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VIA NYSCEF

The Honorable Debra A. James, J. S. C.
Supreme Court of the State of New York - New York County
Part 59
71 Thomas Street
New York, NY 10013

Re: Leventhal v. Bayside Cemetery et al., Index No. 100530/2011 E

Dear Justice James:

We represent Defendants Congregation Shaare Zedek and Bayside Cemetery in the above-referenced matter and write in response to Plaintiff's letter of July 31, 2015 and pursuant to Your Honor's procedures for resolving discovery disputes.

The attorney-client privilege is a longstanding, foundational part of New York law, and it should not be overridden lightly. Yet Plaintiff now seeks to compel production of more than 500 documents that he does not dispute are confidential communications between attorneys and their client in the course of the attorneys' professional employment—communications that would ordinarily be subject to the absolute privilege provided by CPLR 4503—because Plaintiff alleges that they are subject to the "crime-fraud exception."

At the outset of his July 31st submission, Plaintiff correctly quotes the governing law, which requires that the party seeking to overcome the privilege produce evidence sufficient to establish probable cause to believe both that (1) a crime or fraud has been committed, and (2) that the specific attorney-client communications at issue were in furtherance of such crime or fraud. Nowlin v. People, 1 A.D.3d 172, 173 (1st Dep't 2003).[1] Both of those elements are critical because the rule is ***not*** that a defendant accused of (or even adjudged guilty of) a crime or fraud is not entitled to confidential communications with his attorneys. Rather, the privilege can be overcome only where the communication actually furthers a future or ongoing crime or fraud.

It is, therefore, notable that, despite correctly reciting both elements, Plaintiff focuses the remainder of his submission almost exclusively on the first of them. By contrast, he presents

[1] Nowlin adopts the test for the crime-fraud exception described by the Second Circuit in United States v. Jacobs, 117 F.3d 82, 87 (2d Cir. 1997), which is also the basis for Doe v. United States, the opinion cited in Plaintiff's letter. In Jacobs, the Second Circuit went on to explain that, once such probable cause has been shown, the decision as to whether to review the challenged documents *in camera* lies in the sound discretion of the trial court. Finally, "if and when there has been *in camera* review, the [trial] court exercises its discretion again to determine whether the facts are such that the exception applies." Jacobs, 117 F.3d at 87. The First Department adopted that procedure as a matter of New York Law in In re New York City Asbestos Litig., 109 A.D.3d 7, 11 (1st Dep't 2013).

only cursory argument at most—and no evidence—as to why the Court should believe that the 513 documents identified in Exhibit B to his letter, which date from 2002-2007 and are identified on Defendants' privilege log as relating to at least ten different subjects, were all in furtherance of two alleged frauds. That failure to establish a direct link between the attorney's communications and an ongoing fraud is fatal to Plaintiff's attempt to pierce the attorney-client privilege.

Finally, apart from his crime-fraud argument, Plaintiff argues that the attorney-client privilege should not attach to attorney-client communications "in connection with the preparation of publicly filed documents," and thus seeks production of communications underlying the Congregation's November 1, 2004 letter to the Attorney General. Yet despite claiming that "courts throughout the country" support that position, Plaintiff has failed to point to controlling *New York* authority to that effect. And for good reason: Plaintiff's proposed rule runs contrary to well-established principles of the attorney-client privilege and would deprive clients in a wide range of situations of the ability to obtain confidential legal advice from their attorneys.

BACKGROUND

This discovery dispute arises out of a subpoena *duces tecum* that Plaintiff served on Ethan Klingsberg, a partner at Cleary, Gottlieb, Steen & Hamilton LLP ("Cleary Gottlieb"). As is described in Mr. Klingsberg's accompanying affirmation, Mr. Klingsberg and Cleary Gottlieb were retained as counsel to Congregation Shaare Zedek (the "Congregation") in 2003 to work on developing and implementing a long-term plan for Bayside Cemetery and, in particular, a legal process for separating Bayside Cemetery from the Congregation into an independent not-for-profit corporation.

The Subpoena sought a variety of documents related to Mr. Klingsberg's and Cleary Gottlieb's representation of the Congregation. Through his counsel, Mr. Klingsberg produced over numerous documents to Plaintiff, but provided a substantial number of documents that potentially implicated the Congregation's attorney-client privilege to the undersigned, as litigation counsel to the Congregation, for further privilege review. While the Congregation declined to assert privilege over a number of those documents (which were subsequently produced to Plaintiff), the Congregation ultimately asserted the attorney-client privilege over 1,664 documents, as shown on its privilege log (attached as Exhibit A to Plaintiff's July 31st letter to the Court). Plaintiff now seeks production of 513 of those documents based on the crime-fraud exception.

Notably, neither Mr. Klingsberg's document production to Plaintiff, nor the documents ultimately withheld based on the attorney-client privilege, were limited to the specific subject matter of this action, the Congregation's alleged misuse of perpetual care funds. Rather, in the interests of full compliance with the broadly-worded Subpoena and in an effort to avoid unnecessary discovery disputes, Mr. Klingsberg and his counsel deemed as responsive, and thus either produced or asserted privilege with respect to, documents relating to a variety of topics related to Bayside Cemetery and Cleary Gottlieb's work on behalf of the Congregation.

Indeed, even looking only at the privilege log entries for the 513 documents that Plaintiff now seeks to obtain shows that Mr. Klingsberg and his colleagues provided confidential legal advice to the Congregation regarding a range of subjects, including:

- The potential separation of Bayside Cemetery from Shaare Zedek
- The formation of not-for-profit corporations
- Potential funding sources for Bayside Cemetery
- Donations or bequests to Bayside Cemetery

Those are, of course, a subset of the topics covered in Mr. Klingsberg's production and in the documents withheld on the basis of the attorney-client privilege.[2] Despite the fact that none of those are, on their face, relevant to the Congregation's alleged frauds, there is no discussion or argument in Plaintiff's letter submission as to why they are, in fact, sufficiently related such that Mr. Klingsberg's and Cleary Gottlieb's communications could have been "in furtherance" of those frauds.

ARGUMENT

A. Plaintiff has not established the elements of the crime-fraud exception with respect to the alleged "commingling and taking of perpetual care monies."

Plaintiff's first argument relates to his allegation that Defendants unlawfully commingled and used funds placed in trust for the perpetual care of graves at Bayside Cemetery. (See Pl.'s Ltr. at 2.) Yet even if the conduct Plaintiff describes might constitute a breach of contract, it is far from "undisputed" that it would constitute a crime or fraud sufficient to pierce the attorney-client privilege.

Plaintiff's argument is, in fact, directly in conflict with the law of the case as established by this Court and the controlling law in the First Department. For example, while Plaintiff argues that "it cannot be disputed that Defendants violated New York General Business Law § 349 by continuing to sell perpetual care contracts knowing that they had not previously honored such contracts and would breach new contracts by using those monies for unintended purposes," (Pl.'s Ltr. at 2), constituting "a classic example of a consumer fraud," (id.), this Court rejected that precise argument in granting Defendants' CPLR 3211 motion to dismiss Counts I-III of the Complaint for failure to state a claim, (Doc. No. 24 at 2). That ruling was expressly affirmed by the Appellate Division, which held that:

> Mere allegations that a party entered into a contract lacking the intent to perform are insufficient to establish a claim of misrepresentation or fraud. The conduct of which Leventhal complains is essentially that defendants failed to satisfy their contractual duties, not that they concealed or misrepresented contractual terms.

Lucker v. Bayside Cemetery, 114 A.D.3d 162, 175 (1st Dep't 2013).

[2] The log entries for the unchallenged documents reflect similar subject matter, as well as considerable numbers of documents containing legal advice related to the management of Bayside Cemetery, potential real estate transactions and a number of other subjects.

Similarly, citing a number of Defendants' documents, Plaintiff claims that "[d]iscovery in this case establishes that Defendants have been unlawfully commingling monies since at least 1907 and routinely diverting perpetual care monies to offset deficits of CSZ since at least 1964." (Pl.'s Ltr. at 2.) Commingling does not, by itself, establish a crime or fraud, but that allegation actually reveals a more fundamental flaw in Plaintiff's invocation of the crime-fraud exception, namely a failure to demonstrate any basis for believing that the attorney-client communications that Plaintiff seeks to discover—all of which date from 2002-2007—were intended to further an alleged scheme that Plaintiff argues predated Mr. Klingsberg's retention by decades, if not more. This is not, therefore, a case in which the fraudulent scheme was allegedly formulated based on the attorney's advice, or in which the attorney was a witting or unwitting participant.

The evidence in fact suggests that, if funds were being diverted from the cemetery to the synagogue, that practice ceased well *before* Mr. Klingsberg was retained and before the communications at issue occurred. As is explained in Mr. Klingsberg's affirmation and corroborated by the Congregation's communications with the Attorney General (including the very letters that Plaintiff relies on to support his allegations of fraud), by 2003 the Congregation was not drawing on the cemetery funds for any purpose, including the operation of the cemetery, let alone the synagogue. Instead, the Congregation was pouring synagogue money *into* the cemetery, (see Klingsberg Aff. ¶ 5) and it was the Congregation's need to stop that operating subsidy that prompted the November 2004 exchange with the Attorney General discussed below (id. ¶¶ 9-10).

Indeed, acting on behalf of the Congregation, Mr. Klingsberg expressly *disclosed* to the Attorney General the very documents that Plaintiff now relies upon to establish his *prima facie* showing of fraud. It strains credulity to believe that the Congregation would have admitted to the Attorney General that there had been routine comingling and diversion of funds if it (or its attorney) believed that the practice was both ongoing and fraudulent.

Regardless, Plaintiff has entirely failed to satisfy his burden of making a *prima facie* showing that the communications at issue were in furtherance of the alleged comingling or diversion of funds, or even how the Congregation's attorneys advice *could* have furthered those alleged frauds. Nor has Plaintiff shown any reason to believe that the communications did not relate to the entirely legitimate subjects shown on the privilege log, including in particular identifying new support mechanisms for Bayside Cemetery and ultimately hopefully its separation from the Congregation.

Because Plaintiff has the burden of showing both the likely existence of an ongoing fraud and that the attorney's communications were in furtherance of that fraud before even being entitled to an *in camera* review of the privileged documents, his request should be denied insofar as it relates to the first alleged fraud.

B. Plaintiff has not established the elements of the crime-fraud exception with respect to the alleged fraud on the Attorney General.

Plaintiff's submission with respect to his second proffered fraud, relating to the Congregation's November 2004 representations to the Attorney General, is similarly flawed.

As discussed in Defendants' recent opposition to Plaintiff's motion to disqualify counsel, there is no dispute that subsequent facts revealed the November 1, 2004 letter from the Congregation to the Attorney General's office to be inaccurate. In particular, subsequent review of the Congregation's records in connection with a predecessor to this action revealed additional documents that permit more than $29,400 in perpetual care principal to be specifically attributed to identifiable graves, contrary to the representations on pages 1, 2 and 5 of the November 1 letter.

Yet to pierce the attorney-client privilege in this instance, Plaintiff must demonstrate probable cause to believe not just that there was a misrepresentation or breach of contract, but that the representation was *fraudulent*. Plaintiff offers two pieces of evidence to attempt to meet that burden, neither of which is sufficient to establish probable cause:

First, Plaintiff points to a 2002 statement by Joel Shaiman, one of the signatories of the 2004 letter, referring to "200 graves with yellow stickers" at Bayside Cemetery indicating perpetual care. (See Pl.'s Ltr. at 4 & n.17.) Had the 2004 letter represented that there were only a handful of perpetual care-endowed graves at the cemetery, the Shaiman quote might indeed have proven problematic. But the November 2004 letter did *not* purport to make any representations as to the number of perpetual care graves at cemetery, but rather only as to the amount of funds specifically attributable to identifiable graves. Because that limitation was expressly understood by and agreed to by the Charities Bureau (the only recipient of the letter and thus the only party who could have detrimentally relied on its contents), (see, e.g., Klingsberg Aff. ¶¶ 10, 11, 14), the fact that there were additional graves at the cemetery with perpetual care stickers but that could *not* be associated with specific trust funds could not have rendered the November 1 letter fraudulent.

Second, Plaintiff suggests that because the undersigned declined, on the basis of the attorney-client privilege, to answer a question posed by the Attorney General as to what Mr. Klingsberg told me about the circumstances of Cleary Gottlieb's search for documents while preparing the November 2004, the Court should infer that Mr. Klingsberg's statement to me was inconsistent with his statement to the Attorney General that the Congregation's office manager had inadvertently failed to provide them to the Cleary Gottlieb attorneys conducting the review. For the reasons explained at greater length in Defendants' opposition to Plaintiff's motion to disqualify the undersigned as counsel on the basis of the same conversation, no such inference is appropriate. Rather, the privilege applies to a confidential communication between the undersigned (as litigation counsel to the Congregation) and Mr. Klingsberg (as an agent of the Congregation) *regardless* of whether Mr. Klingsberg independently made the same statement to a third-party. To hold otherwise would mean that an attorney's invocation of the privilege would itself impeach the client's credibility by suggesting that the client's statements to the attorney and third party were inconsistent, which is directly contrary to both the law and the policy underlying the attorney-client privilege.

Finally, even if one were to assume, *arguendo*, that the November 2004 letter was fraudulent, Plaintiff has once again failed to provide any basis for believing that the communications that he seeks were in furtherance of the supposed fraud. Indeed, Exhibit B

suggests that he is seeking production of documents as early as November 2002[3] (two years before the allegedly fraudulent letter was submitted) and as late as January 2007[4] (more than two years after it was submitted), without any explanation either for the broad timeframe or for how he believes the attorney-client communications furthered the supposed fraud. Under the rule established by the Appellate Division in Nowlin, even if one were to assume the existence of a fraud, Plaintiff must do far more than simply point to an undifferentiated mass of communications to justify *in camera* review.

C. Plaintiff's proposed rule that the attorney-client privilege does not apply to communications "in connection with" public disclosures is unsupported by New York law.

Plaintiff's final argument is that, entirely apart from the crime-fraud exception, "information and/or documents related to the voluntary disclosures made to the NYAG's office" are outside the scope of the attorney-client privilege and must be produced. In support of that proposition, he provides a long string cite, citing ten cases. Yet notably absent from that citation are any decisions suggesting that *New York* law recognizes such a rule.[5] Instead, the majority of the citations are from courts applying the law of the Fourth Circuit, which has an outlier view as to the "intended-for-publication" rule. As the U.S. District Court for the Eastern District of New York recognized, the Fourth Circuit's broad rule is inconsistent with the law of New York and of the Second Circuit, which takes both a broader view of the privileged status of drafts of documents that may ultimately become public and holds that an extra-judicial disclosure does not work a subject matter waiver. See In re MetLife Demutualization Litig., 2007 WL 1017603, No. 00 Civ. 2258 (Mar. 30, 2007).

Yet even on its own terms, the Fourth Circuit's rule would not help Plaintiff here. As that court recognized in In re Grand Jury Subpoena, 341 F.3d 331 (4th Cir. 2003), its earlier cases held only that when a client retains an attorney "to perform services that demonstrate the client's intent to have his communications published" or for the purpose of preparing documents that are not intended to remain confidential will the privilege not apply. It specifically *rejected* the Government's contention—parallel to that of the Plaintiff here—that the client's communications with his counsel regarding a filing the client intended to make in the future were unprivileged. As the Fourth Circuit noted, "[a]dopting the Government's reasoning would lead to the untenable result that any attorney-client communications relating to the preparation of publicly filed legal documents—such as court pleadings—would be unprotected." Id.

The exact same is true of Plaintiff's argument here. Plaintiff argues that the mere fact that a document was publicly filed renders the underlying communications and details unprivileged, because the "disclosure to a public agency cannot be partial nor incomplete," but

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[3] Entries 725 (Nov. 25, 2006, "Email conveying legal advice of Ethan Klingsberg regarding the potential separation of Bayside Cemetery from Shaare Zedek"), 726 (Nov. 26, 2002, same).

[4] Entries 352 (Jan. 3, 2007, "Email discussing legal advice Ethan Klingsberg regarding communications with New York Attorney General's Charities Bureau."), 703 (Jan. 2, 2007, same), 705 (Jan. 3, 2007, same).

[5] The one New York state case cited, Delta Fin. Corp. v. Morrison, 13 Misc. 3d 1229(A) (N.Y. Sup. Ct. 2006), applied South Carolina privilege law to the facts of the dispute.

rather must be "entirely transparent." (Pl.'s Ltr. at 5.) That simply cannot be the law. To hold otherwise would be to require attorneys to routinely disclose communications with their clients regarding, for example, complaints, defenses and motions filed with courts; submissions to regulators or other state agencies; settlement proposals communicated to the adverse party in litigation; and even plea offers or proffers made to prosecutors in criminal cases.

Cleary Gottlieb was not retained to prepare a prospectus or tax return, but rather to provide confidential legal advice. Allowing the Defendants to assert a privilege here does not, meanwhile, render the 2004 submission to the Attorney General any less "transparent," when the Attorney General was, and remains, satisfied with the submission.

CONCLUSION

Defendants validly asserted the attorney-client privilege over the documents at issue in this dispute. Because Plaintiff does not contest that assertion, and has failed to meet his burden under either the crime-fraud exception or the purported public filings exception, the assertion of the attorney-client privilege should be upheld and any motion to compel denied.

In the alternative, Defendants request the opportunity to be heard prior to issuance of any order requiring production of the documents either to Plaintiff or to the Court for *in camera* review.

Respectfully submitted,

Russell M. Steinthal

Counsel to Defendants Congregation Shaare Zedek and Bayside Cemetery

cc: Michael M. Buchman, Esq.