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NO. 13591-03

**SUPREME COURT - STATE OF NEW YORK**  
**IAS TERM PART 23 NASSAU COUNTY**

**PRESENT:**

**HONORABLE LEONARD B. AUSTIN**  
Justice

\_\_\_\_\_ x  
**GPH ACQUISITION LLC and GPH  
INVESTORS LLC**  
**Plaintiffs,**

- against -

**GRAMERCY PARK HOTEL LTD.,  
STEVEN WEISSBERG, and AB GREEN  
GRAMERCY, LLC**  
**Defendants.**  
\_\_\_\_\_ x

**COUNSEL FOR PLAINTIFF**  
**(for GPH Investors, LLC)**  
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**(for GPH Acquisition LLC)**  
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**(for Steven Weissberg)**  
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**New York, New York 10017**

**(for Gramercy Park Hotel Ltd.)**  
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**Mazur, Carp & Rubin, Esqs.**  
**for non-party witness, Michael Miller,**  
**Esq.**  
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**Getnick & Getnick, Esqs.**  
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**ORDER**

Non-party Herrick, Feinstein, LLP moves for a protective order pursuant to CPLR 3103(a) asserting that a memo prepared by Paul Herman, Esq. ("Herman"), a partner thereof dated July 9, 2002 is not subject to discovery as attorney work product pursuant to CPLR 3101(c). Because this matter is scheduled for trial on January 12, 2004, the Court has agreed to consider this application on the letters of McDermott, Will & Emery (by Carolyn Traister Schiff, Esq.) dated December 22, 2003 seeking disclosure of the memo and Herrick, Feinstein, LLP (by Adam L. Paget, Esq.) dated December 23, 2003 opposing disclosure. No other party has submitted for or against this application.

**BACKGROUND**

One of the key issues in this action is a claim that a sub-lease agreement between Gramercy Park Hotel, Ltd. ("Hotel") and GPH Acquisition, LLC (Acquisition) was fraudulently induced or procured.

These claims of fraud relate to the activities of Andrew Schwab, Esq. ("Schwab"),

an attorney who represented Hotel in connection with the negotiation and signing of the sub-lease.

The late Herbert Weissberg was the principal and President of Hotel. At the time that the sub-lease between Hotel and Acquisition was being negotiated, Mr. Weissberg was elderly and infirm. Due to his infirmity, his wife, Ruth Weissberg ("Ruth"), the Executive Vice President of Hotel, was making the business decisions regarding the Hotel's operation.

Although Schwab represented Hotel in connection with the negotiation and execution of the sub-lease agreement between Hotel and Acquisition, Ruth had retained the services of Herrick, Feinstein LLC to review, comment on and approve the proposed sub-lease.

The claims of fraud relate to changes in the sub-lease allegedly made by Schwab after Herrick Feinstein had approved the final draft of the sub-lease which are claimed to have benefitted Acquisition and worked to the detriment of Hotel.

AB Green Gramercy, LLC asserts that these changes were made without the knowledge or consent of Ruth and in breach of Schwab's duty to his client to insure that Schwab or an entity created by Schwab in which Schwab was a principal would receive a finder's fee in connection with the sub-lease that was to be paid by Acquisition.

The memo in question involves conversations between Herman and Ruth and Herman and Schwab in July 2002 regarding the payment and distribution of the finder's fee.

Any claim of attorney-client privilege relating to this memo has previously been waived. However, Herrick Feinstein refuses to produce the document asserting that is it subject to the attorney's work privilege established by CPLR 3101(c).

The memo has been produced for an *in camera* inspection to determine if it is subject to attorney work product protection.

### DISCUSSION

A review of the memo reveals that its contains information which is "material and necessary" to the prosecution or defense of the action. CPLR 3101(a). As such, it would be discoverable unless subject to privilege.

CPLR 3101(c) provides that "...work product of an attorney shall not be obtainable."

The purpose of the attorney work product privilege is "...to permit the attorney to communicate freely and candidly with his client uninhibited by any concern that his communications will be available to his client's adversaries." Beasock v. Dioguardi Enterprises, Inc., 117 A.D.2d 1016 (4<sup>th</sup> Dept., 1986). The attorney work product privilege "...applies only to those materials that are prepared by an attorney who is acting as an attorney, and which contain the attorney's analysis and trial strategy (citations omitted)." Doe v. Poe, 244 A.D.2d 450, 451 (2<sup>nd</sup> Dept., 1997).

The attorney work product privilege does not apply to memoranda or other writing prepared by an attorney for his/her own use or to writings which reflect an

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attorney's mental impressions. See, Hickman v. Taylor, 329 U.S. 495 (1947). See also, Siegel, *New York Practice 3<sup>rd</sup> § 347*.

Any communications or notes relating to communications between Herman and Schwab are not subject to the attorney work product privilege since Herman and Schwab did not have an attorney-client relationship. Furthermore, the material contained in the July 9, 2002 memo does not relate to either attorneys' analysis or trial strategy.

Ruth and Herman did have an attorney-client relationship. However, the information contained in the memo relates to the substance of a telephone conversation Herman had Ruth regarding the payment of the finder's fee. It does not contain either legal analysis or trial strategy. Therefore, the memo is not subject to the attorney work product privilege. Siegel, *New York Practice 3<sup>rd</sup> § 347*.

The memo has been redacted by the Court to delete those items which are not relevant to the litigation. See, SKEK Assocs. v. Benenson, 293 A.D.2d 737 (2<sup>nd</sup> Dept., 2002). Accordingly, it is,

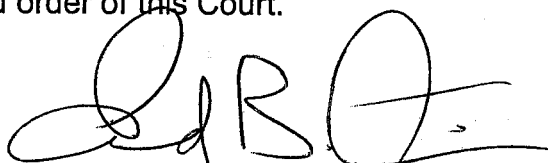
**ORDERED**, that the motion of Herrick, Feinstein, LLC, pursuant to CPLR 3103 (a), seeking a protective order for the memo of Paul Herman, Esq., of Herrick Feinstein dated July 9, 2002 is not discoverable as subject to the attorney work product rule is **denied**; and it is further,

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**ORDERED**, that a copy of that memo as redacted by the Court and a copy of this Order be provided to the attorneys for the parties to this action on or before the close of business on January 5, 2004.

This constitutes the decision and order of this Court.

Dated: Mineola, NY  
January 2, 2004

A handwritten signature in black ink, appearing to read 'L. B. Austin', written over a horizontal line.

Hon. LEONARD B. AUSTIN, J.S.C.

**ENTERED**

JAN 09 2004

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**