SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

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INDEX NO. 652318/2014

UTILISAVE, LLC,

MOTION DATE 09/12/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

FOX HORAN & CAMERINI, LLP and OLEG RIVKIN,

Defendantd.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 90

were read on this motion to/for STRIKE PLEADINGS

Upon the foregoing documents, it is ordered that the motion is decided as follows.

Plaintiff Utilisave, LLC (Utilisave) moves, pursuant to CPLR 3124, to compel defendants Fox Horan & Camerini LLP (Fox) and Oleg Rivkin (Rivkin) (together, defendants) to provide discovery, or in the alternative, for an order, pursuant to CPLR 3126, striking their answer. Defendants oppose the motion and cross-move, pursuant to CPLR 3124, to compel plaintiff to respond to their first notice for discovery and inspection. For the reasons set forth below, plaintiff's motion is granted in part, and defendants' cross motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND

This dispute arises out of the representation defendants provided to Utilisave in an action in Westchester County brought by nonparties MHS Venture Management Corp. (MHS) and Michael F. Steifman (Steifman), titled *Steifman et al. v Khenin et al.*, Supreme Court, Westchester

County Index Number 8271/07 (the Prior Action) (affirmation of Kristopher M. Dennis [Dennis affirmation], exhibit A [complaint], ¶ 16). When the Prior Action was commenced, MHS, of which Steifman is the sole owner, was one of Utilisave's two managing members (*id.*, ¶ 13). The plaintiffs in the Prior Action pursued both direct and derivative claims against Utilisave and its then-CEO, Mikhael Khenin (Khenin). Defendants represented Utilisave from January 2008 through July 2011 when, after a bench trial, a judgment was entered against it (*id.*, ¶¶ 7-8, 19 and 32).

Utilisave commenced this action against defendants for legal malpractice, breach of contract, aiding and abetting a breach of fiduciary duty, and unjust enrichment.

CONTENTIONS OF THE PARTIES

At issue on Utilisave's motion are defendants' responses to Utilisave's first set of interrogatories and first request for documents, both dated June 23, 2015 (Dennis affirmation, exhibits B and C). Utilisave had requested documents related to its retention of defendants, the terms of defendants' engagement, the advice defendants dispensed to Utilisave in the Prior Action, and documents related or referring to the renewal of an employment agreement between Utilisave and Khenin. Two years later, defendants responded to these requests in piecemeal fashion by furnishing responses in July 2017 and September 7, 2017 (Dennis affirmation, exhibits D and E). The responses largely contained general objections.

Utilisave argues that defendants' objections lack merit. First, defendants failed to interpose timely objections to Utilisave's discovery requests, and, therefore, they are precluded from asserting any objections. Second, as the documents pertain to the representation of Utilisave, defendants cannot assert the attorney-client product privilege or the fiduciary exception to those

privileges to prevent disclosure of responsive documents. Utilisave also objects to the relative paucity of the documents produced thus far, as defendants represented Utilisave for more than three years in the Prior Action, but produced only 76 pages of documents. In addition, Utilisave notes that defendants belatedly offered to produce electronically stored information (ESI), provided that Utilisave furnish them with proper search terms.

Defendants contend that Utilisave is not entitled to any privileged communications because the company was purchased by Steifman, who was adverse to Utilisave in the Prior Action. As such, Utilisave, now acting through MHS or Steifman as its new owner, cannot waive the attorney-client privilege to access communications between its former manager, Khenin, and defendants. Therefore, argue defendants, the attorney-client privilege precludes disclosure of any additional documents. Defendants have also furnished Utilisave with a privilege log for the documents they have withheld from disclosure.

Moreover, defendants argue that Utilisave has been dilatory in pursuing discovery. First, Utilisave rebuffed an offer to review three boxes of documents in defendants' possession, the majority of which defendants contend are likely already in Utilisave's possession. Second, Utilisave has refused to provide defendants with search terms so they can retrieve ESI archived on Fox's servers. Submitted on the cross motion is an affidavit from Fox's information and technology manager, Jeffrey Friedland (Friedland), who avers that he bears primary responsibility for the operation of Fox's computer systems (Friedland aff, 1). Friedland states that Fox retains email and digital files created by its attorneys, such as Rivkin (*id.*, 2). When Rivkin left Fox's employ in 2012, his files were archived. Friedland explains that Fox is in possession of Rivkin's email and digital files, as well as those files belonging to other subordinates who worked on the Prior Action (*id.*). A search of Rivkin's email files for the term "Utilisave" produced 5,783 emails

and a search of his digital files revealed 476 files. Defendants contend that producing all ESI files would be extremely burdensome and would subject this court to a lengthy in camera review in any event.

Defendants also allege that Utilisave cannot contest Khenin's instructions to them as he was entitled, as CEO, to manage Utilisave's affairs. Moreover, the issue of control over defendants was decided against Steifman and MHS in the Prior Action. In an order dated November 1, 2007, the court denied MHS's and Steifman's request that Khenin "consult with and . . . obtain consent from Steifman in connection with the choice and retention of counsel for Utilisave to defend this action" (affirmation of James G. McCarney [McCarney affirmation], exhibit E at 3).

Finally, defendants ask the court to issue a conditional order requiring Utilisave to provide discovery.

In reply, Utilisave contends that, as a former client, it is entitled to defendants' entire legal file. The right to waive the attorney-client privilege rests with the corporation, not its individual officers and directors, and defendants should produce the documents. Furthermore, defendants' legal file falls within the fiduciary exception of the attorney-client privilege and should be disclosed. Lastly, Utilisave submits that the burden to provide discovery responsive to Utilisave's demands plainly rests with defendants, and Utilisave should not have to recover defendants' electronic files. In addition, defendants' belated privilege log lists only 73 documents, none of which are internal or external emails. As for the cross motion, Utilisave submits that motion must be denied as a matter of law because defendants failed to submit an affirmation of good faith in support.

Defendants, in response, repeat their assertion that Utilisave's requests are overbroad, vexatious and unduly burdensome, and that Utilisave is not entitled to privileged communications.

LEGAL STANDARDS

It is well settled that "[l]iberal discovery is favored and pretrial disclosure extends not only to proof that is admissible but also to matters that may lead to the disclosure of admissible proof" (*Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance*, 226 AD2d 175, 175 [1st Dept 1996] [citation omitted]). As such, open and full disclosure is encouraged (*see MSCI Inc. v Jacob*, 120 AD3d 1072, 1075 [1st Dept 2014] [citation omitted]). Nevertheless, discovery must not be used as a "fishing expedition" (*see New York Community Bank v Parade Place, LLC*, 96 AD3d 542, 543 [1st Dept 2012], quoting *Orix Credit Alliance v Hable Co.*, 256 ADd 114, 116 [1st Dept 1998]). A demand must describe each item and category with reasonable particularity (*see* CPLR 3120 [2]). Requests that are overly broad, unduly burdensome, irrelevant or vague and demands that seek irrelevant or confidential information are palpably improper (*see McMahon v Cobblestone Lofts Condominium*, 134 AD3d 646, 646 [1st Dept 2015]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531, 531 [2d Dept 2007]). Hence, "[t]he test of whether matter should be disclosed is 'one of usefulness and reason'" (*City of New York v Maul*, 118 AD3d 401, 402 [1st Dept 2014], quoting *Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]).

Pursuant to CPLR 3124, the court may compel a party to provide discovery. The party seeking discovery must show that "the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Abrams v Pecile*, 83 AD3d 527, 528 [1st Dept 2011] [internal quotation marks and citations omitted]).

Where a party refuses to obey an order for disclosure, CPLR 3126 permits the court to strike the offending party's pleadings, stay the proceedings until the order is complied with, or render a judgment by default against the disobedient party (*see CDR Creánces S.A.S. v Cohen*, 23

NY3d 307, 317 [2014]). A party's repeated noncompliance that is "'dilatory, evasive, obstructive and ultimately contumacious'" warrants the striking of that party's pleadings (*see Arts4All, Ltd. v Hancock*, 54 AD3d 286, 286 [1st Dept 2008], *affd* 12 NY3d 846 [2009], *rearg denied* 13 NY3d 762 [2009], *cert denied* 559 US 905 [2010], quoting *Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374, 375 [1st Dept 1990]).

