Memo To: Doble & Doble LLP, Daniel Diamond
File: No File Selected
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Jurisdiction: New York, America
Date: December 31, 2020
Regarding: Waiver of Privilege

Issue

Does the accidental sharing of privileged information and advice with an opposing party result in the waiver of attorney-client privilege?

Facts

An attorney represents a client in a commercial litigation matter. The attorney and client sent a number of emails back and forth where they exchanged privileged information and advice about the case. Near the end of the exchange, the attorney accidentally cc'ed opposing counsel when replying to the client's email. The cc'ed email included the entire email chain containing privileged information. About an hour later, the attorney realized their mistake and immediately sent a follow up email to opposing counsel stating that the email was sent in error. In their email to opposing counsel, the attorney stated that they were not waiving privilege and asked opposing counsel to delete and ignore the email.

Conclusion

Disclosure of a privileged document generally operates as a waiver of the privilege unless it is shown that:

1. the client intended to maintain the confidentiality of the document;

2. reasonable steps were taken to prevent disclosure;

3. the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation; and,

4. the parties who received the documents will not suffer undue prejudice if a protective order against use of the document is issued.

The burden is on the proponent of the privilege to prove that the privilege was not waived. (*Oakwood Realty Corp. v. HRH Construction Corp.*; *N.Y. Times Newspaper Div. v. Lehrer McGovern Bovis, Inc.*).

In *Semsysco GMBH v. Globalfoundries Inc.*, the Court ruled that attorney-client privilege had been waived when the CEO of one of the plaintiffs sent an email to one of the defendants' employees that contained an email chain with privileged communications between the CEO and plaintiffs' counsel. The Court found that the plaintiffs had failed to meet their burden of showing that the disclosure of the email chain was inadvertent. The Court also found that the plaintiffs did not meet the burden of showing that they acted promptly after discovering the disclosure to remedy the situation. (*Semsysco GMBH v. Globalfoundries Inc.*).

In *Broxmeyer v. United Capital Corp.*, an email was sent from the defendants' counsel to a non-party air conditioning contractor. The email contained privileged reports made by a consulting expert who had been retained by the defendants for the defense of the action. The contractor was later subpoenaed by the plaintiffs and produced the privileged reports to the plaintiffs. The defendants argued that their disclosure of the email to the non-party contractor was inadvertent, demanded the return of the documents, and moved for an order precluding the use of the inadvertently disclosed documents. The Court ruled in the defendants' favor and made an order that precluded the plaintiffs from offering or admitting into evidence, or making any reference to, the documents in question. The Court applied the test from *Oakwood Realty Corp.* and also took into account plaintiffs' counsel's apparent failure to follow Rule 4.4(b) of the Rules of Professional Conduct. This rule states that a lawyer who receives a document and knows or reasonably should know that the document was inadvertently provided is required to promptly notify the sender about the disclosure of the document. (*Broxmeyer v. United Capital Corp.*).

In *Vargas v. N.Y. Acad. of Art, Nyaa Holdings,* the defendants made discovery requests of the plaintiff. After receiving documents that were responsive to the discovery request, the defendants informed the plaintiff, by letter, that the plaintiff had disclosed three emails that were sent between the plaintiff and their counsel. The defendants' letter stated that the defendants assumed that the disclosure was knowing and intentional, but that, if the disclosure was not knowing and intentional, the plaintiff should immediately advise the defendants. The defendants sent three additional letters within approximately 1.5 months advising the plaintiff of the same potential issue. 43 days after the first letter had been sent, plaintiff's counsel responded and stated that the documents were produced inadvertently and requested that the defendants destroy the documents. The Court held that disclosure of the emails in question was inadvertent and that the plaintiff did not waive the attorney-client privilege. (*Vargas v. N.Y. Acad. of Art, Nyaa Holdings, LLC*).

In *Delta Fin. Corp. v. Morrison*, the Court set out a slightly different formulation of the test for proving non-waiver of privilege. The Court stated that in order to demonstrate that privilege was not waived by the disclosure of documents, the party that made the disclosure must show:

1. that production of the documents in question was inadvertent;

2. an intention to retain the confidentiality of privileged materials;

3. reasonable precautions to prevent disclosure;

4. a prompt objection; and,

5. an absence of prejudice to defendants were a protective order to be granted.

