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

STEVEN R. LEVENTHAL as representative of a class consisting of himself and all others similarly situated, Plaintiff, v. BAYSIDE CEMETERY, CONGREGATION SHAARE ZEDEK AND COMMUNITY ASSOCIATION FOR JEWISH AT-RISK CEMETERIES, INC. Defendants.	Index No.: 100530/2011E Hon. Debra A. James

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO VACATE THE AUGUST 19, 2016 STATUS CONFERENCE ORDER

Defendants Congregation Shaare Zedek ("Shaare Zedek") and Bayside Cemetery (together with Shaare Zedek, "Defendants"), by and through their attorneys Axinn, Veltrop & Harkrider LLP, respectfully submit this memorandum of law in opposition to Plaintiff's motion to vacate the Status Conference Order dated August 19, 2016 in this matter. For the reasons set forth below, the Status Conference Order correctly sustained Defendants' objections to (a) Plaintiff's subpoena duces tecum and ad testificandum, dated March 2, 2015 and served on Ethan Klingsberg, Esq., Shaare Zedek's former counsel, (the "Klingsberg Subpoena") to the extent it sought the production of documents protected by the attorney-client privilege, and (b) Plaintiff's Second Requests for Documents, dated February 3, 2016, (the "Second Document Request") in its entirety.

BACKGROUND

This is a breach of contract action in which Plaintiff Steven Leventhal seeks an order compelling Defendants to honor the terms of a $1,200 charitable trust that he created in 1985 for the perpetual care of three graves at Bayside Cemetery. Although the Complaint includes additional causes of action for unfair business practices and false advertising in violation of the General Business Law, as well as claims for conversion, unjust enrichment, breach of fiduciary duty and aiding and abetting such a breach, all of the other counts have been dismissed pursuant to CPLR 3211 for failure to state claims upon which relief could be granted. Those dismissals were affirmed by the Appellate Division, First Department, Lucker v. Bayside Cemetery, 114 A.D.3d 162 (1st Dep't 2013), and the Court of Appeals denied leave to appeal, 24 N.Y.3d 901 (2014).[1]

The specific discovery dispute at issue on this motion arises out of the Klingsberg Subpoena, which Plaintiff served in March 2015 on Ethan Klingsberg, a partner at the law firm of Cleary, Gottlieb, Steen & Hamilton LLP. As Mr. Klingsberg describes in his affirmation,[2] Shaare Zedek retained Mr. Klingsberg and Cleary Gottlieb 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 Shaare Zedek into an independent not-for-profit corporation.

The Klingsberg Subpoena sought a broad range of documents relating to Mr. Klingsberg's and his firm's representation of Shaare Zedek and more generally about Bayside Cemetery, including but not limited to the specific perpetual care-related breach of contract issue

[1] In the case of the claim for breach of fiduciary duty, this Court initially denied the motion to dismiss, but the Appellate Division modified this Court's order so as to dismiss that claim and, as so modified, affirmed. Lucker, 114 A.D.3d at 175-76.

[2] Defendants initially attached Mr. Klingsberg's affirmation to their letter to the Court dated August 21, 2015 (NYSCEF Doc. No. 72) and have re-filed it in opposition to the instant motion.

now before the Court.[3] Through his counsel, Mr. Klingsberg produced numerous documents directly to Plaintiff, but provided a substantial number of documents that potentially implicated Shaare Zedek's attorney-client privilege to the undersigned, as Shaare Zedek's litigation counsel, for further privilege review. While Shaare Zedek declined to assert the privilege over a number of those documents (which were subsequently produced to Plaintiff), Shaare Zedek ultimately asserted the attorney-client privilege over 1,644 documents, as shown on its privilege log.[4]

Plaintiff, in turn, sought production of 513 of those documents (the "Challenged Documents"), asserting that the crime-fraud exception to the attorney-client privilege applied, such that those documents were not, in fact, privileged. In accordance with the Court's preferred procedure, the parties made letter submissions to the Court setting forth their respective positions, and the parties argued the issue orally at status conferences on January 26, 2016 and August 12, 2016. On August 19, 2016, the Court issued a Status Conference Order upholding Defendants' claims of privilege over the Challenged Documents and holding that they were not subject to production. The instant motion to vacate the Status Conference Order followed.

ARGUMENT

I. THE COURT CORRECTLY HELD THAT PLAINTIFF HAD FAILED TO MEET HIS BURDEN TO ESTABLISH THE APPLICABILITY OF THE CRIME-FRAUD EXCEPTION.

While attorney-client communications are ordinarily subject to an absolute privilege, CPLR 4503, the privilege does not extend to communications that, as a matter of fact, are in furtherance of a crime or fraud. See, e.g., In re N.Y.C. Asbestos Litig., 109 A.D.3d 7, 10 (1st Dep't 2013); Nowlin v. People, 1 A.D.3d 172, 173 (1st Dep't 2003). Under the framework

[3] A copy of the Klingsberg Subpoena is attached as Exhibit A to the accompanying Affirmation of Russell Steinthal in opposition to Plaintiff's motion.

[4] A copy of Defendants' privilege log is attached to the Plaintiff's counsel's affirmation in support of the instant motion.

explained by the Appellate Division (and adopted from the analogous federal practice, see, e.g., United States v. Jacobs, 117 F.3d 82 (2d Cir. 1987)):

> A party seeking to invoke the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a fraud or crime has been committed and that the communications in question were in furtherance of the fraud or crime. However, a lesser evidentiary showing is needed to trigger in camera review than is required ultimately to overcome the privilege.
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> To permit in camera review of the documents to analyze whether the communications were used in furtherance of such wrongful activity, there need only be a showing of a factual basis adequate to support a good faith belief by a reasonable person that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies. Once that showing is made, the decision whether to engage in in camera review of the evidence rests in the sound discretion of the court.

In re N.Y.C. Asbestos Litig., 109 A.D.3d at 10-11.

As the Court properly held in the Status Conference Order, Plaintiff has failed to make even the "lesser evidentiary showing" necessary to obtain in camera review, let alone production, of the Challenged Documents.[5] Indeed, as described below, Plaintiff has failed to offer any evidence that the Challenged Documents were "communications in furtherance of" a crime or fraud, or that in camera review would reveal such evidence. He has therefore failed to meet his burden to pierce the privilege and has failed to show grounds for vacating the Status Conference Order.

A. **Plaintiff did not demonstrate probable cause to believe that a crime or fraud has been commited.**

As the Court observed in the Status Conference Order, the bulk of Plaintiff's evidence of a supposed crime or fraud related to "the same allegations of fraud made by plaintiff that were

[5] There is therefore no need for the Court to decide whether this might be the type of unusual circumstance in which the proffered independent evidence so clearly establishes the applicability of the exception that in camera review is unnecessary to reach that conclusion.

previously dismissed by order dated January 9, 2012 of this court, which order was affirmed in Lucker v. Bayside Cemetery, 114 AD3d 162 (1st Dep't 2013)." Status Conference Order at 1. The posture of and rationale for the Court's earlier order of dismissal, however, are particularly important.

The January 2012 order was made on a motion to dismiss pursuant to CPLR 3211, meaning that the Court held that Plaintiff's complaint did not state a claim upon which relief could be granted, even assuming the truth of all of his allegations. The dismissal was not, for example, for lack of specificity or for a lack of evidence. Rather, this Court held that Plaintiff's allegations did constitute "consumer fraud" as a matter of law; it follows, therefore, that, no matter how strenuously or repeatedly Plaintiff may argue to the contrary, (Moving Br. at 4-7), additional evidence supporting those same allegations cannot convert a simple breach of contract claim into a crime or fraud that would be sufficient to pierce the privilege. As the Appellate Division explained in affirming this Court's order:

> 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, 114 A.D. 3d at 175.

That is why, even though Defendants agree with Plaintiff that the crime-fraud exception is not limited to cases in which the underlying allegation is a crime or fraud, Defendants believe that the Court nonetheless reached the proper conclusion in the Status Conference Order. While the exception can apply in any type of action if the movant shows that the communications were in furtherance of another crime or fraud, but are nonetheless relevant to the underlying claim (for example, a party to a divorce action could use the exception to pierce the privilege as to

communications in furtherance of an unrelated business fraud if there were reason to believe the resulting evidence would be relevant to the divorce proceeding), here the Plaintiff expressly equated the crime or fraud supporting the exception with the same alleged fraud described in the Complaint. The law of the case that those allegations do not constitute fraud therefore means that they also cannot support the application of the crime-fraud exception.

In moving to vacate the Status Conference Order, Plaintiff also offers three additional potential "crimes or frauds" that could support the crime-fraud exception:

First, he suggests that the same conduct that would not support a civil fraud claim under the General Business Law nonetheless constitutes "larceny by false promise" in violation of Penal Law § 155.05. (Moving Br. at 2 & n.3.) Needless to say, Plaintiff does not offer any evidence or argument supporting the conclusion that "the facts and circumstances of the case are wholly consistent with guilty intent or belief and wholly inconsistent with innocent intent or belief, and excluding to a moral certainty every hypothesis except that of the defendant's intention or belief that the promise would not be performed," as is expressly required by the Penal Law's definition of larceny by false promise. Id.

Second, Plaintiff suggests that Defendants "perpetrated a fraud on the [New York Attorney General]." (Moving Br. at 4-5.) Defendants have conceded on the record, on multiple occasions, that subsequent facts have revealed that the November 1, 2004 letter to the Attorney General on which that allegation relies was inaccurate. But to create even the possibility of piercing the attorney-client privilege as a result, 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 does not offer any new evidence to that effect in his submission on this motion, but in his original letter submission for the status conference, Plaintiff cited two pieces of evidence to attempt to meet that burden, neither of which is sufficient to establish probable cause.

First, Plaintiff highlighted that, two years before signing the November 2004 letter, a newspaper reporter had quoted Joel Shaiman (one of the two signatories of the letter) as having referenced "200 graves with yellow stickers" at Bayside Cemetery indicating perpetual care. (Buchman Aff., Ex. A at 6, 122.) 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. (See Buchman Aff., Ex. A at 111-112.) 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.

Plaintiff also suggested that the undersigned's assertion of the attorney-client privilege at a deposition to decline 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 letter supported an inference 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. 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 in this regard, even though, as described above, the Attorney General's staff fully understood the limitations of the November 2004 letter, as soon as Shaare Zedek learned in 2007 that the earlier letter was inaccurate, it promptly informed the Attorney General of the new information that contradicted its earlier representations. The Attorney General responded by requesting additional documents to fully understand the situation, which Shaare Zedek voluntarily produced in lieu of a subpoena. Those are the very documents on which Plaintiff now premises this motion. As the Court observed at the status conference, the Attorney General is fully capable of defending his own interests if he or his staff have been "defrauded"; the Court can, therefore, reasonably infer—particularly given the lack of any other evidence of fraudulent intent—that the Attorney General did not believe the November 2004 letter rose to the level of a "fraud."

Third and finally, apart from the alleged larceny by false promise and the alleged "fraud on the NYAG," Plaintiff suggests that the Complaint's allegation of fraudulent concealment (Compl. ¶ 44) independently supports the application of the crime-fraud exception. Plaintiff neglects to mention, however, that the Appellate Division rejected his assertion of fraudulent concealment, holding that "Leventhal provides no basis for a claim that he relied on later acts of

deception or concealment," or "how defendants' actions kept him from brining a timely lawsuit," Lucker, 114 A.D.3d at 175, each of which would be essential to establishing fraudulent concealment, either as a basis for tolling the statute of limitations (which the Appellate Division refused to do) or a common law fraud claim (which also requires detrimental reliance). Nor has Plaintiff offered any additional evidence on this motion providing the "factual basis" for applying the crime-fraud exception on that ground.

