

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

Prospect Capital Corp. v. Morgan Lewis & Bockius LLP

Prospect Capital Corp., 2026 NY Slip Op 02220 (Supreme Court of the State of New York Appellate Division First Department 2026) · No. Index No. 653941/22; Appeal No. 6353; Case No. 2025-05186 · Decided April 14, 2026

SUMMARY

The Appellate Division, First Department affirmed an order addressing Prospect Capital's motion for a protective order concerning categories of documents on its privilege log. The court held that Prospect placed certain attorney-client and work-product communications at issue by alleging reliance on defendants' advice regarding a turnover provision and litigation strategy, while other communications concerning related contracts were not relevant and remained protected. The decision concerns privilege waiver under the at-issue doctrine in a legal malpractice action.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Moulton, J.P.; Friedman, J.; González, J.; Shulman, J.; Rosado, J.
JURISDICTION	New York Supreme Court, Appellate Division, First Department
DECIDED	April 14, 2026
DOCKET	Index No. 653941/22; Appeal No. 6353; Case No. 2025-05186
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal and cross-appeal from an order of Supreme Court, New York County, concerning plaintiff's motion for a protective order and privilege-log categories in a legal malpractice action.
STANDARD OF REVIEW	The Appellate Division reviewed whether Supreme Court providently exercised its discretion in ruling on the protective order and privilege-log categories.
PRECEDENTIAL VALUE	Published appellate decision; precedential under New York law.
PARTIES	Prospect Capital Corporation v. Morgan Lewis & Bockius LLP, et al.

TOPICS

discovery dispute

waiver

civil procedure

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PRACTICE AREAS

legal malpractice

civil discovery

attorney-client privilege

work-product protection

QUESTIONS PRESENTED

1. Whether Prospect placed communications concerning the turnover provision, its interpretation, and decisions regarding litigation against Silicon Valley Bank at issue, thereby waiving attorney-client and work-product privilege.
2. Whether communications concerning other contracts and amendments in the same transaction were relevant to Prospect's reliance on defendants' advice regarding the turnover provision and therefore subject to disclosure.

HOLDINGS

1. Prospect waived attorney-client and work-product privilege under the at-issue doctrine as to communications from in-house counsel concerning the turnover provision, its interpretation, and decisions whether or when to litigate against Silicon Valley Bank, because Prospect alleged reliance on defendants' advice in formulating its negotiation and litigation strategy. Disclosure of category 19 was properly limited to advice related to Prospect's choice to bring the turnover claim.
2. The communications in categories 6, 9, 10, and 12 were not relevant to whether Prospect relied on defendants' advice regarding the turnover provision, so Supreme Court properly granted Prospect's protective order as to those categories.

KEY QUOTATIONS

*"The "communications sought . . . were made concurrently with the representation" by defendants and were "relevant to establishing . . . alleged reliance" on their advice" ([*1])*

*"The privilege based on work product may also be waived "by reason of the at-issue doctrine"" ([*1])*

FACTUAL BACKGROUND

Prospect brought a legal malpractice action alleging that Morgan Lewis's malpractice caused the loss of a cause of action under the turnover provision of a subordination agreement. Prospect alleged that it relied on defendants' advice in formulating its negotiation and litigation strategy concerning the turnover provision and whether or when to litigate against Silicon Valley Bank. The disputed privilege-log materials included communications from in-house counsel concerning the turnover provision, its interpretation, and related litigation decisions, as well as communications concerning other contracts and amendments in the same transaction.

PROCEDURAL HISTORY

Supreme Court, New York County, denied plaintiff's motion for a protective order as to privilege-log categories 15, 19, and 20, limiting category 19 disclosure to advice concerning Prospect's choice to bring the turnover claim. The court granted the motion as to categories 6, 9, 10, and 12. The Appellate Division unanimously affirmed the order to the extent appealed and cross-appealed from.