In *Delta Fin. Corp.* the defendants' attorneys served documents in response to the plaintiff's notice to produce. The document review process involved screening for privileged content; however, the defendants mistakenly produced an e-mail chain between one of the defendants and his former counsel. The Defendants remained unaware of the error and only learned about it after the plaintiff brought a motion to amend the complaint which included a copy of the privileged email. Upon learning that the email had been disclosed, the defendants immediately sought its return. The plaintiff argued that the production of the document constituted a waiver of the

privilege. The Court held that the accidental disclosure of the emails had not waived privilege. Citing the ABA Committee on Ethics and Professional Responsibility, Formal Opinion 05-437, the Court stated that plaintiff's counsel had an ethical obligation to, at the very least, notify defendants' counsel of the receipt of the document in order to give the defendants an opportunity to seek protective measures; however, this was not done. Finally, the Court stated that no prejudice to the plaintiff would arise from granting a protective order with respect to the documents because the plaintiff had not been notified of the disclosure and the document had not been used in the process of questioning witnesses. (*Delta Fin. Corp. v. Morrison*).

Law

In *N.Y. Times Newspaper Div. v. Lehrer McGovern Bovis, Inc.*, 300 A.D.2d 169 (1st Dep't. 2002), the Appellate Division of the First Department held that disclosure of a privileged document generally operates as a waiver of the privilege unless it is shown that:

1. the client intended to maintain the confidentiality of the document;

2. reasonable steps were taken to prevent disclosure;

3. the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation; and,

4. the parties who received the documents will not suffer undue prejudice if a protective order against use of the document is issued.

In addition, the Court noted that the burden is on the proponent of the privilege to prove that the privilege was not waived. In *N.Y. Times Newspaper Div.* the Court reversed the decision of the lower court and granted a protective order prohibiting the use of the document. The Court held that the document had been inadvertently disclosed, that the document itself was labelled as privileged, and that affidavits from counsel stated that at all times the client intended the document in question to remain confidential. The Court stated the following at 170-172:

> The requested memo, together with a cover letter from Nicholas Mariani, Parsons' project manager for the Queens facility project, both dated May 19, 2000, were sent

to Chernis. The Cauffman memo bore the legend, "Attorney-Client Privileged Communication/Attorney Work Product," and the Mariani cover letter expressly stated that the memo was "being provided under the attorney-client privileged communication attorney work product. . . ." The memo was inadvertently turned over to the other defendants during pretrial discovery. After the error was discovered, Parsons' counsel demanded that all copies of the Cauffman report be returned and sought a protective order against the use of the document.

Parsons argued that the report was protected both by attorney-client privilege and as material prepared in contemplation of litigation. Defendants/third-party plaintiffs Bovis Lend Lease LMB, Inc. and Bovis Lend Lease, Inc. (Bovis), opposed the motion, arguing that the document was not protected by any privilege and, even if it were, the privilege was waived by Parsons' inadvertent disclosure.

[...]

Bovis argues that, even if the Cauffman report is subject to attorney-client privilege, the privilege was waived when the report was produced as part of Parsons' pretrial discovery. Disclosure of a privileged document generally operates as a waiver of the privilege unless it is shown that the client intended to maintain the confidentiality of the document, that reasonable steps were taken to prevent disclosure, that the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation, and that the parties who received the documents will not suffer undue prejudice if a protective order against use of the document is issued (*Manufacturers and Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 398-400; accord *John Blair Communication, Inc. v. Reliance Capital Group, L.P.,* 182 A.D.2d 578, 579). The burden is on the proponent of the privilege to prove that the privilege was not waived (*John Blair*, supra, 182 A.D.2d at 579).

Supreme Court found that the production of the report was inadvertent, and that finding is supported by the uncontested Chernis and Nugent affidavits. The Nugent affidavit confirms that "Parsons at all times intended for Mr. Cauffman's memorandum to remain confidential, subject to the protections of both the attorney-

client privilege and the attorney work-product doctrine." The record is clear that the other factors barring a finding of waiver, as outlined supra, were present.

In *Oakwood Realty Corp. v. HRH Construction Corp.*, 51 A.D.3d 747 (2nd Dep't. 2008), the Appellate Division of the Third Department, citing *N.Y. Times Newspaper Div.,* noted that disclosure of a privileged document generally operates as a waiver of the privilege unless the four criteria from *N.Y. Times Newspaper Div,* are met. The Court also noted that the burden is on the proponent of the privilege to prove that privilege was not waived. At 749-750 the Court stated:

> Moreover, the court correctly determined that the attorney-client privilege was not waived when the report was produced as part of HRH's pretrial discovery. Disclosure of a privileged document generally operates as a waiver of the privilege unless it is shown that the client intended to maintain the confidentiality of the document, reasonable steps were taken to prevent disclosure, the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation, and the parties who received the documents will not suffer undue prejudice if a protective order against use of the document is issued (*see New York Times Newspaper Div. of NY. Times Co. v Lehrer McGovern Bovis*, 300 AD2d 169; *Manufacturers Traders Trust Co. v Servotronics, Inc.*, 132 AD2d 392, 398-400; *accord John Blair Communications v Reliance Capital Group*, 182 AD2d 578, 579). The burden is on the proponent of the privilege to prove that the privilege was not waived (*see John Blair Communications v Reliance Capital Group*, 182 AD2d at 579).
>
> The production of the report was inadvertent. HRH at all times intended the Lovett report to remain confidential, subject to the protections of both the attorney-client privilege and the attorney work-product doctrine. The record is clear that the factors barring a finding of waiver, as outlined above, were present (*see New York Times Newspaper Div. of NY. Times Co. v Lehrer McGovern Bovis*, 300 AD2d 169).

