SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York,

Petitioner,

-against-

THE TRUMP ORGANIZATION, INC.; DJT HOLDINGS LLC; DJT HOLDINGS MANAGING MEMBER LLC; SEVEN SPRINGS LLC; ERIC TRUMP; CHARLES MARTABANO; MORGAN, LEWIS & BOCKIUS, LLP; and SHERI DILLON,

Respondents.

Index No. 451685/2020

Motion Sequence 007: Reargue

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF THE ATTORNEY GENERAL'S MOTION FOR LEAVE TO REARGUE

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INTRODUCTION

In orders dated October 16, 2020, and October 30, 2020, the Court entered privilege rulings that permit two respondents—the Trump Organization (TTO) and Charles Martabano—to withhold a subset of responsive communications between each Respondent and Ralph Mastromonaco, a third-party engineer who assisted the Trump Organization with engineering plans for potential development of the Seven Springs property. NYSCEF Nos. 280, 283. The Court's rulings appear to have relied on Respondents' blanket characterization on the TTO and Martabano privilege logs that "an engineering consultant qualifies as a privileged agent under *Spicer v. GardaWorld Consulting (UK) Ltd.*, 181 A.D.3d 413 (1st Dep't 2020)." *E.g.*, Oct. 30 Court Ruling on Martabano Privilege Log (entry for NYAGREV00170866) ("Oct. 30 Log"); Oct. 16 Court Ruling on TTO Privilege Log (entry for NYAGREV00049607) ("Oct. 16 Log").

Petitioner the Office of the New York State Attorney General (OAG) respectfully seeks reargument on three grounds that the Court may have overlooked or misapprehended. *First*, the *Kovel* doctrine on which Respondents rely has long been understood to apply *only* where the third party is acting as an interpreter whose participation is necessary for attorney and client to communicate, *not* where the third party's role is merely to assist an attorney in performing her work. The decision on which Respondents rely (*Spicer*) merely overturned a blanket ruling that no privilege applied, leaving the trial court free to apply longstanding *Kovel* principles on remand. To the extent the Court's rulings here rely on a different construction of the law, OAG respectfully requests that the Court reconsider.

Second, even if merely assisting an attorney provide legal advice to her client could suffice to extend the attorney-client privilege, Respondents never met their burden to establish, as to any of the withheld communications, that Mr. Mastromonaco in fact performed that narrow function. To the contrary, the record shows that Mr. Mastromonaco performed independent

engineering work; he was not assisting Mr. Martabano, an experienced land-use attorney, with understanding local land-use law or complex facts requiring engineering advice. And Respondents never even sought to present any evidence that would support a conclusion that they had a reasonable expectation of confidentiality between themselves and Mr. Mastromonaco.

Third, the Court may have overlooked or misapprehended the facts and law regarding the waiver of privilege claims when a party selectively discloses information to an adversary, including—as here—to the Internal Revenue Service.

ARGUMENT

I. Standard of review.

A motion for leave to reargue "shall be based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." C.P.L.R. 2221(d)(2). A motion for leave to reargue is left to the Court's sound discretion. *Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 971, 971 (1st Dep't 1984); *see also Am. Alt. Ins. Corp. v. Pelszynski*, 85 A.D.3d 1157, 1158 (2d Dep't 2011).

A motion for leave to reargue is timely if made within thirty days after service of a copy of the order and written notice of its entry. C.P.L.R. 2221(d)(3). This motion is timely because it is made within thirty days of the October 20 notice of entry of the October 16 Order. NYSCEF No. 281.

II. Petitioner's motion for leave to reargue should be granted.

OAG respectfully seeks reargument on the ground that the Court may have overlooked or misapprehended controlling law regarding when the attorney-client privilege can extend to cover a non-client third party, and may have overlooked certain facts regarding the Trump Organization's waiver of privilege over its communications with Mr. Mastromonaco.

A. The attorney-client privilege does not apply to communications disclosed to a third party, and the *Kovel* exception does not apply here.

It is undisputed that the attorney-client privilege is waived if "a communication is made in confidence but subsequently revealed to a third party." *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016). Because Mr. Mastromonaco is a non-client third party, communications to or from an attorney that include Mr. Mastromonaco ordinarily would not be protected. *See id.* Despite that principle, the Court's October 16 ruling regarding documents identified on the TTO privilege log designated 20 communications with Mr. Mastromonaco as attorney-client privileged.[1] The Court's October 30 ruling regarding documents identified on the Martabano privilege log likewise designated 32 communications with Mr. Mastromonaco as attorney-client privileged.[2]

In designating these documents as privileged, the Court indicated that it was relying on the *Kovel* doctrine to protect communications between Mr. Mastromonaco and the Trump Organization or Mr. Martabano. Specifically, by so-ordering as privileged certain of the withholdings identified on Respondents' privilege logs, the Court appears to have relied on Respondents' notations on both privilege logs contending that these communications were privileged because Mr. Mastromonaco "spent at least some portion of [his] time helping counsel to understand various aspects of the . . . transaction," Oct. 16 Log at entry NYAGREV00049607 (citing *Spicer*, 181 A.D.3d 413), or because a "consulting expert qualifies under the attorney-

[1] *See* Oct. 16 Log at entries NYAGREV00049607, 00049795, 00049797, 00049877, 00049880, 00049883, 00049884, 00049885, 00049913, 00049936, 00049941, 00049944, 00049946, 00049948, 00049949, 00049950, 00049954, 00049955, 00049961, 00049962.

[2] *See* Oct. 30 Log at entries NYAGREV00170946, 00172263, 00172264, 00172265, 00172292, 00172293, 00172318, 00172454, 00172455, 00172456, 00172457, 00172638, 00172639, 00172817, 00172818, 00172819, 00172985, 00173007, 00173116, 00173169, 00173385, 00173526, 00173527, 00173528, 00173529, 00173530, 00174383, 00174400, 00174408, 00174439, 00174451, 00174484.

client privilege as a privileged agency if the expert is consulted to improve the attorney's comprehension of the facts/serve as an interpreter," *id.* (citing *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961)).

Petitioner respectfully contends that the Court may have overlooked or misapprehended the narrow application of the *Kovel* doctrine, which extends the attorney-client privilege *only* when the third party plays a role "analogous to an interpreter," *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999) (citing *Kovel*, 296 F.2d at 922), whose participation is necessary to "facilitate communications" between the attorney and the client, *People v. Osorio*, 75 N.Y.2d 80, 84 (1989). Providing "help" or "assistance" to the attorney is not sufficient to extend the attorney-client privilege to cover communications with a third party, because "[t]he privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client." *JBGR LLC v. Chicago Title Ins. Co.*, 56 Misc.3d 1215(A) at *2 (Sup. Ct. Suffolk Cty. 2017). The *Kovel* doctrine thus applies *only* when, as to a particular communication, the third party is "*necessary* to enable the attorney-client communication and the client has a reasonable expectation of confidentiality." *Galasso v. Cobleskill Stone Prods., Inc.*, 169 A.D.3d 1344, 1346-47 (3d Dep't 2019) (rejecting argument that *Kovel* applies to valuation report because "the purpose of the report was not to facilitate or clarify communications between plaintiff and his attorneys"); *United States v. Richey*, 632 F.3d 559, 562 (9th Cir. 2011); *United States v. Ackert*, 169 F.3d 136, 138-40 (2d Cir. 1999); *United States v. Adlman*, 68 F.3d 1495, 1500 (2d Cir. 1995).

In other words, the critical analysis is not simply whether the communication that included Mr. Mastromonaco was of a legal or business nature, but whether Mr. Mastromonaco's role was necessary to the provision of legal advice by the attorney to the client. If not, his

inclusion waives any privilege. Were it otherwise, a business could hire a slew of non-legal professionals through an attorney (or merely have them work through an attorney), assert in a general way that the non-legal professional "helped counsel to understand" certain facts, and thereby shield a range of business conduct from legitimate examination by a law enforcement agency. That would eviscerate core *Kovel* principles, under which "if the advice sought is the accountant's rather than the lawyer's, no privilege exists," 296 F.2d at 922; and it would undermine the central premise, frequently articulated by the Court of Appeals, that the privilege is an obstacle to the truth-finding process and thus must be "strictly confined within the narrowest possible limits consistent with the logic of its principle." *Ambac*, 27 N.Y.3d at 624 (quoting 8 Wigmore, Evidence § 2291 at 554 (McNaughton rev. 1961)).

The First Department's recent decision in *Spicer*, 181 A.D.3d 413 (1st Dep't 2020), merely applies these principles. In *Spicer*, one party to a sales transaction hired a financial advisor who engaged in communications with that party's counsel.[3] The lower court had accepted a "*blanket* challenge" to privilege assertions over more than 500 communications because the consultant was viewed as a non-confidential third party. *Id.* at 414 (emphasis added); *see Spicer v. Gardaworld Consulting (UK) Ltd.*, 2019 N.Y. Slip Op. 32375[U], at 2, 4 (Sup. Ct. N.Y. Cty. 2019). The First Department reversed. In the decision, the court noted that communications in the presence of third parties generally are not privileged. *Spicer*, 181 A.D.3d at 414. But, the court explained, it was incorrect to accept a "blanket challenge" to privilege over such communications where there was "unrebutted evidence" that the financial advisor spent "some portion of its time helping counsel to understand various aspects of the transaction" *and*

[3] As Supreme Court explained in *Spicer*, the documents at issue were "those documents that Hogan Lovells and the seller plaintiffs shared with KDC," the valuation consultant. *Spicer v. Gardaworld Consulting (UK) Ltd.*, 2019 N.Y. Slip Op. 32375[U], at 3 (Sup. Ct. N.Y. Cty. 2019).

was thus "*necessary* to enable attorney-client communication"—the sort of interpretive role the *Kovel* doctrine has covered. *Id.* at 414 (emphasis added).