CPLR 4503, which codifies the attorney-client privilege, reads, in relevant part, that "[u]nless the client waives the privilege, . . . a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action." Thus, the privilege applies when the communication is "made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose" (*Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 593 [1989] [internal quotation marks and citations omitted]), or when the communication is "made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship" (*id.* at 593 [citation omitted]). The attorney-client "privilege, however, is not limitless," because invoking the privilege "constitutes an 'obstacle' to the truth-finding process" (*Matter of Priest v Hennessy*, 51 NY2d 62, 68 [1980], quoting *Matter of Jacqueline F.*, 47 NY2d 215, 219 [1979]). Thus, a "blanket assertion of privilege is insufficient" (*McCarthy v Klein*, 238 AD2d 552, 554 [2d Dept 1997]). Therefore, "[t]he burden of proving each element of the [attorney-client] privilege rests upon the party asserting it" (*Matter of Priest*, 51 NY2d at 69).

It is also well settled that a corporation possesses the right to assert the attorney-client privilege to bar the disclosure of its communications with counsel (*Rossi*, 73 NY2d at 592). When ownership of a corporation changes and the new owners continue the corporations' pre-existing

business, the right to assert or waive the privilege transfers to successor management as well (*Tekni-Plex, Inc. v Meyer & Landis*, 89 NY2d 123, 133 [1996], *rearg denied* 89 NY2d 917 [1996], citing *Commodity Futures Trading Commn. v Weintraub*, 471 US 343, 349 [1985]). However, where there is a mere transfer of assets, the right to control the privilege is not transferred (*Tekni-Plex, Inc.*, 89 NY2d at 133).

In New York, a former client is entitled to "presumptive access to the attorney's entire file on the represented matter, subject to narrow exceptions" (*Matter of Sage Realty Corp. v Proskauer Rose Goetz & Mendelsohn*, 91 NY2d 30, 37 [1997]). These exceptions prohibit the disclosure of "documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law" as well as "firm documents intended for internal law office review and use" (*id.* [citation omitted]).

LEGAL CONCLUSIONS

As a preliminary matter, the court granted Utilisave leave to move for discovery (NY St Cts Elec Filing [NYSCEF] Doc No. 11), but same was not granted to defendants. In reviewing the cross motion, the court notes that defendants' papers lack an affirmation of good faith. Generally, a party moving for discovery must submit an affirmation of good faith as required by Uniform Rules for Trial Courts (22 NYCRR) § 202.7 (c). "To be deemed sufficient, the affirmation must state the nature of the efforts made by the moving party to reconcile with opposing counsel" (*241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470, 471 [1st Dept 2013]; *accord Molyneaux v City of New York*, 64 AD3d 406, 407 [1st Dept 2009]). The good faith requirement contemplates something more than just sending a one-side letter to the plaintiff (*see Amherst Synagogue v Schuele Paint Co., Inc.*, 30 AD3d 1055, 1057 [4th Dept 2006]). Indeed, the affirmation must detail

the parties' diligent efforts to resolve the dispute (*see Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]). A party's failure to comply with 22 NYCRR § 202.7 (c), though, may be excused if the facts in the affirmation in support of the motion provide the requisite detail (*see Cuprill v Citywide Towing & Auto Repair Servs.*, 149 AD3d 442, 443 [1st Dept 2017]; *Loeb v Assara N.Y. I L.P.*, 118 AD3d 457, 457-458 [1st Dept 2014]). Here, defendants' affirmation in support lacks any detail of their diligent attempts to resolve the discovery dispute with Utilisave. Accordingly, defendants' cross motion to compel Utilisave to provide discovery is denied (*see Jackson v Hunter Roberts Constr. Group, L.L.C.*, 139 AD3d 429, 429 [1st Dept 2016]; *Perez De Sanchez v Trevz Trucking LLC*, 124 AD3d 527, 527 [1st Dept 2015]). The cross motion is denied for the additional reason that defendants did not request permission to move for discovery in accordance with the undersigned's part rules, with which the parties should be familiar.

With regards to Utilisave's motion, defendants did not timely object to the discovery demands (*see* CPLR 3122 [a]) or timely move for a protective order (*see* CPLR 3103). Nevertheless, defendants have invoked the attorney-client privilege to withhold additional documents from disclosure. The court finds this contention unavailing.

