

<b>Kijek v West</b>
2018 NY Slip Op 34374(U)
September 26, 2018
Supreme Court, Westchester County
Docket Number: Index No. 66639/2016
Judge: Joan B. Lefkowitz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER : COMPLIANCE PART

-----X

MICHELE KIJEK and JOHN KIJEK,

*Plaintiffs,*

*-against-*

DECISION AND ORDER

LYNN WEST, STANLEY WEST, BOARD OF MANAGERS OF LAKESIDE OF BEDFORD CONDOMINIUM, KATONAH MANAGEMENT GROUP, INC., JANE McCONNELL and JASON WELSCH,

Index No. 66639/2016  
Motion Ret. Date: 9.26.2018  
Motion. Seq. No.: 2

*Defendants.*

-----X

LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs for an order pursuant to CPLR 3124 compelling defendants Board of Managers of Lakeside of Bedford Condominium and Katonah Management Group, Inc. to disclose: (1) complete and unredacted copies of any and all emails between defendant Lakeside of Bedford Condominium and Shapiro, Gettinger Waldinger & Montelone, LLP (including all attorneys and/or employees of such law firm, including but not limited to Steven Waldinger and Jennifer Catalanotto) and defendant Katonah Management Group, Inc. (including but not limited to Andrea Morse, Stephen Brussels, Bryan Hao, Dean Sterino, Jeanne Casarini and Sylvia Padrevita for the year of 2016), and (2) that a search be performed in the email history of Andrea Morse, Jeanne Cassarini, Stephen Brussels, Sylvia Padrevita, Rosemary Capone, Jim Stakebake, Jerry Moskowitz, Laurie Hilliard and Bill Lang for any emails related to the incidents described in the complaint and for such other and further relief as this Court deems necessary and proper.

Order to Show Cause, Affidavit in Support, Affirmation of Good Faith, Exhibits A-O;  
Affirmation of Opposition, Exhibits A-O.<sup>1</sup>

Upon the foregoing papers and the proceedings held on September 26, 2018, this motion is determined as follows:

In this action, plaintiffs allege defendants Lynn West and Stanley West (hereinafter

<sup>1</sup>Despite the clear direction of this Court contained in its Briefing Schedule dated August 16, 2018 cautioning counsel: "No reply papers shall be accepted.", in violation thereof, plaintiffs' counsel filed a reply affirmation on September 13, 2018 which this Court has not considered.

defendants “Wests”) were tenants of defendant Jane McConnell, the owner of a condominium located at 100 Haines Road, Unit 1005, Bedford Hills, New York. Plaintiffs assert that on July 29, 2016, defendants Wests owned a certain dog named Harrison or “Harry” which attacked plaintiffs’ daughter Sydney Woodard and their dog known as “Cooper” in the vicinity of defendants Wests’ condominium causing her injuries and injuries to “Cooper”. On October 1, 2016, defendants Wests’ dog named Harrison or “Harry” attacked plaintiff Michele Kijek causing her personal injuries.

The summons and complaint were filed on November 4, 2016.<sup>2</sup> Defendants Lakeside at Bedford Condominium s/h/a Board of Managers of Lakeside of Bedford Condominium and Katonah Management Group, Inc. filed their answer on January 6, 2017.<sup>3</sup> Defendants Lynn West and Stanley West filed their answer on January 12, 2017.<sup>4</sup> Defendants Jane McConnell and Jason Welsch filed their answer on June 1, 2017.<sup>5</sup> The parties engaged in discovery, and a trial order of readiness was “so ordered” on August 17, 2018 (Lefkowitz, J.) and filed via NYSCEF on August 17, 2018<sup>6</sup>. The note of issue was filed via NYSCEF on August 31, 2018.<sup>7</sup>

Plaintiffs allege that among the salient issues in this case are whether defendants Wests had knowledge of their dog’s vicious propensities, what actions they took to prevent the second incident from occurring and whether they acted with reckless disregard for the safety of others. In light of the foregoing, plaintiffs insist on the production by defendants of emails in order to establish who knew what and when, the proposed actions considered by defendants, the reasoning employed by defendants for their actions or inactions and the reasonableness of their actions or inactions following the first incident. Plaintiffs concede that defendants have furnished numerous emails between the parties but complain that several of such emails produced have been redacted on the basis of attorney-client privilege and attorney-work product doctrine.