In *Semsysco GMBH v. Globalfoundries Inc.*, 2019 N.Y. Slip Op. 30664 (Sup. Ct. NY Cnty. 2019), the Supreme Court of New York County ruled on whether attorney-client privilege had

been waived when the CEO of one of the plaintiffs sent an email to one of the defendants' employees that contained an email chain with privileged communications between the plaintiff's CEO and plaintiffs' counsel. The defendants argued that the CEO intentionally forwarded the email chain and that the plaintiffs had, therefore, waived the attorney-client privilege. The Court cited the test from *N.Y. Times Newspaper Div.* and *Oakwood Realty Corp.* and noted that that the party who asserts privilege has the burden of establishing that it has not waived the privilege. The Court held that, in this case, the CEO's forwarding of the email chain resulted in the waiver of attorney-client privilege.

The Court found that the plaintiffs had failed to meet their burden of showing that the disclosure of the email chain was inadvertent. The Court noted that the CEO acknowledged that he intended to send the first email in the email chain, but stated that he had inadvertently included emails lower down in the chain that contained privileged information. The Court noted that the CEO did not state that he was unaware that the email chain was attached to his primary email to the defendant and also noted that the first email in the chain expressly referred to emails below on the chain and could not be understood without references to emails lower in the chain.

The Court also held that the plaintiffs did not meet the burden of showing that they acted promptly after discovering the disclosure to remedy the situation. The plaintiffs requested the return of the email chain within 48 hours of receiving a letter from the defendants' counsel advising that attorney-client privilege had been waived by the CEO's disclosure of the email chain. However, the Court noted that the plaintiffs did not establish the date of their discovery of the forwarding of the email chain - there were conflicting statements regarding when the plaintiffs first became aware that the email chain had been shared with the defendants. Therefore, the court refused to find that the plaintiffs' request for the return of the emails was prompt. The Court stated the following at 2-7:

> It is undisputed that Herbert Otzlinger, the chief executive officer (CEO) of Semsysco, sent to Hans Peter Ehweiner, one of defendants' employees, an email dated June 6 or June 9, 2015, to which a series of emails was attached (the email chain). It is also undisputed that this email chain contained a series of communications between plaintiffs and their counsel, and that these communications were privileged. (Defs.' Memo. In Supp., at 2; Pls.' Memo. In

Opp., at 3; Defs.' Reply Memo., at 1.)

[...]

Defendants contend that Mr. Otzlinger intentionally forwarded the email chain, and that plaintiffs have accordingly waived the attorney-client privilege with respect to every subject matter "touched upon" in the chain. (Defs.' Memo. In Supp., at 1.) Plaintiffs contend that Mr. Otzlinger only intended to forward the top email in the chain to Mr. Ehweiner, in order to obtain Mr. Ehweiner's views on a contact at GlobalFoundries with whom to conduct settlement discussions before commencing litigation. (See Aff. of Herbert Otzlinger, sworn to on July 24, 2018 [Otzlinger Aff.], ¶¶ 3-5 [Rose Aff., Ex. G]; Pls.' Memo. In Opp., at 2-3.)

CPLR 4503 (a) (1) provides that "[u]nless the client waives the privilege," confidential attorney-client communications shall be protected from disclosure. As the Court of Appeals has explained, "[g]enerally, communications between an attorney and a client that are made in the presence of or subsequently disclosed to third parties are not protected by the attorney-client privilege." (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 620, 624 [2016].) Thus, when a litigant or counsel voluntarily discloses privileged communications, by email or otherwise, a waiver will be found. (See e.g. S*iras Partners LLC v Activity Kuafu Hudson Yards LLC,* 157 AD3d 445, 446 [1st Dept 2018], affg 2017 NY Slip Op 31216 [U], 2017 WL 2444798, * 1-2 [Sup Ct, NY County 2017] [finding a waiver where defendant sent an email to a third-party, the contents of which disclosed advice given to him by counsel]; *Matter of Sheikh [v Sheikh*], 2017 WL 6451277, * 1-2 [Sup Ct, Suffolk County 2017] [finding that petitioner waived the attorney-client privilege as to one communication that petitioner's counsel intentionally attached to an email sent to defendant's counsel].)

> A communication does not "lose its privileged character for the sole reason that it is communicated by electronic means. . . ." (CPLR 4548.)

The general rule that a disclosure of a privileged communication will operate as a

waiver of the attorney-client privilege is subject to an exception where "it is shown that the client intended to maintain the confidentiality of the document, that reasonable steps were taken to prevent disclosure, that the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation, and that the parties who received the documents will not suffer undue prejudice if a protective order against use of the document is issued." (*New York Times Newspaper Div. of the NY Times Co. v Lehrer McGovern Bovis, Inc.*, 300 AD2d 169, 172 [1st Dept 2002] [*NY Times*]; accord *Oakwood Realty Corp v HRH Constr. Corp.*, 51 AD3d 747, 749 [2d Dept 2008].)

[...]

It is further settled that the party who asserts the privilege has the burden of establishing that it has not waived the privilege. (See generally *Ambac Assur. Corp.*, 27 NY3d at 624; *Matter of New York City Asbestos Litig. [v Amchem Prods., Inc.]*, 151 AD3d 550, 551 [1st Dept 2017], lv dismissed 30 NY3d 1055 [2018], rearg denied 31 NY3d 946.)

Applying these standards, the court holds that plaintiffs have not met their burden of establishing that Mr. Otzlinger's forwarding of the email chain did not result in a waiver of the attorney-client privilege. As a threshold matter, plaintiffs fail to meet their burden of showing that the disclosure of the email chain was inadvertent.

[...]

Mr. Otzlinger acknowledges that he deliberately sent the "top email" (i.e., the first email in the chain beneath his email to Mr. Ehweiner) in order to facilitate settlement discussions. (Otzlinger Aff., ¶¶ 3-4.) He asserts, however, that he "inadvertently forwarded to [Mr. Ehweiner] certain emails involving privileged communications with Grunwald and Semsysco's counsel." (Id., ¶ 5.) Mr. Otzlinger's statement that he inadvertently forwarded the chain is wholly conclusory. He nowhere states that he was unaware that the email chain was attached. Nor does he address the fact that Mr. Ehweiner's response also included the entire email chain,

or claim that he was not put on notice by this responsive email that the entire chain had been forwarded. In addition, the top email expressly refers to statements by Dr. Wibbe and Mr. Hegger, and cannot readily be understood without references to their underlying emails in the chain concerning settlement discussions.

In claiming that Mr. Otzlinger did not intentionally forward the entire email chain, plaintiffs argue that Mr. Otzlinger sent the email to Mr. Ehweiner after getting "off a long flight" to Taiwan and only "one minute" after sending the top email to Semsysco and Grunwald personnel and their counsel. (Pls.' Memo. In Opp., at 3, 6; Nov 15, 2018 Tr., at 30.) Plaintiffs do not provide a meaningful explanation for the time difference between these emails. More important, Mr. Otzlinger himself does not make any claim that the circumstances under which he sent the email to Mr. Ehweiner caused him to inadvertently or unintentionally forward the entire email chain. For example, he does not claim in his affidavit that he erred in forwarding the chain because he acted so quickly—within one minute of his email to Dr. Wihbe—in sending the email to Mr. Ehweiner. Nor does he claim that the long flight caused him to inadvertently forward the chain.

According to the June 13, 2018 translation, Mr. Otzlinger's email to Mr. Ehweiner was sent on "Tuesday, June 9, 2015 8:27 PM," while Mr. Otzlinger's email to Dr. Wihbe and others was sent on "Wednesday, June 10, 2015 02:26." (Rose Aff., Ex. A [emphasis supplied].) Presumably, the date and time of the email from Mr. Otzlinger to Mr. Ehweiner reflects the date and time at which Mr. Ehweiner received the email and not at which Mr. Otzlinger sent it. If so, the one minute difference (accounting for the time change) may be shown. This point is not, however, made by plaintiffs.

Under these circumstances, the court does not find that plaintiffs have shown that the forwarding of the chain was inadvertent. Plaintiffs also fail to meet their burden of showing that they acted promptly after discovering the disclosure to remedy the situation. In claiming that they acted promptly, plaintiffs point to their counsel's request for the return of the email chain in June 2018, within 48 hours of a letter from defendants' counsel to plaintiffs' counsel advising them that their "client" had

"waived its attorney-client privilege" by disclosing the email chain to Mr. Ehweiner when he was an employee of GlobalFoundries. (Pls.' Memo. In Opp., at 4, 7; Pls.' Email dated June 2, 2018 [Aff. of M. Jonathan Seibald (Pls.' Atty.), In Opp. (Seibald Aff.), Ex. 6]; Defs.' Letter dated May 31, 2018 [Rose Aff., Ex. E].) Plaintiffs do not, however, make any showing that they were unaware, prior to receipt of defendants' counsel's letter, that Mr. Otzlinger had forwarded the email chain. Mr. Otzlinger's affidavit fails to address when he realized that he had forwarded the email chain. Plaintiffs also fail to clarify apparently inconsistent statements made on this motion as to when they first acquired knowledge that the email chain had been forwarded. In their memorandum in opposition, plaintiffs state that "Defendants incorrectly suggest that the Email Chain was not collected and that Plaintiffs 'hid' it from Defendants. In fact, the Email Chain was properly collected and later marked as privileged—unsurprising given the ubiquitous presence of attorneys on the Email Chain and the fact that it was forwarded to a personal, non-GlobalFoundries email address." (Pls.' Memo. In Opp., at 7 n 12 [emphasis in original] [internal citation omitted].) In contrast, at oral argument of the motion, plaintiffs' counsel appeared to state that plaintiffs did not know about the email chain. He apparently acknowledged that the computer review system failed to Identify the chain, stating: "I freely admit my mistake, it should have been caught and we should have produced only the unredacted, the non-privilege part." (See Nov. 15, 2018 Tr., at 42-43.)

As plaintiffs have not established the date of their discovery of the forwarding of the email chain, the court does not find that they have shown that their request for the return of the chain was prompt. The court accordingly holds, under the *NY Times* standard, that Mr. Otzlinger's forwarding of the email chain resulted in waiver of the attorney-client privilege.

In *Broxmeyer v. United Capital Corp.*, 2012 N.Y. Slip Op. 33739 , an email was sent from the defendants' counsel to a non-party air conditioning contractor. The email contained privileged reports made by a consulting expert who had been retained by the defendants for the defense of the action. The contractor was later subpoenaed by the plaintiffs and produced the privileged reports to the plaintiffs. The defendants argued that their disclosure of the email to the non-party

contractor was inadvertent, demanded the return of the documents, and moved for an order precluding the use of the inadvertently disclosed documents. Citing *Oakwood Realty Corp.*, the Supreme Court of Nassau County stated that disclosure of a privileged document generally operates as a waiver of privilege unless it is shown that the client intended to maintain the confidentiality of the document, reasonable steps were taken to prevent disclosure, the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation, and the parties who received the documents would not suffer undue prejudice if a protective order against the use of the document is issued. The Court ruled in the defendants' favor and made an order that precluded the plaintiffs from offering or admitting into evidence, or making any reference to, the documents in question.

The Court noted that in this case: the defendants submitted proof (by way of an affidavit) that the disclosure of said documents was inadvertent; the defendants made a demand for the return of the email and documents promptly upon discovery of the disclosure; there was no evidence that the plaintiffs had a substantial need for the email and documents or that plaintiffs could not obtain the substantial equivalent of same by other means; and, there was no evidence that the plaintiffs would be unduly prejudiced if a protective order against the use of the email and documents is issued.

The Court also took into account that there was no evidence that plaintiffs' counsel followed Rule 4.4(b) of the Rules of Professional Conduct. This rule states that a lawyer who receives a document and knows or reasonably should know that the document was inadvertently provided is required to promptly notify the sender about the disclosure of the document. The Court stated the following at 4-5:

> Defendants next contend that defendants' consulting expert's work product was inadvertently disclosed to plaintiffs and that defendants made a prompt demand for its return, but plaintiffs have failed to return same. Defendants contend that they retained the a consulting expert in connection with this litigation who produced a report concerning the units' sound relative to the Village Code. Defendants contend that the documents are privileged and were emailed by counsel to the Vice-President of both defendants, Michael Lamoretti, as a private attorney-client communication. Mr. Lamoretti, who submits an affidavit in support of defendants'

motion, inadvertently forwarded the documents to a non-party air-conditioning contractor that services the units, along with the counsel's email. Mr. Lamoretti attests that on June 17, 2008, he received an attorney-client email from defendants' counsel forwarding attachments of the consulting expert's work-product. He attests that the attachments concerned the subject HVAC units, and, on the same day, he inadvertently forwarded the privileged email from counsel and the consulting expert's work-product to the representative of the air conditioning contractor company that services the units, Mr. Ronald Nathan. Non-party, Ronald Nathan, was thereafter subpoenaed by plaintiffs and produced the privileged documents in response to the plaintiffs' subpoena. As the disclosure of said documents from Mr. Lamoretti to Mr. Nathan was inadvertent, and as defendants demanded return of same at the deposition of non-party Ronald J. Nathan on November 20, 2008, defendants move for an order precluding the use of the inadvertently disclosed documents.

[...] Plaintiffs further contend that since the documents were forwarded by Mr. Lamoretti to a non-party, they are not protected by the attorney-client privilege. Contrary to plaintiffs contentions, however, Mr. Lamoretti attests that the email from his counsel and the attached documents of the defendants' consulting expert were inadvertently disclosed to the non-party. Further, it is undisputed that the alleged unintentionally disclosed documents, which were forwarded with counsel's email to Mr. Lamonetti, contained reports and charts by a noise engineer, or consulting expert, retained by the defendants. Reports of consultants retained by counsel, which are prepared in anticipation of litigation, are exempt from disclosure based upon the attorney-client and work-product privileges. (*Oakwood Realty Corp. v. HRH Const. Corp.*, 51 A.D.3d 747, 858 N.Y.S.2d 677 (2d Dept. 2008)(holding that such reports are "'an adjunct to the lawyer's strategic thought processes, thus qualifying for complete exemption from disclosure' under the attorney work-product doctrine as well as CPLR 3101(d)(2)"); *Santariga v. McCann*, 161 A.D.2d 320, 555 N.Y.S.2d 309 (1st Dept. 1990)). "Disclosure of a privileged document generally operates as a waiver of privilege unless it is shown that the client intended to maintain the confidentiality of the document, reasonable steps were taken to

prevent disclosure, the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation, and the parties who received the documents will not suffer undue prejudice if a protective order against the use of the document is issued." (*Oakwood Realty Corp. v. HRH Const. Corp.*, 51 A.D.3d 747, 858 N.Y.S.2d 677 (2d Dept. 2008); *Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, 301 A.D.2d 23, 749 N.Y.S.2d 488 (1st Dept. 2002)). [....]

As the email was sent from counsel to an officer of the defendant and contained reports made by the consulting expert who was retained by the defendants for the defense of this action, and as defendants have submitted proof that the disclosure of said documents was inadvertent, said email and documents are covered by the attorney-client and work-product privileges. Further, as the defendants made a demand for the return of said email and documents promptly upon discovery at Mr. Nathan's deposition, as there is no evidence that the plaintiffs have a substantial need for the email and documents or that plaintiffs cannot obtain the substantial equivalent of same by other means, and as there is no evidence that the plaintiffs would be unduly prejudiced if a protective order against the use of the email and documents is issued, it is hereby ordered that plaintiffs are precluded at the time of trial from offering or admitting into evidence, or making any reference to, the privileged communications, email, documents and information pertaining to defendants' consulting expert which were inadvertently disclosed to Mr. Nathan, and then to plaintiffs' counsel, during discovery. (See, *Oakwood Realty Corp. v. HRH Const. Corp.*, 51 A.D.3d 747, 858 N.Y.S.2d 677 (2d Dept. 2008); *Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, 301 A.D.2d 23, 749 N.Y.S.2d 488 (1st Dept. 2002); *New York Times Newspaper Div. of N.Y. Times Co. v. Lehrer McGovern*, 300 A.D.2d 169, 752 N.Y.S.2d 642 (1st Dept. 2002)). Further, the Court notes that the Rules of Professional Conduct 4.4(b) state that "a lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the documents was inadvertently sent shall promptly notify the sender," and there is no evidence that same was done here.

In *Vargas v. N.Y. Acad. of Art, Nyaa Holdings, LLC*, 2019 N.Y. Slip Op. 30468 Sup. Ct. Kings

Cnty. 2019), the Supreme Court of Kings County discussed what constitutes "promptness" with respect to asserting the privilege after discovering an accidental disclosure of privileged information. In *Vargas*, the defendants made discovery requests of the plaintiff. After receiving documents that were responsive to the discovery request, the defendants informed the plaintiff, by letter, that the plaintiff had disclosed three emails that were sent between the plaintiff and their counsel. The defendants' letter stated that the defendants assumed that the disclosure was knowing and intentional, but that, if the disclosure was not knowing and intentional, the plaintiff should immediately advise the defendants. The defendants sent three additional letters within approximately 1.5 months advising the plaintiff of the same potential issue. 43 days after the first letter had been sent, plaintiff's counsel responded and stated that the documents were produced inadvertently and requested that the defendants destroy the documents.

The defendants argued that plaintiff's counsel's failure to respond until 43 days after having been advised of the disclosure effectively waived the attorney-client privilege in regard to the documents at issue. The plaintiff argued that the disclosure was inadvertent and that attorney-client privilege had not been waived. The Court sided with the plaintiff and held that disclosure of the emails in question was inadvertent and that the plaintiff did not waive the attorney-client privilege. The Court noted that revocation had been completed in 43 days; there was no intent by the plaintiff to waive the attorney-client privilege, but rather, that the documents were produced in error; each of the emails contained a disclaimer regarding their confidentiality; depositions had not yet been conducted; there was no prejudice to the defendant by remedying the accidental disclosure; and, the plaintiff did not intend to use the information in the inadvertently disclosed emails to establish any of plaintiff's damages. The Court stated at 3-6:

> "The attorney-client privilege applies to confidential communications between clients and their attorneys made "in the course of professional employment" (CPLR 4503[a]), "and such privileged communications are absolutely immune from discovery" (CPLR 3101[b]; see also *Spectrum Systems International Corp. v. Chemical Bank*, 78 NY2d 371, 377, 575 NYS2d 809, 581 NE2d 1055). "The privilege applies to communications from the client to the attorney when the communication is " 'made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose' " (*Rossi v. Blue Cross and Blue Shield of Greater New York,* 73 N.Y.2d 588, 593, 542 N.Y.S.2d 508, 540

N.E.2d 703); citing *New York Times Newspaper Div. of New York Times Co. v. Lehrer McGovern Bovis, Inc.*, 300 AD2d 169, 171, 752 NYS2d 642, 644-45 (2002).