The transfer of the attorney-client privilege to "the new owners [of a corporation] turns on the practical consequences rather than the formalities of the particular transaction" (*Tekni-Plex, Inc.*, 89 NY2d at 133). "Examining the 'practical consequences' of a transaction . . . [requires] examining as a practical matter what claims or liabilities passed from or remained with the seller pursuant to the transaction to determine whether the attorney-client privilege was important to the transferee . . ." (*Matter of I Successor Corp.*, 321 BR 640, 653 n4 [Bankr SD NY 2005]). "As a practical matter, the predecessor company lives on when its business operations are continued, notwithstanding the technical legal changes effected by the acquisition and merger" (*Orbit One*

Communications, Inc. v Numerex Corp., 255 FRD 98, 104 [SD NY 2008], citing *Tekni-Plex*, 89 NY2d at 134). Applying those precepts to the present action, defendants do not dispute that liquidation trustee sold Utilisave to Steifman (defendants' answer [NYSCEF Doc No. 6], ¶ 44), or that MHS, as the new owner, has continued Utilisave's business.

Defendants urge that, because Steifman was in an adverse posture to the former Utilisave in the Prior Action, he cannot waive the company's right to assert the attorney client privilege. To be sure, had Steifman or MHS sought privileged communications during the pendency of that action, defendants' documents would have been prohibited from disclosure (*see Barasch v Williams Real Estate Co., Inc.*, 104 AD3d 490, 492 [1st Dept 2013] [denying the petitioner's request for documents from the respondent corporation, in which she was both a director and a shareholder, because the communications at issue concerned "privileged communications about her, which took place at a time when she was adverse to the corporation, in order to advance her own interests as a shareholder"]; *accord Matter of Weinberg*, 133 Misc 2d 950, 952 [Sur Ct, NY County 1986], *affd as mod sub nom. Matter of Beiny (Weinberg)*, 129 AD2d 126 [1st Dept 1987], *rearg denied* 132 AD2d 190 [1st Dept 1987], *lv dismissed* 71 NY2d 994 [1988] [concluding that the respondent corporate officer "should not be allowed to use his corporate position to waive the privilege that attaches to the corporation in a litigation relating to his own rights or in which he is asserting claims that are or may be adverse to the corporation"]). However, the gravamen of Utilisave's complaint concerns advice relayed prior to the transfer of ownership, namely whether defendants advised Khenin that he could unilaterally renew his employment agreement. Notwithstanding the propriety of Khenin's actions that were at issue in the Prior Action, Utilisave alleges that defendants' advice on this issue directly impacted its business operations. Thus, the practical consequence of Steifman's purchase signifies that Utilisave, under its successor

management, is the only entity that may pursue a legal malpractice claim against defendants for their pre-acquisition advice to the company. Thus, the interests of the former Utilisave, as defendants' true client, and the current Utilisave are aligned since the requested documents are not being sought for the sole purpose of furthering MHS's or Steifman's pursuit of individual claims against Utilisave. Concluding otherwise would forever preclude defendants from revealing the contents of their communications with Utilisave, even when those very communications could have caused possible injury to the company.

Given the foregoing, the court finds that defendants' discovery responses are woefully deficient. First, defendants readily admit that Rivkin worked with several associates on the Prior Action, but they failed to produce a list of those custodians who may possess potentially responsive material. Second, defendants argue that searching for and producing ESI would be prohibitively burdensome, that a search would likely yield little relevant information, and that its costs would be contrary to the "proportionality in discovery." As such, they request search terms to narrow the returns on ESI. However, defendants have not adequately described the burden or expense they would incur in producing the archived material. Indeed, Friedland was able to perform a search of Rivkin's archived records, which returned nearly 6,000 emails and 476 digital files. Defendants also submit that of the 476 digital files, all but 63 have been withheld from disclosure under the work product privilege.[1]

Defendants also argue that the remaining digital files, which consist of court filings and correspondence, are already in Steifman's possession (McCarney affirmation, ¶ 4). However, Steifman is not a party to this action. Furthermore, it is unclear whether the 403 digital files that have not been exchanged are duplicative of those contained in the three boxes of documents

[1] The privilege log submitted with the cross motion reveals that defendants have withheld 73 files (McCarney affirmation, exhibit Y).

plaintiff declined to inspect. In addition, the fact "[t]hat the documents sought may be available in public records does not, in itself, preclude production of those records from a party" (*Alfaro v Schwartz*, 233 AD2d 281, 282 [2d Dept 1996] [citation omitted]). Last, the rule of proportionality applies to the Commercial Division of the Supreme Court (*see* 22 NYCRR § 202.70 [g]), to which this matter is not assigned. In any event, it does not appear that defendants made any effort to review Rivkin's emails to locate responsive material. Apart from general statements concerning proportionality, defendants also have not informed the court of the anticipated time and expense associated with a potential ESI production. And contrary to their position that undertaking a privilege review would take a considerable amount of time, defendants were able to review Rivkin's 476 digital files and produce a privilege log shortly after plaintiff filed its motion.

