

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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SECURITIZED ASSET FUNDING 2011-2, LTD.,

Plaintiff,

- v -

CANADIAN IMPERIAL BANK OF COMMERCE,  
CANADIAN IMPERIAL BANK OF COMMERCE,  
SECURITIZED ASSET FUNDING 2011-2, LTD.,  
SECURITIZED ASSET FUNDING 2009-1, LTD.,  
PROMONTORIA EUROPE INVESTMENTS XXIII LDC,  
CSMC 2012-8R, LTD.

Defendant.

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SALIANN SCARPULLA, J.:

In this action, *inter alia*, to recover damages for breach of contract, plaintiff Securitized Asset Funding 2011-2, Ltd. moves to compel defendant Canadian Imperial Bank of Commerce (“CIBC”) to produce certain documents withheld or redacted as privileged, and to allow examination before trial testimony on topics objected to on the basis of privilege.<sup>1</sup>

In support of its motion, plaintiff argues that CIBC waived the attorney-client privilege that it asserted in response to plaintiff’s request for certain documents and testimony. According to plaintiff, CIBC is asserting the mistake defense in this action, alleging that its “business understanding” of the subject contracts, which was allegedly discussed and reached with its counsel, differed from the contracts’ actual terms, which was drafted by counsel. Plaintiff therefore maintains that any attorney-client privilege

<sup>1</sup> For a full recitation of the facts of this case, see my Decision and Order dated April 3, 2018.

asserted in response to documents, communications, and testimony relating to CIBC's "business understanding" of the contracts is waived. Specifically, plaintiff argues that because CIBC put its understanding of the subject contracts at issue through its mistake and estoppel defenses, the at-issue waiver "prevents CIBC from simultaneously (1) asserting a different understanding than the Contracts' plain meaning, and (2) denying [plaintiff] evidence that might contradict that assertion."

Plaintiff further argues that CIBC also waived privilege by selectively testifying about the subject matter of the relevant attorney-client communications.

In opposition, CIBC first argues that plaintiff's motion is untimely. Next, with regard to plaintiff's contention that the at-issue waiver applies, CIBC maintains that it does not intend to rely on any of the subject privileged documents or communications to support its mistake defense. Rather, it intends to rely on non-privileged contemporaneous documents, witness testimony, and the parties' course of conduct and performance. Further, CIBC contends that mistake is not its only defense in this action, and, in any event, a mistake defense can successfully be asserted without waiving privilege. Advancing the defense of mistake does not automatically result in an at-issue waiver of privilege. CIBC also maintains that plaintiff admitted that it does not need the subject privileged documents and testimony to defend against CIBC's arguments, rather it can rely on other documents and testimony.

Finally, with regard to a potential subject matter waiver, CIBC contends that the testimony referred to by plaintiff did not disclose the content of any privileged

communications with counsel or any advice from counsel. That testimony simply demonstrated that there was communication with counsel but did not refer to any of the substance of the advice given by counsel. And, even if some testimony about an understanding of privileged material was mistakenly disclosed, it would not constitute a waiver of all testimony.

In reply, plaintiff notes that the at-issue waiver can still apply even if the party asserting the privilege does not intend to use the evidence to prove its claim or defense. Further, without this evidence, it will be denied vital evidence to refute CIBC's arguments.

### **Discussion**

An "at issue" waiver of privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information. *Deutsche Bank Trust Co. of Ams. v. Tri-Links Inv. Trust*, 43 A.D.3d 56, 63 (1st Dept. 2007). A party can also waive the attorney-client privilege "by placing the subject matter of counsel's advice in issue and by making selective disclosure of such advice." *Orco Bank, N.V. v. Proteinas Del Pacifico, S.A.*, 179 A.D.2d 390, 390 (1st Dept. 1992).

Here, CIBC maintains that it would not need to use any of the privileged evidence to support its defense to this action. Rather, there is ample other evidence in its

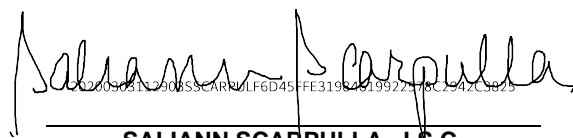
possession, and in plaintiff’s possession, that it intends to rely on to defend itself in this action. Further, plaintiff has failed to refer to any specific testimony showing that CIBC placed the subject matter of counsel’s advice at issue and made selective disclosure of that advice. Plaintiff has not demonstrated that the failure to waive the privilege would cause any prejudice or deprive it of access to vital information, especially because there are other available means of discovery to prove the validity of the claims asserted here, namely, through discovery already provided. See Credit Suisse First Boston v. Utrecht-America Fin. Co., 27 A.D.3d 253 (1st Dept. 2006).

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Securitized Asset Funding 2011-2, Ltd.’s motion to compel defendant Canadian Imperial Bank of Commerce to produce certain documents withheld or redacted as privileged, and to allow examination before trial testimony on topics objected to on the basis of privilege, is denied.

This constitutes the decision and order of the court.

3/3/2020  
DATE

  
SALIANN SCARPULLA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER