13 Misc.3d 1229(A)
Unreported Disposition
(The decision of the Court is referenced in a table in the New York Supplement.)
Supreme Court, Nassau County, New York.

DELTA FINANCIAL CORPORATION, in its individual capacity and as Initial Member of Delta Funding Residual Exchange Company, LLC, Plaintiff,
v.
James E. MORRISON, Delta Funding Residual Management, Inc. and Delta Funding Residual Exchange Company, LLC, Defendants.
Delta Funding Residual Exchange Company, LLC, and Delta Funding Residual Management Inc., Plaintiffs,
v.
Delta Financial Corporation, Sidney A. Miller, Hugh Miller, Marc E. Miller, Richard Blass, and Arnold B. Pollard, Defendants.
Delta Funding Residual Exchange Company, LLC, Plaintiff,
v.
KPMG LLP, Defendant.

No. 011118/2003. | Oct. 24, 2006.

**Attorneys and Law Firms**

Delta Financial Corp. by Eugene Licker, Esq., Melissa Kosack, Esq ., Loeb & Loeb, New York.

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Daniel Malone, Esq., Ross Hirsch, Esq., and Marc Stein of Dechert, LLP, New York, and Christopher A. Byrne, Esq., Christopher A. Byrne, P.C., Washington, D.C., for Delta Funding Residual Exchange Co. LLC, and James Morrison and Delta Funding Residual Management, Inc.

Scott Calahan and Boston Portfolio Advisors by Peter Portley, Portley and Sullivan, Lighthouse Point, FL, for Interested Party.

**Opinion**

IRA B. WARSHAWSKY, J.

***1** The issue before the court concerns an e-mail sent by Scott Calahan ("Mr.Calahan"), President of Boston Portfolio Associates ("BPA"), a non-party to the consolidated matters, to Mark Kornfeld, Esq., ("Mr.Kornfeld"), counsel for defendant KPMG, on March 27, 2006 (the "Calahan E–Mail"), and the question of whether the Calahan E–Mail should be cloaked with the attorney-client privilege so as to preclude further use. A discussion of the relevant facts and a time line are necessary to make a determination on this informal application by the LLC for an order barring any party from using the Calahan E–Mail. The facts have been provided by counsel for the parties in their respective briefs and during oral argument on August 25, 2006.

According to the briefs, which were originally provided to Michael Cardello, Esq., the Court–Appointed Discovery Referee, and were subsequently modified to delete any reference to the actual language of the Calahan E–Mail, during the discovery process, KMPG served a Subpoena Duces Tecum (the "Subpoena") upon non-party BPA. The Subpoena was served after the first day of deposition testimony of Mr. Calahan held on November 15, 2005. The Subpoena was served apparently in prelude to the second day of Mr. Calahan's deposition. Said deposition was limited by the court to questioning about the methodology for valuing the excess cash flow certificates that are the subject of these consolidated matters.

Apparently, as the second day of Mr. Calahan's deposition neared, counsel for KPMG sent numerous e-mail correspondence to counsel for BPA, Peter Portley ("Mr.Portley"), regarding BPA's lack of document production and failure to serve a privilege log. The response by Mr. Calahan to one of those e-mails from Mr. Kornfeld, which was sent to Mr. Calahan by Mr. Portley, leads us to the instant issue.

***Specific Facts Relevant to Issue***

It is not disputed that on Friday, March 24, 2006 at 6:24 p.m., Mr. Kornfeld, counsel for KPMG, sent an e-mail communication to Mr. Portley regarding KPMG's serious concerns with respect to the apparent lack of response to other e-mail correspondence that Mr. Kornfeld had sent to Mr. Portley in the prior weeks with regard to BPA's lack of response to the Subpoena and its lack of production of a privilege log. According to counsel for BPA, upon receipt of Mr. Kornfeld's e-mail, he forwarded the e-mail to Mr. Calahan, who was now apparently in Hilton Head Island, South Carolina. Upon receipt of Mr. Kornfeld's

e-mail from Mr. Portley, Mr. Calahan authored a response on March 24, 2006 at 6:29 p.m., which is the subject of this ruling. The Calahan E–Mail was sent to Mr. Kornfeld instead of Mr. Portley. It is the position of BPA and LLC that the Calahan E–Mail was intended for Mr. Portley only and was inadvertently sent to Mr. Kornfeld.

