SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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THE PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

- v -

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

Respondents.

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INDEX NO. 451685/2020

MOTION DATE 11/19/2020

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301

were read on this motion to REARGUE.

Upon the foregoing documents, it is hereby ordered that the instant motion to reargue is granted, and upon reargument this Court decides and orders as follows.

As set forth in this Court's Decision and Order on Motion dated September 23, 2020 (the "Prior Decision"), NYSCEF Doc. No. 255, familiarity with which may assist the reader, in this special proceeding, as now relevant, petitioner, the People of the State of New York, by Letitia James, Attorney General of the State of New York, seeks to compel the production of documents allegedly relevant to an ongoing investigation into potential fraud or illegality by respondent The Trump Organization ("TTO") and related entities. Specifically, petitioner is investigating whether TTO improperly inflated, on various financial statements, the value of certain of its real estate assets in order to obtain tax and other financial benefits. The Prior Decision directed respondents to produce various categories of documents to this Court for an in camera inspection as to whether or not they were shielded by the attorney-client privilege or other protections against disclosure, while noting (at 2) that "disclosure to a third-party waives any privilege." Interestingly, the Prior Decision does not mention the name "Ralph Mastromonaco," whose sending or receipt of certain documents or other communications is the focus of the instant motion.

Respondents timely produced thousands of documents for the aforesaid inspection, and in Decisions and Orders dated October 16 and 30, 2020 ("the Disclosure Decisions"), this Court held that, pursuant to the "Kovel" doctrine, some, but not all, of the documents that Mr. Mastromonaco possessed were privileged. In United States v Kovel, 296 F2d 918 (1961), the United States Supreme Court held that communications with a third-party non-lawyer could

nonetheless be privileged if he or she were explaining complex technical subjects (in that case, accounting) to a lawyer in order for the lawyer to provide legal advice to the client.

Since Kovel, various federal and state courts have endorsed different nuanced standards for interpreting what level of assistance by non-lawyers is sufficient to invoke privilege protection. In the Disclosure Decisions, this Court followed the approach that myriad federal courts have taken: "the attorney-client privilege may extend to communications with third parties who have been engaged *to assist* the attorney in providing legal advice." United States v Richey, 632 F3d 559, 566 (9th Cir. 2011) (emphasis added); accord, Golden Trade, S.r.L. v Lee Apparel Co., 143 FRD 514, 518 (SDNY 1992) (holding that "[i]f the [non-lawyer specialist] is acting to assist an attorney to provide legal services, the communications with him by the attorney or the client should come within the ambit of the privilege"). Consequently, the Disclosure Decisions afforded privilege under Kovel if a non-lawyer communication "helped" or "assisted" a lawyer to provide legal advice.

However, the federal courts do not apply the "helpful" standard consistently; indeed, for each federal case that TTO cites, approximately as many federal cases apply a "necessary" standard. E.g., United States v Ackert, 169 F3d 136, 139 (2d Cir. 1999). Furthermore, New York cases that bind this Court, overseeing a New York case applying New York law, tilt heavily toward the higher standard.

Petitioner now moves to reargue the Disclosure Decisions, asserting that this Court "overlooked or misapprehended" (CPLR 2221(d)(2)) controlling New York law in applying the higher, "necessary" standard. Ambac Assur. Corp. v Countrywide Home Loans, Inc., 27 NY3d 616, 624 (2016); Spicer v GardaWorld Consulting (UK) Ltd., 181 AD3d 413, 414 (1st Dept. 2020) (privilege applies only if "the presence of such third parties is deemed *necessary* to enable the attorney-client communication). Of note, the Prior Decision did not need to address directly whether Kovel protected Mastromonaco's communications; and in issuing the Disclosure Decisions this Court seems to have lost sight of the forest for the trees, having overlooked Ambac and Spicer.

Moreover, as petitioner points out, the burden rested on TTO to provide the Court with sufficient evidence, from persons with actual personal knowledge, demonstrating that Mastromonaco's communications were necessary, not merely helpful, to provide legal advice. TTO failed to do so. Notably, TTO, not Martabano, hired Mastromonaco; and Mastromonaco, a non-lawyer, was working for TTO for approximately a year before Martabano came on the scene. See Cavallaro v United States, 284 F3d 236, 248 (1st Cir. 2002) (that accounting firm was hired by taxpayer, as opposed to lawyer, is "probative when considering whether [accounting firm] was employed to help [law firm] render legal advice"). There is no affidavit from Martabano, an attorney versed in land-use issues, that he *needed* Mastromonaco to provide legal advice, and no documentary evidence to this effect. While this Court's review of Mastromonaco's communications found many documents that could "assist" TTO's attorneys, it did not find anything that on its face, or in context, appeared necessary for providing legal advice, and TTO's failure to satisfy, or even address, this burden in its many court filings results in a waiver of such claim.

Similarly, the Court's review of the Morgan Lewis productions has found that TTO failed to satisfy its burden of demonstrating privilege over communications that include third-parties that Morgan Lewis retained. Of the many experts and consultants hired by Morgan Lewis on behalf of TTO, there is no claim by anyone with personal knowledge at Morgan Lewis that any such consultant was *necessary* to its provision of legal services. As neither the face of the documents themselves, nor their contexts, demonstrates such necessity, and TTO has failed to furnish this Court with supplemental documents, as is its burden, this Court finds it has waived any such privilege over communications that include third-parties.

Furthermore, this Court also finds that TTO, the privilege holder, has explicitly waived any privilege claim it might have had to Mastromonaco's communications. As evidenced in petitioner's papers, TTO waived privilege, then attempted to claw back such waiver, several times (first through express waiver on December 10, 2019, then through inaction between December 2019 and January 2020).

Specifically, the record includes a December 16, 2019 email from petitioner's representative, Mr. Colangelo, to TTO, which states, in pertinent part:

> To clarify, the request in the OAG's December 10 letter regarding Mr. Mastromonaco was not limited to communications between him and Cushman. As you were specifically responding to our request[,] we assume the limitation in your response was inadvertent, and we further assume that you are not asserting any privilege with respect to his work concerning Seven Springs. If this is not accurate, please advise.

(NYSCEF Doc. No. 174.) Despite some ambiguous assertions from TTO's counsel that petitioner should have understood from the context that TTO did not intend fully to waive privilege, the record is devoid of any affirmative communication by TTO in response to Mr. Colangelo's email until at least May 2020, over five months after the waiver.

Finally, the Prior Decision notes (at 1) as follows:

> 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. Zuckerman v City of New York, 49 NY2d 557, 560 (1980). That fact alone arguably justifies granting the petition in its entirety.

It does. It also justifies granting the instant motion, and upon reargument finding that no documents that non-party, non-lawyer Ralph Mastromonaco possessed, or communications with him, are privileged (TTO's having waived the privilege) and, going forward, that any other Kovel claims of privilege for documents or communications with non-lawyers must meet the "necessary" standard.

Accordingly, this Court hereby grants reargument; and upon reargument the Court modifies its previous orders as follows: by December 18, 2020 (1) Respondents TTO and Charles Martabano

shall produce all communications with Ralph Mastromonaco to petitioner; (2) all respondents are ordered to produce all communications to, from, or on which third-party non-lawyers are copied to petitioner; and (3) Morgan Lewis shall submit a revised privilege log and document production to the Court that no longer includes the documents hereby ordered to be produced.

12/15/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:		**CASE DISPOSED**			**X**	**NON-FINAL DISPOSITION**	
	X	**GRANTED**		**DENIED**		**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**