The Court's October 16 and October 30 Orders regarding the TTO and Martabano privilege logs appear to have accepted Respondents' reference to the First Department's observation that the financial advisor "spent at least some portion of its time helping counsel to understand various aspects of the stock sale transaction." *E.g.*, Oct. 16 Log at entry NYAGREV00049607 (citing *Spicer*, 181 A.D.3d at 414). Petitioner respectfully seeks leave to reargue on this point. In potentially adopting Respondents' reference to that language, the Court may have overlooked that the First Department's holding did not stop with that observation, but with the further conclusion that this assistance was "*necessary*" to enable the attorney and client to communicate with one another. Mere assistance is not enough, as set forth above.

B. Even if a non-party engineer's mere assistance to a lawyer could shield those communications under the attorney-client privilege, Respondents have not established that the privilege applies here.

For the reasons described in Part II.A *supra*, the First Department's decision in *Spicer* did not overrule existing law and create a new test whereby assistance to an attorney suffices to shield all such "helpful" communications from disclosure under the attorney-client privilege. Even assuming that *Spicer* did expand the *Kovel* doctrine to protect communications that "help[] counsel to understand" a transaction (without the further showing that this assistance was necessary to permit the attorney and client to understand one another), Petitioner submits that leave to reargue should be granted because the Court may have overlooked facts that distinguish this case from *Spicer* in two critical ways.

1. As noted above, *Spicer* stands at most for the proposition that, although communications involving a third party generally are not privileged, a *blanket* rejection of the privilege is incorrect because *some* underlying documents may still be privileged where the third

party performs an interpretive role necessary for an attorney to provide legal advice. 181 A.D.3d at 414. In *Spicer*, neither the Appellate Division nor Supreme Court ruled whether evidence showed that any particular document involved that sort of interpretive work. Because those issues were not before the Appellate Division, the party seeking disclosure in *Spicer* remained "free to challenge specific documents on plaintiffs' log" on remand. *Id.* at 415.

Here, by contrast, Respondents presented no evidence showing that Mr. Mastromonaco, in any of the 52 documents the Court held were privileged on the October 16 Log and October 30 Log, was performing the limited interpretive function *Kovel* protects. "The burden of proving each element of the privilege rests upon the party asserting it." *Osorio*, 75 N.Y.2d at 84. As explained in Petitioner's Reply Memorandum of Law—and as the Court previously acknowledged—no Respondent presented admissible facts to meet this burden. *See* OAG Reply Mem. 2-6 (NYSCEF No. 240); Sept. 23 Order (NYSCEF No. 255) ("Preliminarily, none of the opposition papers that the multiple respondents filed contains an affidavit from anyone with personal knowledge of the factual matters at issue. Accordingly, the opposition papers that respondents submitted are not in admissible form. That fact alone arguably justifies granting the petition in its entirety.") (citing *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560 (1980)).

In contrast to *Spicer*, where "[t]he unrebutted evidence" was that the third-party professional in at least one instance performed work necessary to fall within the scope of the *Kovel* privilege, 181 A.D.3d at 414, the Court here may have overlooked the fact that in this case, the unrebutted evidence cuts precisely the other way: Mr. Mastromonaco was not performing the limited role that *Kovel* covers. His purpose was not to help TTO understand its own lawyers, or to help TTO's lawyers understand any complex factual issue necessary to advise their client; to the contrary, he testified that in performing his work on the Seven Springs project,

he did not (and was not hired to) interpret or translate information between TTO and any of its lawyers, or to provide legal advice. *See* First Aff. ¶ 233.

At a minimum, because *Spicer* rejected a conclusion that a "blanket" privilege applies to documents involving a third-party where the purported privilege holder asserted a *Kovel*-like claim, 181 A.D.3d at 414, the Court here should, on reargument, consider anew whether, for each document the Court concluded was privileged, the Trump Organization established through competent evidence that Mr. Mastromonaco was performing the limited interpretive role the *Kovel* doctrine covers.

2. Leave to reargue is also warranted on the ground that the Court may have overlooked another distinction between this case and *Spicer*: the First Department relied in part in the fact that there was a "reasonable expectation that the confidentiality of communications between [the party's] counsel and [the financial advisor] would be maintained"—based on both a promise from the financial advisor and a term in a written agreement to that effect. 181 A.D.3d at 414. Here, by contrast, Respondents have never even contended that any such expectation of confidentiality existed between themselves and Mr. Mastromonaco—much less presented any evidence that would support such a conclusion. Indeed, Mr. Mastromonaco specifically testified that he understood that he was hired for the purpose of submitting his work to town officials—of disclosing his work to others. First Aff. ¶¶ 233 (citing Ex. 158 at 15:5-23).