Plaintiffs posit that the attorneys in question merely represented the defendant Board of Managers of Lakeside of Bedford Condominium (hereinafter “BMLBC”) and not defendant Katonah Management Group, Inc. (hereinafter “KMG”) nor did defendant KMG act as agent for defendant BMLBC. Even had defendant KMG acted in such capacity, such entity would not be entitled to assert such privilege relying on *People v Osorio*, 75 NY 2d 80 [1989] for the proposition that the attorney-client privilege extends only where the agents’ purpose is to assist the attorney in communicating with the client. Thus, no attorney-client relationship can be asserted between

---

<sup>2</sup>NYSCEF Doc. No. 1, Exhibit A to plaintiffs’ moving papers, NYSCEF Doc. No. 40, Exhibit A to opposition papers, NYSCEF Doc. No. 61.

<sup>3</sup>NYSCEF Doc. No. 8, Exhibit B to plaintiffs’ moving papers, NYSCEF Doc. No. 41, Exhibit B to opposition papers, NYSCEF Doc. No. 62.

<sup>4</sup>NYSCEF Doc. No. 9, Exhibit C to plaintiffs’ moving papers, NYSCEF Doc. No. 42, Exhibit C to opposition papers, NYSCEF Doc. No. 63.

<sup>5</sup>NYSCEF Doc. No. 19, Exhibit D to plaintiffs’ moving papers, NYSCEF Doc. No. 43, Exhibit D to opposition papers, NYSCEF Doc. No. 64.

<sup>6</sup>NYSCEF Doc. No. 35.

<sup>7</sup>NYSCEF Doc. No. 56.

defendant KMG and defendant BMLBC, and plaintiffs are therefore entitled to all unredacted emails exchanged between the two such defendants.

Plaintiffs additionally assert that defendants BMLBC and KMG are not entitled to assert the attorney-work product privilege. They contend that the emails sought herein could not have possibly been prepared in anticipation of litigation since the injury sustained by plaintiff Michele Kijek did not occur until October 1, 2016 which was subsequent to the exchange of the majority of the emails they seek in this application. Plaintiffs believe that the bulk of the subject emails relate to communications between the parties, including the attorney for defendant BMLBC, regarding the terms under which defendants Wests would be permitted to keep their dog on the property. Further, plaintiffs posit that since the liability carrier is not included in these emails, such emails do not concern potential litigation. As to those emails that were exchanged subsequent to the October 1, 2016 incident, plaintiffs asseverate such emails were not created by the attorney for BMLBC but rather an employee of defendant KMG and thus are not subject to the attorney-work product privilege.

Defendants counter that defendant KMG is, in fact, an agent of defendant BMLBC and a necessary party, joined in interest in any discussion between defendant BMLBC and its general counsel as defendant KMG is the “facilitator” for defendant BMLBC insofar as defendant BMLBC acts and communicates through defendant KMG, its managing agent. In its role as agent of defendant BMLBC, defendants argue that in anticipation of the litigation herein, defendant KMG was a necessary party to communications with defendant BMLBC’s counsel on behalf of defendant BMLBC and thus such communications are subject to the attorney-client privilege.

Moreover, defendants assert as to plaintiffs’ insistence that the privileged communications will establish who knew what and when, the proposed actions considered by defendants, the reasoning employed by defendants for their actions or inactions and the reasonableness of their actions or inactions following the first incident, plaintiffs had more than ample opportunity to question the two witnesses defendants produced for examinations before trial, Mr. James Stakebake, on behalf of defendant BMLBC and Mr. Bryan Hao on behalf of KMG during their lengthy depositions over several days. Further, when defendants offered to produce former KMG managing agent employee Andrea Morse, plaintiffs responded that her testimony was not necessary.

Plaintiffs’ first argument that the attorney-client privilege exists only as to the defendant BMLBC and not defendant managing agent KMG is unavailing.

James Stakebake is an owner and resident of such premises for approximately 20 years, board member of defendant BMLBC for nearly 19 years and was vice president of the board in 2016.<sup>8</sup> He testified that the Board hires a property management company<sup>9</sup>, and the role of such property management company is to oversee all of the common fees that are collected for the property, assist in finding vendors that will be doing projects including landscaping and snow removal. “If there is

---

<sup>8</sup>Defendants’ Exhibit M to moving papers, Transcript of James Stakebake, Page 10, Line 21, 24; Page 11, Lines 3, 5, 8-9, 11-12, 15, 18, 21, 24; Page 12, Line 4, 7, 10, 12, 15, 17, 20, 23; Page 13, Lines 2, 5, 8, 14, 16.

<sup>9</sup>Defendants’ Exhibit M to moving papers, Transcript of James Stakebake, Page 13, Line 19.

any issues, you know, with the homeowners, they bring it to the board's attention."<sup>10</sup> Mr. Stakebake asserted that the reason defendant BMLBC retained defendant KMG management company is to "do the day-to-day management of the community."<sup>11</sup> He stated that defendant KMG has been the property manager for defendant BMLBC for nearly 19 years<sup>12</sup>, and in October of 2016, there was a contract between defendant KMG and defendant BMLBC.<sup>13</sup> The monthly board meetings are held at the offices of defendant KMG in Croton Falls, New York.<sup>14</sup> The board's records and files including all the minutes of its board meetings are kept in the offices of defendant KMG.<sup>15</sup> Mr. Stakebake further averred that if an email is sent out, it is automatically sent out to all board members.<sup>16</sup> He testified that the two people that defendant BMLBC primarily worked with at defendant KMG were Andrea Morse and Bryan Hao.<sup>17</sup> Mr. Stakebake stated that the board has monthly board meetings as well as special board meetings if there is an emergency situation<sup>18</sup>, and the agenda is created by defendant KMG.<sup>19</sup> Upon being questioned by plaintiffs' counsel and shown various emails, affiant stated that Steven Waldinger is an attorney that has represented defendant BMLBC and the condominium for many years<sup>20</sup>, and the firm is paid on a case-by-case basis by the community association. The witness, however, had no idea whether Mr. Waldinger was the attorney

---

<sup>10</sup>Defendants' Exhibit M to moving papers, Transcript of James Stakebake, Page 13, Lines 23-25; Page 14, Lines 2-5; Defendants' Exhibit N to moving papers. Transcript of James Stakebake, Page 58, Lines 16-20.

<sup>11</sup>Defendants' Exhibit M to moving papers, Transcript of James Stakebake, Page 63, Lines 18-21; Page 72, Lines 8-11; Defendants' Exhibit N to moving papers. Transcript of James Stakebake, Page 38, Lines 22-25; Page 39, Line 3; Defendants' Exhibit N to moving papers. Transcript of James Stakebake, Page 120, Lines 13, 17-19.

<sup>12</sup>Defendants' Exhibit M to moving papers, Transcript of James Stakebake, Page 19, Lines 17-21; Page 73, Lines 21-25; Page 74, Lines 2-10, 15-20; Defendants' Exhibit N to moving papers. Transcript of James Stakebake, Lines 22-24, Page 59, Lines 5, 7-8.

<sup>13</sup>Defendants' Exhibit M to moving papers, Transcript of James Stakebake, Page 14, Line 18.

<sup>14</sup>Defendants' Exhibit M to moving papers, Transcript of James Stakebake, Page 14, Lines 23-25; Page 15, Lines 2, 6-7; Page 40, Lines 8, 13-25; Page 41, Lines 3-8; Page 42, Lines 7-8, 14-16.

<sup>15</sup>Defendants' Exhibit M to moving papers, Transcript of James Stakebake, Page 15, Lines 11-12, 14; Page 26, Lines 10-11; Page 36, Line 6; Page 61, Line 9; Page 62, Lines 17, 19-20.

<sup>16</sup>Defendants' Exhibit M to moving papers, Transcript of James Stakebake, Page 15, Lines 23-24; Page 16, Lines 3-5; Page 17, Lines 13-14; Page 21, Lines 15-18;

<sup>17</sup>Defendants' Exhibit M to moving papers, Transcript of James Stakebake, Page 20, Lines 5-6, 9, 11, 13-4, 16, 19.