Nonetheless, the draconian penalty of striking defendants' answer is not warranted at this time, as defendants have exhibited at least some effort to comply with their discovery obligations (*see Allstate Ins. Co. v Buziashvili*, 71 AD3d 571, 573 [1st Dept 2010]).

The court is cognizant of the fact that producing nearly 6,000 archived emails, together with the unknown number of potentially responsive files maintained by other Fox associates, is significant because "[i]t is the producing party that is to bear the cost of the searching for, retrieving, and producing documents, including electronically stored information" (*U.S. Bank, N.A. v GreenPoint Mtge. Funding, Inc.*, 94 AD3d 58, 62 [1st Dept 2012]). In addition, plaintiffs may not be entitled to receipt of all the documents in defendants' possession (*see Matter of Sage Realty Corp.*, 91 NY2d at 37), and the court further notes that plaintiff has not advanced any argument that it is entitled to defendants' work product. Consequently, as discussed *infra*, plaintiff's motion to compel discovery is granted. As Utilisave is entitled to its legal file, the court sees no reason for defendants to apply any search terms, apart from "Utilisave," to trim the universe

of documents to be produced. However, defendants should be afforded additional time to retrieve their email and digital files that pertain to the Prior Action for privilege before any records are exchanged. To the extent that defendants contend that there are no documents showing that defendants ever counseled Khenin on extending or renewing his employment agreement (oral argument tr at 8), the exchange of such an affidavit does not obviate Utilisave's request that, as defendants' former client, it is entitled to access its own legal file. If the total cost of production is significant compared to the amount in controversy or compared to defendants' ability to pay (*see U.S. Bank, N.A.*, 94 AD3d at 64, *citing Zubulake v UBS Warburg LLC*, 217 FRD 309, 322 [SD NY 2003]), defendants are not precluded from bringing an application to shift a portion of those costs to plaintiff. At this juncture, defendants have not furnished the court with sufficient information to make such a determination.

Finally, as to plaintiff's demand to recover the fees and costs associated with making the motion, the court denies this request. Any unresolved issues may be raised at the next compliance conference.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of plaintiff's motion to compel defendants to provide discovery is granted to the following extent:

(1) that within 30 days of the date of service of this order with notice of entry, plaintiff shall advise defendants if it wishes to inspect and copy the three boxes of non-privileged documents in defendants' possession, as described above, and if plaintiff so

chooses to inspect same, the inspection shall take place at a mutually agreed upon date and location, not later than 45 days after service of this order with notice of entry; and

(2) that within 30 days of the date of service of this order with notice of entry, defendants shall furnish plaintiff with a complete list of the associates who worked on the Prior Action, as defined above, along with the total number of email and digital files each associate has or had maintained pertaining to the Prior Action using the search term "Utilisave"; and

(3) within 14 days after plaintiff's receipt of the responses to paragraph (2), above, the parties are directed to meet and confer at a mutually agreed upon date, time and location to devise a schedule and timetable for the retrieval of defendant Oleg Rivkin's 403 non-privileged digital files, the retrieval of the email files of defendant Oleg Rivkin, the retrieval of the email and digital files of those persons described in paragraph (2), above, the completion of a privilege review, the completion and production of a privilege log for the documents that are to be withheld, the format of the production, and the date by which the production shall be made; and it is further

ORDERED that the branch of plaintiff's motion seeking to strike defendants' answer is denied; and it is further

ORDERED that defendants' cross motion to compel plaintiff to provide discovery is denied; and it is further

ORDERED that, in light of the discovery ordered above, the status conference scheduled for January 15, 2019 is adjourned and the parties shall instead appear for a status conference in Part 2, Room 280, 80 Centre Street, on April 30, 2019, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

12/17/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE