UNITED STATES DISTRICT COURT (ECF)
SOUTHERN DISTRICT OF NEW YORK

EUGENE WINANS, MICHAEL BIENTHCS, REYNOLD MANGONES, MATTHEW TABER and KRISTEN TOMAINO, on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

STARBUCKS CORPORATION,

Defendant.

08 Civ. 3734 (LTS) (JCF)

MEMORANDUM AND ORDER

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

This is a putative class action in which the plaintiffs, Assistant Store Managers ("ASMs") in Starbucks Corporation ("Starbucks") stores in New York, allege that they have been improperly excluded from participating in each store's tip pool, in violation of New York Labor Law. Starbucks contends that the ASMs are managerial employees who are not entitled to share tips under the Labor Law. A dispute has now arisen over the defendant's assertion of the attorney-client privilege with respect to communications that its counsel had with certain ASMs after the commencement of litigation.

Background

On May 7, 2010, the plaintiffs moved to certify this matter as

a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. In response, Starbucks submitted declarations from sixteen ASMs attesting to the scope of their duties and responsibilities. In the declarations, each ASM also confirms that the statement is voluntary and that no benefit was received in return for making it.

At the plaintiffs' request, Starbucks then made eight of the declarants available for deposition. However, during the examinations, Starbucks' counsel instructed each witness not to answer questions about the execution of his or her declaration to the extent that the testimony would reveal information protected by the attorney-client privilege. (Transcript dated Oct. 13, 2010, attached as Exh. A to Letter of Lewis M. Steel dated Oct. 27, 2010 ("Steel Letter"); Transcripts dated Oct. 13-28, 2010, attached as Exhs. 1-8 to Letter of Lewis M. Steel dated Nov. 10, 2010 ("Steel Reply Letter")).

The plaintiffs have now submitted a letter motion seeking an order overruling Starbucks' assertion of the attorney-client privilege with respect to communications between Starbucks' counsel and the declarant ASMs. (Steel Letter at 4). They argue that the privilege does not attach to the conversations at issue; that, even if it did, it has been waived; and that, in any event, the possibility that the ASMs were subject to coercion warrants

disclosure of the communications leading up to the execution of the declarations. (Steel Letter at 2-4). In addition, the plaintiffs request an order compelling Starbucks to produce all e-mails and other communications regarding the selection of ASMs to execute declarations and the arrangement of meetings between the ASMs and Starbucks' counsel. (Steel Letter at 4).

Discussion

A. Existence of the Privilege

The attorney-client privilege protects from discovery "(1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." In re County of Erie, 473 F.3d 413, 419 (2d Cir. 2007); see United States v. Construction Products Research, Inc., 73 F.3d 464, 473 (2d Cir. 1996).[1] The party invoking the privilege bears the burden of

[1] Federal jurisdiction in this case is based on diversity, and the substantive claims are governed by New York law. Consequently, privilege issues are also controlled by New York law. Fed. R. Evid. 501; Dixon v. 80 Pine Street Corp., 516 F.2d 1278, 1280 (2d Cir. 1975); Allied Irish Banks, p.l.c. v. Bank of America, N.A., 240 F.R.D. 96, 102 (S.D.N.Y. 2007). However, New York courts rely on the common law, including federal case law, to evaluate claims of privilege. See Spectrum Systems International Corp. v. Chemical Bank, 78 N.Y.2d 371, 377, 575 N.Y.S.2d 809, 813-14 (1991). In any event, the parties in this case have cited primarily to federal cases, and there appears to be no material distinction between New York law and the common law as construed by the federal courts in this jurisdiction.

establishing all of the elements. See In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002, 318 F.3d 379, 384 (2d Cir. 2003); Construction Products Research, 73 F.3d at 473.

In Upjohn Co. v. United States, 449 U.S. 383 (1981), the Supreme Court addressed the applicability of the privilege to corporate entities. In doing so, it rejected the "control group" test, which protected only those communications between counsel for the corporate entity and those corporate employees "'in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney.'" Id. at 390 (quoting Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483, 485 (E.D. Pa.), petition for mandamus and prohibition denied sub nom. General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962)). The Court reasoned that "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." Id. The Court further observed that "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." Id. at 390-91. Thus, the Court found that the privilege extends to communications with employees "beyond the control group" because

> Middle-level -- and indeed lower-level -- employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.

Id. at 391.

Within a corporation, then, the attorney-client privilege protects communications by corporate employees to counsel for the corporation who is acting as a lawyer when the communications are made at the direction of corporate superiors in order to secure legal advice and the employees were aware that they were being questioned in connection with the provision of such advice. Id. at 394-95; see also Stampf v. Long Island Railroad Co., No. 07 CV 3349, 2009 WL 3628109, at *1 (E.D.N.Y. Oct. 27, 2009); In re Copper Market Antitrust Litigation, 200 F.R.D. 213, 218 (S.D.N.Y. 2001); Leucadia, Inc. v. Reliance Insurance Co., 101 F.R.D. 674, 678 (S.D.N.Y. 1983).

There is no doubt that the communications at issue here meet these criteria. The plaintiffs' contention that the conversations were not privileged because Starbucks' counsel does not represent the ASMs individually (Steel Letter at 2) misses the point; the privilege belongs to Starbucks, not to the ASMs, and arises from the need to question these employees to solicit information pertinent to obtaining legal advice.

The complication here arises from the fact that the ASMs are members of the putative class. Because the class has not yet been certified, Starbucks is under no general prohibition against speaking with them. See Gulf Oil Co. v. Bernard, 452 U.S. 89, 103-04 (1981) (absent record showing likely abuses, court order prohibiting counsel from communicating with putative class members was abuse of discretion); Goody v. Jefferson County, No. CV-09-437, 2010 WL 3834025, at *2 (D. Idaho Sept. 23, 2010) ("In general, courts have found that pre-certification communication with putative members of a collective action should be allowed unless the communication contradicts a court notice, is misleading, or improper.") (citing cases); Casteneda v. Burger King Corp., No. C 08-4262, 2009 WL 2382688, at *5-6 (N.D. Cal. July 31, 2009); Longcrier v. HL-A Co., 595 F. Supp. 2d 1218, 1225-26 (S.D. Ala. 2008). Nevertheless, there is a question whether the communications could reasonably have been considered confidential when made, since, if a class is ultimately certified, the ASMs would end up being adverse to Starbucks and might be expected to reveal the substance of their communications with Starbucks' counsel to counsel for the plaintiffs. See Amatuzio v. Gandalf Systems Corp., 932 F. Supp. 113, 118-19 (D.N.J. 1996) ("[I]n determining the applicability of the attorney-client privilege vel non the court should consider whether an employer enjoyed an

expectation of privacy with respect to a particular employee at the time the disclosure was made.”).

This concern is resolved by examining more closely who possesses the privilege and how it may be waived. Where a corporate entity seeks legal advice, the attorney-client privilege belongs to the corporation alone. See In re O.P.M. Leasing Services, Inc., 670 F.2d 383, 386 (2d Cir. 1982). It follows that the privilege may be waived only by corporate officers or directors with the authority to do so. See id.; Barcomb v. Sabo, No. 07-CV-877, 2009 WL 5214878, at *4 (N.D.N.Y. Dec. 28, 2009); Business Integration Services, Inc. v. AT & T Corp., 251 F.R.D. 121, 128 (S.D.N.Y. 2008). In this case, then, Starbucks is entitled to consider its communications with the ASMs to be confidential because the privilege belongs to it rather than to any individual ASM, and, even if the ASMs later become adverse to Starbucks, only the corporation can waive the privilege and disclose the communications. In other words, the ASMs are forever precluded from revealing the content of their communications with counsel absent a waiver by Starbucks, and the conversations are thus properly considered confidential and protected by the attorney-client privilege.[2]

[2] This case is distinguishable from Amatuzio because there the court found that a corporation could not have had an expectation of

B. Waiver

According to the plaintiffs, even if the privilege attaches to the communications, it has been waived because Starbucks has placed the content of those communications "at issue." (Steel Letter at 3; Steel Reply Letter at 5). A party places a privileged communication at issue and thereby forfeits the privilege in three circumstances: "'when a client testifies concerning portions of the attorney-client communication, . . . when a client places the attorney-client relationship directly at issue, . . . and when a client asserts reliance on an attorney's advice as an element of a claim or defense. . . .'" County of Erie, 546 F.3d at 228 (quoting Sedco International, S.A. v. Cory, 683 F.2d 1201, 1206 (8th Cir. 1982)). No such circumstance is present here.

Certainly, the mere fact that a party has submitted a declaration to the court does not forfeit the privilege with respect to the discussions between client and attorney that took

---

privacy when an employee expected to be the subject of an adverse employment action was made party to conversations involving legal strategy, although he was not necessary to such discussions. 932 F. Supp. at 115-16, 119 ("[The employee] appears to have been needed by [the employer] solely for the purpose of gathering factual information, and it would have been no burden to have excluded him from any conversation with the company's attorney in which corporate policy or legal strategy were being discussed."). In contrast, here the communications sought are ones in which the ASMs provided facts central to Starbucks' ability to mount a defense.

place during the drafting of the declaration. Indeed, the plaintiffs have disclaimed any such argument (Steel Reply Letter at 5), and contend instead that the privilege was forfeited when each employee specifically stated that his or her declaration was being submitted voluntarily and had not been coerced. (Steel Letter at 3). But those statements reveal no privileged communications; indeed, they could be complete and accurate even if the declarants had never spoken to Starbucks' counsel. Therefore, no unfairness is created by allowing the declarants to make such a statement while at the same time preserving the sanctity of communications with counsel.

C. Coercion

The plaintiffs' argument with respect to potential coercion of the ASMs by Starbucks is somewhat ambiguous. Initially, the plaintiffs support their argument by relying on cases in which courts have limited communications between defendants and members of a putative plaintiff class, but they never request prospective relief in that form. (Steel Letter at 3-4). Rather, they maintain that, because of the possibility of coercion, these communications should be revealed in order to inform their decision whether to seek further relief. (Steel Reply Letter at 3-4). To the extent these communications are privileged, there is no legal authority for such a proposition.

Even if a court is empowered to pierce the privilege in order to determine whether a witness' testimony has been coerced, the plaintiffs have not provided a sufficient basis for exercising such authority here. See In re Currency Conversion Fee Antitrust Litigation, 361 F. Supp. 2d 237, 252-54 (S.D.N.Y. 2005) (suggesting court is entitled to manage communications with class members only after "improper" or misleading communications have taken place). The plaintiffs suggest that the declarants must have been coerced because they met with Starbucks' counsel in the corporate offices, most signed the declarations prepared by counsel without making any changes, they were presented with the declarations at their place of work, and they were each offered or received a promotion. (Steel Reply Letter at 2). None of this conduct is inherently coercive, however, and the promotion of ASMs raises no red flags given that these employees are on training tracks specifically designed to result in their advancement.[3]

D. Document Requests

Finally, the plaintiffs demand production of "all emails and communications regarding the selection of ASMs to execute

---

[3] Indeed, Starbucks contests the plaintiffs' representation that all eight declarants were promoted, asserting instead that four were promoted consistent with normal career paths and that some of the offers of promotion were made before the ASMs became involved in the litigation. (Letter of Samidh Guha dated Nov. 15, 2010 ("Guha Reply Letter") at 2).

declarations regarding this litigation and the arrangement of meetings between ASMs and Starbucks' counsel regarding this litigation." (Steel Letter at 4). Starbucks has objected on grounds that the request is not ripe and that the communications are protected from disclosure by the attorney-client privilege and the work product doctrine. (Guha Reply Letter at 2).

While the attorney-client privilege would protect at least those communications between ASMs and Starbucks' counsel for the reasons discussed above, all of the requested communications are immune from discovery under the work product doctrine. The work product doctrine "is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." United States v. Adlman, 134 F.3d 1194, 1196 (2d Cir. 1998) (quoting Hickman v. Taylor, 329 U.S. 495, 510-11 (1947)); see also In re Steinhardt Partners, L.P., 9 F.3d 230, 234 (2d Cir. 1993) ("The logic behind the work product doctrine is that opposing counsel should not enjoy free access to an attorney's thought processes."). To warrant protection as work product, a document or communication must have been prepared in anticipation of litigation by or for a party, or by his representative. Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc., 215 F.R.D. 466, 474 (S.D.N.Y. 2003). As explained by the Second Circuit,

"documents should be deemed prepared 'in anticipation of litigation,' . . . if 'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" Adlman, 134 F.3d at 1202 (emphasis omitted) (quoting 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2024, at 343 (2d ed. 1994)).

Here, the plaintiffs have requested information that is core work product: it goes to the choices that Starbucks' counsel made in identifying the ASMs who ultimately filed declarations on behalf of the defendant. Because the documents sought are opinion work product, they would rarely, if ever, be subject to production. Adlman, 134 F.3d at 1197, 1204; see also Newmarkets Partners, LLC v. Sal. Oppenheim, Jr. & Cie. S.C.A., 258 F.R.D. 95, 102 (S.D.N.Y. 2009). Even if they consisted merely of fact work product -- facts collected by or at the behest of counsel in anticipation of litigation -- the plaintiffs have not shown the substantial need that would justify their disclosure. See id.

Conclusion

For the reasons set forth above, the plaintiffs' motion to overrule the defendant's assertion of privilege and compel disclosure of communications relating to the preparation of

declarations submitted by Assistant Store Managers in connection with Starbucks' opposition to the plaintiffs' motion for class certification is denied. Remaining class discovery shall be completed by December 31, 2010, and plaintiffs' reply papers in connection with the class certification motion shall be submitted by January 21, 2011.

SO ORDERED.

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
December 15, 2010

Copies mailed this date:

Lewis M. Steel, Esq.
Adam T. Klein, Esq.
Justin M. Swartz, Esq.
Molly A. Brooks, Esq.
Outten & Golden LLP
3 Park Avenue, 29th Floor
New York, New York 10016

Jessica W. Paniccia, Esq.
Nathan J. Oleson, Esq.
Daniel L. Nash, Esq.
Akin, Gump Strauss Hauer & Feld LLP
Robert S. Strauss Building
1333 New Hampshire Avenue, N.W.
Washington, DC 20036

Samidh J. Guha, Esq.
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, New York 10036

Gregory W. Knopp, Esq.
Akin Gump Strauss Hauer & Feld LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067