

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

MERKAZ THE CENTER, INC.,

Index #1538/2014
NOTICE OF
ENTRY

Plaintiff,

- against -

AISH HATORAH NEW YORK, INC., RABBI DAVID
COHEN, KENNETH YITZCHAK GREENMAN, PETER
HOCHFELDER, MITCH KUFLIK, VICTOR LIPNITSKY,
STUART SCHABES, INVOTEX, OBER KALER GRIMES
AND SHRIVER, P.C., DAVID MARKOWITZ, JACOB
FETMAN,

Defendants.

PLEASE TAKE NOTICE that attached herewith is a true copy of an order signed by the
Hon. C. Demarest and entered in the within court on April 30, 2015.

DATED: New York, N.Y.
April 30, 2015



Jon A. Lefkowitz
Attorney for Plaintiff
1222 AVE. M, SUITE 204
Brooklyn, New York 11230
(718) 692-0459

At an IAS Term, Com 1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of April, 2015.

P R E S E N T:

HON. CAROLYN E. DEMAREST, JSC.

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MERKAZ THE CENTER, INC.,

Plaintiff(s),

-against-

**Amended
Order**

Index No. 3432/2014

AISH HATORAH NEW YORK, INC., RABBI DAVID COHEN, KENNETH YITZCHAK GREENMAN, PETER HOCHFELDER, VICTOR LIPNITSKY, STUART SCHABES, INVOTEX, OBER KALER GRIMES AND SHRIVER, P.C., DAVID MARKOWITZ, and JACOB FETMAN,

Defendant(s),

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By Order dated April 23, 2015, this Court granted defendants' motion to stay discovery pending the outcome of the motion to dismiss, with the exception of disclosure of the report of Victor Lipnitsky ("Lipnitsky"), a forensic accountant deposed in this matter on March 31, 2015. Plaintiff Merkaz the Center, Inc. ("Merkaz"), seeks disclosure of a "report" or "letter" prepared by Lipnitsky regarding his preliminary findings, along with the supporting documentation upon which Lipnitsky relied in order to draw his conclusions. The letter and supporting documentation have been provided to this Court for *in camera* review. Defendants claim that this document is protected by attorney work-product privilege pursuant to CPLR 3101(d)(2).

According to Lipnitsky, he was first contacted by Rabbi Greenman ("Greenman"), the executive director of Aish Hatorah New York, Inc. ("Aish"), in connection with the Beis Din proceeding (the "Arbitration") that is now the subject of the instant matter and the related matter, *Aish Hatorah v Fetman*, index number 22057/13 (Deposition of Lipnitsky at 24). Lipnitsky then advised Greenman to hire a law firm, which in turn would hire Lipnitsky's firm, Invotex, to work on the matter (Deposition at 30). Aish hired the law firm of Ober Kaler, which contracted with Invotex for its services on October 15, 2013.

In connection with his investigation, Lipnitsky spoke with Jacob Fetman ("Fetman"), the CFO of Aish, and collected documents from Fetman (Deposition at 36-38). According to the affirmation of Stuart Schabes, Esq. ("Schabes"), dated April 25, 2014, the first arbitration session, held on October 10, 2013, had already taken place before his firm, Ober Kaler, or Lipnitsky, were retained. Schabes further states that it was during this first session that the arbitrator, Rabbi David Cohen (the "Arbitrator"), suggested that Aish retain a forensic accountant.

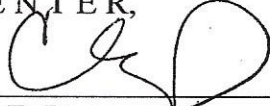
Following his preliminary investigation, Lipnitsky gave testimony at the second arbitration session, held on October 22, 2013, at which he presented schedules he had prepared based on the information and documents he had gathered up to that point (Deposition at 52). Lipnitsky also stated that he prepared "preliminary notes in the form of a letter", which he sent to Schabes only, which estimated that the amount stolen by Fetman from Aish was \$2.4 million (Deposition at 63-64, 120, 128). This letter is dated December 17, 2013, the same date that the Arbitrator issued his award. Lipnitsky states that the schedules attached to the letter were presented during the arbitration and were shared with Fetman and his attorney (Deposition at 126, 129). However, Lipnitsky also stated that, following the last arbitration session on December 9, 2013, he had a phone conversation with the Arbitrator in which the Arbitrator sought clarification of the total dollar amount that Lipnitsky believed had been stolen by Fetman and that Lipnitsky stated to the Arbitrator that it was approximately \$2.4 million (Deposition at 65-66, 129).

Materials prepared by an accountant for attorneys in anticipation of litigation are protected by privilege as attorney work product (*see Straus v Ambinder*, 61 AD3d 672 [2d Dept 2009]). Plaintiff argues that Lipnitsky's letter is not covered by privilege because it was not prepared at the specific request of an attorney and because it was prepared as part of an investigation, not for trial. However, Lipnitsky was directly retained by the law firm of Ober Kaler, and he did prepare the letter at the request of Schabes, one of the firm's attorneys. Further, the fact that Lipnitsky was retained after arbitration had already begun supports defendants' argument that Lipnitsky's letter was prepared in anticipation of litigation, and therefore would be covered by privilege.

However, the fact that Lipnitsky testified at the arbitration proceeding as an expert witness and had disclosed some of the documents to Fetman and his attorneys, as well as the Arbitrator, demonstrates that privilege was waived. Because Lipnitsky was used as a witness and not only as an investigator, the work-product privilege was waived with respect to matters covered in his testimony (*see United States v Nobles*, 422 US 225, 239 [1975]). Further, work-product privilege may be waived by the conduct of the parties, such as where a party selectively discloses certain privileged material but withholds certain underlying data, in which case principles of fairness may require a more complete disclosure (*see Matter of New York City Asbestos Litig.*, 2011 NY Slip Op 33158[U], *25 [NY County Sup Ct 2011]). Here, Lipnitsky disclosed the documents he used and the schedules he prepared during his investigation at the arbitration proceeding. Based on the Court's *in camera* review of Lipnitsky's letter, this letter contains nothing more than a summary of Lipnitsky's findings based on the documents that have already been disclosed.

Moreover, the defendants have not raised the issue of work-product privilege in their two prior motions for a protective order both before this Court and before the Appellate Division, nor did they provide a privilege log in response to plaintiff's notice of deposition, dated October 7, 2014. Following the Court's orders of December 3, 2014 and March 4, 2015 requiring Lipnitsky to appear for deposition and provide his written report "if there is a written report", defendants moved for a protective order to stay discovery by order to show cause dated March 24, 2015. This Court denied the motion and reiterated that the deposition of Lipnitsky was to proceed as previously ordered. Defendants then sought a protective order from the Appellate Division but were also denied. Defendants did not assert work-product privilege in either of these motions for a protective order and have thereby waived the privilege. Therefore, the privilege is deemed waived and defendants are directed to disclose the letter and all supporting documentation to Merkaz on or before May 4, 2015.

This constitutes the decision and order of the Court.

ENTER,


Carolyn E. Demarest
J. S. C.