

TENTATIVE RULING

HEARING DATE: **November 12, 2010** TRIAL: **None Set**
CASE: **O'Melveny & Myers LLP v. MGA Entertainment, Inc.**
CASE NO.: **BC441593**
Opposed: **Yes**

**MOTION TO STAY PROCEEDINGS AND FOR PRELIMINARY INJUNCTION
AND/OR PROTECTIVE ORDER**

MOVING PARTY: Defendants and Cross-Complainants – MGA Entertainment, Inc. (D/XC) and MGA Entertainment (HK) Limited and Isaac Larian (XCs)

RESPONDING PARTY(S): Plaintiff Continental Business Credit, Inc.

PROOF OF SERVICE:

- Correct Address: OK
- 16/21 (CCP § 1005(b)): OK. Parties stipulated to a continued hearing date from 09/27/10.

CASE HISTORY:

- 07/13/10: Complaint filed by P.
- 08/05/10: Cross-Complaint filed by MGA Entertainment, Inc., MGA Entertainment (HK) Limited, and Isaac Larian.

STATEMENT OF FACTS

This is a dispute between Plaintiff law firm O'Melveny & Meyers, L.L.C. and its former client, the MGA Entertainment, Inc. Defendants/Cross-Complainants over attorneys fees and costs and cross-claims for malpractice, breach of fiduciary duty and overbilling arising out of federal court litigation against Mattel over the ownership of the Bratz line of dolls.

Defendant /Cross-Complainant MGA Entertainment, Inc. and Cross-Complainants MGA Entertainment (HK) Limited and Isaac Larian (collectively "MGA") move for an order staying all proceedings in this matter pending the retrial of certain consolidated cases in district court. Moving parties also seek a preliminary injunction and/or protective order against disclosure and/or dissemination of attorney client privileged information.

{Note: Although the Notice of Motion seeks only a stay as to “all discovery proceedings in this matter pending the retrial of the consolidated [district court] cases,” (Notice of Motion), the Points and Authorities argue for a stay of this entire proceeding, and both parties’ arguments are based on that position}

- **DENY Motion to Stay.**
- **GRANT Motion for Protective Order as to narrower scope.**

ANALYSIS

Defendant/Cross-Complainants seek the following relief: (1) an Order staying all discovery proceedings in this matter pending the January 11, 2011 retrial of the consolidated cases of MGA v. Mattel, U.S. District Court, Central District of California (Western Division – Los Angeles), Case No. 2:04-cv-02727; Mattel v. Bryant, U.S. District Court for the Central District of California (Western Division – Los Angeles) Case No. 2:04-cv-09059; and Bryant v. Mattel, U.S. District Court, Central District of California (Western Division – Los Angeles), Case No. 2:04-cv-09049; and (2) A preliminary injunction or a protective order prohibiting both MGA and O’Melveny & Myers, L.L.P. from disclosing or disseminating any information, documents, material or communications protected by the attorney-client privilege arising out of or pertaining to O’Melveny’s representation of MGA, except to their counsel of record or as allowed by Court order in this proceeding.

Motion for Stay

[E]xisting law provides the means for courts to deal with potential problems that may arise from the filing of a legal malpractice action when related litigation is pending. (Citation omitted.) The case management tools available to trial courts, including the inherent authority to stay an action when appropriate and the ability to issue protective orders when necessary, can overcome problems of simultaneous litigation if they do occur. (Citation omitted.)

Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal.4th 739, 758.

The elements of a legal malpractice cause of action are “(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney’s negligence. [Citations.]” (Citation omitted.) In a legal malpractice claim, the method for proving the element of causation has been likened to a “trial within a trial” or a “case within a case.” (Citations omitted.) “The case-within-a-case or trial-within-a-trial approach applied in legal malpractice cases [is] an objective approach to decide what should have been the result in the underlying proceeding or matter. [Citation.]” (Citation omitted.)

Ambriz v. Kelegian (2007) 146 Cal.App.4th 1519, 1531 (italics added).

Here, MGA's Cross-Complaint alleges professional negligence (malpractice), breach of fiduciary duty and breach of contract arising out of O'Melveny's alleged failure to properly prepare the case against Mattel regarding ownership of the Bratz dolls line for trial during the 3 ½ years O'Melveny represented MGA. The impact of O'Melveny's strategic decisions on MGA's actual damages arising from its representation and withdrawal as to the first trial have already been determined. The Ninth Circuit Court of Appeals vacated the equitable relief awarded by Judge Larson, which included injunctive relief which would have transferred the entire Bratz trademark portfolio from MGA to Mattel worldwide. See Ninth Circuit Court of Appeals Opinion, Exhibit A attached to Declaration of William Gwire In Support of Motion for Stay at Page 10549. Although the Ninth Circuit did not vacate the jury's verdict and damage award, it acknowledged such would need to occur and a retrial of the entire case held. Id. at 10548. Given that the case is set for retrial, it appears that the jury's \$1,000,000.00 verdict has effectively been vacated. The fact of injury to MGA's reputation as a result of O'Melveny's alleged negligence resulting in the first jury's verdict has likewise already accrued, although damages may still be occurring.

The outcome of the retrial is in part dependent upon MGA's current counsel's strategic decisions. MGA does not explain how O'Melveny's representation could affect the result on retrial, nor how some factors regarding causation could be attributed or apportioned to O'Melveny when MGA's current counsel is responsible for the retrial.

Likewise, it does not appear that the outcome on retrial will have an impact upon MGA's claim that it was overbilled for work O'Melveny performed which was ineffective, inappropriate, unnecessary, duplicative or wasteful. The outcome at the retrial is not directly affected by the amount of hours billed by O'Melveny. MGA's claim that O'Melveny's billing did not advance MGA's interests or confer any benefit is to be tested by the result at the first trial. The work performed by counsel handling the retrial will obfuscate whether O'Melveny's work in the first trial was of any benefit to MGA in the retrial. Further, O'Melveny's Complaint includes claims for fees regarding work performed in a lawsuit filed against MGA by Art Attacks Ink LLC, and other matters unrelated to the Mattel litigation. See Complaint, ¶¶ 9, 11.

Motion for Protective Order

Although Evidence Code § 958 states that "[t]here is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship," there is only a limited waiver of the privilege:

[Evidence Code § 958] is not a general client-litigant exception allowing disclosure of *any* privileged communication simply because it is raised in litigation. (Citations omitted.) Evidence Code section 958 only authorizes disclosure of relevant communications between a client (e.g., Jones) and an attorney charged with professional wrongdoing (e.g., petitioner). (Citations omitted.) This approach gives the attorney a meaningful opportunity to defend

against the charge, but does not deter the client from confiding in other attorneys (e.g., Waco) about the dispute. . . .

Brockway v. State Bar (1991) 53 Cal.3d 51, 63-64 (Cal. 1991)(italics in original).

See also McDermott, Will & Emery v. Superior Court (2000) 83 Cal.App.4th 378, 383-84: “Generally, the filing of a legal malpractice action against one's attorney results in a waiver of the privilege, thus enabling the attorney to disclose, **to the extent necessary to defend against the action**, information otherwise protected by the attorney-client privilege. (Citations omitted.)” (Bold emphasis added.)

MGA’s request for a protective order preventing O’Melveny’s disclosure or dissemination of information, documents, material or communications protected by the attorney-client privilege arising out of O’Melveny’s representation of MGA, except to their counsel of record or as allowed by court order, is overbroad because O’Melveny is allowed to disclose such communications in this litigation as are relevant to defend against the claims by MGA. However, O’Melveny should not be allowed to disclose such communications to third persons or for purposes unrelated to this litigation.

Thus, MGA’s Motion for a Protective Order is GRANTED, but only as to disclosure to third persons or for purposes unrelated to this litigation of information, documents, material or communications between O’Melveny’s and MGA during the existence of their attorney-client relationship.

TENTATIVE RULING

The Motion for Stay is DENIED.

The Motion for Protective Order is GRANTED as to a narrower scope. The parties are to meet-and-confer regarding the proposed language of the Protective Order and are to submit a joint Proposed Protective Order within 10 days.