

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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G-I HOLDINGS, INC.,

Plaintiff,

- against -

01 Civ. 0216 (RWS)

O P I N I O N

BARON & BUDD; FREDERICK BARON; RUSSELL  
BUDD; NESS, MOTLEY, LOADHOLT, RICHARDSON  
& POOLE; RONALD MOTLEY; JOSEPH RICE;  
WEITZ & LUXENBERG; PERRY WEITZ and  
ROBERT GORDON,

Defendants.

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A P P E A R A N C E S:

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Sweet, D.J.,

Plaintiff G-I Holdings ("Holdings") seeks an order compelling defendant Joseph Rice ("Rice") of defendant law firm Ness, Motley, Loadholt, Richardson & Poole ("Ness Motley") and defendant Perry Weitz ("Weitz") of defendant law firm Weitz & Luxenberg to answer deposition questions concerning legal advice given by their respective law firms to their respective clients. Holdings also seeks to compel Weitz to answer questions concerning his exercise of independent professional judgment with respect to certain advice provided to clients of Weitz and Luxenberg.<sup>1</sup>

For the reasons set forth herein, the motion is denied.

#### Prior Proceedings

The status of this litigation and certain of the prior determinations are contained in G-I Holdings, Inc. v. Baron & Budd, No. 01 Civ. 0216, 2004 WL 638141 (S.D.N.Y. Mar. 30, 2004); G-I Holdings, Inc. v. Baron & Budd, 2004 WL 540456 (S.D.N.Y. Mar. 17, 2004); G-I Holdings, Inc. v. Baron & Budd, 2004 WL 374450 (S.D.N.Y. Feb. 27, 2004); G-I Holdings, Inc. v. Baron & Budd, 218 F.R.D. 409 (S.D.N.Y. 2003); G-I Holdings, Inc. v. Baron & Budd, 213 F.R.D. 146

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<sup>1</sup> Pursuant to its letter of April 12, 2005, Holdings' request for an order compelling Weitz to answer questions concerning his exercise of independent professional judgment is denied as moot. (See Letter from Thomas J. Kaveler of 4/12/95, at 6.)

(S.D.N.Y. 2003); G-I Holdings, Inc. v. Baron & Budd, 02 Civ. 0216, 2002 WL 31251702 (S.D.N.Y. Oct. 8, 2002); G-I Holdings, Inc. v. Baron & Budd, 238 F. Supp. 2d 521 (S.D.N.Y. 2002); and G-I Holdings v. Baron & Budd, 179 F. Supp. 2d 233 (S.D.N.Y. 2001), familiarity with which is presumed.

The present discovery dispute first arose on October 15, 2004, when Holdings sought an order from the Court compelling Weitz and Rice to answer deposition questions concerning the steps their respective law firms took to comply with the April 15, 2004 settlement agreement (the "Futures Agreement") executed by Michael F. Rooney of the Center For Claims Resolution ("CCR") as sole agent for CCR's members (including GAF Corporation, the predecessor to Holdings) and Weitz in his individual capacity and as agent of Plaintiff Counsel. In open Court on October 27, 2004, it was determined that Weitz and Rice could be required to describe actions taken in order to comply with the Futures Agreement but not the mental process that resulted from any such action. On October 27, 2004, this Court stated:

[T]he opinion of the firm rendered to its client is covered by the privilege. I think that it is possible [that] in the peculiar circumstances of this case that it might be that the privilege should be broken, but I am not at that point yet. I don't think that issue will probably be ripe until I get the motions for summary judgment, and it is possible, it seems to me, that the issue may still be out there.

October 27, 2004 Transcript, at 20:11-18.

On February 2, 2005, Holdings wrote to the Court seeking an order (1) compelling Weitz to answer questions concerning the exercise of his independent professional judgment in connection with the Futures Agreement, (2) compelling the Ness Motley defendants to produce a complete list of clients who deferred their claims in the period from June 1997 to January 2000 so that a representative sample could be developed, and (3) granting Holdings leave to take discovery based on this sample set. In open court on February 16, 2005, this Court stated:

I tried to make clear at the first go-round of this issue that I didn't want to invade the attorney-client privilege or have you invade the attorney-client privilege, but [that what] I did want ... is factual procedures, what factual procedures you went through in order to make your decisions.

I would permit a further deposition, and the question would be -- and it may not be necessary to have the deposition because the answer may be none -- referring to these procedures ... .

February 16, 2005 Transcript, at 38:4-14.

Holdings' present motion was submitted by letter dated March 15, 2005. It was heard and marked fully submitted on April 13, 2005.

## Discussion

By this motion, Holdings seeks a determination that the particular circumstances of this case warrant invasion of the attorney-client privilege held by certain clients of Luxenberg and Weiss and Ness Motley. This issue -- i.e., whether the circumstances of this case might justify such an invasion -- is one that the Court previously declined to reach. Therefore, defendants' argument that Holdings seeks reconsideration of previously decided issues is unavailing.

### 1. Choice of Law

Rule 501 of the Federal Rules of Evidence provides, in pertinent part, that

in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Fed. R. Evid. 501. The discovery at issue here is sought for the purpose of establishing breach of contract on the part of the defendants. Since these are state law claims, the question of whether or not grounds exist for the invasion of the attorney-client privilege is also determined pursuant to state law. See id.

In its initial papers, Holdings has cited case law from the United States District Court for the District of New Jersey for the proposition that pursuant to the law of the State of New Jersey, the attorney-client privilege is qualified and can be invaded upon a showing: (1) that there is a legitimate need for the evidence, (2) that the evidence is relevant and material to the issue before the Court, and (3) that the evidence cannot be secured from any less intrusive source. See Dome Petroleum Ltd. v. Employers Mut. Liability Ins. Co. of Wisconsin, 131 F.R.D. 63, 70 (D.N.J. 1990) (applying New Jersey law) (citing In re Kozlov, 79 N.J. 232, 243-45, 398 A.2d 882 (1979)); see also Leonen v. Johns-Manville, 135 F.R.D. 94, 100 (D.N.J. 1990) (same). In contrast, the defendants assert that New York law governs, and that under New York law, the attorney-client privilege is subject to only a limited number of narrow exceptions that are not applicable under the present circumstances.

As to the state law claims at issue here, a court must apply the choice-of-law rules prevailing in the state in which the court sits. See, e.g., Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); Krauss v. Manhattan Life Ins. Co., 643 F.2d 98, 100 (2d Cir. 1981). With respect to the law of evidentiary privileges, New York courts generally apply the law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding itself. See Drimmer v. Appleton, 628 F. Supp. 1249, 1250 (S.D.N.Y. 1986) (stating that no

conflict issue exists where trial and deposition were in same state); Brandman v. Cross & Brown Co. of Florida, Inc., 125 Misc. 2d 185, 479 N.Y.S.2d 435, 437 (N.Y. Sup. Ct. 1984). Here, the evidence will be introduced in New York. Therefore, New York privilege law shall apply.

## 2. New York's Attorney-Client Privilege

New York's attorney-client privilege is codified in Section 4503 of the Civil Practice Laws and Rules ("C.P.L.R."), which states, in pertinent part, as follows:

Unless the client waives the privilege, an attorney ... who obtains ... a confidential communication ... made between the attorney ... and the client in the course of professional employment shall not disclose, or be allowed to disclose such communication, in any action.

N.Y. C.P.L.R. § 4503(a). "Although typically arising in the context of a client's communication to an attorney, th[is] privilege extends as well to communications from attorney to client." Spectrum Sys. Int'l Corp. v. Chemical Bank, 78 N.Y.2d 371, 377, 575 N.Y.S.2d 809, 814, 581 N.E.2d 1055, 1060 (1991).

The purpose of this privilege is to "encourage persons needing professional advice to disclose freely the facts in reference to which they seek advice, without fear that such facts will be made public to their disgrace or detriment by their

attorney." Hurlburt v. Hurlburt, 128 N.Y. 420, 424, 28 N.E. 651 (1891); Matter of Jacqueline F., 47 N.Y.2d 215, 218, 417 N.Y.S.2d 884, 886, 391 N.E.2d 967, 969 (1979) (privilege established to effectuate "a more orderly administration of justice through frank revelation of pertinent information").

There are a limited number of circumstances in which a civil litigant in this state can invade the attorney-client privilege held by another. First, in "any action involving the probate, validity or construction of a will, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will or other relevant instrument." N.Y. C.P.L.R. § 4503(b). Second, upon a showing of good cause, a civil litigant may invade the attorney-client privilege of one who owes that litigant a fiduciary duty. See, e.g., Hoopes v. Carota, 74 N.Y.2d 716, 544 N.Y.S.2d 808, 543 N.E.2d 73 (1989). Third, upon an appropriate showing, a civil litigant can invade the attorney-client privilege of another where the sought communication was made for the purpose of furthering a future crime or fraud. See, e.g., Surgical Design Corp. v. Correa, 284 A.D.2d 528, 727 N.Y.S.2d 462 (2d Dep't 2001) (citing Alexander v. United States, 138 U.S. 353 (1891)). Fourth, "when two or more persons consult an attorney with regard to a matter of common interest, nothing that is said by the parties or the attorney is confidential[] in any action subsequently arising between the parties or their personal representatives." 58A N.Y. Jur. 2d

Evidence & Witnesses § 876, at 396 (2000) (citing Tekni-Plex, Inc. v. Meyner and Landis, 89 N.Y.2d 123, 651 N.Y.S.2d 954, 674 N.E.2d 663, reargument denied, 89 N.Y.2d 917, 653 N.Y.S.2d 921, 676 N.E.2d 503, and reargument denied, 89 N.Y.2d 917, 653 N.Y.S.2d 921, 676 N.E.2d 503 (1996)).

Fifth, a civil litigant may invade the attorney-client privilege of another where such invasion is justified by "strong public policy considerations." Spectrum Systems, 78 N.Y.2d at 380, 575 N.Y.S.2d at 815, 581 N.E.2d at 1062 (holding that strong public policy considerations did not justify invasion of the privilege where plaintiff sought discovery of investigative report drafted by defendant's outside counsel for the purpose of demonstrating that plaintiff was entitled to payment of fees for consulting services rendered) (citing Priest v. Hennessy, 51 N.Y.2d 62, 69, 431 N.Y.S.2d 511, 514, 409 N.E.2d 983, 986 (1980) (holding that no attorney-client relationship had been shown to exist between attorneys and third parties who had paid for the representation of certain of the attorneys' clients)); Matter of Jacqueline F., 47 N.Y.2d at 223 417 N.Y.S.2d at 889, 391 N.E.2d at 972 (1979) (holding that where an attorney's client fled the state with her niece after the child's biological parents had re-established legal custody, the state's interest in the child's welfare justified invading the attorney-client privilege for the purpose of compelling the attorney to disclose the client's address).

The Jacqueline F. court, which first recognized the public policy exception, stressed that its decision to permit invasion of the attorney-client privilege was prompted by the "unique circumstances" of the case before it:

[T]he present case ... involv[es] the welfare of a young child caught in an intrafamilial legal battle in which the victor stands to gain an uncommon reward custody of a child. The ordeal suffered by a child during a custody proceeding is unfortunate but often necessary. It is, however, quite another matter to put a child through such an ordeal only to permit an unsuccessful litigant to frustrate the court's judgment rendered in the best interests of the child.

Matter of Jacqueline F., 47 N.Y.2d at 222, 417 N.Y.S.2d at 888, 391 N.E.2d at 971.

Since Jacqueline F., this public policy exception has rarely been applied by the courts of New York. See N.Y. C.P.L.R. § 4503 (McKinney 1992) (Practice Commentary C4503:5. Exceptions) (observing that between 1980 and 1992, the Court of Appeals "twice rejected the applicability of the so-called public policy exception") (citing Spectrum Sys. Int'l Corp., 78 N.Y.2d at 380-81, 575 N.Y.S.2d at 816, 581 N.E.2d at 1062; Rossi v. Blue Cross and Blue Shield of Greater New York, 73 N.Y.2d 588, 594, 542 N.Y.S.2d 508, 511, 540 N.E.2d 703, 706 (1989) (stating that public policy exception did not justify invasion of the attorney-client privilege for purpose of disclosing to a defamation plaintiff the content of a memorandum prepared by defendant's in-house counsel)).

3. Holdings Has Failed To Demonstrate That Invasion Of The Attorney-Client Privilege Is Warranted

Holdings does not dispute that the communications at issue are within the scope of the attorney-client privilege. Rather, it asserts that the State of New York's policy interest in the enforcement of valid contracts militates in favor of invasion of the attorney-client privilege. That is, they assert that if they are not permitted to invade the attorney-client privilege, then they will be deprived of any meaningful way to gather evidence that the defendants breached their duty pursuant to paragraph 4 of the Futures Agreement, which provides, in pertinent part, that "Plaintiffs Counsel . . . agrees, unless in the exercise of its independent professional judgment it determines otherwise, to recommend that its clients seriously consider [the] alternative dispute resolution procedure [described in paragraph 7 of the Futures Agreement]." (Letter from Stephen M. Juris, Ex. F at 2.)

However, Holdings has failed to cite any authority for the proposition that New York's interest in the enforcement of contractual duties is sufficiently strong to justify invasion of the attorney-client privilege. Nor have the plaintiffs cited any authority suggesting an inclination on the part of the New York Court of Appeals to expand the public policy exception beyond the narrow parameters articulated by the Jacqueline F. court.

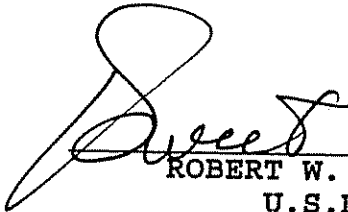
Furthermore, Holdings' argument in favor of invading the attorney-client privilege ignores the fundamental principal that the attorney-client privilege belongs to the client and not the attorney. In all five of the above-described circumstances where invasion of the privilege has been permitted, it is the nature of the client's conduct or the client's relationship to the litigant that justifies invasion. Here, Holdings has made no showing that (1) defendants' clients committed any act that would justify invading their privilege or (2) that the nature of the relationship between defendants' clients and Holdings is such that invasion is warranted. Finally, it should be noted that to the extent that GAF's agent executed the Future's Agreement on GAF's behalf, the allegedly intractable problem that Holdings has identified -- i.e., how to vindicate its rights pursuant to paragraph 4 of the Futures Agreement without invading the attorney-client privilege of the Weitz and Luxenberg and Ness Motley clients -- is, in no small measure, one of its own making. The problem of how to enforce paragraph 4 was foreseeable, and GAF's failure to insist on contractual terms that specified an enforcement mechanism does not justify the invasion into the privilege that Holdings now seeks.

Conclusion

Based on the foregoing, Holdings' motion is denied.

It is so ordered.

New York, NY  
July 13, 2005

  
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ROBERT W. SWEET  
U.S.D.J.