The Trump Organization's own conduct during the course of this investigation reinforces the conclusion that there was no reasonable expectation of privacy involving communications with Mr. Mastromonaco. OAG served subpoenas for documents and testimony on Mr. Mastromonaco on December 5, 2019, and promptly contacted TTO to confirm that TTO did not assert any privilege in connection with those subpoenas. First Aff. ¶¶ 233-41. Despite the fact

that TTO provided privilege instructions and pre-reviewed responsive records for privilege in connection with many other subpoenas OAG has served in the course of this investigation—including those served on Cushman & Wakefield, Morgan Lewis & Bockius LLP, Vinson & Elkins LLP, Sheri Dillon, Charles Martabano, and others, *see* First Aff. ¶¶ 117-19, 151-52, 163, 171, 192, 194-95, 213-30—the Trump Organization never asserted any such right, despite clear notice, in connection with the subpoenas served on Mr. Mastromonaco.[4] *Id.* ¶¶ 233-48. If TTO had believed there was any reasonable expectation of confidentiality in connection with communications with Mr. Mastromonaco, it stands to reason that TTO would have asserted a right to provide privilege instructions or review Mr. Mastromonaco's responsive records—as they have done in literally dozens of other instances over the course of OAG's investigation.[5]

III. Any privilege that may have applied to communications with Mr. Mastromonaco has been waived by selective disclosure of information to adversaries.

Finally, OAG respectfully submits that this motion for leave to reargue should be granted on the ground that the Court may have overlooked or misapprehended facts and law regarding the waiver of any privilege claims through selective disclosure.

First, privilege may not be used as a "sword and shield" via selective disclosure, including to a governmental agency. *See People v. Greenberg*, 50 A.D.3d 195, 202-03 (1st Dep't 2008). Here, the Trump Organization submitted the Seven Springs appraisal to the Internal

[4] In response to the Court's orders that certain of Mr. Mastromonaco's communications are privileged, and notwithstanding that TTO has never made this request despite its awareness for eleven months that OAG had subpoenaed records and testimony from Mr. Mastromonaco, OAG has segregated documents Mr. Mastromonaco produced in response to the December 2019 subpoena and will not review or rely on them pending resolution of this issue.

[5] Although OAG does not seek reargument on this ground, OAG expressly preserves its argument that no communications with Mr. Mastromonaco are protected because the Trump Organization stated to OAG in December 2019 that it was asserting no privilege at all as to Mr. Mastromonaco. *See* OAG Mem. 21-22, 37 n.12, 57 (NYSCEF No. 13); First Aff. ¶¶ 231-40 (NYSCEF No. 14); OAG Reply Mem. 39 (NYSCEF No. 240).

Revenue Service for the purpose of substantiating a multimillion dollar tax deduction, and there is no dispute that Mr. Mastromonaco's communications were a necessary component of the underlying work that supported that appraisal. *See* First Aff. ¶¶ 233, 235, 237-38. Those communications must therefore be disclosed on the established principle that a party may not rely on certain materials to claim a benefit but then shield the underlying foundation from disclosure. *See In re N.Y. City Asbestos Litig.*, 109 A.D.3d 7, 13-14 (1st Dep't 2013).

Second, and relatedly, disclosures to third parties waive the attorney-client privilege not only as to that communication, but also as to communications that relate to the same subject matter: "The waiver of the attorney-client privilege . . . normally compels the production of other documents protected by the privilege which relate to the same subject." *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 109 (Sup. Ct. N.Y. Cty. 2003) (quoting *In re Baker*, 139 Misc. 2d 573, 576 (Sup. Ct. Nassau Cty. 1988)). TTO has selectively disclosed hundreds of communications between Mr. Mastromonaco and TTO's attorneys in the course of OAG's investigation. *See, e.g.*, First Aff. ¶ 246. Having done so, communications relating to the same subject matter can no longer be shielded by any privilege. To permit otherwise would be to allow a party to present a selective version of the facts that would impede the truth-finding process. *Vill. Bd. of the Vill. of Pleasantville v. Rattner*, 130 A.D.2d 654, 655 (2d Dep't 1987) ("selective disclosure is not permitted as a party may not rely on the protection of the privilege regarding damaging communications while disclosing other self-serving communications").

The Court's Orders permitting Respondents to withhold certain communications with Mr. Mastromonaco did not address these dispositive waiver arguments, and OAG respectfully suggests that the Court may therefore have overlooked these facts and law.

CONCLUSION

OAG respectfully requests that the Court grant Petitioner's motion for leave to reargue.

DATED: November 19, 2020

Respectfully submitted,

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