such allocations exist. Accordingly, damages with respect to this cause of action will be resolved at trial.

Accordingly, Mr. Gidumal's motion (Mot. Seq. No. 012) for summary judgment dismissing the first cause of action for breach of contract is denied, and RAM's cross-motion for partial summary judgment on the first cause of action is granted to the extent of awarding summary judgment on liability to RAM. The Court has considered the parties' remaining arguments therein and finds them to be without merit. Further, in light of this Court's decision in Motion Sequence No. 012, Mr. Gidumal's motion to strike certain portions of RAM's memorandum of law in opposition to said motion and to supplement the record on the same motion is denied as moot. *Mark Hotel LLC*, 61 A.D.3d at 144.

III. Mr. Gidumal's Motion to Compel Discovery and RAM's Cross-Motion for a Protective Order (Mot. Seq. No. 014)

In Motion Sequence No. 014, Mr. Gidumal moves, pursuant to CPLR 3124, to compel RAM to produce "the necessary financial information concerning the [c]ompanies and the funds that they manage, and allow [him] to obtain the requested information that he has subpoenaed from the auditors of RAM and M.D. Sass." NYSCEF Doc. No. 317, at 2. In addition, Mr. Gidumal asks the Court to conduct an *in camera* review of certain e-mails sent by RAM's former general counsel and currently a Vice President, Mr. Sivin, to determine whether they are protected by attorney-client privilege.

CPLR 3124 allows a party to "move to compel compliance or a response" with any discovery device or order. "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." CPLR 3101(a). "What is 'material and necessary' . . . includes 'any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.'" *Andon v.*

302-304 Mott St. Assoc., 94 N.Y.2d 740, 746 (2000) (quoting *Allen v. Crowell-Collier Publ'g Co.*, 21 N.Y.2d 403, 406 (1968)). "The test is one of usefulness and reason" and is left to the court's discretion. *Id.*

As an initial matter, the subpoenas Mr. Gidumal refers to were held in abeyance by this Court (Singh, J.) pending the resolution of the motion for sanctions (Mot. Seq. No. 011) and motion and cross-motion for summary judgment (Mot. Seq. No. 012). NYSCEF Doc. No. 273. As these motions have now been resolved, Mr. Gidumal is directed to serve a copy of this order with notice of entry upon nonparties Berdon LLP and Deloitte & Touche LLP, and said nonparties shall have forty-five (45) days from the date of service thereof to respond to the subpoenas. To the extent that it appears Mr. Gidumal is seeking to have the Court preemptively deny any potential motion to quash the subpoenas, such relief is not available to him under this motion. The parties may make whatever additional motions they so choose with respect to the subpoenas.

A. The Companies' Financial Information

Mr. Gidumal seeks "all financial information for the [c]ompanies, as well as the funds that the [c]ompanies manage." NYSCEF Doc. No. 317, at 8. Mr. Gidumal argues that he is entitled to obtain documents that supports the representations regarding financial information that have been made by RAM. Mr. Gidumal also contends that the financial statements that he has received do not cover all of the profits and funds for all three of the companies. Specifically, Mr. Gidumal claims that detailed records of each company and the underlying funds held therein are the only way that he can accurately calculate his potential damages with respect to his counterclaim for an unpaid profit share. According to Mr. Gidumal, common sense and Mr. Sass' deposition testimony indicate that such records must exist.

In opposition, RAM argues that Mr. Gidumal is only entitled to the financial statements already produced under the terms of the Termination Agreement. The companies' policy is to generate a single set of financial statements for all three entities, and those documents have already been produced. Additionally, the companies claim that they have previously produced other documents related to their revenue. Moreover, the companies contend that the First Department's decision reversing this Court's (Singh, J.) grant of partial summary judgment for RAM limited Mr. Gidumal to a single deposition before summary judgment could be determined.

In deciding RAM's prior motion for partial summary judgment (Mot. Seq. No. 005), this Court (Singh, J.) held that RAM had satisfied its obligations under the Termination Agreement by producing financial statements "for all of [Mr.] Gidumal's contractual counterparties." NYSCEF Doc. No. 112, at 7. The First Department reversed, holding that "the court erred to the extent its order can be read as determining that RAM . . . provided complete and accurate documentation showing that it had paid defendant all the profits to which he was entitled under the termination agreement." *Resurgence Asset Mgmt., LLC*, 134 A.D.3d at 463. The First Department stated that Mr. Gidumal "should be entitled to depose a witness who can provide a full explanation as to how the pro rata share was determined, including an explanation of how RAM determined the persons who were subject to the clawback obligation and the persons who were not," but did not otherwise limit or opine on the state of discovery in this action. *Id.* As such, Mr. Gidumal was not limited to a single deposition by the First Department, contrary to RAM's argument.