Disclosure of a privileged document generally operates as a waiver of the privilege unless it is shown that the client intended to maintain the confidentiality of the document, reasonable steps were taken to prevent disclosure, the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation, and the parties who received the documents will not suffer undue prejudice if a protective order against use of the document is issued (see *New York Times Newspaper Div. of N.Y. Times Co. v. Lehrer McGovern Bovis*, 300 AD2d 169, 752 NYS2d 642; *Manufacturers & Traders Trust Co. v. Servotronics, Inc.*, 132 AD2d 392, 393-400, 522 NYS2d 999; *John Blair Communications v. Reliance Capital Group,* 182 AD2d 578, 579, 582 NYS2d 720). The burden is on the proponent of the privilege to prove that the privilege was not waived (see *John Blair Communications v. Reliance Capital Group*, 182 AD2d at 579, 582 NYS2d 720); citing *Oakwood Realty Corp. v. HRH Const. Corp.*, 51 AD3d 747, 749-50, 858 NYS2d 677, 679-80 (2008).

In the present case, on April 18, 2018 defendants counsel by letter to plaintiffs' counsel informed them that they disclosed in their response to discovery requests three (3) emails that were between plaintiff and their counsel which "they assume was knowing and intentional and if they were not knowing and intentional that they need to advise the defendants immediately." Defendant again wrote another letter advising of the same on April 20, 2018, and again on April 26, 2018; and again, on May 29, 2018. Plaintiff's counsel responded to the alleged disclosure forty-three (43) days later on May 31, 2018 wherein they state the documents were produced inadvertently and requested that defendant counsel destroy the documents immediately. In response to the present motion plaintiff's counsel contends the documents in question are subject to the attorney client privilege and such privilege has not been waived by inadvertent disclosure.

It is noted and undisputed that the defendant has not attach the emails

> in question to any of their motion papers. Therefore, the court has not reviewed the disclosed documents. --------
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> Defendant's rely on *AFA Protective Sys. v. City of N.Y.*, 13 AD3d 564 (2 dept. 2004), in arguing that the plaintiff's failed to exercise due diligence to revoke the document it claimed was privileged. However, in the *AFA Protective Sys.*, case they did not attempt to revoke the inadvertently disclosed documents for four (4) years. In the present case, no such length of time had passed before revocation, revocation was done in 43 days. There is clearly no intent by the plaintiff to waive the attorney-client privilege. Counsel for the plaintiff asserts they utilized a screening process for the production of documents for privileged information, but these emails were produced in error. It is also undisputed that a disclaimer as to the confidentiality of the document was included at the bottom of each of the emails in question. Moreover, depositions have not been conducted and there is no prejudice to the defendant by remedying the accidental disclosure. Additionally, plaintiff has admitted that they do not intend to use the information in the inadvertently disclosed emails to establish any of plaintiff's damages. Therefore, it is the determination of this court that the plaintiff did not waive the attorney-client privilege and the discovery disclosure regarding the emails in question was inadvertent. As such, the defendants shall immediately destroy said documents and shall be prohibited from using said documents.

In *Delta Fin. Corp. v. Morrison*, 12 Misc. 3d 807 (Sup. Ct. Nassau Cnty. 2006), the Supreme Court of Nassau County set out a slightly different formulation of the test for proving non-waiver of privilege. The Court stated that in order to demonstrate that privilege was not waived by the disclosure of documents, the party that made the disclosure must show:

1. that production of the documents in question was inadvertent;

2. an intention to retain the confidentiality of privileged materials;

3. reasonable precautions to prevent disclosure;

4. a prompt objection; and,

5. an absence of prejudice to defendants were a protective order to be granted.

In *Delta Fin. Corp.* the defendants' attorneys served documents in response to the plaintiff's notice to produce. The document review process involved screening for privileged content; however, the defendants mistakenly produced an e-mail chain between one of the defendants and his former counsel. The Defendants remained unaware of the error and only learned about it after the plaintiff brought a motion to amend the complaint which included a copy of the privileged email. Upon learning that the email had been disclosed, the defendants immediately sought its return. The plaintiff argued that the production of the document constituted a waiver of the privilege.

The Court held that the accidental disclosure of the emails had not waived privilege. Noting the defendants' attorney's affidavit regarding the document review procedure, the Court found that the defendants' production of the document was not intentional and that the defendants intended to keep the document confidential. The Court stated that, although it took the defendants a year to object to the disclosure, this objection was "prompt". Citing the ABA Committee on Ethics and Professional Responsibility, Formal Opinion 05-437, the Court stated that plaintiff's counsel had an ethical obligation to, at the very least, notify defendants' counsel of the receipt of the document in order to give the defendants an opportunity to seek protective measures; however, this was not done. Finally, the Court stated that no prejudice to the plaintiff would arise from granting a protective order with respect to the documents because the plaintiff had not been notified of the disclosure and the document had not been used in the process of questioning witnesses. The Court stated the following at 810-811:

> It is the burden of the proponent of the privilege to prove nonwaiver. (*Manufacturers & Traders Trust Co. v Servotronics, Inc.*, 132 AD2d 392, 398-399 [4th Dept 1987].) In order to succeed, defendant (LLC) must show (1) that production of the documents in question was inadvertent, (2) an intention to retain the confidentiality of privileged materials, (3) reasonable precautions to prevent disclosure, (4) a prompt objection, and (5) an absence of prejudice to defendants were a protective order to be granted. (*John Blair Communications v Reliance Capital Group*, 182 AD2d 578, 579 [1st Dept 1992], citing *Manufacturers & Traders Trust Co. v Servotronics, Inc.*, 132 AD2d at 398-400.)

Defendants have satisfied this court that the document's production was inadvertent and not "intentional." In his affidavit, defendants' attorney Christopher Byrne states that during the document review all communications to or from an attorney were set aside for his personal assessment and those that were deemed privileged were removed and placed in the privilege log. (*Manufacturers & Traders Trust Co. v Servotronics, Inc.*, 132 AD2d 392, 399 [4th Dept 1987] [the bank's counsel alleged that during a search of the file he discovered and removed those documents he deemed confidential and privileged].) In addition, defendants state that they intended at all times to keep the document privileged as evidenced by the precautions taken to avoid disclosure of privileged material. Furthermore,

> "[t]he error counsel made was in inadequately screening the material before it was delivered to defense counsel. Notwithstanding that error, however, the fact that counsel undertook a screening procedure indicates that he took some precaution to avoid disclosure of privileged material. Disclosure caused by an error of a competent screener . . . does not evidence a lack of precautions." (*Manufacturers & Traders Trust Co. v Servotronics, Inc.*, 132 AD2d 392, 399 [4th Dept 1987].)

Upon discovering the mistake (when the document was used by DFC in its motion to amend the complaint), defendants' attorney promptly objected to the disclosure. That the document was produced at least a year earlier does not cause defendants to fail on this point. Plaintiff's counsel had an ethical obligation to, at the very least, notify defendants' counsel of the receipt of the document in order to give the LLC an opportunity to seek protective measures. (ABA Comm on Ethics and Prof Responsibility, Formal Op 05-437.)[*] Plaintiff's counsel does not deny recognizing the privileged nature of the document but rather assumed that defendants' counsel intentionally produced it and therefore did not inform the LLC of its receipt.

Lastly, no prejudice to DFC will result in granting the protective order. In *In re Grand Jury Investigation of Ocean Transp.* (604 F2d 672, 675 [DC Cir 1979]) disclosure of privileged documents was made to the government but the plaintiff

did not move for the return of them until 15 months after their production, after the recipient notified plaintiff of the privileged documents and plaintiff's counsel mistakenly stated that the production was intentional. During the interim, the government had digested and analyzed the documents and used them in questioning witnesses and the court held that the attorney-client privilege had been waived. (*Id.*) In the instant matter, LLC was never notified of the receipt of the document by DFC and it has not been used in questioning witnesses.

Authorities

N.Y. Times Newspaper Div. v. Lehrer McGovern Bovis, Inc., 300 A.D.2d 169 (1st Dep't. 2002)

Oakwood Realty Corp. v. HRH Construction Corp., 51 A.D.3d 747 (2nd Dep't. 2008)

Semsysco GMBH v. Globalfoundries Inc., 2019 N.Y. Slip Op. 30664 (Sup. Ct. NY Cnty. 2019)

Broxmeyer v. United Capital Corp., 2012 N.Y. Slip Op. 33739 (Sup. Ct. Nassau Cnty. 2012)

Vargas v. N.Y. Acad. of Art, Nyaa Holdings, LLC, 2019 N.Y. Slip Op. 30468 Sup. Ct. Kings Cnty. 2019)

Delta Fin. Corp. v. Morrison, 12 Misc. 3d 807 (Sup. Ct. Nassau Cnty. 2006)