<sup>18</sup>Defendants' Exhibit M to moving papers, Transcript of James Stakebake, Page 30, Lines 21-24; Page 31, Lines 6-8; 21-25.

<sup>19</sup>Defendants' Exhibit M to moving papers, Transcript of James Stakebake, Page 32, Lines 20-23.

<sup>20</sup>Defendants' Exhibit M to moving papers, Transcript of James Stakebake, Page 48, Lines 21-23; Page 49, Lines 10-14, 15, 17, 18-19, 23; Page 83, Lines 12, 15, 17-18, 20; Defendants' Exhibit N to moving papers. Transcript of James Stakebake, Page 52, Line 25, Page 53, Lines 2-23; Defendants' Exhibit N to moving papers. Transcript of James Stakebake, Page 75, Lines 12-13, 16, 18-19; Defendants' Exhibit N to moving papers. Transcript of James Stakebake, Page 85, Lines 11, 13.

Mr. Bryan Hao testified that defendant KMG is a property management firm that focuses on primarily providing support for residential boards of directors and associations of condominiums or homeowner associations.<sup>22</sup> Affiant is one of the two principals in the firm and the other is Stephen J. Brussels.<sup>23</sup> Mr. Hao explained that defendant KMG has a contract with defendant BMLBC which they generally renew every three years<sup>24</sup>, and the duties of KMG consist of, inter alia, all operational aspects of the community, working with the board of directors regarding policies and practices<sup>25</sup> which include but are not limited to collecting and depositing all common charges for the association, paying all invoices that the condominium association incurs as part of their operations, and defendant KMG reports such expenditures as part of its monthly obligations to the association. In addition, KMG performs periodic inspections, responds to homeowner issues and seeks approval from the board of directors or board of managers for extraordinary expenditures as well as fielding homeowners telephone calls and investigating residents' complaints.<sup>26</sup> He further testified that in 2016, the assigned property manager for defendant BMLBC was Andrea Morse and the administrator who supported the property manager, Andrea Morse, was Jeanne Casarini.<sup>27</sup>

Moreover, as Mr. Hao states in his affidavit in opposition to plaintiffs' application, when defendant KMG communicated with counsel, its sole purpose was to seek legal advice and to facilitate attorney communications on behalf of defendant BMLBC, and defendant KMG expected such communications to be confidential.

### Analysis

As a preliminary matter, CPLR 2214(c) provides in relevant part that "[t]he moving party shall furnish all papers not already in the possession of the court necessary to the consideration of the questions involved" (see *Reyes v Eleftheria Rest. Corp.*, 162 AD3d 808 [2d Dept 2018]; *Deutsche Bank Natl. Trust Co. v Hounnou*, 147 AD3d 814 [2d Dept 2017]; *Aquatic Pool & Spa*

---

<sup>21</sup>Defendants' Exhibit M to moving papers, Transcript of James Stakebake, Page 49, Line 23; Page 50, Line 2; Page 83, Lines 24-25; Page 84, Lines 2, 4-5.

<sup>22</sup>Defendants' Exhibit O to moving papers, Transcript of Bryan Hao dated May 18, 2018, Page 10, Line 25; Page 26, Lines 2-5.

<sup>23</sup>Defendants' Exhibit O to moving papers, Transcript of Bryan Hao dated May 18, 2018, Page 11, Line 10.

<sup>24</sup>Defendants' Exhibit O to moving papers, Transcript of Bryan Hao dated May 18, 2018, Page 13, Lines 19-22; Page 14, Lines 10-11.

<sup>25</sup>Defendants' Exhibit O to moving papers, Transcript of Bryan Hao dated May 18, 2018, Page 13, Lines 13-16.

<sup>26</sup>Defendants' Exhibit O to moving papers, Transcript of Bryan Hao dated May 18, 2018, Page 18, Lines 4-15; Defendants' Exhibit P to moving papers, Transcript of Bryan Hao dated May 18, 2018, Page 6, Line 21; Page 14, Lines 9, 13-14.

<sup>27</sup>Defendants' Exhibit P to moving papers, Transcript of Bryan Hao dated May 18, 2018, Page 7. Lines 12, 13-14, 24-25; Page 8, Lines 7, 10; Page 12, Lines 21, 23; Page 13, Line 2.



*Servs., Inc. v WN Weaver4 St., LLC*, 2012 NY Slip Op 33811(U) [Sup Ct West Co]; *Specialized Realty Servs., LLC v Maikisch*, 2012 NY Slip Op 33743(U) [Sup Ct Orange Co]; *Kayel v El-Bab*, 2011 NY Slip Op 31522(U) [Sup Ct Suffolk Co]; *Bellofatto v Bellofatto*, 8 Misc 3d 1019(A) [Sup Ct Putnam Co 2005]). In this instance, plaintiffs have provided only select portions of the transcripts of the testimony of defendants' witnesses James Stakebake and Bryan Kao. Plaintiffs are responsible for assembling a complete set of papers documenting the procedural history of their application and providing a proper foundation for the relief requested, and in this instance, they have not done so. The absence of sufficient motion papers is reason enough for denial of the plaintiffs' motion (*see Roberts v Roberts*, 159 AD3d 932 [2d Dept 2018]; *Homar v American Home Mtge. Acceptance, Inc.*, 2012 Ny Slip Op 33724(U) [Sup Ct Orange Co 2012]).

Turning first to the issue of the attorney-client privilege, 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 and the communication itself must be primarily or predominantly of a legal character (*see Spectrum Sys. Int'l Corp. v Chem. Bank*, 78 NY2d 371 [1991]). Privilege is not waived if the third party is acting as an agent of the attorney or the client (*see People v Osorio*, 75 NY2d 80 [1989]; *Gama Aviation, Inc. v Sandton Capital Partners, L.P.*, 99 AD3d 423 [1<sup>st</sup> Dept 2012]). Whether a third party is an agent "is not defined by the third parties employment or function," but rather depends on whether the client had "a reasonable expectation of confidentiality under the circumstances" (*see Osorio*, 75 NY2d 84; *see also Stroh v Gen. Motors Corp.*, 213 AD2d 267, 268 [1<sup>st</sup> Dept 1995]). When an agent is closely involved in a company's activities, there is no reason to distinguish between a person on the corporation's payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice (*see BEW Parking Corp. v Apthorp Assoc. LLC* [1<sup>st</sup> Dept 2016]; *Jacmuth v Leonard*, 2018 NY Slip Op 32155(U) [Sup Ct NY Co Aug 31, 2018]).

Relying on *Osorio*, 75 NY2d 80, Courts have applied the attorney-client privilege to "communications of one serving as an agent of either attorney or client" (*see Hudson Ins. Co. v M.J. Oppenheim*, 72 AD3d 489 [1<sup>st</sup> Dept 2010], applying privilege to documents generated by forensic accountant retained by defense counsel and quoting *Robert V. Straus Prods. v Pollard*, 289 AD2d 130 [1<sup>st</sup> Dept 2001], which, in turn, quoted *Osorio*, 75 NY2d at 84], accord, *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 93 AD3d 574 [1<sup>st</sup> Dept 2012] where plaintiff submitted evidence including retainer agreements establishing that its counsel retained consultants to help provide legal advice to plaintiff with respect to potential legal claims against defendants. The Court held quoting *Hudson*, 72 AD3d 489, that the attorney client privilege was applicable and extended to documents generated by consultants retained by counsel to assist in analyzing or preparing for anticipated litigation; *see also Gama*, 99 AD3d 423 [2012], rejecting the assertion that the attorney-client privilege was waived because the communications were copies to, sent to or authored by a third party where the third party was acting as an agent of the represented party and such party had a reasonable expectation that the third party would keep the communication confidential; *see also Stroh*, 213 AD2d 267, for the proposition that communications made to counsel through an agent of the client to facilitate communication generally will be privileged, holding that the daughter's presence in discussions with the elderly mother's counsel did not destroy the privilege where the daughter selected the law firm to represent her mother, transported her to the law office and put her mother sufficiently at ease in order to communicate effectively with counsel; *see also Beach v Touradji Capital Mgt, LP*, 99 AD3d 167 [1<sup>st</sup> Dept 2012]). In light of the foregoing, clearly, defendant KMG

was acting as an agent of defendant BMLBC in relation to communications concerning discussions regarding the subject incidents and defendant BMLBC's attempts to resolve the disputes. Indeed, even plaintiffs' counsel recognized that defendants KMG and BMLBC had consulted with counsel to obtain legal advice and recommendations, and such communications may be subject to privilege.<sup>28</sup>