On March 27, 2006, the Calahan E–Mail was forwarded to the Discovery Referee, Mr. Cardello as well as to Allan Hyman, Esq. and Eugene Licker, Esq., counsel for DFC; Christopher A. Byrne, Esq., Daniel C. Malone, Esq., Ross Hirsch, Esq., and Marc Stein, Esq., counsel for LLC; and Mr. Portley, counsel for BPA. Apparently, Mr. Kornfeld also forwarded the Calahan E–Mail to Andrew Ward, Esq., in-house counsel for KPMG. Upon receipt of the Calahan E–Mail by the Discovery Referee on March 27, 2006, all counsel were directed to participate in a conference call on March 28, 2006 to address the issue. The March 28, 2006 conference was re-scheduled to April 11, 2006. On April 4, 2006, Mr. Portley sent e-mail correspondence to all counsel that the Calahan E–Mail was intended as a privileged communication and was to be returned to him immediately. The e-mail reads as follows:

> ***2** the [sic] above email was intended as a communication from Scott Calahan, my client to myself, as such it is an attorney client privileged communication which was sent in error to Mark Kornfeld. demand [sic] is respectfully made upon all persons who have received same to return same to me. I understand this issue is to be discussed in a[sic] upcoming phone conference therefore I understand that compliance with this request will await the discussion regarding the same next week. in [sic] no event should there be any further dissemination of this e-mail. thank [sic] you.

On April 11, 2006, counsel for the parties, BPA, and the Discovery Referee participated in a telephone conference to address this issue. During the conference call, counsel for DFC, Melissa Kosack, Esq. stated that Eugene Licker, Esq., lead counsel for DFC, would like to be heard on the issue but was unable to participate on the call at that time as he was otherwise engaged.

On April 20, 2006, counsel for the parties, BPA, and the Discovery Referee participated in another conference call to discuss the Calahan E–Mail. It was during that conference call that Mr. Licker expressed his intention to use the Calahan E–Mail during trial. Upon learning of this fact, the Discovery Referee notified the Court, which directed counsel to submit briefs to the Court to set forth their respective position and to be prepared to orally argue the application on August 25, 2006.[1]

[1] In an e-mail correspondence dated May 9, 2006 to Mr. Cardello, counsel for KPMG notified the Discovery Referee that it would not be pursing this matter, that it would not be submitting a letter brief in connection with the Calahan E–Mail, stated that it would continue to abide by the non-publication direction issued by the Discovery Referee and has destroyed all copies of the Calahan E–Mail.

## *ARGUMENTS*

Counsel for DFC argues that the Calahan E–Mail is not protected by the attorney-client privilege and intends to use the Calahan E–Mail during trial. DFC contends that to receive the protections afforded privileged communications, the communication must be one in which the client seeks confidential legal advice. DFC avers that one who seeks out an attorney for business or personal advice may not assert a privilege as to those communications. DFC asserts that the Calahan E–Mail is contemptuous and that Mr. Calahan does nothing more than express his bias and seeks no legal advice. Therefore, DFC argues the Calahan E–Mail communication should not be afforded the protections of the attorney-client privilege.

In support of its position, counsel for DFC cites, *inter alia*, a prior decision of this Court on a different communication in the same consolidated matter (*see* Short Form Order dated May 9, 2006), which states:

> [t]he privilege attaches (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived. *United States v. Bein*, 728 F.2d 107 at 112 (2d

> Cir.1984) (quoting *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir.1961).

Counsel for DFC states in his brief and reiterated during oral argument that the Calahan E–Mail fails to satisfy the elements set forth by this Court in that Mr. Calahan was not seeking legal advice, his communication did not relate to that purpose, and even if the privilege did apply, Mr. Calahan intentionally waived the privilege.

