

<b>BML Props. Ltd. v China Constr. Am., Inc.</b>
2021 NY Slip Op 31798(U)
May 26, 2021
Supreme Court, New York County
Docket Number: 657550/2017
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

INDEX NO. 657550/2017
MOTION DATE 12/26/2019, 03/31/2021
MOTION SEQ. NO. 007 009

BML PROPERTIES LTD.,
Plaintiff,
- v -

CHINA CONSTRUCTION AMERICA, INC., NOW KNOW AS
CCA CONSTRUCTION, INC., CCA CONSTRUCTION,
INC., CSCEC BAHAMAS, LTD., CCA BAHAMAS LTD.,
DOES 1 THROUGH 10
Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 276, 311, 331, 332, 333, 337, 338, 339, 340, 341, 342, 343, 344

were read on this motion to/for ORDER OF PROTECTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 312, 313, 314, 315, 316, 317, 318, 335, 336, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356

were read on this motion to/for DISCOVERY

Upon the foregoing documents and as set forth on the record (5/26/2021), BML Properties Ltd.'s (BMLP) motions for (i) a protective order (mtn. seq. no. 007) and (ii) to compel (mtn. seq. no. 008) are both granted.

In brief, BMLP alleges a massive fraud by the defendants—three affiliated corporate entities, CCA Construction Inc. (CCA), CCA Bahamas Ltd. (CCAB), and CSCEC Bahamas Ltd. (CSCECB)—in connection with the development of the Baha Mar resort in the Bahamas.

BMLP claims that the defendants acting as alter egos and/or successors in interest for one another, and as an investor in and construction manager for the project, defrauded it with regard to timely project completion, ultimately leading to the loss of, among other things, BMLP's nearly billion-dollar equity investment in the project and the expected profits therefrom.

#### I. **The Motion for a Protective Order Must be Granted**

At issue in the motion for a protective order is the defendants' use, as evidence, of two legal opinions and valuations quoting from these legal opinions (together, the **Legal Opinions**) prepared by law firms analyzing the potential legal claims of Baha Mar Ltd. (**Baha Mar**) against the defendants and their affiliates and any counterclaims such parties may have. Baha Mar is not a party to this action and its corporate affiliation with BMLP was severed when Baha Mar went into receivership. However, BMLP objects to use of these Legal Opinions because it contends that it shared Baha Mar's privilege either as a joint client or due to a common legal interest. Therefore, BMLP has moved for a protective order over these documents. The defendants object, arguing that the Legal Opinions were prepared solely for Baha Mar, not BMLP, and that BMLP cannot assert any privilege as to these Legal Opinions. Put simply, the defendants are wrong.

BMLP has established a joint privilege over the Legal Opinions by submitting two attorney affidavits stating that they provided the Legal Opinions as counsel to BMLP, as well as two affidavits from BMLP officers attesting to that same understanding. To the extent that BMLP's

president, Thomas M. Dunlap, was unclear about this in his prior deposition testimony on August 7, 2015, he has clarified his prior testimony in his affidavit dated April 8, 2021:

5. In connection with the bankruptcy, I gave deposition testimony in my individual capacity regarding all 15 Debtors. At my Aug. 7, 2015 deposition, I was asked: "What is your position at the debtor?" I answered, "I am the president of Baha Mar Limited, amongst other entities." I testified that I was also chairman, president, and director of debtor Northshore Mainland Services. I also testified that I was the President of each of the other debtors (including the Plaintiff BML Properties Limited) and had been since August 2012:

Q And that you are president of each of the other debtors?

A Correct.

Q And have been so since August 2012?

A Yes, sir.

(Doc. No. 307 at 22). This testimony was accurate, including as to Plaintiff BML Properties Ltd.

6. Later in the August 7, 2015 deposition, I was asked again whether I had a position with BML Properties Ltd. Contrary to my earlier, accurate testimony, I said, "No, sir, I don't believe I do." (Doc. 307 at 44). That was incorrect. As indicated above, I had been President of BML Properties Ltd. since 2012. My mistake was never corrected.

7. At my August 26, 2015 deposition, I was asked, "Does Baha Mar Properties Limited engage in any business activities other than being an investor in Baha Mar Limited?" I responded: "I do not believe so." (Doc. 308 at 99). This testimony should have been more precise. BML Properties Ltd. was the majority investor and voting shareholder in Baha Mar Ltd. and, in that capacity, was the "day-to-day manager of Baha Mar Ltd. and its subsidiaries." (Doc. 217). While BML Properties Ltd.'s role as "day-to-day manager" arose from its position as investor in Baha Mar Ltd., my testimony could have given the misleading impression that BML Properties Ltd. was solely a passive investor and not the day-to-day manager.

(NYSCEF Doc. No. 333, ¶¶ 5-7)

There is simply no question about joint privilege where, as here, the lawyers and the clients *all* agree about the scope of representation (*see Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 631 [2018]). Nor did waiver occur, as the defendants argue. As the court (Scarpulla, J.) noted, the Bahamas court said that there would be no waiver, and this court never disturbed that ruling (2/26/2020 *Tr.* at 17). Finally, BMLP did not put the Legal Opinions “at issue” by instituting this action. Outside of the legal malpractice context, there is no “relevance exception” to attorney-client privilege. The mere “fact that a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself at issue in the lawsuit” (*Ambac Assur. Corp. v DLJ Mtge Capital, Inc.*, 92 AD3d 451, 452 [1<sup>st</sup> Dept 2012])[citations omitted]. Accordingly, the motion for a protective order over the Legal Opinions must be granted.

## II. The Motion to Compel Must Also be Granted

Disclosure of ESI search terms, custodians, and other parameters is a basic tenet of modern discovery, and courts routinely compel such disclosure (e.g., *Starr Russia Invs. III BV v Deloitte Touche Tohmatsu Ltd.*, 63 Misc3d 1204[A] [Sup Ct NY Cnty October 8, 2020]; *Lechase Const. Servs., LLC v Info. Advantage, Inc.*, 48 Misc3d 1218[A] [Sup Ct Monroe Cnty 2012]). Indeed, such disclosure appears to be expressly contemplated by the governing ESI Protocol in this action, i.e.,

“[t]he parties agree to meet and confer as to any search terms that may be requested by either party to supplement a producing party’s use of search terms . . . .”

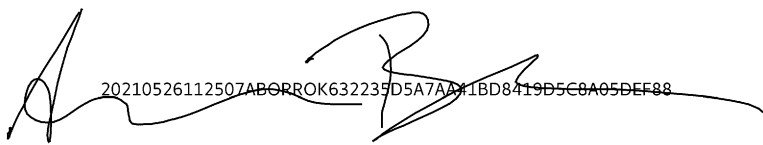
(NYSCEF Doc. No. 270, §3[c]).

The defendants' ESI search terms are not entitled to secrecy as this would necessarily prejudice the requesting party's ability to request supplemental search teams or to review whether such completed searches were done properly. With respect to the motion as it relates to CCA, at oral argument (5/26/2021), counsel for defendants indicated that CCA will produce responsive ESI documents within 45 days. Therefore, inasmuch as BMLP also seeks to compel CCA's ESI production, this issue is now moot.

Accordingly, it is

ORDERED that the motion (seq. no. 007) for a protective order is granted and the legal opinions and valuations that are the subject of this motion may not be used in this litigation and are protected by the joint attorney client privilege; and it is further

ORDERED that the motion (seq. no. 009) to compel disclosure of defendants' ESI parameters is granted and the defendants are order to disclose such parameters within 7 days of this decision and order.



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5/26/2021  
DATE

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ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE

Defendants cannot avoid disclosing basic information about the processes they have used to gather and produce ESI where the ESI production