COMMERICAL LITIGATION

The At-Issue Doctrine & Waiver of Ancillary Privilege

By Leo K. Barnes Jr.

Many trial attorneys prepare summations before *voir dire* or opening statements because an effective summation will have a nexus with *voir dire* and opening statements such positions can be taken with the jury or judge premised upon what the admissible evidence will show. Although the summation will undoubtedly be refined during the trial process, the blueprint for the case presentation must be determined well in advance.

That global perspective must start at the first client interview. For example, when drafting a complaint, plaintiff's counsel risks waiving the right to a jury by including certain equitable claims which constitute a waiver. "The rule is fundamental that where a plaintiff seeks legal and equitable relief in respect of the same wrong, his right to trial by jury is lost. If any right remains, it is the right of the defendant." *Di Menna v. Cooper & Evans Co*., 220 N.Y. 391, 396 (1917). Sometimes, the pursuit of equitable claims is inevitable; but in situations where the equitable claim is merely perfunctory, the savvy attorney will avoid the same to avoid the risk of jury waiver. The same global perspective must continue through the discovery process so that other waivers are not inadvertently effectuated.

In *Alekna v. 207-217 W. 110 Portfolio Owner LLC*, 156847/2016, New York County Supreme Court Justice Carol Edmead determined that the "at-issue" doctrine applied, ordering defendants to produce an otherwise privileged due diligence report. According to the decision in Alekna, plaintiffs' claim was premised upon a rental overcharge scheme stemming from allegations that defendants failed to honor their obligations in connection with their receipt of J-51 tax benefits (J-51 is a tax exemption/abatement program for multi-family property owners).

The Buyer Defendants bought the subject property from defendants 207 Realty Associates LLC and Mann Realty Associates (Seller Defendants) in April 2016. In their amended answer and cross-claims, the Buyer Defendants alleged that they did not willfully overcharge plaintiffs, as Buyer Defendants relied on misrepresentations as to plaintiffs' rental status in the rent rolls provided by Seller Defendants. *Moreover, Buyer Defendants alleged that they "could not reasonably have discovered" Plaintiffs' rental status.* These allegations were significant because the Buyer Defendants could be liable for treble damages if a finding was made that they willfully overcharged plaintiffs (see *Smoke v. Windermere Owners*, 173 A.D.3d 500 (1st Dep't 2019)).

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Apparently, the parties agreed that a certain Due Diligence Report, prepared by Buyer Defendants' former counsel, would, in the absence of an applicable exception or waiver, be protected by the attorney/client privilege. However, plaintiffs argued that the Due Diligence Report was discoverable, because the at-issue doctrine provided a waiver of privilege such that the Due Diligence Report should be exchanged during discovery. The Buyer Defendants argued that the at-issue doctrine did not apply, as Buyer Defendants did not plan to use the Due Diligence Report at the dispositive motion or trial stages of the action.

Accordingly, plaintiffs filed a CPLR 3124 motion to compel defendants to produce the Due Diligence Report, while the defendants opposed the motion on the basis that the Due Diligence Report was privileged and was not waived.

As per the Court of Appeals observation in *Green v. Montgomery*, 95 N.Y.2d 693, 699-700 (2001):

> [p]rivileges, while important in the law, are not absolute. Indeed, most rights and privileges are waivable, even such constitutional rights as the right to a jury trial, the right to appeal and the right against self-incrimination.

Accordingly, for the "at issue" doctrine, an otherwise privileged communication is waived when a party places the subject matter of advice "at issue." *Orco Bank, N.V. v Proteinas Del Pacifico, S.A*., 179 A.D.2d 390, 577 N.Y.S.2d 841 (1st Dep't 1992). Under the "at issue" doctrine, a party that places legal advice or other privileged facts or communications at issue is deemed to have waived any privilege with respect to such facts or communications and can be compelled to produce the same. The doctrine applies when a party, through affirmative acts, places privileged material at issue and has selectively disclosed the otherwise privileged advice. Determining waiver of attorney-client privilege requires careful analysis of facts and circumstances regarding whether a party actually placed otherwise confidential communications "at issue." See *Deutsche Bank Trust Co. of Americas v Tri-Links Inv. Trust*, 43 A.D.3d 56, 837 N.Y.S.2d 15 (1st Dep't 2007); *American Re-Insurance Co. v U.S. Fidelity & Guar. Co*., 40 A.D.3d 486, 837 N.Y.S.2d 616 (1st Dep't 2007).

Applying the foregoing principles, Justice Edmead determined that the defendants had, in fact, placed their otherwise privileged documents at issue in the litigation and ordered disclosure subject to certain permissible redactions:

> Whether this doctrine applies where a landlord alleges that its overcharge of tenants was unwilful, and that it had no way of discerning, at the time it bought the subject property, whether the prior receipt of J-51 benefits placed the subject units within the ambit of rent stabilization, is a novel question of law. The court finds that the at-issue doctrine does apply in these circumstances. The sale of the subject property was in April 2016, nearly seven years after the Court of Appeals landmark decision in *Roberts v. Tishman Speyer* (13 N.Y.3d 270 (2009)) (holding that landlords receiving J-51 benefits may not luxury deregulate units within buildings receiving such benefit). Moreover, *Roberts*' progeny had, by the time of the subject sale, made it clear that the Roberts decision applied retroactively (see *Gersten v. 56 7th Ave*, 88 A.D.3d 189 (1st Dep't 2011). Thus, it is reasonable to conclude that the Buyer Defendants' Due Diligence Report may contain statements as to the legal status of plaintiffs' apartments. To the extent that it does, *plaintiffs are entitled to a redacted copy of the Due Diligence Report, as this evidence would rebut the Buyer Defendants' allegations regarding their own ignorance. Failing to order the Buyer Defendants' to turn over portions of the Due Diligence Report that relate to the legal status of the apartments within the subject property would deprive plaintiffs of vital information relating to an issue that Buyer Defendants have brought into play*. Portions of the Due Diligence Report that do not relate to the regulatory status of the apartments remain privileged and are properly redacted [bold added].

The court's determination that the defendants' election to assert a position which ultimately resulted in the disclosure of otherwise privileged documents serves as a reminder that counsel must maintain a global perspective on the litigation end zone and the ramifications which correspond with the route thereto.

Note: Leo K. Barnes Jr. is a partner at Barnes Catterson LoFrumento Barnes LLP. He practices commercial litigation and can be reached at LKB@BCLBLawGroup.com.