***3** In further support of the position that the Calahan E–Mail should not be cloaked with the attorney/client privilege, DFC cites *Joyner v. Southern Pennsylvania Transportation Authority*, 736 A.2d 35 (Commonwealth Ct. Pa.1999) which was discussed during oral argument. Specifically, DFC relies on *Joyner* to support its claim that a negligently misdirected communication by a client such as Mr. Calahan to someone not his attorney, Mr. Kornfeld, is not covered by the attorney/client privilege.

In addition, during oral argument on the issue, counsel for DFC argued that even if the communication was cloaked with the attorney-client privilege, the privilege was waived, because Mr. Portley purportedly sent the Calahan E–Mail to Mr. Kornfeld as part of his apologetic comments on behalf of his client.

On the other hand, counsel for BPA submits the Affidavit of Mr. Calahan, as well as an Affidavit of Mr. Portley and Memorandum of Law to support its position that the Calahan E-mail is cloaked with the attorney-client privilege. According to the papers submitted by BPA, the Calahan E–Mail is, in fact, a privileged communication and was inadvertently sent to Mr. Kornfeld. Mr. Calahan's Affidavit states that he authored the Calahan E–Mail expressing his frustration with the document production process and the privilege log creation requirements and was intending to solicit from Mr. Portley advice as to whether or not the latest e-mail message from Mr. Kornfeld was a serious request which required a serious response.

BPA contends that the Calahan E–Mail was an attorney-client communication that had the expectation of confidentiality and was intended only for Mr. Portley, counsel for BPA, notwithstanding its inadvertent delivery to Mr. Kornfeld. Accordingly, BPA claims that the Calahan E–Mail is protected by the attorney-client privilege and the communication should not be subject to any further discussion, dissemination or examination and to the extent possible should be returned or destroyed by all recipients.

Joined in BPA's position is counsel for LLC, who sets forth in its brief that the Calahan E–Mail is a communication related to the provision of legal services and therefore is protected by the attorney-client privilege belonging to BPA. The LLC states that there can be no dispute that the Calahan E–Mail was intended to be a confidential communication between Mr. Calahan and his counsel as the e-mail was only addressed to "Peter", and that clearly the communication was related to the provision of legal services as it was made in response to Mr. Portley's e-mail forwarding questions regarding discovery from Kornfeld for KPMG.

According to LLC, the Calahan E-mail expressed Mr. Calahan's reaction to the burdens of KPMG's discovery demands and questions the appropriateness of such demands. LLC contends that while certain remarks contained in the Calahan E–Mail were inappropriate and offensive, the protections of attorney-client privilege do not evaporate as a result thereof. Counsel for LLC argues that the Calahan E–Mail is protected no matter what it says, as the attorney-client privilege would even extend so far as to protect allegedly defamatory statements made by a client to an attorney about a third party. As such, LLC alleges that the Calahan E–Mail was intended to be a confidential communication by Mr. Calahan to his attorney within the scope of attorney-client relationship and in connection with the attorney's provision of legal advice.

***4** In addition, citing a prior decision of this Court in this matter, counsel for LLC contends that the privilege has not been waived by BPA as a result of the inadvertent production. *See Delta Fin. Corp. v. Morrison*, 12 Misc.3d 807, 819 N.Y.S.2d 425, 2006 WL 1233000, at *5 (N.Y. Sup.Ct. Nassau Co. March 9, 2006) (Warshawsky, J.). The LLC also cites *Galison v. Greenberg*, 5 Misc.3d 1025(A) (1st Dep't 2004) in support of its position that inadvertent disclosure of a document protected by the attorney-client privilege does not constitute a waiver of the privilege. Therefore, LLC claims that the inadvertent disclosure of the Calahan E–Mail does not constitute a waiver as that the Calahan E–Mail was clearly sent to Mr. Kornfeld by mistake as the salutation reads "Peter".

Moreover, LLC argues that BPA took reasonable steps to prevent further disclosure by sending correspondence to all counsel to cease any further dissemination and to either destroy or return the copy of the e-mail. LLC concludes that the Calahan E-mail is subject to the attorney-client privilege and that the privilege was not waived by the inadvertent production.

***Choice of Law***

The first issue requiring resolution is which states' law with regard to privilege is applicable. Although not affirmatively addressed, counsel for DFC has cited New York law in his brief, while counsel for BPA has cited Florida law in his brief. Counsel for LLC affirmatively argues that South Carolina is applicable (although New York and Florida law is apparently not materially different.). Prior to deciding whether privilege attaches to the Calahan E–Mail, a determination must be made regarding which states' privilege law applies.

The Court finds the case *Lego v. Stratos Lightwave, Inc.*, 224 F.R.D. 576 (S.D.N.Y.2004) to be instructive. In *Lego*, the Court stated: "[i]n cases requiring a choice of privilege law, the interest analysis usually had led New York courts to apply the law of the jurisdiction in which the assertedly privileged communications were made, which in most of the cases was also the jurisdiction in which the party that made the communications resided".*Lego*, 224 F.R.D. at 579.The court in *Lego* went on to reason that "[t]he most common rationale is that the parties who made the communications expected that those communications would remain confidential under the law of that jurisdiction, and the state has an interest in furthering the policies behind the privilege at issue".*Id;* see also *Satcon Int'l Group v. Orbcomm Int'l Partners*, 1999 WL 76847 at 1 (applying Virginia's law of attorney client privilege because the communications at issue were between the defendant, a Virginia limited partnership, and its general counsel at the defendant's executive committee meeting; *A.I.A.Holdings, SA v. Lehman Brothers, Inc.*, 1999 WL 61442, at 6 (S.D.N.Y.1999) (communications in issue were not protected by attorney-client privilege because Lebanon, which is where the attorney and client were located and where the communications took place, does not recognize an attorney-client privilege); *Tartaglia v. Paul Revere Life Insurance Company*, 948 F.Supp. 325, 326 (S.D.N.Y.1996) (New York law of privileges applies to the Plaintiff's health records, which were created and maintained in New York by a New York corporation and concerned a New York doctor practicing in New York); *Mazzella v. Philadelphia Newspapers, Inc.*, 479 F.Supp. 523, 527 (E.D.N.Y.1979) (applying Pennsylvania's newsmen's privilege in defamation suit where defendants were a Pennsylvania based newspaper and journalist, and the confidential communications between sources and reporter apparently occurred in Pennsylvania); *Doe v. Roe*, 190 A.D.2d 463, 469–70, 599 N.Y.S.2d 350, 352–353 (4th Dep't 1993) (propriety of disclosure of plaintiff's HIV status to plaintiff's Pennsylvania employer by physician in New York should be determined according to New York law because the treatment occurred in New York, an alleged promise to preserve confidentiality was made in New York, and the disclosure occurred in the physician's in New York office); *Brandman v. Cross and Brown Co. of Florida*, 125 Misc.2d 185,186, 479 N.Y.S.2d 435, 436–37 (Sup.Ct. Kings Co.1984) (applying New York law to claim of privilege for bills issued by a New York attorney to a corporation with a Brooklyn address, even though the partnership agreement being sued on was made by New York and Florida entities for the purpose of developing real estate in Florida, and Florida law might govern other aspects of the controversy). Accordingly, the Court finds that the application of South Carolina privilege law is warranted to determine whether the Calahan E–Mail should be cloaked with the attorney-client privilege.

**The Law With Regard to *Attorney–Client Privilege***

***5** In *Floyd v. Floyd*, the Court of Appeals for South Carolina stated:

> [t]he attorney-client privilege has long been recognized in this State. Privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained. The privilege belongs to the client and, unless waived by him, survives even his death. *South Carolina State Highway Department v. Booker*, 260 S.C. 245, 195 S.E.2d 615 (1973). Generally, the party asserting the privilege must raise it. *State v. Lowe*, 275 S.C. 55, 271 S.E.2d 110 (1980).

*Floyd v. Floyd*, 365 S.C. 58, 88, 615 S.E.2d 465 (2005).

Moreover, the United States Supreme Court in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.E.2d 584 (1981), observed:

> [t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and

> frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyers being fully informed by the client. The lawyer-client privilege rests on the need for the advocate and the counselor to know all that relates to the client's reasons for seeking representation if its professional mission is to be carried out.

*Upjohn*, 449 U.S. at 389.

The Court of Appeals of South Carolina further stated in *Floyd*, that "the attorney-client privilege excludes from evidence confidential communications of a professional nature between attorney and client, unless the client, for whose benefit the rule is established, waives the privilege. *Floyd*, at 325 S.C. 88, 480 S.E.2d 77;*see also Drayton v. Industrial Life and Health Insurance Co.*, 205 S.C. 98, 31 S.E.2d 148 (1944).

In *Floyd*, the Court of Appeals of South Carolina opined that "in order to protect the communication on the ground of attorney-client privilege, it must appear that the attorney was acting, at the time, as a legal advisor. *Floyd*, 365 S.C. at 89, 615 S.E.2d 465;*see also, Marshall v. Marshall*, 282 S.E. 534, 539, 320 S.E.2d 44, 47 (Ct.App.1984). Only confidential communications are protected by the attorney-client privilege. *Cloniger v. Cloniger*, 261 S.C. 603, 193 S.E.2d 647 (1973). In *Ross v. Medical University of South Carolina*, 317 S.C. 377, 453 S.E.2d 880 (1994), the South Carolina Supreme Court stated:

> [a]ttorney-client privilege protects a client and any other person from disclosing confidential communications made to counsel relative to legal matter. However this privilege is not absolute. Not every communication within the client relationship is privileged. The public policy protecting confidential communications must be balanced against the public interest and proper administration of justice. This is exemplified by the widely recognized rule that the privilege does not extend to communication in furtherance of criminal, tortious or fraudulent conduct. *State v. Doster*, 276 S.C. 645, 651, 284 S.E.2d 218, 220 (1981).

***6** *Ross*, 317 S.C. at 383–84, 453 S.E.2d 880.

The attorney-client privilege is owned by the client and, therefore can be waived by the client. *South Carolina State Highway Department*, 260 S.C. at 254, 195 S.E.2d 615."Any voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed, but also to all communications between the same attorney and the same client on the same subject".*Marshall v. Marshall*, 282 S.C. at 539, 320 S.E.2d 44, citing *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146 (D.S.C.1975).

**Determination of Whether Privilege *Attaches to the Calahan E–Mail***

Based upon the case law set forth above, it is the determination of this Court that although the language contained in the Calahan E–Mail is of an offensive nature, the Calahan E–Mail should be cloaked with the attorney-client privilege. Based upon the papers submitted to the Court and the arguments proffered by counsel for all parties and non-party BPA at oral argument, it is the Court's finding that Mr. Calahan was intending to respond to his counsel, Mr. Portley, who had forwarded the Calahan E–Mail to him, which Mr. Calahan inadvertently responded to counsel for KPMG instead of his counsel, Mr. Portley. While the words used by Mr. Calahan were of a boorish nature, he is, in fact, commenting to his attorney in confidence regarding BPA's response to the Subpoena served upon it by KPMG. Without the attachment of the attorney-client privilege to such a communication, which was intended as a confidential communication to an attorney, unintended consequences would arise in an attorney's representation of his client, such as, less than candid discussion between attorney and client. Clients must be able to comment and express their reactions to case developments and issues related to the case to their counsel (in this case, relating to the discovery process) without the fear that those comments and/or communications would be discoverable. As the Calahan E–Mail was intended by its salutation to "Peter" who is Mr. Portley, BPA's counsel, it was intended to be a confidential communication, which was inadvertently sent to someone other than Mr. Portley.

According to the Affidavit sworn to by Mr. Calahan, which he submitted to the court, his intention was to author an e-mail to his attorney regarding the document production process and the privilege log issues arising out of the Subpoena issued by KPMG. According to Paragraph 6 of the Calahan Affidavit, Mr. Calahan states:

> [m]y e-mail was intended to solicit from my attorney advice as to whether or not this latest Mark Kornfeld message was a serious request which required a serious response. The e-mail which I created and sent within minutes of receiving the forward of Mr. Kornfeld's message to me from my attorney Peter A. Portley, was intended *only* for my attorney, Peter A. Portley and was sent to him with the expectation that it be both confidential and privileged. (emphasis in original).

***7** Accordingly, the Calahan E–Mail is a communication cloaked with the attorney-client privilege.

Finally, the Pennsylvania case of *Joyner v. Southeastern Pennsylvania Transportation Authority*, 736 A.2d 35 (1999) cited by DFC is distinguishable. In *Joyner*, the Court held the tape-recorded message of plaintiff should not be cloaked with the attorney-client privilege as the plaintiff Mr. Joyner failed to establish the reasonableness of his subjective belief that he was communicating with his attorney. In *Joyner*, the plaintiff inadvertently left a message on opposing counsel's voice mail system when he thought he was leaving a message for his counsel. The attorney for Joyner filed a motion in limine to preclude the admission of this tape-recorded message as coming within the attorney-client privileged. The trial court denied the motion and the appellate court affirmed stating that the plain language of the statutory privilege is not applicable under the facts of the case as the receiver of the message was not counsel for Mr. Joyner. Thus, the defendant was not precluded by the plain language of the statute from presenting evidence of what Mr. Joyner stated on the opposing counsel's voicemail. Because Mr. Joyner was not opposing counsel client there was no "confidential communication made to by his client" within the meaning of the statute.

Moreover, the court in *Joyner* never reached the waiver issue because it stated that as a perquisite to the analysis of whether privilege was waived, one must first establish the existence of the attorney-client relationship. The Court concluded that Mr. Joyner failed to establish such a relationship.

The *Joyner* case is not persuasive because the Pennsylvania court was basing its decision upon a narrow reading of a specific statute that codified the attorney-client privilege in the Commonwealth of Pennsylvania at 42 PaC.S. § 5928, not under the common law. This Court finds that the *Joyner* court's narrow interpretation of the Pennsylvania statute does not guide this Court in its decision applying South Carolina law and the common law regarding attorney-client privilege issues. Rather, this Court chooses to rely upon South Carolina cases to support its decision that the Calahan E–Mail is privileged. *See e.g.*, *Floyd v. Floyd*, 365 S.C. 56, 615 S.E. 2 465 (2005).

**The Attorney–Client Privilege *Has Not Been Waived By BPA***

As stated by the Court in *South Carolina State Highway Department*, the attorney client privilege is owned by the client, and therefore, can be waived only by the client. *South Carolina State Highway Department*, 260 S.C. 245, 195 S.E.2d 615 (1973). Any voluntary disclosure by a client to a third party waives the attorney-client privilege. However, the Calahan E–Mail was sent inadvertently and was not intended to be received by anyone other than Mr. Portley. It is clear from the Affidavit of Mr. Calahan and the Calahan E–Mail itself that he intended to maintain the confidentiality of the document as it was meant only for his counsel with the salutation of "Peter".

***8** Moreover, Mr. Portley took steps in a reasonable time frame to demand its return which was done, via e-mail, on April 4, 2006, several days after the Calahan E–Mail was sent. Accordingly, BPA did not waive its privilege with regard to the Calahan E–Mail as it was inadvertently sent to someone other than Mr. Portley, it was intended to be a confidential communication, and counsel for BPA, within a reasonable time, demanded the return and/or destruction of the e-mail. *See**Floyd v. Floyd*, 365 S.C. 56, 91, 615 S.E.2d 465 (2005). Accordingly, the privilege has not been waived.

***CONCLUSION***

For the reasons set forth above, the Calahan E–Mail dated March 28, 2006 is a communication cloaked with the attorney-client privilege, which has not been waived, and therefore, shall be afforded all the protections thereof.

It is **SO ORDERED.**

13 Misc.3d 1229(A), 831 N.Y.S.2d 352 (Table), 2006 WL 3068853, 2006 N.Y. Slip Op. 52059(U)

**All Citations**

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