Neither *Osorio*, 75 NY2d 80 nor *United States v Kovel*, 296 F2d 918 [2d Cir 1961] nor the cases cited by plaintiffs' counsel as he claims, stand for the proposition that the attorney-client privilege attaches only where the participation of the third-party is "necessary" in order to facilitate the provision of legal advice. However, to the extent that there is limited authority to that effect (*see Doe v Poe*, 244 AD2d 450 [2d Dept 1997], *affd* on other grounds, 92 NY2d 864 [1998]; *Lehman Bros. Intl. (Europe)(in administration) v AG Fin., Prods., Inc.*, 2016 NY Slip Op 30187(U) [NY Co 2016]), in this context, defendant BMLBC is comprised of primarily laypersons who retained defendant KMG, an experienced, professional management entity to handle its day-to-day operations as well as other issues, such as the one herein, as they arose.<sup>29</sup> The testimony of Mr. Hao and Mr. Stakebake soundly established that defendant KMG enforced the community rules, handled the incidents asserted in plaintiffs' complaint and communicated with defendant BMLBC's counsel in its role as agent of defendant BMLBC in anticipation of litigation.

With regard to the issue of whether the attorney's work product is subject to privilege, CPLR 3101(c) provides that the "[t]he work product of an attorney shall not be obtainable." Since the attorney's work product privilege affords the material absolute immunity from disclosure, courts have narrowly construed the work product of an attorney to include only those materials prepared by an attorney which contain his analysis and trial strategy (*see Cioffi v S.M. Foods, Inc.*, 142 AD3d 520 [2d Dept 2016]; *Zimmerman v Nassau Hosp.* 76 AD2d 921, 429 N.Y.S.2d 262 [2d Dept 1980]; *Kenford Co., Inc. v Erie County*, 55 AD2d 466, 390 N.Y.S.2d 715 [4th Dept 1977]; *Doe*, 244 AD2d 450) and has been applied to documents which reflect counsel's learning and professional skills, including legal research, analysis, conclusions, legal theory and strategy (*see Geffner v Mercy Med. Ctr.*, 125 AD3d 802 [2d Dept 2015]; *Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 190-191 [1<sup>st</sup> Dept 2005]). Moreover, the work product privilege affords protection to interviews, statements, memoranda, correspondence, briefs, mental impressions, and personal beliefs that were held, prepared or conducted by the attorney (*see Hickman v Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 [1947]; *Central Buffalo Project Corp. v Rainbow Salads, Inc.*, 140 AD2d 943 [4<sup>th</sup> Dept 1988]).

Plaintiffs' demand for the emails of defendants KMG and BMLBC on the grounds that the

---

<sup>28</sup>Hao Deposition, June 12, 2018, Counsel for Plaintiffs: Q. "I think you said a few times before that either Katonah or the board consulted with counsel in June of 2016". Hao. A. "I don't know about time frame." Counsel for Plaintiffs: Q. "Was there a legal recommendation made regarding whether or not a service dog can be removed because it's in excess of the weight limit?" Counsel for Defendants: "Note that the attorney-client privilege exists and you can't get beyond that. You can ask him other questions.", Page 67, Lines 19-23; Page 68, Lines 3-5. Counsel for Plaintiffs: "How do you interpret it? You can't ask the lawyer., It's attorney-client privilege. Remember?" Counsel for Defendants: "You can ask a lawyer what he wrote, you can't ask him about his communications with his client." Page 131, Lines 23-25; Page 132, Lines 2-4.

<sup>29</sup>Mr. Stakebake testified that if there was a complaint made to defendant KMFG regarding a dog, "Well, generally, what would happen is Katonah Management would handle it, because they are the managing agents, and that is what we hire them to do.", Transcript of James Stakebake, Page 72, Lines 4-11, May 8, 2018.



e-mails they demand "could not possibly have been prepared in anticipation of litigation since the Plaintiff's injury which gives rise to this litigation did not occur until October 1, 2016, which was after most of the subject emails were sent" is wholly without merit.

Notwithstanding plaintiffs' numerous allegations in their complaint relating to an incident occurring on July 29, 2016, during the deposition of Mr. Stakebake on June 13, 2018, the following exchanges took place:

Q [Plaintiffs' Attorney]: "So, did Mr. Kijek tell [you that] Harrison bit Cooper in that incident on July 29<sup>th</sup>?"

A: I believe so, yes.

Q. After speaking with Mr. Kijek and some of the other members of the board, you notified Katonah Management?

A: Immediately."<sup>30</sup>

"Q: Just drawing your attention back to the e-mail we previously looked at, from July 29<sup>th</sup> 2016, at 8:56 p.m., didn't that email discuss how it was the board's desire to have the dog removed from the condominium in that email?"<sup>31</sup>

"A: I see that, but what they decided is, when they were talking about a lawsuit, they felt it was best that the board did not talk about this at all to the community and we were then instructed, at that point and I – Katonah management was handling it and they thought well, let's you know..."<sup>32</sup>

"A: I think that the mere fact that a lawsuit was being talked about we were like okay, this is – you know, we would take this seriously anyway but now we're talking lawsuits and we need to, you know, not only protect the community but, you know, if they're going to sue themselves in suing the community association, we better get an attorney involved..."<sup>33</sup> (emphasis added).

"Q: "Were you aware there were legal proceedings in the Katonah town court regarding the first incident from July 29<sup>th</sup> of 2016?"

A: Yes..."<sup>34</sup>

There can be no question that defendants were anticipating legal action by plaintiffs; indeed, legal proceedings had already been commenced in the local courts.

---

<sup>30</sup>Transcript of James Stakebake, Page 68, Lines 19-25; Page 67, Line 2.

<sup>31</sup>Transcript of James Stakebake, Page 79, Lines 5-10.

<sup>32</sup>Transcript of James Stakebake, Page 80, Lines 9-14.

<sup>33</sup>Transcript of James Stakebake, Page 82, Lines 21-25, Page 83, Lines 2-5

<sup>34</sup>Transcript of James Stakebake, Page 118, Lines 21-24.

Moreover, plaintiffs demand that defendants BMLBC and KMG conduct searches of their emails and provide them with “a complete set of emails, including unredacted portions of the emails sent or received by Steven Waldinger [counsel] (including those previously disclosed emails which were redacted).” Clearly, such demand is overbroad and improper (*see Spectrum Sys. Int’l Corp.*, 78 NY2d 371, 376-377 [1991]). Moreover, as Mr. Stakebake previously testified “It is with the board itself. If a message is sent out, it is sent to all board members.”<sup>35</sup> So there is never an email that goes to one board member. It goes to everybody each time”.<sup>36</sup> Additionally, Mr. Hao has confirmed he performed a search of his emails and turned over all emails in his possession related to the subject incidents. He has affirmed that he had access to former employee Morse’s email and provided plaintiffs with any emails she may have had concerning these incidents. He has also restated Mr. Stakebake’s assertion that all emails are distributed to the entire board, and he is on the distribution list of defendant BMLBC and would have been copied on the board’s emails relating to these incidents.

Finally, defendants note that plaintiffs served combined discovery demands upon defendant BMLBC on February 7, 2017<sup>37</sup>, and defendant BMLBC timely served its response on February 21, 2017.<sup>38</sup> Plaintiffs then served a second set of discovery demands on July 5, 2017<sup>39</sup>, and co-defendants West and McConnell served their discovery demands on November 15, 2017. Defendant BMLBC responded to plaintiffs’ and co-defendants’ demands in December of 2017.<sup>40</sup> Plaintiffs then served a third set of post examination before trial combined demands comprising two pages on defendants on April 24, 2018<sup>41</sup> and on May 30, 2018 served an additional post examination before trial notice to produce.<sup>42</sup> Defendants served their response to the May 30, 2018 demand on August 1, 2018.<sup>43</sup> They allege they have complied with plaintiffs’ discovery demands.

