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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0012-22**

**GRAND MAUJER
DEVELOPMENT, LLC,**

Plaintiff-Respondent,

v.

**HOLLISTER CONSTRUCTION
SERVICES, LLC, and ARCH
INSURANCE COMPANY,**

Defendants,

and

BRACH EICHLER, L.L.C.,

Defendant-Appellant.

ARCH INSURANCE COMPANY,

Third-Party Plaintiff,

v.

**BRIGHT STAR SERVICE, INC.,
STUCCO AND STONE, INC.,
KLEARWALL INDUSTRIES,**

LLC, STROBER-WRIGHT
ROOFING, INC., STMR, INC.,
NORTHEAST LANDSCAPING &
MASONRY ASSOCIATES, INC.,
KAWNEER CO., INC., WINDOW
CITY, INC., MON-X USA INC.,
EFT CORP., K.B.F. INTERIOR
DESIGN, a/k/a K BROTHERS
FLOORING, INC., ARROW
UNITED INDUSTRIES, INC.,
RELIABLE PRODUCTS, INC.,
DONATO, INC., and PLUMBING
AND HEATING, AND GENERAL
RESTORATION GROUP,

Third-Party Defendants.

Argued January 23, 2023 – Decided July 18, 2023

Before Judges Haas and DeAlmeida.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-2208-18.

Marshall D. Bilder argued the cause for appellant (Eckert Seamans Cherin & Mellott, LLC, attorneys; Marshall D. Bilder and Jason S. Feinstein, on the briefs).

Donald A. Ottaunick argued the cause for respondent (Cole Schotz, PC, attorneys; Donald A. Ottaunick, of counsel and on the brief; Alison E. Wrynn, on the brief).

PER CURIAM

On leave granted, defendant Brach Eichler, L.L.C. (Brach) appeals from the May 5, 2022 order of the Law Division in this legal malpractice action compelling plaintiff Grand Maujer Development, LLC (GMD) to provide the court for in camera review documents containing communications between it and its counsel, Cole Schotz, P.C. (Cole), that relate to GMD's decision to settle a breach of contract action arising from a construction project. GMD alleges it was compelled to settle that action for less than its true damages because of Brach's legal malpractice. Brach also appeals the July 22, 2022 order of the Law Division denying its motion for reconsideration of the May 5, 2022 order. We vacate the orders under review and remand for further proceedings.

I.

GMD entered a contract with Hollister Construction Services, LLC (Hollister) for construction of a mixed-use building in Brooklyn, New York, with Arch Insurance Company (Arch) as the surety. Believing Hollister had materially breached the contract, GMD, on February 8, 2018, sent a notice of termination of the contract to Hollister. The notice of termination was drafted by Brach, which was, at that time, GMD's counsel.

On March 28, 2018, GMD filed suit in the Law Division against Hollister alleging it materially breached the contract by failing to properly manage the

project and make payments to sub-contractors, completing defective, incomplete, and exceedingly untimely work, and failing to turn over key project documents and drawings.

On October 16, 2018, GMD filed a First Amended Complaint joining Arch as a defendant, alleging that GMD demanded Arch as surety complete performance of Hollister's contract, but Arch had refused to do so, resulting in a breach of the performance bond.

In their answer to the First Amended Complaint, Hollister and Arch argued as an affirmative defense that the notice of termination was deficient and a wrongful termination of the contract that released them from all responsibility, liability, and obligations in the contract and performance bond. Brach alleges that despite this response, Hollister informed GMD that it was "committed to closing out this project and will continue to do so."

GMD, believing that the legal advice Brach provided regarding the notice of termination raised potential malpractice claims against Brach, "instructed Brach . . . to take no further action" with respect to Hollister and Arch and hired Cole as its new counsel. Cole, on behalf of GMD, attempted to withdraw the original notice of termination and send a replacement notice of termination to Hollister. Hollister and Arch argued the second notice of termination also was

defective. According to Brach, GMD also rejected Hollister's offer to complete the contract despite Hollister having stated that the Brach notice of termination was deficient.

On December 8, 2020, GMD joined Brach as a defendant in its Second Amended Complaint, alleging professional negligence. GMD alleged Brach failed to provide proper or correct legal advice regarding the termination of the contract, including the notice GMD was required to provide to Hollister and Arch.

On March 19, 2021, the trial court severed and stayed GMD's claims against Brach pending resolution of GMD's claims against Hollister and Arch.¹ In July 2021, GMD, still represented by Cole, settled with Arch and Hollister's Liquidating Trustee for \$2 million in damages. All claims against the parties other than Brach were dismissed.²

After the settlement, on August 31, 2021, GMD filed a Third Amended Complaint against Brach. It alleged that its actual damages from Hollister and Arch's breach of contract were \$10 million, but it was compelled to settle for \$2

¹ On September 11, 2019, Hollister filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. This resulted in GMD's claims against Hollister being stayed by the trial court. The stay was later lifted.

² Hollister and Arch filed a third-party complaint against several entities.

million due to Brach's malpractice. GMD alleged that Brach's deficient notice of termination doomed GMD's litigation position because it created an incurable error that provided Hollister and Arch with an absolute defense to GMD's claims.

Brach disputes GMD's allegations, arguing that the notice of termination it drafted had no bearing on GMD's eventual settlement of its claims against Hollister and Arch. In addition, Brach notes that GMD, presumably on Cole's advice, rejected Hollister's offer to complete the project despite Hollister's claim that the initial notice of termination was deficient. Brach also notes that Cole sent its own deficient notice of termination to Hollister and Arch and argues that Cole, although claiming that Brach's deficient notice of termination gave Hollister and Arch an absolute defense to GMD's claims, engaged in extensive litigation against those parties, raising doubt that GMD really believed its claims were precluded by Brach's notice of termination.

During discovery, counsel for the parties discussed GMD's production of documents regarding its decision to settle its claims against Hollister and Arch, including communications between GMD and Cole regarding their evaluation of Hollister's and Arch's factual and legal positions, and the decision to settle for an amount less than what GMD believed to be the full value of its claims.

GMD produced a privilege log of the requested documents. For each document, the log listed the subject, the name of any files attached to the communication, whether the document was privileged or not, and a short description of the communication. There were two categories of descriptions: (1) "Discussion of issues surrounding surety's defenses" and (2) "Discussion of issues surrounding Hollister's termination." Documents with those descriptions also had subheadings that included "analysis," "analysis of case," "relevant case law," "research," "termination arguments," "termination notice, analysis," "termination questions" and "termination research."

On April 13, 2022, Brach moved to compel GMD to produce all of the documents on the privilege log that were labeled as privileged due to attorney-client privilege and work product.

On May 5, 2022, the trial court entered an order requiring Cole to produce for in camera review "a copy of the communications between [Cole] and [GMD] that relate to the decision to settle" its claims against Hollister and Arch.

On May 24, 2022, Cole sent a letter to the court stating it had conferred with GMD and determined there were no documents on the privilege log that relate to GMD's decision to settle its claims against Hollister and Arch and no documents on which GMD relied on when deciding to settle those claims.

Therefore, the letter stated, there are no documents to send to the court for in camera review.

On June 22, 2022, Brach moved for reconsideration of the May 5, 2022 order. Brach argued that GMD appeared to have interpreted the May 5, 2022 order as applying only to documents labeled as "settlement" documents on the privilege log, rather than those relating to the settlement. Brach argued that GMD's interpretation of the order was narrower than intended by the court and constricted Brach's right to discovery of documents likely to lead to admissible evidence at trial.

On July 22, 2022, the court denied the motion and stated GMD complied with the May 5, 2022 order when it conferred with Cole and determined that no documents on the privilege log were responsive to Brach's discovery request or required in camera review. A July 22, 2022 order memorializes the court's decision.

We subsequently granted Brach's motion for leave to appeal from the May 5, 2022 and July 22, 2022 orders. Brach argues the privilege log produced by GMD on its face identifies dozens of documents that relate to the decision to settle, even if the decision to settle came after the date of the documents listed in the log. In addition, Brach argues the trial court erred by not conducting an

in camera review of the documents on the privilege log to determine whether they should be produced, instead of relying on the representation of GMD and Cole that the log contained no documents responsive to Brach's discovery request. Brach also argues that the trial court erred when it denied Brach's request to compel the production of attorney work product relating to the prosecution and settlement of GMD's claims against Hollister and Arch.

II.

A.

"New Jersey's discovery rules are to be construed liberally in favor of broad pretrial discovery." Payton v. N.J. Tpk. Auth., 148 N.J. 524, 535 (1997) (citing Jenkins v. Rainer, 69 N.J. 50, 56 (1976)). "While we normally defer to a trial court's disposition of discovery matters . . . unless the court has abused its discretion . . . deference is inappropriate if the court's determination is based on a mistaken understanding of the applicable law." Connolly v. Burger King Corp., 306 N.J. Super. 344, 349 (App. Div. 1997) (quoting Payton, 148 N.J. at 559 (citations omitted)). Since "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference," Manalapan Realty, L.P. v. Manalapan Twp. Comm., 140 N.J.

