

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION- CIVIL**

TOWERS WATSON DELAWARE, INC.,	:	APRIL TERM, 2017
	:	
Plaintiff,	:	NO. 02096
	:	
v.	:	COMMERCE PROGRAM
	:	
MORGAN, LEWIS & BOCKIUS, LLP, and	:	
JEREMY P. BLUMENFELD, ESQ.,	:	2352 EDA 2018
	:	
Defendants.	:	

Towers Watson Delaware, Inc. Vs Morgan, Lewi-OPFLD



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OPINION

Appellant, Towers Watson Delaware Inc. (“Towers”) has filed an interlocutory appeal from this court’s¹ Order of June 28, 2018, (“June 28th Order”)² directing Towers to comply with certain discovery requests propounded by defendants Morgan Lewis & Bockius LLP and Jeremy P. Blumenfeld, Esquire (collectively, “Morgan Lewis”). Appellant filed a timely 1925(b) concise statement of matters complained of on appeal. In said statement, Towers claims the information sought from its in-house counsel is protected by the attorney-client privilege and the work-product doctrine.

In this action, Towers asserts claims for legal malpractice against Morgan Lewis arising out of Morgan Lewis’ representation of Towers, and Morgan Lewis’ allegedly conflicting representation of Meriter in a class action, which subsequently led to a lawsuit by Meriter against Towers (the “Meriter Action”). Towers claims that Morgan Lewis advised Meriter’s attorneys

¹ The Order was signed by the Honorable Patricia A. McInerney two days before her retirement from the bench. This case was subsequently reassigned to the undersigned.

² As counsel for the parties were attempting to resolve these issues themselves, the court allowed them an opportunity to do so. Counsel were able to resolve several of the parties’ discovery disputes, but not this one.

(denominated as “Law Firm 2”) in the Meriter Action against Towers and that such advice was contrary to the interests of Morgan Lewis’ existing client, Towers.

One of the issues raised in this malpractice action is whether Towers effectively, prospectively waived its claims of conflict of interest in its 2010 and 2012 engagement letters with Morgan Lewis. In the Motion to Compel that gave rise to this appeal, Morgan Lewis requested the court to order the

production of documents relating to Towers’ agreement to the prospective conflict waivers in the 2010 and 2012 engagement letters, including but not limited to (1) Towers’ awareness of the potential for a conflict when it agreed to the prospective waiver in the 2010 engagement letter, and (2) Towers’ awareness of Morgan Lewis’ alleged conflict in 2012 when it reaffirmed the 2010 engagement letter.³

Towers objected that such information would reveal the advice and thought processes of Tower’s in-house counsel, who apparently reviewed the engagement letters, so that such information was protected from disclosure by the attorney-client privilege and the work product doctrine.

In granting the Motion to Compel in part,⁴ the court directed Towers to “amend its responses to [Morgan Lewis’] Interrogatories and produce all documents responsive to [Morgan Lewis’] Document Requests with respect to Towers’ informed consent to Morgan Lewis’ alleged conflict of interest.”⁵ This court also noted that, after oral argument, Towers had “agreed to let [Morgan Lewis] take the depositions of [Towers’] in-house counsel who dealt directly with Morgan Lewis with respect to the 2010 and 2012 retainer agreements containing the prospective conflict waivers.”⁶

³ Defendants’ Motion to Compel, filed on May 29, 2018, at ¶ 27.

⁴ The court denied without prejudice the portion of Morgan Lewis’ Motion requesting that Towers provide responses to Interrogatories and Documents Requests concerning Towers’ settlement of the Meriter Action, specifically the Pepper Hamilton analysis issued to Towers in connection therewith.

⁵ June 28th Order at ¶ 2.

⁶ *Id.* at fnt. 2.

Towers necessarily waived its claim of attorney-client privilege with respect to in-house counsel's involvement with approving the engagement letters because Towers denied that its in-house counsel had knowledge of Morgan Lewis' conflicting representation of Meriter, and Towers continues to deny that the waiver is valid and enforceable against it in this action.⁷

In response to Towers' claims of malpractice asserted in its Complaint, Morgan Lewis made the following assertions of law and fact in its New Matter in support of its affirmative defense of waiver:

1. [Towers] waived any conflict arising from [Morgan Lewis'] representation of clients in matters adverse to [Towers], as reflected in a July 2010 engagement agreement and a March 2012 email reaffirming the pertinent terms of that waiver. Copies of the 2010 engagement agreement and the March 2012 reaffirmation of the waiver are attached to the Complaint.
2. Both the 2010 engagement agreement and the 2012 reaffirmation of the conflict waiver were agreed to and approved with knowledge of in-house counsel for [Towers.]
3. The conflict waiver contained in the 2010 engagement agreement was given by and on behalf of [Towers and its affiliates], which were sophisticated business entities. Attorneys at [Towers] understood at the time that Morgan Lewis regularly represented clients in a broad range of commercial matters and that there was a significant likelihood that the waiver would result in Morgan Lewis engaging in one or more litigations or other legal matters that were adverse to [Towers].
4. At the time that the conflict waiver was reaffirmed in the March 2012 email attached to the Complaint, [Towers], through their in-house counsel and others, w[as] already aware that: (a) [Morgan Lewis was] representing Meriter in the Class Action; and (b) that Meriter was contemplating the assertion of claims against [Towers] relating to that litigation. Specifically, [Towers was] aware that Meriter was considering the assertion of claims arising from and related to [previous] actuarial and benefits consulting work performed by [Towers for Meriter]. Thus, the waiver was given with informed consent.⁸

⁷ Towers previously asked this court to hold that the conflict of which Towers accuses Morgan Lewis is so egregious as to be non-waivable. However, the court cannot do so until the contested facts underlying Towers' claim of conflict of interest are established as true at trial or otherwise. Once the extent of the conflict is known, then the court can determine if it is waivable or not. Until then, the parties must comply with their discovery obligations.

⁸ Defendants' Amended Answer with New Matter, filed January 11, 2018, at pp. 24-5.

In its Reply to Morgan Lewis' New Matter, Towers denied that its consent to the waiver of conflicts was informed with respect to the Meriter Action, and Towers specifically denied that its in-house counsel had knowledge of that conflict:

1. Admitted in part; denied in part. It is only admitted that true and correct copies of engagement documents between Morgan Lewis and [Towers] are attached to Plaintiff's Complaint. It is specifically denied that "[Towers] waived any conflict arising from [Morgan Lewis'] representation of clients in matters adverse to [Towers], as reflected in a July 2010 engagement agreement and a March 2012 email reaffirming the pertinent terms of that waiver." To the contrary, the representations contained in both engagement documents are insufficient, as a matter of law, to support a finding of conflict waiver as this Court already held by Order dated November 8, 2017.⁹ By way of further answer, conflict waiver cannot occur absent a knowing and intelligent decision by the client following a full and complete disclosure of the conflict by the client's counsel. [Morgan Lewis] did not satisfy – and [does] not contend that [it] satisfied – [its] duties of disclosure to [Towers] to enable [Towers] to knowingly and intelligently waive [Morgan Lewis'] conflict at issue in this litigation. In addition, [Morgan Lewis] failed to notify [Towers] of the conflict at issue in this litigation despite an affirmative duty to do so under the law, Rules of Professional Conduct and both engagement documents. Finally, the representations in this paragraph other than those expressly admitted or denied by [Towers] constitute conclusions of law to which no responses are required and are deemed denied under Pa.R.C.P. 1029.

2. Admitted in part; denied in part. It is only admitted that the engagement documents referenced in the corresponding paragraph of Defendants' New Matter were approved by in-house counsel for [Towers]. [Towers] is unable to admit or deny the representation regarding "knowledge" in the corresponding paragraph of Defendants' New Matter because [Morgan Lewis] fail[ed] to define the nature of the "knowledge" to which [it] refer[s] and therefore this representation is deemed denied under Pa. R.C.P. 1029. By way of further response, [Towers] incorporates its response to paragraph 1 *supra*.

3. Admitted in part; denied in part. It is admitted that [Towers and its affiliates] are business entities. It also is admitted that [Towers] understood that Morgan Lewis represented clients in a broad range of commercial matters. [Morgan Lewis'] averment regarding [Towers'] sophistication constitutes a legal conclusion to which no response is required under the Rules. By way of further

⁹ In the court's Order overruling most of Morgan Lewis' Preliminary Objections to the Complaint, the court noted that "[t]here are disputed issues involving, *inter alia*, notice that cannot be resolved at this stage in the proceedings." Order entered November 8, 2017.

response, it is denied that a client's sophistication constitutes a valid and legal substitute for informed consent, and it is further specifically denied that [Towers] understood that "there was a significant likelihood that the waiver would result in Morgan Lewis engaging in one or more litigations or other legal matters that were adverse to [Towers]." To the contrary, [Towers] was not in a position to gauge such likelihood of conflicts arising from Morgan Lewis' representation of other parties and was therefore dependent on Morgan Lewis to determine when its representation was adverse to Towers and to timely disclose such conflicts to Towers as required under the law, the Rules of Professional Conduct and the operative engagement documents. By way of further response, [Morgan Lewis] failed to satisfy [its] legal, ethical and contractual obligations owed to [Towers], as discussed in paragraph 1, *supra*, despite [Morgan Lewis'] knowledge, understanding, and appreciation as early as 2010 that Morgan Lewis "cannot be adverse to Towers" and "should not be involved in discussions about Meriter's potential claims against Towers" in the Class Action referenced in Plaintiff's Complaint and Morgan Lewis' repeated reiteration of this position throughout the duration of the Class Action to Meriter, Meriter's insurer, and a second law firm that was retained by Meriter for the express purpose of exploring the possibility of bringing claims against third parties. *See* Plaintiff's Complaint at ¶¶ 20-23, 27, 29-31 which is incorporated herein by reference.

4. Admitted in part; denied in part. It is only admitted that, by March 2012, [Towers] was aware that [Morgan Lewis was] representing Meriter in the Class Action. It is specifically denied that, by March 2012, [Towers was] aware that (a) "Meriter was contemplating the assertion of claims against [Towers] relating to that litigation," or (b) "Meriter was considering the assertion of claims arising from and related to [previous] actuarial and benefits consulting work performed by [Towers for Meriter]." To the contrary, [Towers] became aware that Meriter was considering claims against [Towers] in late November 2014, when a lawyer from [Meriter's] Law Firm 2 contacted an in-house counsel at [Towers] to advise of Meriter's potential claims against [Towers] and, on January 5, 2015, when Meriter filed its complaint against [Towers] and others. By way of further response, it is specifically denied that [Towers] "waived" with "informed consent" any conflict as represented in the corresponding paragraph of Defendants' New Matter for the reasons stated in paragraph 1, *supra*.¹⁰

By responding to Morgan Lewis' allegations in this manner, Towers created a dispute of material fact regarding its in-house counsel's (lack of) knowledge of the claims giving rise to the Meriter Action, as well as in-house counsel's and Towers' alleged informed consent to Morgan Lewis' alleged conflict in advising Meriter's Law Firm 2 regarding Meriter's claims against

¹⁰ Plaintiff's Reply to Defendants' New Matter, filed January 19, 2018, at pp. 1-4.

Towers. Yet Towers seeks in this appeal to prevent Morgan Lewis from exploring in discovery whether Towers' in-house counsel or other agents did know about, and consent to, the conflicting representation. Towers may not invoke the attorney client privilege and work product doctrine in this manner.

The Restatement (Third) of the Law Governing Lawyers is replete with examples of instances where a lawyer is permitted to rely upon privileged materials in defending itself against a client who attempts to use the privilege as a sword rather than a shield, as such situations are colloquially described.

Decisions sometimes invoke a shield-but-not-a-sword rationale - a client should be permitted to assert the privilege only in a defensive posture. The shield-sword metaphor fails to capture the sense of the doctrine fully. If followed literally, it could lead to upholding erroneously a claim of privilege, for often the client asserts the privilege defensively. The preferred approach is to require that the client either permit a fair presentation of the issues raised by the client or protect the right to keep privileged communications secret by not raising at all an issue whose fair exposition requires examining the communications.¹¹

Since the client, Towers, has raised the issue of its in-house counsel's (lack of) knowledge and consent in an attempt to defeat Morgan Lewis' defense of waiver, Towers must permit its former attorneys, Morgan Lewis, to examine through discovery Towers' in-house counsel's relevant communications in order to enable a "fair exposition" and "fair presentation" of the disputed issues of knowledge and consent. Such discovery requires Towers to provide substantive responses to the Document Requests and Interrogatories at issue here, as well as to

¹¹ Restatement (Third) of the Law Governing Lawyers (2000) § 80 Reporter's Note to Comment (b) 'Putting a privileged communication into issue.' *See also id.* at § 83, Comment (d) 'The exception for a lawyer's defense against a charge of wrongdoing' ("the attorney-client privilege does not apply to the lawyer's self-protective use of reasonably relevant but otherwise privileged communications concerning disputed circumstances of a representation."); *id.* at § 64 ("A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to defend the lawyer or the lawyer's associate or agent against a charge or threatened charge by any person that the lawyer or such associate or agent acted wrongfully in the course of representing a client.")

permit Morgan Lewis to depose Towers' in-house counsel regarding the 2010 and 2012 engagement letters and in-house counsel's knowledge of Meriter's potential claims against Towers.¹²

CONCLUSION

For all the foregoing reasons, the court respectfully requests that its Order entered June 28, 2018 be affirmed on appeal.

Dated: January 22, 2019



NINA W. PADILLA, J.

¹² *See id.* at § 80 (“The attorney-client privilege is waived for any relevant communication if the client [Towers] asserts as to a material issue in a proceeding that: (a) the client [Towers] acted upon the advice of a lawyer [in-house counsel] or that the advice was otherwise relevant to the legal significance of [Towers'] conduct [knowledge, consent, waiver]; or (b) a lawyer's [Morgan Lewis'] assistance was ineffective, negligent, or otherwise wrongful.”)