Since the First Department issued the above decision, RAM has produced additional documents related to the profits and revenues for the companies. NYSCEF Doc. Nos. 358, ¶ 2;

359. While "unlimited disclosure is not mandated, and the court may deny, limit, condition, or regulate the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." *Hackshaw v. Mercy Med. Ctr.*, 139 A.D.3d 798, 799-800 (2d Dep't 2016) (quoting *Diaz v. City of New York*, 117 A.D.3d 777, 777 (2d Dep't 2014)); *see Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 164 A.D.3d 401, at *2 (1st Dep't 2018) (stating that CPLR 3103(a) "permits a court to issue a protective order" for such purposes). Although Mr. Gidumal is seeking additional documents more than five years after this action was commenced, and more than four years after the financial statements were originally produced, he asserts that such documents may be relevant in helping to determine whether RAM denied him a share of the profits under the Termination Agreement. *See Liberty Petroleum Realty, LLC*, 164 A.D.3d 401, at *2-3 (stating that when the opposing party is seeking a protective order, "the subpoenaing party must establish that the discovery sought is material and necessary to the prosecution or defense of an action, i.e., that it is relevant" (quoting *Kapon v. Koch*, 23 N.Y.3d 32, 34 (2014) (internal quotation marks omitted))).

It is unclear from the statements made in opposition to the instant motion whether RAM is representing that a complete production of all the relevant financial information was made to Mr. Gidumal. Thus, the Court is directing that, within sixty (60) days of the date of this decision and order, plaintiffs and counterclaim defendants are to clearly state that all responsive financial documents for the companies have been produced and, if not, a supplemental production is required to meet discovery obligations. Accordingly, that branch of Mr. Gidumal's motion to compel disclosure of additional financial records for the companies in Motion Sequence No. 014 is granted to the extent set forth above.

B. Mr. Sivin's E-mails

Mr. Gidumal also seeks an order directing nineteen e-mails involving Mr. Sivin, SASS's Vice President and former general counsel to be produced to the Court for an *in camera* review to determine whether they are protected by attorney-client privilege. Mr. Gidumal argues that Mr. Sivin has worked for SASS in a business capacity since 2005 and, under such circumstances, the Court should review the e-mails to ensure that they are not improperly protected business communications. Mr. Gidumal further states that it is RAM's burden to show that the communications at issue were meant to seek legal advice.

In opposition, RAM argues that it has produced any communications where Mr. Sivin was discussing business matters and that it has produced detailed privilege logs for those communications involving legal counsel and advice. RAM claims that Mr. Gidumal has made no effort to analyze or even address the privilege logs in the instant motion to compel. Further, RAM asserts that Mr. Gidumal waited eight months after the privilege was invoked to move against it, and that his delay should militate against the Court conducting an *in camera* review.

"In order for the privilege to apply, the communication from attorney to client must be made 'for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship.'" *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377-78 (1991) (quoting *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 593 (1989)). "[W]hether a particular document is or is not protected is necessarily a fact-specific determination." *Id.* at 378. However, it is "the rare case that *in camera* determinations will be necessary" when the opposing party is asserting attorney-client privileged. *John Blair Commc'ns, Inc. v. Reliance Capital Grp., L.P.*, 182 A.D.2d 578, 579-80 (1st Dep't 1992) (quoting *Cirale v. 80 Pine St. Corp.*, 35 N.Y.2d 113, 119 (1974)).

Here, the privilege logs produced by RAM indicate that the withheld e-mails at issue are protected by both the attorney-client and work product privileges and are labeled as "[c]onfidential communication[s] in the context of actual and potential litigation concerning clawback collection efforts." NYSCEF Doc. No. 361. In its opposition to the instant motion, RAM claims that Mr. Sivin was working in his capacity as an in-house lawyer in an attempt to collect clawback obligations and not in a business capacity. RAM further states that it has produced other factual information attached to Mr. Sivin's privileged communications and business communications to which he was a party.

In response to RAM's assertion of privilege, Mr. Gidumal provides no evidence that the communications at issue were related to business matters, or that RAM's privilege review was somehow flawed. He relies only on Mr. Sivin's position, as a Vice President, to assert that the Court must review the withheld e-mail communications to which he is a party. Mr. Gidumal also references related litigation in Delaware Chancery Court involving RAM, however, such litigation is irrelevant for two reasons. First, any discovery determinations made in the Delaware Chancery Court (Laster, V.C.) are not binding on this Court.[3] Second, the ruling made in that litigation appears to relate to Mr. Sivin's role in an entirely different company that is not a party to this litigation, and thus has no bearing on this action. NYSCEF Doc. No. 338, Tr. 70:19-72:24.