Pursuant to the preliminary conference stipulation dated “so ordered” on July 26, 2017, defendants’ depositions were ordered to be completed by October 12, 2017, and depositions of all parties, including non-parties were directed to be completed by December 29, 2017. When depositions were not completed by such date, by compliance conference referee report and order dated January 16, 2018, the parties were instructed that examinations before trial must be completed by February 21, 2018. On February 28, 2018, the parties appeared for a conference and depositions were still not completed. By compliance conference referee report and order, the deposition of

---

<sup>35</sup>Transcript of James Stakebake, Page 15, Lines 23-25.

<sup>36</sup>Transcript of James Stakebake, Page 16, Lines 4-5.

<sup>37</sup>Defendants’ Exhibit E to moving papers, NYSECF Doc. No. 65.

<sup>38</sup>Defendants’ Exhibit F to moving papers, NYSECF Doc. No. 66.

<sup>39</sup>Defendants’ Exhibit G to moving papers, NYSCEF Doc. No. 67.

<sup>40</sup>Defendants’ Exhibit I to moving papers, NYSCEF Doc. No. 69.

<sup>41</sup>Defendants’ Exhibit J to moving papers, NYSCEF Doc. No. 70.

<sup>42</sup>Defendants’ Exhibit K to moving papers, NYSCEF Doc. No. 71.

<sup>43</sup>Defendants’ Exhibit L to moving papers, NYSCEF Doc. No. 72.

plaintiff John Kijek was scheduled for March 27, 2018, the examination before trial of defendant Lynn West was scheduled for April 3, 2018 and the depositions of defendants BMLBC and KMG were ordered to be completed by April 10, 2018. By compliance conference referee report and order of April 13, 2018, upon learning that depositions were still not completed, this Court noted that "Plaintiff, having failed to advise the Court that their demand for Board minutes was allegedly outstanding at two prior conferences before the Court, such shall not constitute cause to adjourn any examinations before trial" and "Plaintiff, having failed to proceed with Court-ordered examinations before trial of defendants are cautioned to proceed with examinations before trial as ordered herein or such shall be deemed waived." The examinations before trial of defendants BMLBC and KMG were then scheduled for May 8, 2018.<sup>44</sup> The parties again appeared before the Court on May 11, 2018, and depositions of defendants BMLBC and KMG were still not complete, and by compliance conference referee report and order dated May 15, 2018, examinations before trial of such defendants were ordered to be completed by June 13, 2018. Following the exchange of post-deposition discovery, the trial order of readiness was filed on August 20, 2018, and the note of issue was filed on August 31, 2018.

The filing of a note of issue generally denotes the completion of discovery, not the opportunity to launch another phase of it (*see Arons v Jutkowitz*, 9 NY3d 393 [2007]). A certificate of readiness certifies that all discovery is completed, waived or not required, and the action is ready for trial (*see Tirado v Miller*, 75 AD3d 153 [2d Dept 2010]).

Here, plaintiffs' delay in proceeding with discovery including failing to conduct examinations before trial over a significant period of time and serving additional discovery demands entitled as post-ebt notices to produce just prior to the filing of the note of issue without providing a basis therefore is disingenuous at best. This Court will not countenance any further delay in these proceedings.

Accordingly, it is

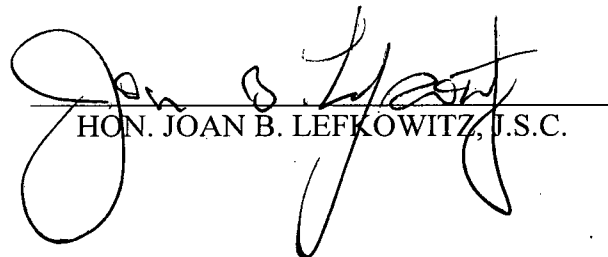
ORDERED that, plaintiffs' motion is denied in its entirety; and it is further

ORDERED that, counsel for all parties are directed to appear for a conference in the Settlement Conference Part, Courtroom 1600 on October 31, 2018 at 9:15 a.m.; and it is

ORDERED that, plaintiffs shall serve a copy of this order with notice of entry upon defendants within five (5) days of entry; and it is further

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York  
September 26, 2018

  
HON. JOAN B. LEFKOWITZ, J.S.C.

<sup>44</sup>NYSCEF Doc. 31.