366, 378 (1995), we review the applicability of the attorney-client privilege de novo.

"It is well-settled under New Jersey law that communications between lawyers and clients 'in the course of that relationship and in professional confidence' are privileged and therefore protected from disclosure." Hedden v. Kean Univ., 434 N.J. Super. 1, 10 (App. Div. 2013) (quoting N.J.S.A. 2A:84A-20(1); N.J.R.E. 504(1)). However, this privilege is "neither absolute nor sacrosanct." Id. at 11-12. Testimonial privileges are construed narrowly "because they prevent the trier of fact from hearing relevant evidence and thereby undermine the search for truth[,] . . . [and] courts sensibly accommodate privileges to the aim of a just result, and accept them to the extent they outweigh the public interest in full disclosure." State v. Mauti, 208 N.J. 519, 531-32 (2012) (quoting State v. J.G., 201 N.J. 369, 383 (2010) (citations and internal quotation marks omitted)).

To pierce the attorney-client privilege, there must be (1) "a legitimate need . . . to reach the evidence sought to be shielded"; (2) the evidence must be relevant and material to an issue in the case; and (3) there must be a finding, by a fair preponderance of the evidence, that the information sought cannot be obtained from a less intrusive source. In re Kozlov, 79 N.J. 232, 243-44 (1979).

The third prong of the Kozlov test is construed narrowly and is only satisfied when "a privilege is in conflict with a defendant's right to a constitutionally guaranteed fair trial." Mauti, 208 N.J. 537-38.

However, "a privilege may be waived 'implicitly' where a party puts a confidential communication 'in issue' in a litigation." Id. at 532 (quoting Kinsella v. Kinsella, 150 N.J. 276, 300 (1997)). Clients waive the protections of the attorney-client privilege when they sue their attorney. Connell, Foley & Geiser, LLP v. Israel Travel Advisory Servs., Inc., 377 N.J. Super. 350, 361-62 (App. Div. 2005); see N.J.R.E. 504(2)(c) (the privilege does not extend "to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer."). "In essence, in [such a] circumstance[], the party who places a confidential communication in issue voluntarily creates the 'need' for disclosure of those confidences to the adversary." Mauti, 208 N.J. at 532.

By suing Brach and claiming it committed legal malpractice, GMD implicitly waived the attorney-client privilege by placing at issue in the malpractice action the legal advice Cole, as superseding counsel, gave GMD with respect to settling GMD's claims against Hollister and Arch. Cole's advice with respect to the strength of GMD's claims against Hollister and Arch, the

scope of the defenses, if any, inuring to Hollister and Arch as a result of Brach's notice of termination, the extent of GMD's damages, and the decision whether to settle GMD's claims against Hollister and Arch for \$2 million are directly related to whether Brach's alleged malpractice was the proximate cause of GMD's alleged damages. Brach is entitled to the production of those documents, provided they satisfy the factors set forth in Kozlov, to defend itself against GMD's claims.

In light of the nature of GMD's claims against Brach, we conclude that the trial court's May 5, 2022 order unnecessarily limited production for in camera review to those documents on the privilege log related to GMD's settlement. GMD and Cole relied on the narrow scope of the order when they determined that none of the documents on the log were responsive to Brach's discovery request. Brach is instead entitled to production of any documents, claimed to be protected by attorney-client privilege, that fall within the categories described in the previous paragraph and which satisfy the factors set forth in Kozlov.

Rather than leaving to GMD and Cole the determination of which documents should be submitted to the court for in camera review, we remand the matter for the trial court to conduct an in camera review of all of the documents on the privilege log, to apply the factors set forth in Kozlov, and to


make a determination if the documents should be produced to Brach with appropriate safeguards to prevent unnecessary dissemination of otherwise privileged communications. This process will ensure that Brach receives access to the documents it needs to defend against GMD's malpractice claims.

B.

Work product of an attorney prepared in anticipation of litigation may be produced if "the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Rule 4:10-2(c). As is the case with documents identified on the privilege log as protected by the attorney-client privilege, we remand this matter to the trial court to conduct an in camera review of the documents on the privilege log identified as protected by the attorney work product privilege. The court shall make a determination with respect to whether Brach has made a sufficient showing to warrant production of those documents with appropriate safeguards to prevent further dissemination of attorney work product.

The orders under review are vacated and the matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION