

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T :

HON. CONRAD D. SINGER,
Justice

DR. ABDUL G. MUNDIA and ROSHANARA MUNDIA,

Plaintiffs,

-against-

SABAA MUNDIA and MUNIB MUNDIA,

Defendants.

Index No.: 617863/2019
Motion Seq. No.: 004
Motion Submitted:
07/18/2022

DECISION AND ORDER
ON MOTION SEQ. 004

The following papers read on this motion:

Plaintiff's Order to Show Cause and Supporting Papers.....1
Defendants' Affirmation in Opposition and Supporting Papers.....2

Plaintiffs, Dr. Abdul G. Mundia and Rosha Nara Mundia ("Plaintiffs") move this Court (Motion Seq. 004) for an Order, which: 1) determines that the defendant, Sabaa Mundia, waived her attorney-client privilege with third-party witness Clark & Amadio, P.C.; and 2) compels Clark & Amadio, P.C., to appear for its deposition in this matter pursuant to CPLR §§ 3124 and 2308(b). The defendant, Sabaa Mundia, through counsel, has filed opposition papers. The defendant, pro se, Munib Mundia, has not filed any opposition papers. The plaintiffs' motion is determined as follows:

This is an action sounding in constructive trust, fraud, and unjust enrichment. The plaintiffs commenced this action by filing a summons and verified complaint on December 23, 2019. Issue was joined with defendant Sabaa Mundia serving her verified answer. On or about April 1, 2022, defendant, pro se, Munib Mundia, filed a motion to dismiss the verified complaint, which was denied by Decision and Order dated December 23, 2021 (NYSCEF Doc. No. 46).

The plaintiffs allege that on or about November 17, 2017, they purchased real property located at 50 Chestnut Street, in Garden City, Nassau County, New York [the “real property”]. They paid the sum of approximately \$235,000.00 as a down payment and financed the balance of the purchase price by borrowing approximately \$800,000.00 from City Mortgage. They permitted the defendants, Sabaa Mundia [“Sabaa”] and Munib Mundia [“Munib”] [collectively, the “Defendants”] to reside in the real property, and in exchange, the defendants agreed to pay the plaintiffs an amount equal to the property’s monthly mortgage payment, i.e., approximately \$5,400.00 per month. The plaintiffs allege that, in consideration of the loan made by Citi Mortgage to acquire the real property, they made and delivered their note and mortgage with respect to the real property in the amount of \$800,000.00, and that they continue to be liable upon the note and mortgage which encumbers the real property.

It is further alleged that, in or about June 2018, the defendants’ children were enrolled in the Garden City School District. The plaintiffs contend that, on or about June 5, 2018, the Garden City School District advised Sabaa that they required proof of defendants’ residency for the real property at 50 Chestnut, and that they requested a copy of the defendants’ deed or mortgage statement to complete the residency process. A copy of an email from the Garden City School District registrar is appended as Exhibit B to the plaintiffs’ motion papers, and the plaintiffs also cite to relevant excerpts from Sabaa’s deposition transcript. The defendants allegedly advised the plaintiffs that, in order to provide the requested proof to the Garden City School District registrar, the defendants’ attorneys, Clark & Amadio, P.C. [“C&A”], would prepare a written lease agreement for the real property.

The plaintiffs further allege that, rather than provide the plaintiffs with a lease agreement, the defendants thereafter presented the plaintiffs with a Bargain and Sale Deed for the real property

at 50 Chestnut St., which purports to transfer title to the Defendants, and that attorney Alfred Amadio, Esq., of C&A, prepared the Deed. They assert that, acting in reliance on the defendants' statements and representations, the plaintiffs unknowingly executed the document that the defendants presented.

It is alleged that on June 8, 2018, four days before the defendants asked the plaintiffs to execute the purported Bargain and Sale Deed, Sabaa entered into a written retainer agreement with C&A to represent her in a matrimonial action that she subsequently commenced against defendant Munib. It is further alleged that the defendants have failed to make any rent payments to the plaintiffs since June of 2019, and that they have not made any mortgage payments. It is further alleged that the plaintiffs have received written notice from the current holder and servicer of the mortgage on the real property that the Note and Mortgage are currently in default and that an action to foreclose the Mortgage is to be commenced. They filed this action seeking, *inter alia*, a judgment declaring the Deed to be null and void, rescinding the Deed, directing the defendants to execute a deed transferring the real property to the plaintiffs; and/or imposing a constructive trust as to the real property.

The plaintiffs previously served C&A with a subpoena to testify at a deposition in this matter, regarding C&A's preparation of the Bargain and Sale Deed transferring the subject real property from the plaintiffs to the defendants. The plaintiffs' counsel contend that C&A possesses relevant information concerning, *inter alia*, (a) Sabaa's request that C&A prepare a document which they could present to the Garden City School District to establish residency; and (b) C&A's preparation of the Deed; and (c) the true reason and/or motivation behind Sabaa's request; and (d) C&A's reason for preparing the Deed and not a Lease; and (e) C&A's statements to Munib, in which C&A advised Munib that the Deed is of "zero value" and was "simply being prepared to

satisfy the Garden City School District's requirements"; and (f) a February 28, 2019 memo that C&A prepared in which C&A advised Sabaa that the subject real property is owned by the plaintiffs.

Plaintiffs' counsel was advised by C&A that they would not be appearing for the deposition due to attorney-client privilege, that "any testimony requested in connection with the subpoena will clearly violate the attorney-client privilege", and that they would not be able to comply with the subpoena absent a written waiver from their client Sabaa. (*See Affirmation by Joseph E. Macy*, dated April 1, 2022 ["Macy Aff. In Support"], ¶ 11).

The plaintiffs' motion is filed pursuant to CPLR § 3124, which permits them to move to compel a person's compliance with a subpoena, and pursuant to CPLR § 2308(b), which governs motions filed to compel compliance with a non-judicial subpoena. In their opposition to the plaintiffs' motion, Sabaa's counsel contend that they have no objection to C&A being questioned about their conversations with Munib, who was not C&A's client, or about the circumstances of when and how C&A purportedly prepared the deed. They do, however, object to C&A being compelled to testify about conversations and communications C&A had with its client, Sabaa.

Attorney client privilege "shields from disclosure any confidential communications between an attorney and his or her client made for the purpose of obtaining or facilitating legal advice in the course of a professional relationship". (*Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 NY3d 616, 623 [2016] (citing to CPLR § 4503[a][1])). The privilege "exists to ensure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his embarrassment or legal detriment". (*Ambac Assur. Corp.*, 27 NY3d at 623).

The attorney client privilege is “in ‘obvious tension’ with the policy of this State favoring liberal discovery”. (*Ambac Assur. Corp.*, 27 NY3d at 624; *see also Siegel v. Snyder*, 202 AD3d 125, 130-131 [2d Dept. 2021] [“Obvious tension exists between the policy favoring full disclosure and the policy permitting parties to withhold relevant evidence”]). “[T]he burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity”. (*Siegel*, 202 AD3d at 130-131 [citation omitted]).

The attorney client privilege may be waived by the client, and “[a] waiver of the attorney-client privilege may be found where the client places the subject matter of the privileged communication in issue or where invasion of the privilege is required to determine the validity of the client’s claim or defense and application of the privilege would deprive the adversary of vital information”. (*Siegel*, 202 AD3d at 132 [citations omitted]).

Central to this matter is the parties’ intent, and their state of mind with respect to the circumstances surrounding the preparation of and execution of the subject Deed. The parties have asserted two vastly differing explanations for the plaintiffs’ executing the Deed, i.e., the plaintiffs contend that the defendants essentially duped them into signing a Deed to transfer them the subject real property, because the plaintiffs believed that they were executing a lease agreement to ensure that their granddaughters could remain in the Garden City School District. Defendant Sabaa, in contrast, maintains that the plaintiffs executed the subject Deed because they intended 50 Chestnut Street to be the family home for the defendants and their daughters, and this constructive trust action is one of several actions taken by the plaintiffs to retaliate against and destroy Sabaa for her commencing a matrimonial litigation against their son.

While Sabaa's counsel maintains that she is not using communications with her former counsel C&A as a "sword and shield", the Court finds that in defending this action Sabaa has placed all parties' intent in issue, including the defendants' intent in directing C&A to prepare the subject Deed, and the plaintiffs' intent in executing the subject Deed, and that by placing the parties' intent in issue, Sabaa has waived the attorney-client privilege as it relates to the defendants' request for C&A to prepare a deed and/or lease concerning the subject real property. (*See, New York TRW Title Ins. Inc. v. Wade's Canadian Inn & Cocktail Lounge Inc.*, 225 AD2d 863 [3d Dept 1996] [in defending against action involving imposition of an equitable mortgage, the defendants squarely placed the parties' intent in issue as it concerned a transaction involving the purchase of certain real property, and therefore the defendants waived the attorney/client privilege and the plaintiff was permitted to question former counsel regarding the issues of the intent and understanding of the parties to the underlying real estate transaction]).

For the foregoing reasons, the plaintiffs' motion is granted to the extent that defendant Sabaa Mundia is determined to have waived her attorney-client privilege with Clark & Amadio, P.C., with respect to issues concerning the parties' respective intent and understanding of the circumstances surrounding C&A's preparation of the subject Deed; and Clark & Amadio, P.C., will be compelled to appear for its deposition in this matter pursuant to CPLR §§ 3124 and 2308(b).

Accordingly, it is hereby:

ORDERED, that the plaintiffs' motion is granted to the extent that defendant Sabaa Mundia is determined to have waived her attorney-client privilege with Clark & Amadio, P.C., with respect to issues concerning the parties' respective intent and understanding of the circumstances surrounding C&A's preparation of the subject Deed pertaining to the real property located at 50 Chestnut Street in Garden City, Nassau County, New York 11530; and it is further,

ORDERED, that Clark & Amadio, P.C. is hereby compelled to appear for its deposition in this matter, and to comply with that portion of the Subpoena Ad Testificandum dated January 5, 2022 [NYSCEF Document No. 69], which required them to produce “All documents regarding the preparation of a deed dated June 11, 2018, transferring the real property located at 50 Chestnut Street, Garden City, New York, 11530, from Dr. Abdul G. Mundia and Roshanara Mundia to Sabaa Mundia and Munib Mundia” in C&A’s possession, custody or control, and required them to designate for said deposition an individual who is knowledgeable and prepared to testify about the above-named defendants’ request to prepare a deed and/or lease relating to the real property located at 50 Chestnut Street, Garden City, New York 11530; and it is further,

ORDERED, that Clark & Amadio, P.C., is directed to comply with said subpoena and to produce a witness for deposition no later than 30 days after being served with Notice of Entry and a copy of this Decision and Order; and it is further,

ORDERED, that all other requests for relief not specifically addressed herein shall be deemed DENIED.

Dated: July 27, 2022
Mineola, NY



HON. CONRAD D. SINGER, J.S.C.**ENTERED****Jul 29 2022****NASSAU COUNTY
COUNTY CLERK'S OFFICE**