B. **Plaintiff did not offer any factual basis for believing that the Challenged Documents were in furtherance of a crime or fraud.**

As described above, Plaintiff failed to establish probable cause to believe that any crime or fraud occurred that would be sufficient to pierce the attorney-client privilege. Yet even assuming arguendo that he had made such a showing, his separate failure to demonstrate that the Challenged Documents were communications in furtherance of such a crime or fraud would nonetheless be an independent basis for denying his motion.

Under the framework elaborated in federal law and adopted by the Appellate Division in In re N.Y.C. Asbestos Litigation, Plaintiff (who claims not to want or need in camera review of the documents) had the burden of showing that there was "a factual basis for a showing of probable cause to believe" not just "that a fraud or crime has been committed," but also "that the communications in question were in furtherance of the fraud or crime." Id. (citing United States v. Jacobs, 117 F.3d 82 (2d Cir. 1997)). Importantly, it is not sufficient that the communications relate to or evidence a past fraud. Rather, they must be "in furtherance of contemplated or ongoing criminal or fraudulent conduct." Jacobs, 117 F.3d at 87.

The Challenged Documents date from 2002-2007, by which point Plaintiff's own Complaint and brief on this motion allege that the Defendants' "overarching scheme," (Moving Br. at 4) had been ongoing for decades. Indeed, while Defendants disagree, the moving brief

itself alleges that Mr. Klingsberg's and Cleary Gottlieb's retention was motivated by a complaint filed with the Attorney General in 2003 regarding Bayside Cemetery's poor condition and the resulting informal investigation. Plaintiff's original letter submission, meanwhile, argued 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." (Buchman Aff., Ex. A at 4.)

Comingling of funds does not, by itself, establish a crime or fraud, but in any event, 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 Shaare Zedek's communications with the Attorney General (including the very letters that Plaintiff relies on to support his allegations of fraud), by 2003 Shaare Zedek was not drawing on the cemetery funds for any purpose, including the operation of the cemetery, let alone the synagogue. Instead, Shaare Zedek 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 above (id. ¶¶ 9-10).

Indeed, it was Shaare Zedek, acting through Mr. Klingsberg, that expressly disclosed to the Attorney General the very documents that Plaintiff relies upon to establish his prima facie showing of fraud. It strains credulity to believe that Shaare Zedek 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.

Taking all of those facts into account, the Court was therefore entirely correct to hold in the Status Conference Order that Plaintiff had failed to offer "any explanation as to how such communications made decades after the alleged fraud were in furtherance thereof." Status Conference Order at 2.[6]

And despite that express holding, Plaintiff has not offered any additional evidence to explain that discrepancy on his motion to vacate. Instead, despite the Court of Appeals' admonition that "whether a particular document is or is not protected [by the attorney-client privilege] is necessarily a fact-specific determination, most often requiring in camera review," Spectrum Systems Int'l Corp. v. Chemical Bank, 78 N.Y.2d 371, 378 (1991); see also Horizon Asset Mgmt. v. Duffy, 82 A.D.3d 442, 443 (1st Dep't 2011) (applying Spectrum to the crime-fraud exception), Plaintiff offers only generalities and speculation. He argues, for example, that the Challenged Documents are from a "time period" (of unspecified duration) during which there was "real potential for criminal or civil prosecution," which "substantially increases the likelihood," that the communications were for an unlawful purpose; that the time period is "extremely ripe for communications in furtherance" of an alleged crime or fraud; and that the Challenged Documents will "undoubtedly involve communications concerning the preparation and submission" of the November 2004 letter discussed above. (Moving Br. at 8.) But neither an "increased likelihood", nor an "extremely ripe" time period or Plaintiff's assertion as to what is "undoubtedly" in the documents comes even close to the type of specific factual basis that the courts require to warrant even in camera review, let alone production of otherwise privileged documents.

[6] To the extent that Plaintiff relies on the alleged "fraud on the NYAG," a similar problem also exists, as he is seeking documents from after the allegedly fraudulent letter was submitted.

As the Appellate Division held in Horizon Asset Management, "it was not an abuse of discretion for Supreme Court to deny in camera review of the privileged documents absent evidence to credit the allegation that crime-fraud exception to the attorney client privilege applied." Plaintiff has utterly failed to provide such evidence here and the Court properly upheld Defendants' claim of privilege.

C. In the alternative, the Court properly exercised its discretion in refusing to pierce the privilege in light of the posture of the case.

Even if Plaintiff had provided the factual basis required to permit an in camera review of the Challenged Documents, the Court would nonetheless have been justified in declining to conduct one or to order the production of the Challenged Documents as part of its broad discretion to control discovery in this matter. As the Court observed in the Status Conference Order, not only were Plaintiff's consumer fraud claims dismissed, but the "only remaining claim in this case" is for "breach of contract, in particular the claim of plaintiff that defendants failed to abide by the terms of the charitable trust established by plaintiff in 1985 for the perpetual care of three graves at Bayside Cemetery." Status Conference Order at 2. The Appellate Division went further in Lucker, holding that Plaintiff is not entitled to damages, but only has standing "to obtain an order requiring the trustee to satisfy its obligations" under the trust. 114 A.D.3d at 173.

Questions such as whether the 2004 letter was or was not fraudulent, or what Shaare Zedek and its attorneys discussed in 2003-2007 are, highly unlikely to be relevant to the limited remaining issues in this case. That would have provided an independent and alternative ground for denying Plaintiff's attempt to pierce the attorney-client privilege. For example, in Surgical Design Corp. v. Correa, 21 A.D.3d 409, 410 (2d Dep't 2005), the Appellate Division applied the crime-fraud exception to hold that three documents were "not protected by the attorney-client

privilege, because they relate to client communications in furtherance of a fraudulent scheme," id. at 410, but nonetheless held that the lower court had erred in refusing to vacate a special referee's order "directing the plaintiff to produce these three unprotected letters since the collateral issue of the plaintiff's fraudulent scheme is not material and relevant to the remaining issues in the litigation," id.

II. PLAINTIFF'S CURSORY ARGUMENT THAT THE ATTORNEY-CLIENT PRIVILEGE "CANNOT APPLY TO COMMUNICATIONS THAT OCCURRED IN CONNECTION WITH A PUBLIC FILING" IS UNSUPPORTED IN NEW YORK LAW.

In a single sentence and accompanying footnote on the last two pages of its brief, Plaintiff repeats an argument from its earlier letter submission that the attorney-client privilege does not apply to "communications that occurred in connection with a public filing." (Moving Br. at 8-9 & n.5.) While that issue was not argued at the status conference or ruled upon in the Status Conference Order, it misunderstands the nature of the attorney-client privilege, is entirely unsupported in New York law and provides no basis for vacating the Status Conference Order.

In support of his argument, Plaintiff 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.[7] 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).

[7] 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.

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 rather must be "entirely transparent." (Buchman Aff., Ex. A at 7.) 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.

III. PLAINTIFF HAS WAIVED ANY ARGUMENT AS TO THE SECOND DOCUMENT REQUEST.

In addition to upholding Defendants' objections to the Klingsberg Subpoena, the Status Conference Order also upheld Defendants' objections to any production of documents under Plaintiff's Second Document Request, dated February 3, 2016. Status Conference Order at 2. Despite moving to vacate the Status Conference Order in its entirety, Plaintiff offers no argument as to why that portion of the order was in error and has thus waived any such argument.

The Court was, in any event, entirely correct to hold that documents "pertaining to any proposed sale of the real estate owned by defendant Congregation Shaare Zedek" were "immaterial to the only remaining claim in this case." Id.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the motion to vacate be denied, the Status Conference Order be confirmed as correct and the Defendants' objections to the Klingsberg Subpoena and the Second Document Request be sustained.

Dated: September 23, 2016
New York, NY

Respectfully submitted,
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Electronically signed pursuant to State Technology Law § 304(2), Martin v. Portexit Corp., 98 A.D. 3d 63 (1st Dep't 2012).