While Mr. Sivin's dual role is not, by itself, sufficient grounds for the Court to conduct an *in camera* review when the record reflects ongoing and anticipated clawback litigation, RAM does not submit any evidence to indicate that Mr. Sivin was working as an in-house lawyer for

[3] *Virtus Capital, L.P. v. Sterling Chemicals, Inc.*, 2014 WL 64150 (Del. Ch. Ct. Jan. 7, 2014). Mr. Gidumal references this action in his papers, but neither party discusses the subject matter of the litigation, except for the fact that it also involved Mr. Gidumal and the companies as parties.

the companies other than its own assertion. Accordingly, that branch of Motion Sequence No. 014 in which Mr. Gidumal seeks an *in camera* review is granted. RAM is directed to produce the nineteen e-mail communications to which Mr. Sivin is a party that it asserts are confidential communications in its privilege log (NYSCEF Doc. No. 361) to the Court for an *in camera* review within thirty (30) days of the date of this decision and order.

C. RAM's Cross-Motion for a Protective Order

Here, RAM argues that Mr. Gidumal seeks financial information of the companies in order to publicly release it for the purpose of encouraging other lawsuits against RAM in violation of the confidentiality order herein. This argument is supported solely by speculation based upon an unclear statement made by Mr. Gidumal's counsel. As there is already a confidentiality order in place (NYSCEF Doc. No. 368, Ex. B), in accordance with the Commercial Division Form Confidentiality Order (NYSCEF Doc. No. 368, Ex. C), which provides a process for designating documents as confidential or highly confidential, provides a means for challenging such designation, and appropriate guidelines for dealing with such documents, the order does not need to be modified to prevent against an alleged misuse of confidential information. While the confidentiality order does not provide for confidential or highly confidential documents to be filed under seal or redacted, it was RAM's choice to file such documents for public access over the six years that this litigation has been pending. As such, RAM's cross-motion is granted to the extent that, going forward, the Court directs the parties to e-file a redacted version of any document that is designated confidential or highly confidential and provide its adversary and the Court with an unredacted copy of the same.

Accordingly, it is hereby

ORDERED that Mr. Gidumal's motion for summary judgment dismissing the first cause

of action for breach of contract (Mot. Seq. No. 012) is denied; and it is further,

ORDERED that RAM's cross-motion for partial summary judgment on the first cause of action (Mot. Seq. No. 012) is granted to the extent of finding Mr. Gidumal liable to RAM on the first cause of action, and the issue of the amount of damages to be entered thereon shall be determined at the trial herein; and it is further,

ORDERED that Mr. Gidumal's motion to supplement the record on his prior motion for sanctions in Motion Sequence No. 011 (Mot. Seq. No. 013) is denied; and it is further;

ORDERED that Mr. Gidumal's motion to compel (Mot. Seq. No. 014) is granted to the extent of ordering that nonparties Deloitte & Touche LLP and Berdon LLP shall have forty-five (45) days from service of a copy of this decision and order, with notice of entry, to respond to the subpoenas previously served on them; that plaintiffs and counterclaim defendants shall have sixty (60) days from the date of this decision and order to clearly state that all responsive financial documents have been produced and, if not, a supplemental production of said information shall be provided to defendant; that plaintiffs shall have thirty (30) days from the date of this decision and order to produce the nineteen e-mails to which Mr. Sivin is a party in RAM's privilege log to the Court for an *in camera* review; and the motion is otherwise denied; and it is further,

ORDERED that RAM's cross-motion for a protective order (Mot. Seq. No. 014) is granted to the extent of permitting the parties to e-file redacted documents that are classified as confidential or highly confidential pursuant to the confidentiality order in place in the within action and to serve an unredacted copy on its adversary and the Court, and the cross-motion is otherwise denied; and it is further,

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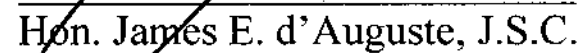
ORDERED that Mr. Gidumal's motion to strike certain portions of RAM's memorandum of law in opposition to his prior motion for summary judgment in Motion Sequence No. 012 and to supplement the record on said motion (Mot. Seq. No. 015) is denied.

This constitutes the decision and order of this Court.

Dated: November 2, 2018



Hon. James E. d'Auguste, J.S.C.