

**New York State Div. of Human Rights v Cooper  
Square Realty, Inc.**

2019 NY Slip Op 32996(U)

October 10, 2019

Supreme Court, New York County

Docket Number: 450486/2013

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM**

*Justice*

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INDEX NO. 450486/2013

NEW YORK STATE DIVISION OF HUMAN RIGHTS, ON  
THE COMPLAINT OF GERALDINE PAULING, GERALDINE  
PAULING

MOTION DATE N/A

MOTION SEQ. NO. 005

Plaintiff,

- v -

COOPER SQUARE REALTY, INC. N/K/A FIRSTSERVICE  
RESIDENTIAL NEW YORK, INC., ROYAL YORK OWNERS  
CORPORATION,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 117, 118, 119, 120, 121, 122, 123, 124, 125, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143

were read on this motion to/for MISCELLANEOUS

In this action, plaintiff-intervenor Geraldine Pauling seeks to recover for the emotional distress she allegedly suffered as a result of defendants' failure to accommodate her disability. The lawsuit was originally commenced by the New York State Division of Human Rights in 2013 and plaintiff-intervenor filed her own complaint seeking injunctive relief and damages for emotional distress in 2017. Throughout the pendency of this lawsuit, Ms. Pauling has been treating with a licensed therapist, Lauren Taylor. The therapists' notes were recently produced in discovery pursuant to a HIPAA authorization and the therapist was also deposed. The therapist notes reveal that Ms. Pauling discussed her lawsuit against defendants with the therapist and also disclosed certain communications she had with her attorney concerning the lawsuit. Defendants now move to compel the production of all communications between Ms. Pauling and her attorney concerning her emotional distress claim and seek to re-depose Ms. Pauling regarding these documents.

Defendants argue that Ms. Pauling waived her attorney-client privilege by disclosing her communications with her attorney to her therapist. For a document to be privileged as an attorney-client communication pursuant to CPLR 4503(a), the document must be primarily or predominantly a communication of a legal character, for the purpose of obtaining or rendering legal advice or services, and intended to be confidential. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 623 (2016). The party asserting the privilege has the burden of establishing its entitlement to protection by showing that the communications are privileged and that the privilege has not been waived. *Id.* at 624. It is undisputed that Ms. Pauling's communications with her attorney regarding this lawsuit are privileged and thus the issue is whether Ms. Pauling's disclosure of these communications constitutes a waiver of the privilege. As a general matter, communications between counsel and client which are shared voluntarily with third-parties are generally not privileged. *People v. Osorio*, 75 N.Y.2d 80, 84 (1989); *Robert V. Strauss Prods. Inc. v. Pollard*, 289 A.D.2d 130, 131 (1<sup>st</sup> Dep't 2001). An exception to waiver exists for one serving as an agent of either attorney or client in certain circumstances since a client has a reasonable expectation that such communication will remain confidential. *Osorio*, 75 N.Y.2d at 84. Here, plaintiff does not assert that this exception to waiver is applicable and thus has failed to meet her burden of showing that the privilege has not been waived by her disclosure of attorney-client communications to her therapist. Thus, plaintiff has waived the attorney-client privilege with respect to the specific communications she disclosed to her therapist.

However, defendants do not merely seek disclosure of these specific communications but rather argue that plaintiff waived her attorney-client privilege regarding all communications with her attorney regarding her emotional distress claim. In support, defendants argue that by

selectively disclosing certain attorney-client communications and not others to her therapist, plaintiff has put all of these communications at issue. However, unlike the cases cited by defendants, plaintiff is not using the advice of her counsel as a basis for any claim or defense in this lawsuit. Since “[w]aiver is predicated on the privilege holder’s placing the selective disclosed privileged communications at issue, i.e., intending to prove an asserted claim or defense by use of the privileged materials,” the doctrine of selective disclosure is inapplicable in these circumstances. *People v. Greenberg*, 63 A.D.3d 576, 577-78 (1<sup>st</sup> Dep’t 2009).

What defendants are really seeking to prove here is that Ms. Pauling, on alleged advice of counsel, exaggerated her emotional distress to her therapist in order to bolster her claim in this lawsuit. However, this argument does not support subject matter waiver as the communications themselves are not at issue. Indeed, plaintiff has already disclosed what are arguably the harmful communications to her therapist and thus this is not an instance where plaintiff is attempting to use the privilege as both a sword and a shield. To the extent defendants intend to prove that Ms. Pauling exaggerated her symptoms to her therapist, they are free to do so on cross-examination of Ms. Pauling and the therapist at trial.

Thus, the waiver of the attorney-client privilege is limited to the specific communications Ms. Pauling disclosed to her therapist. The only specific communications defendants discuss in their motion are Ms. Pauling’s statement to her therapist on February 11, 2019 regarding her attorney’s advice regarding settlement and the 24-page memorandum that Ms. Pauling wrote for her attorney. Accordingly, Ms. Pauling must produce all documents related to these specific communications and defendants may re-depose Ms. Pauling concerning same.

Finally, defendants move to strike the errata sheets that Ms. Pauling provided after her depositions. The errata sheets contain numerous, lengthy changes to the substance of her

testimony without providing a statement of the reasons for these changes. Accordingly, the errata sheets must be stricken pursuant to CPLR 3116(a). *Garcia v. Stickel*, 37 A.D.3d 368, 368-69 (1<sup>st</sup> Dep't 2007).

Accordingly, it is

ORDERED that Ms. Pauling must provide to defendants, within seven (7) days of entry of this order, any documents relating to the communication referenced in the therapist's notes from February 11, 2019 and the 24-page memorandum she wrote for her attorney; and it is further

ORDERED that defendants may re-depose Ms. Pauling concerning these specific communications by October 30, 2019; and it is

ORDERED that Ms. Pauling's errata sheets are stricken; and it is further

ORDERED that plaintiffs shall file the note of issue by October 31, 2019.

10/10/19  
DATE

  
PAUL A. GOETZ, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED  DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

- OTHER
- REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: