AmBase Corp. v 111 W. 57th Sponsor LLC

2024 NY Slip Op 34400(U)

December 12, 2024

Supreme Court, New York County

Docket Number: Index No. 652301/2016

Judge: Joel M. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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AMBASE CORPORATION, 111 WEST 57TH MANAGER FUNDING LLC,111 WEST 57TH INVESTMENT LLC, ON BEHALF OF ITSELF AND DERIVATIVELY ON BEHALF OF 111 WEST 57TH PARTNERS LLC,111 WEST 57TH MEZZ 1 LLC,

Plaintiffs,

- v -

111 WEST 57TH SPONSOR LLC,111 WEST 57TH CONTROL LLC,111 WEST 57TH DEVELOPER LLC, KEVIN MALONEY, MATTHEW PHILLIPS, MICHAEL STERN, NED WHITE, 111 CONSTRUCTION MANAGER LLC, PROPERTY MARKETS GROUP, INC., JDS DEVELOPMENT LLC, JDS CONSTRUCTION GROUP, LLC, PMG CONSTRUCTION GROUP LLC, MANAGER MEMBER 111W57 LLC, LIBERTY MUTUAL INSURANCE COMPANY, LIBERTY MUTUAL FIRE INSURANCE COMPANY, 111 WEST 57TH PARTNERS LLC (AS A NOMINAL DEFENDANT), 111 WEST 57TH MEZZ 1 LLC,

Defendants.

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INDEX NO. 652301/2016

MOTION DATE 07/03/2024

MOTION SEQ. NO. 026

SUPPLEMENTAL DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 026) 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813

were read on this motion to COMPEL DISCOVERY.

THIS MATTER, having come before the Court by Plaintiffs'[1] Order to Show Cause seeking to compel Defendants[2] to produce certain "Act I" and "Act II" discovery, for a Negative

[1] AmBase Corporation, 111 West 57th Manager Funding LLC, and 111 West 57th Investment LLC, on behalf of itself and derivatively on behalf of 111 West 57th Partners LLC ("Partners") and 111 West 57th Mezz 1 LLC (collectively, "Plaintiffs").

[2] Defendants 111 West 57th Sponsor LLC, 111 West 57th Control LLC, 111 West 57th Developer LLC ("Developer"), Kevin Maloney, Michael Stern, and JDS Construction Group LLC ("JDS Construction") (collectively, "Sponsor Defendants").

Interference, and an award of attorney's fees, and the Court having issued a Decision and Order dated September 11, 2024 (NYSCEF 844) on the majority of the relief sought therein, and having reserved decision on the issue of privilege for oral argument, and oral argument having been held, it is now therefore

ORDERED that, for the reasons explained herein, the branch of Plaintiffs' Motion to Compel seeking production of certain communications withheld from production on grounds of attorney-client privilege and attorney work product protection is **DENIED**.

DISCUSSION

This dispute involves legal advice given to Sponsor relating to the strict foreclosure. Plaintiffs argue they are entitled to discovery of that legal advice and certain other matters because (i) they are members of 111 West 57th Partners ("Partners"), and (ii) the "fiduciary exception" applies.[3]

Plaintiffs argue that because "Kasowitz represented the Partners joint venture entity in connection with the strict foreclosure—of which Plaintiff, Investment, was the majority-interest member—Plaintiffs share in that privilege and are entitled to know the substance of the legal advice given to Sponsor" (NYSCEF 759 at 18), relying in part on upon *Fochetta v Schlackman* (257 AD2d 546 [1st Dept 1999]). In that case, the "Plaintiff was a principal and a 50% shareholder of each of the closely held defendant corporations until 1996 when he executed the stock surrender, the validity of which form[ed] the focal point of [that] litigation." (*id.*). The plaintiff filed a motion to compel disclosure of billing invoices. The First Department held that

[3] Plaintiffs' counsel made additional arguments at oral argument relating to waiver of privilege that were not set forth in the motion papers. Therefore, the Court declines to consider those arguments in rendering this decision.

"[g]iven the extent of plaintiff's ownership interest and managerial involvement in defendant corporations prior to the disputed stock surrender, the motion court properly determined that the attorney-client privilege was not properly invoked by defendants to deny plaintiff access to otherwise privileged pre-surrender materials essential to the proof of his claims" (*id.*).

Here, unlike *Fochetta*, the record does not support Plaintiffs' contention that they were involved in the management of the Company. To the contrary, Sponsor (not Plaintiff) is the managing member of Partners (NYSCEF 493 ["JVA"] at 1), with "day-today authority to act for the Company" (*id.* § 7.2; *accord id.* §§ 8.2, 8.4). The Court does not find persuasive Plaintiffs' reference to having certain rights to issue capital calls to bring this case within the ambit of *Fochetta*. In any event, the Court in *Fochetta* ultimately determined that the plaintiff was only entitled to some portions of the invoices which he sought which occurred *pre-surrender* of the stock (*Fochetta*, 257 AD2d at 546 ["plaintiff has no right to those portions of the sought billing invoices that would reveal client confidences as to services and strategy"]). Thus, the *Fochetta* Court did not address whether the plaintiff would be entitled to privileged communications that occurred after the dispute arose between the parties.

More on point is the so-called fiduciary exception. "In the corporate context, where a shareholder (or, as here, an investor in a company) brings suit against corporate management for breach of fiduciary duty or similar wrongdoing, courts have carved out a 'fiduciary exception' to the privilege that otherwise attaches to communications between management and corporate counsel" (*Nama Holdings, LLC v Greenberg Traurig LLP*, 133 AD3d 46, 52 [1st Dept 2015]). If Plaintiffs' assertion—that by virtue of their membership interest in Partners, they "share in th[e] privilege" (NYSCEF 759 at 18) between Sponsor and Partners' attorneys—were true, there

would be no need to rely upon an "exception" to the privilege. Thus, the issue is whether the fiduciary exception applies.

Under the circumstances presented, Plaintiffs are not entitled to Sponsor Defendants' "attorney-client communication under the narrow fiduciary exception given the parties' adversarial relationship" (*Fraiture v Bd. of Directors of 44 King St., Inc.*, 216 AD3d 530, 531 [1st Dept 2023]). The principle behind the fiduciary exception is that the privilege should not permit a fiduciary to shield communications from the parties on whose behalf the fiduciary is acting (*Nama Holdings*, 133 AD3d at 52). Here, Plaintiffs do not dispute that all fiduciary duties were contractually waived. The existence of an implied duty of good faith and fair dealing—which is inherent in every contract—does not trigger the type of fiduciary relationship that can vitiate attorney-client privilege between the entity and its counsel. Furthermore, Plaintiffs have not cited any case law for the proposition that where, as is the case here, all fiduciary duties have been waived (*see* JVA §8.5), the Court may still find a fiduciary relationship between the parties (*cf. Matter of Stenovich v Wachtell, Lipton, Rosen & Katz*, 195 Misc 2d 99, 112 [Sup Ct, NY County 2003] [There must be a "fiduciary relationship between the party seeking disclosure and the party who sought legal advice for the party seeking disclosure"]).

Second, "the applicability of the fiduciary exception depends on whether the 'real client' of the attorney rendering counsel was the fiduciary in his or her individual capacity or . . . the beneficiaries to whom the fiduciary duty was owed" (*Stock v Schnader Harrison Segal & Lewis LLP*, 142 AD3d 210, 222 [1st Dept 2016]). "[T]he question of good cause for disclosure[4] arises

[4] "In extending the fiduciary exception to the corporate sphere, the *Garner* [*Garner v Wolfinbarger*, 430 F2d 1093, 1104 [5th Cir 1970]] court set forth a non-exhaustive list of factors that should be considered to determine whether a party has shown good cause for applying the

only after it has been determined that the party seeking the disclosure was the "real client" entitled to invoke the exception" (*id.* at 225-26). Here, Plaintiffs have failed to demonstrate that they were the "real client" of Kasowitz. Thus, "[b]ecause plaintiffs were not the 'real client' entitled to invoke the fiduciary exception, the good cause analysis of whether they are entitled to attorney-client communications is not applicable" (*Fraiture*, 216 AD3d at 531-32).

In any event, Plaintiffs have not established good cause. The instant litigation was pending for over a year prior to the strict foreclosure, with the Complaint alleging that Defendants engaged in an unlawful scheme to dilute AmBase's equity interest (NYSCEF 2). The communications at issue on this motion thus occurred *during this litigation*. In those circumstances, Plaintiffs' commencement of this action and "retention of counsel demonstrated that they did not believe that the [Sponsor's] counsel was representing their interests as shareholders" (*Fraiture*, 216 AD3d at 531 [finding that the fiduciary exception did not apply in dispute between the plaintiff shareholders in a residential co-op and defendant co-op and board where plaintiffs retained their own counsel to seek legal advice to protect their own self-interests, "rather than to guide the fiduciary in the performance of his or her own duties to the beneficiary"]).

Finally, Plaintiffs' argument that they are entitled to pierce the privilege because of an alleged conflict of interest by the Kasowitz firm similarly fails. Plaintiffs have been aware of this alleged "conflict" for over eight years and never moved to disqualify counsel on that basis.

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exception in a given case. Since then, several different tests have been formulated; yet it has been said that "[t]he precise meaning of 'good cause' has not been articulated by the New York courts" (*Nama Holdings*, 133 AD3d 46, 55 [1st Dept 2015]). Ultimately, there must be a "balancing of the requesting party's need for information against the threat to corporate confidentiality (*see* Restatement [Third] of Law Governing Lawyers § 85 [2000]), which is indeed the overarching consideration" (*id.*).

Plaintiffs cannot raise this previously unasserted "conflict" to pierce the attorney client privilege just before the close of a long discovery process, and they cite no authority for doing so.

Accordingly, it is

ORDERED that the branch of Plaintiffs' Motion to Compel seeking production of certain communications withheld from production on grounds of attorney-client privilege and attorney work product protection is **DENIED**.

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12/12/2024
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		**CASE DISPOSED**		X	**NON-FINAL DISPOSITION**		
		GRANTED	X **DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**