

<b>Theroux v Resnicow</b>
2021 NY Slip Op 32434(U)
November 23, 2021
Supreme Court, New York County
Docket Number: 154642/2017
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. GERALD LEBOVITS PART 07**

*Justice*

-----X INDEX NO. 154642/2017

JUSTIN THEROUX,

Plaintiff,

MOTION DATE 10/12/2021,  
10/12/2021,  
11/04/2021

- v -

MOTION SEQ. NO. 009 010 011

NORMAN RESNICOW, BARBARA RESNICOW, 71  
WASHINGTON PLACE OWNERS, INC., and BOARD OF  
DIRECTORS OF 71 WASHINGTON PLACE OWNERS,  
INC.,

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 009) 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 445, 446, 456, 457

were read on this motion for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 447, 448, 449, 450, 451, 452, 453, 454, 455, 458, 459

were read on this motion for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 486, 487, 488, 489, 497, 498, 499

were read on this motion for RENEWAL.

*Pryor Cashman LLP*, New York, NY (Eric D. Sherman, Bryan T. Mohler, and Daniel V. Derby of counsel), for plaintiff.

*Peter M. Levine, Esq.*, New York, NY, for defendants Norman J. Resnicow and Barbara Resnicow.

Gerald Lebovits, J.:

In this ongoing quarrel between neighbors in a co-op apartment building, plaintiff Justin Theroux and defendants Norman and Barbara Resnicow have brought these motions to obtain formal resolution of several discovery disputes between them.

With respect to motion sequences 009 and 010, the parties raised discovery-related disagreements during scheduled status conferences; they then supplemented their positions with further emails and letter briefing. This court resolved some of the parties' disagreements by

formal decisions,<sup>1</sup> and some by emailed rulings.<sup>2</sup> To ensure that the emailed discovery rulings would be reflected in an order appealable as of right (*see Sholes v Meagher*, 100 NY2d 333, 335 [2003]), this court also set a schedule for the parties to file formal motions on notice seeking reargument of the rulings. (*See* NYSCEF No. 393.) In motion sequence 009, Theroux seeks to reargue this court's ruling requiring production of some of his emails as unprivileged, and to renew this court's ruling on the scope of a privilege waiver by the Resnicows. In motion sequence 010, the Resnicows seek to reargue this court's ruling that other Theroux emails were shielded from disclosure as privileged.

With respect to motion sequence 011, this court previously held on motion sequence 006 that Norman Resnicow had not categorically waived applicable privileges shielding his personal emails from disclosure merely because those emails had been sent using his work email account. (*See Theroux v Resnicow*, 2020 NY Slip Op 51489[U] [Sup Ct, NY County Dec. 16, 2020].) Theroux now contends that deposition testimony given by Norman Resnicow since that ruling undermines the basis for this court's ruling. He seeks renewal on that basis.

Theroux's motion in effect to renew and reargue this court's emailed discovery rulings is granted in part and denied in part. The Resnicows' motion in effect to reargue this court's emailed discovery rulings is denied. Theroux's motion to renew this court's decision and order about Norman Resnicow's emails is denied.

## DISCUSSION

### I. Motion Sequences 009 and 010

As discussed above, in spring and summer 2021, this court rendered by email rulings on multiple discovery disputes between the parties. Those emails were later incorporated by reference in an August 2021 status-conference order. (*See* NYSCEF No. 393.) As provided for in that conference order, the parties now move, in effect, to renew and reargue this court's emailed rulings. The parties' requests for leave to renew and leave to reargue are granted. On renewal and reargument, this court determines as follows.

1. The first ruling that the parties challenge on these motions pertains to emails exchanged between Theroux and Pat Doudna. Doudna, a licensed attorney, serves as Theroux's advisor in a variety of areas. Theroux initially withheld 107 email threads between himself and Doudna on the ground of the attorney-client privilege. This court determined that approximately 20 of those threads were shielded by privilege and could be withheld, and directed production of the rest. In motion sequence 009, Theroux seeks reargument as to 10 email threads that this court determined not to be privileged.<sup>3</sup> (*See* NYSCEF No. 395 at 10-16.) The Resnicows oppose this branch of the motion (*see* NYSCEF No. 445 at 3-6); and in motion sequence 010, they seek

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<sup>1</sup> *See Theroux v Resnicow* (72 Misc 3d 654 [Sup Ct, NY County 2021]); *Theroux v Resnicow* (2021 NY Slip Op 50622[U] [Sup Ct, NY County July 7, 2021]).

<sup>2</sup> One such ruling is reproduced at NYSCEF No. 446.

<sup>3</sup> Theroux also has submitted the ten email threads for this court's in camera review, highlighting the portions of the emails that he believes demonstrates them to be privileged.

reargument as to the email threads that this court determined *were* privileged (*see* NYSCEF No. 444).

This court adheres to its determination that some of the emails between Theroux and Doudna are shielded by attorney-client privilege. The court agrees with the Resnicows' contention that the "mere assertion that [Doudna] was providing legal advice does not suffice to establish the privilege." (NYSCEF No. 444.) But having conducted a thorough in camera review of the emails at issue, this court is satisfied that the emails it has held to be privileged were, in fact, confidential communications between an attorney and her client that were sent for the purpose of obtaining or providing legal advice.

With respect to Theroux's motion for reargument, this court agrees upon further consideration that some of the 10 email threads at issue seek or provide legal advice, and therefore may be withheld by Theroux as privileged. The motion is therefore granted as to email threads 1, 2, 3, 4, and 7, as listed in Theroux's attorney's affirmation in support of motion sequence 009.<sup>4</sup> (*See* NYSCEF No. 395 at 15-16.) With respect to email threads 5, 6, 8, 9, and 10 listed in that attorney's affirmation, this court adheres to its conclusion that those emails do not involve legal advice and are not shielded by the attorney-client privilege. Theroux must by December 17, 2021, produce those email threads to the Resnicows.

2. The second ruling that the parties challenge pertains to emails exchanged between the Resnicows. In 2017, Norman Resnicow disclosed to media outlets (namely, TMZ and the New York Post) a July 2015 email sent to him from his wife. This court determined in an emailed ruling that this disclosure constituted a partial waiver of the privilege shielding the Resnicows' marital communications from disclosure. In motion sequence 009, Theroux seeks to reargue this court's holding on the scope of the privilege waiver, contending that it should be construed more broadly. On that point, this court disagrees, and adheres to its original determination.

Also in motion sequence 009, Theroux moves, in effect, for renewal. On this point, he contends that the Resnicows waived the marital privilege to a significant degree by including an excerpt from that same July 2015 email in a paragraph in the amended answer filed in this action.<sup>5</sup> (*See* NYSCEF No. 395 at 3-4, 6-10; *see also* NYSCEF No. 9 at 3.) Although Theroux has not previously raised this argument, he is correct that the Resnicows disclosed a marital communication in their initial pleading in this action to rebut allegations in the amended complaint—an obvious waiver of the privilege.

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<sup>4</sup> Those email threads are entries 23, 26, 27, 82, and 102 on Theroux's privilege log dated February 22, 2021.

<sup>5</sup> In context, the email is excerpted as follows in the Resnicows' amended answer:

"The ceilings/floors of this 1848 row house are very thin. For years, from their 2004 move-in until Theroux essentially relocated to California, the Resnicows stoically endured the extreme noise emanating from Theroux's apartment by the continuous tramping of people and the yowling of multiple dogs. (As Barbara wrote July 9, 2015 regarding the two second-floor rooms she uses most: "in the back rooms, when someone is walking above, it feels like they are in our apartment.")"

The quotation in the answer of the July 2015 email was intended to support the Resnicows' argument that Theroux's use of his apartment produced considerable noise in their apartment, and thus that their request of Theroux to install soundproofing between the apartments was reasonable. (*See* NYSCEF No. 9 at 3.) This court therefore concludes on renewal that the Resnicows have waived marital privilege as to all communications between them sent prior to August 31, 2017 (the date of filing of the amended answer) on the topics of noise transmission and soundproofing and that any such emails must be produced to Theroux.

In opposing the motion, the Resnicows' counsel represents in an affirmation that the July 2015 email "was the only e-mail between the Resnicows regarding noise," and that "[n]one of the other documents withheld or redacted by the Resnicows on the basis of the marital privilege pertain to noise." (NYSCEF No. 445 at ¶ 3.) The Resnicows are directed to conduct a supplemental review to confirm the accuracy of these representations. If that review turns up any other (i) marital communications between the Resnicows (ii) on the subject of noise transmission or soundproofing and (iii) sent prior to August 31, 2017, the Resnicows shall by December 17, 2021, produce those communications to Theroux. If the supplemental review does not find any other emails satisfying those three criteria, the Resnicows shall by December 17, 2021, provide Theroux with a sworn affidavit to that effect.

## II. Motion Sequence 011

As discussed above, this motion seeks renewal of this court's prior ruling on motion sequence 006 about whether Norman Resnicow had categorically waived any privilege shielding his personal emails by sending those emails from his law firm email account. This court, applying the test set out in *Matter of Asia Global Crossing, Ltd.* (322 BR 247 [Bankr SD NY 2005]), held in December 2020 that no categorical waiver had occurred. (*See Theroux v Resnicow*, 2020 NY Slip Op 51489[U] [Sup Ct, NY County Dec. 16, 2020].)

