

Spicer v Gardaworld Consulting (UK) Ltd.
2019 NY Slip Op 32375(U)
August 7, 2019
Supreme Court, New York County
Docket Number: 655352/2017
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

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INDEX NO. 655352/2017

TIMOTHY SPICER, JEFFREY DAY, MARK BULLOUGH,
DOMINIC MCCAUSLAND ARMSTRONG, LORD PETER INGE,
JOHN BIRCH, JAMES ELLERY

MOTION DATE 06/14/2019

Plaintiff,

MOTION SEQ. NO. 005

- v -

GARDAWORLD CONSULTING (UK) LIMITED,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302

were read on this motion to/for DISCOVERY.

Upon the foregoing documents and for the reasons set forth on the record (8/6/2019), Gardaworld Consulting (UK) Limited’s (**Gardaworld**) motion to compel is granted solely to the extent that the plaintiffs shall produce all documents it shared with KippsDeSanto & Company by August 15, 2019 and is otherwise denied.

The Relevant Facts and Circumstances

This action arises from the plaintiffs’ sale of Hestia, a Netherlands holding company, to Gardaworld, pursuant to a purchase and sale agreement (the **PSA**), dated July 10, 2015 (NYSCEF Doc. No. 2). Hestia conducted its business through operating companies, known as the Aegis Group (**Aegis**). Gardaworld ultimately acquired Hestia and Aegis in the transaction, which closed on September 17, 2015. The law firm of Hogan Lovells represented the seller plaintiffs, Hestia, and Aegis in the transaction.

During the transaction, Aegis entered into an agreement with KippsDeSanto & Company (KDC), dated June 3, 2014, whereby KDC acted as a financial advisor in connection with the plaintiffs' sale of Hestia (NYSCEF Doc. No. 301; hereinafter the **Engagement Letter**). The Engagement Letter provided that:

With respect to any matter subject to indemnification under this Agreement, (i) both the Indemnified Person and the Company, as the case may be, shall keep the other reasonably fully informed in all material respects of the status of any related proceedings where either the Indemnified Person or the Company are not represented by their own counsel, and (ii) *the Indemnified Person and the Company agree to render to each other such assistance as they may reasonably require of each other and to cooperate in good faith with each other in order to ensure the proper and adequate defense of any such proceeding* [emphasis added] (*id.*, at B-2 to B-3).

The plaintiffs commenced this action on August 14, 2017, for breach of the earnout provision at Section 1.5 of the PSA. The plaintiffs allege that Gardaworld failed to use the correct time period to calculate the first earnout amount due to the plaintiffs (NYSCEF Doc. No. 5, ¶¶ 5-6). Gardaworld counterclaimed for fraud (NYSCEF Doc. No. 18).

Gardaworld served KDC with a subpoena on October 15, 2017 seeking documents related to Hestia's valuation, among other items (NYSCEF Doc. No. 19). In its response, dated December 21, 2017, KDC requested that Gardaworld reimburse KDC for related expenses pursuant to the Engagement Letter (NYSCEF Doc. No. 245). Gardaworld ultimately agreed to pay such expenses and KDC produced certain non-privileged documents. However, 507 documents from KDC were withheld by the plaintiffs, who asserted privilege over communications that its counsel, Hogan Lovells, had with KDC (*see* NYSCEF Doc. No. 256). The plaintiffs assert attorney-client privilege over 222 of the 507 documents (the **Pre-Closing Documents**) and work-product privilege over the remaining 285 documents (the **Post-Closing Documents**).

Gardaworld now moves to compel production of the Pre-Closing and Post-Closing Documents. For the avoidance of doubt, during oral argument, Gardaworld clarified that it was only seeking production of those documents that Hogan Lovells and the seller plaintiffs shared with KDC, and not documents shared between KDC and its own counsel, Morrison & Foerster.

Discussion

A. Pre-Closing Documents

Gardaworld argues that the Pre-Closing Documents should be produced because communications between the plaintiffs and KDC as a non-party financial advisor cannot be subject to any applicable privilege. The plaintiffs argue that the Pre-Closing Documents are protected by attorney-client privilege, and alternatively, by a third-party exception to the attorney-client privilege.

A party that asserts attorney-client privilege bears the burden of establishing that there was a communication “between an attorney and a client ‘for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship,’ that the communication is predominantly of a legal character, that the communication was confidential and that the privilege was not waived (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 [2016]). Communications made to third parties may nevertheless remain privileged “where the presence of such third parties is deemed necessary to enable the attorney-client communication and the client has a reasonable expectation of confidentiality” (*id.*, citing *People v Osorio*, 75 NY2d 80, 84 [1989]).

In this case, the Pre-Closing Documents do not involve communications between an attorney and client because KDC was not a client of Hogan Lovells, who was the attorney for the seller in the transaction. Consequently, the Pre-Closing Documents are not subject to attorney-client privilege in the first instance. Further, the Pre-Closing Documents do not fall within the exception outlined in *Ambac* because the plaintiffs could not have a reasonable expectation of confidentiality given that the Engagement Letter required that KDC and Aegis, now acquired by Gardaworld, “cooperate in good faith” to ensure the proper defense of any proceeding (NYSCEF Doc. No. 301). Accordingly, Gardaworld’s motion to compel disclosure of the Pre-Closing Documents is granted.

B. Post-Closing Documents

Gardaworld argues that the Post-Closing Documents are not protected by work-product privilege because there could be no expectation of litigation at that stage of the proceedings. The plaintiffs argue that the Post-Closing Documents are subject to work-product privilege because these documents relate to the plaintiffs’ dispute with Gardaworld over the earnout provision in the PSA.

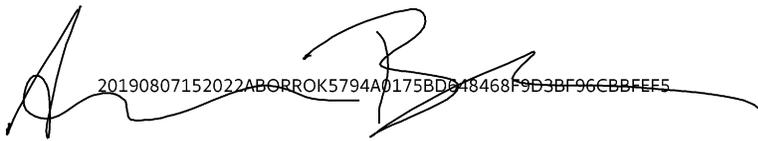
Documents subject to work product privilege must be prepared in anticipated of litigation (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 93 AD3d 574, 574 [1st Dept 2012]; CPLR § 3101 (d)(2)). Although the Post-Closing Documents concern the earnout dispute that is a subject of this action, the plaintiffs have not established that said documents were prepared in anticipation of litigation, especially when the Post-Closing Documents were created between April to

October 2016, nearly one year before this action was commenced. As a result, Gardaworld's motion to compel production of the Post-Closing Documents is granted.

To the extent that Gardaworld seeks sanctions, costs, or attorney's fees in connection with KDC's document production, that branch of the motion is denied because the events preceding this motion suggest that the parties engaged in a good faith effort to resolve the issue before bringing this motion.

Accordingly, it is

ORDERED that defendant's motion to compel is granted solely to the extent that the plaintiffs shall produce all documents listed in its privilege log (NYSCEF Doc. No. 256) by August 15, 2019.



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8/7/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE