

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

Berk v. Riverbay Corp.

Berk, 2026 NY Slip Op 00574 (Appellate Division of the Supreme Court of the State of New York First Department 2026) · No. Index No. 300068/19; Appeal No. 5753; Case No. 2025-00559 · Decided February 5, 2026

SUMMARY

The Appellate Division, First Department affirmed an order denying Linda Berk’s motion to compel disclosure of an investigation report prepared by Riverbay Corporation’s general counsel. The court held that the report was protected by attorney-client privilege and work-product protections, that disclosure during a closed executive board meeting did not waive the privilege, and that Berk could not waive Riverbay’s privilege as a former board president. The court also upheld the protective order and sealing of the report.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, First Department
WRITING FOR THE COURT	Moulton, J.P.; Friedman, J.; Higgitt, J.; Rosado, J.; O'Neill Levy, J.
JURISDICTION	New York Appellate Division, First Department
DECIDED	February 5, 2026
DOCKET	Index No. 300068/19; Appeal No. 5753; Case No. 2025-00559
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiff appealed from an order of Supreme Court, Bronx County, that denied her motion to compel disclosure of an investigation report, granted Riverbay Corporation's cross-motion for a protective order, and sealed the report.
STANDARD OF REVIEW	Abuse of discretion review of the trial court's determination concerning disclosure, a protective order, and sealing.
PRECEDENTIAL VALUE	Published
PARTIES	Linda Berk v. Riverbay Corporation

TOPICS

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attorney client privilege

civil procedure

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether the investigation report prepared by Riverbay's general counsel was protected by attorney-client privilege and immune from disclosure.
2. Whether Riverbay waived attorney-client privilege by disclosing the report at a closed Executive Board meeting.
3. Whether Berk, as Riverbay's former Board president, could waive Riverbay's privilege.
4. Whether Riverbay placed the report at issue by its conduct in the litigation.
5. Whether the trial court properly granted a protective order and sealed the report.

HOLDINGS

1. The investigation report was privileged and immune from disclosure because it was prepared by Riverbay's general counsel and was primarily and predominantly a legal communication containing legal advice and recommendations to minimize Riverbay's potential liability.
2. Riverbay did not waive attorney-client privilege by disclosing the report during the closed Executive Board meeting.
3. Berk, as Riverbay's former Board president, was not entitled to waive Riverbay's attorney-client privilege.
4. Riverbay did not place the report at issue in the litigation.
5. The trial court properly denied the motion to compel, granted Riverbay's application for a protective order, and sealed the filed copy of the report.

KEY QUOTATIONS

"facts were selected and presented in the [Report] as the foundation for the law firm's legal advice, and [] the communication was primarily and predominantly of a legal character"

"upon a written finding of good cause"

FACTUAL BACKGROUND

Riverbay Corporation's general counsel prepared an investigation report concerning allegations made against Linda Berk while she was president of Riverbay's Board of Directors. The report contained factual findings, legal advice intended to minimize Riverbay's potential liability, and recommendations for policy changes. Riverbay disclosed the report at a closed Executive Board meeting attended only by Board members and attorneys representing general counsel, collected the copies afterward, and did not rely on the report or counsel's advice as part of a litigation defense.

PROCEDURAL HISTORY

Supreme Court, Bronx County, denied Linda Berk's motion to compel disclosure of an investigation report prepared by Riverbay's general counsel, granted Riverbay's cross-motion for a protective order, and sealed the report. The Appellate Division, First Department, unanimously affirmed the order insofar as appealed from.

DISPOSITION

affirmed

CASES CITED

- Smith v. Ford Found., 231 AD2d 456, 456 (1st Dept 1996)
- Spectrum Sys. Intl. Corp. v. Chemical Bank, 78 NY2d 371, 379-380 (1991)
- Brooklyn Union Gas Co. v. American Home Assur. Co., 23 AD3d 190, 190-191 (1st Dept 2005)
- Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 NY3d 616, 624 (2016)
- People v. Greenberg, 50 AD3d 195, 201-202 (1st Dept 2008), lv dismissed 10 NY3d 894 (2008)
- Barasch v. Williams Real Estate Co., Inc., 104 AD3d 490, 492 (1st Dept 2013)
- U.S. Bank N.A. v. Lightstone Holdings LLC, 196 AD3d 445, 447-448 (1st Dept 2021), lv denied 38 NY3d 913 (2022)
- Deutsche Bank Trust Co. of Ams. v. Tri-Links Inv. Trust, 43 AD3d 56, 63-64 (1st Dept 2007)
- Matter of Peerenboom v. Marvel Entertainment, LLC, 160 AD3d 439, 440 (1st Dept 2018)
- Maxim Inc. v. Feifer, 145 AD3d 516, 517 (1st Dept 2016)

OPINION

PER CURIAM.

Berk v Riverbay Corp. (2026 NY Slip Op 00574) Berk v Riverbay Corp. 2026 NY Slip Op 00574 Decided on February 05, 2026 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered: February 05, 2026 Before: Moulton, J.P., Friedman, Higgitt, Rosado, O'Neill Levy, JJ. Index No. 300068/19|Appeal No. 5753|Case No. 2025-00559| [*1]Linda Berk, Plaintiff-Appellant, v Riverbay Corporation, et al., Defendants-Respondents.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellant. Cullen and Dykman LLP, Uniondale (Ariel E. Ronneburger of counsel), for Riverbay Corporation, respondent. Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered December 23, 2024, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to compel disclosure of an investigation report (the Report) prepared by general counsel of defendant Riverbay Corporation (Riverbay), granted Riverbay's cross-motion for a protective order, and sealed the Report, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion by concluding, after reviewing a partial copy of the Report submitted by plaintiff, that the Report was privileged and immune from disclosure (CPLR 3101[b], [c]; see *Smith v Ford Found.*, 231 AD2d 456, 456 [1st Dept 1996]).

The Report was prepared by Riverbay's general counsel after an investigation into allegations made against plaintiff, who was the president of the Board of Directors at the time, and the Report contained legal advice intended to minimize Riverbay's potential liability as well as recommendations for policy changes to prevent similar issues arising in the future (see *Spectrum Sys.*

Intl. Corp. v Chemical Bank, 78 NY2d 371, 379-380 [1991]; *Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 190-191 [1st Dept 2005]). Although the Report included general counsel's factual findings, the "facts were selected and presented in the [Report] as the foundation for the law firm's legal advice, and [] the communication was primarily and predominantly of a legal character" (*Spectrum*, 78 NY2d at 379).

Riverbay did not waive any privilege by disclosing the Report during a closed Executive Board meeting where the only individuals present were Riverbay Board members and attorneys representing general counsel and the copies of the Report were collected at the end of the meeting (see *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 [2016]).

Plaintiff, as the former president of the Board, is not entitled to waive Riverbay's privilege (see *People v Greenberg*, 50 AD3d 195, 201-202 [1st Dept 2008], lv dismissed 10 NY3d 894 [2008]; see also *Barasch v Williams Real Estate Co., Inc.*, 104 AD3d 490, 492 [1st Dept 2013]).

Moreover, Riverbay did not place the Report "at issue" in this litigation, as Riverbay has not raised any defense relying on the Report or on general counsel's advice, and application of the privilege does not deprive plaintiff of essential information (see *U.S. Bank N.A. v Lightstone Holdings LLC*, 196 AD3d 445, 447-448 [1st Dept 2021], lv denied 38 NY3d 913 [2022]; *Deutsche Bank Trust Co. of Ams. v Tri-Links Inv.*

Trust, 43 AD3d 56, 63-64 [1st Dept 2007]). Under these circumstances, the court properly denied plaintiff's motion to compel disclosure, granted Riverbay's application for a protective order (see generally CPLR 3103; *Spectrum*, 78 NY2d at 374-375; *Matter of Peerenboom v Marvel Entertainment, LLC*, 160 AD3d 439, 440 [1st Dept 2018]), and sealed the filed copy of the Report, "upon a written finding of good cause" (Uniform Rules for Trial Cts [22 NYCRR] § 216.1[a]; see *Maxim Inc. v Feifer*, 145 AD3d 516, 517 [1st Dept 2016]).THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: February 5, 2026