Theroux deposed Norman Resnicow in July 2021. During the deposition, Resnicow gave testimony on an email-related topic that Theroux contends should alter this court's conclusion on the waiver issue. Theroux therefore moves for renewal under CPLR 2221. This court concludes that the deposition testimony on which he relies is a new fact that was not available to him on the prior motion, and therefore that leave to renew is warranted. On renewal, this court adheres to its prior determination.

Resnicow is an equity partner at the law firm Fox Horan & Camerini LLP. At his deposition, Resnicow was asked whether Fox Horan was aware that he was using his firm email account to send certain emails on personal matters. Resnicow answered that he did not "know who was aware of what," but that "emails, as you know, in law firms . . . can be seen by management committee and the tech person through them." (NYSCEF No. 473 at 9 [excerpt of deposition transcript].) Theroux contends that this answer, standing alone, should materially alter the waiver conclusion reached in the court's prior decision on the issue. This court disagrees.

Theroux argues that Resnicow's statement at the deposition undermines his contention on the prior motion that a Fox Horan partner's personal emails sent or received on Fox Horan

servers still belong to that partner, such that other partners or firm staff may not read those emails without the partner's permission. (*See* NYSCEF No. 461 at 8-9.) This court is not persuaded that an inconsistency necessarily exists between these two positions. At his deposition, Theroux's counsel asked Resnicow whether Fox Horan was, in fact, aware of particular emails that he had sent on Fox Horan servers, not whether that awareness had been obtained in a manner consistent with firm policy. Nor is it clear that Resnicow's answer—which he couched in terms of “law firms” generally—conceded the *propriety* of Fox Horan management and IT staff accessing partner emails on Fox Horan servers, as distinct from their technical capacity to do so.<sup>6</sup>

Theroux also asserts that Resnicow's deposition answer “demonstrates he had ‘actual notice’ that his emails were accessible to third parties and, thus, were not private.” (NYSCEF No. 461 at 10.) But again, this assertion conflates whether Resnicow knew that Fox Horan management/IT staff *could* access his emails with whether he knew it would be permissible or proper for them to do so. Furthermore, Resnicow gave his answer in the present tense—*i.e.*, about his awareness in 2021 of what had or had not occurred in 2017. That answer does not, as Theroux implies, resolve the question of Resnicow's awareness of the (lack of) privacy of his emails when he sent the email at issue *in 2017*.<sup>7</sup> Only that contemporaneous awareness is relevant to the privilege-waiver inquiry. (*See Peerenboom v Marvel Entertainment, LLC*, 148 AD3d 531, 532 [1st Dept 2017] [considering the company's email policies “during the relevant time periods”].)

In short, Resnicow's 2021 deposition answer does not alter this court's conclusion that Resnicow's personal emails are not categorically foreclosed from being privileged because they were sent through his Fox Horan email account.

Accordingly, for the foregoing reasons it is hereby

ORDERED that the branch of Theroux's motion, in effect, for leave to reargue (mot seq 009) is granted, and that on reargument, this court grants in part Theroux's request for a protective order shielding specified emails from disclosure and adheres in part to its decision directing production of those emails, as set forth above; and it is further

ORDERED that the branch of Theroux's motion, in effect, for leave to renew (mot seq 009) is granted, and that on renewal, this court grants Theroux's request to compel additional discovery to the extent set forth above; and it is further

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<sup>6</sup> Indeed, it is undisputed that during this action, Fox Horan IT staff accessed and collected responsive emails sent or received by Resnicow on his Fox Horan email account, and then provided those emails to Resnicow's counsel for counsel's review. (*See* NYSCEF No. 232 at ¶¶ 14-15.) Yet this court did not accept Theroux's argument on the prior motion that this collection process itself constituted a waiver of applicable privileges covering those emails. (*See Theroux*, 2020 NY Slip Op 51489[U], at \*2 & n 2, \*5 n 6.)

<sup>7</sup> This point has particular force given the detailed arguments in the parties' prior motion practice (and in this court's decision on the motion) about whether and under what circumstances Fox Horan could access personal emails sent on its servers.

ORDERED that the Resnicows' motion, in effect, for leave to reargue (mot seq 010) is granted, and that on reargument, this court adheres to its decision that the emails sought by the Resnicows on this motion are shielded from disclosure as privileged; and it is further

ORDERED that Theroux's motion for leave to renew this court's decision and order dated December 16, 2020, is granted, and that on renewal this court adheres to its prior decision.

  
**HON. GERALD LEBOWITZ**  
J.S.C.

11/23/2021  
DATE

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