DISPOSITION

affirmed

CASES CITED

- Those Certain Underwriters at Lloyd's, London v. Occidental Gems, Inc., 11 N.Y.3d 843, 845 (2008)
- G.D. Searle & Co. v. Pennie & Edmonds, 308 A.D.2d 404, 404 (1st Dep't 2003)
- Prospect Capital Corp. v. Morgan Lewis & Bockius LLP, 239 A.D.3d 526, 527 (1st Dep't 2025)
- Deutsche Bank Trust Co. of Ams. v. Tri-Links Inv. Trust, 43 A.D.3d 56, 63-64 (1st Dep't 2007)
- Bolton v. Weil, Gotshal & Manges LLP, 4 Misc. 3d 1029(A), 2004 NY Slip Op 51118(U), *6 (Sup. Ct. N.Y. County 2004)
- Charbern Mgmt. Grp. LLC v. Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., 2023 WL 3945599, *4, 2023 U.S. Dist. LEXIS 101340, *9-10 (S.D.N.Y. June 12, 2023) (No. 22-CV-8137 (VEC))
- Goldberg v. Hirschberg, 10 Misc. 3d 292, 298 (Sup. Ct. N.Y. County 2004)

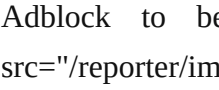
OPINION

Prospect Capital Corp. v. Morgan Lewis & Bockius LLP 2026 NY Slip Op 02220
PER CURIAM.

Prospect Capital Corp. v Morgan Lewis & Bockius LLP - 2026 NY Slip Op 02220

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Prospect Capital Corp. v Morgan Lewis & Bockius LLP

2026 NY Slip Op 02220

April 14, 2026

Appellate Division, First Department

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This decision is uncorrected and subject to revision before publication in the Official Reports.

Prospect Capital Corporation, Plaintiff-Appellant-Respondent,

v

Morgan Lewis & Bockius LLP et al., Defendants-Respondents-Appellants.

Decided and Entered: April 14, 2026

Index No. 653941/22|Appeal No. 6353|Case No. 2025-05186

Before: Moulton, J.P., Friedman, González, Shulman, Rosado, JJ.

Adam M.

Burton, New York, for appellant-respondent.

Goulston & Storrs PC, New York (Nicholas Cutaia of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered on or about July 25, 2025, which, to the extent appealed from, denied in part plaintiff's motion for a protective order insofar as categories 15, 19, and 20 of its privilege log were found to have been placed at issue, and which, to the extent cross-appealed from as limited by the briefs, granted plaintiff's motion for a protective order as to categories 6, 9, 10, and 12 of its privilege log, unanimously affirmed, without costs.

In this legal malpractice case, Supreme Court providently denied plaintiff's motion for a protective order as to categories 15, 19, and 20 of its privilege log, limiting disclosure of category 19 solely to advice related to Prospect's choice to bring the turnover claim, because plaintiff had waived the attorney-client privilege and work product privilege by reason of the at-issue doctrine (*see* CPLR 3103[a]; *Those Certain Underwriters at Lloyd's, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]; *G.D. Searle & Co. v Pennie & Edmonds*, 308 AD2d 404, 404 [1st Dept 2003]). As this Court previously stated, the issues in this case "involve whether defendants' alleged malpractice leading to the loss of a cause of action under the turnover provision of the subordination agreement caused Prospect damages" (*Prospect Capital Corp. v Morgan Lewis & Bockius LLP*, 239 AD3d 526, 527 [1st Dept 2025]). As to categories 15, 19, and 20, plaintiff has placed at issue the communications from in-house counsel regarding the turnover provision, its interpretation, and the decisions of whether or when to litigate against nonparty Silicon Valley Bank, because plaintiff has alleged that it relied on defendants' advice in formulating its negotiation and litigation strategy (*see* *Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 63-64 [1st Dept 2007]). The "communications sought . . . were made concurrently with the representation" by defendants and were "relevant to establishing . . . alleged reliance" on their advice (*Bolton v Weil, Gotshal & Manges LLP*, 4 Misc 3d 1029[A], 2004 NY Slip Op 51118[U], *6 [Sup Ct, New York County 2004]; *see also* *Charbern Mgmt. Grp. LLC v Borah, Goldstein, Altschuler, Nahins & Goidel, P.C.*, 2023 WL 3945599, *4, 2023 US Dist LEXIS 101340, * 9-10 [SD NY, June 12, 2023, No. 22-CV-8137 (VEC)]). The privilege based on work product may also be waived "by reason of the at-issue doctrine" (*G.D. Searle & Co.*, 308 AD2d at 404; *see also* *Goldberg v Hirschberg*, 10 Misc 3d 292, 298 [Sup Ct, New York County 2004]; *Bolton*, 2004 NY Slip Op 51118[U], *4).

On the other hand, Supreme Court providently granted plaintiff's motion for a protective order as to categories 6, 9, 10, and 12 of its privilege log. The communications at issue, involving other contracts and amendments in the same transaction, are not relevant to whether plaintiff relied on defendants' advice regarding the turnover provision (*see* *Prospect Capital Corp.*, 239 AD3d at 526-527).

We have considered the remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: April 14,

2026

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