

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

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 CANDACE CARMEL BARASCH, :  
 :  
 Petitioner-Respondent, :  
 :  
 - against - :  
 :  
 WILLIAMS REAL ESTATE CO., INC., WILLIAMS :  
 CORPORATE REALTY SERVICES, LTD., :  
 WILLIAMS INTERNATIONAL REALTY SERVICES, :  
 LTD., WILLIAMS PM, INC., WILLIAMS :  
 MANAGEMENT REALTY CORP., WILLIAMS U.S.A. :  
 REALTY SERVICES, INC., REALTY PROGRAMS :  
 CORPORATION, MICHAEL T. COHEN, ROBERT L. :  
 FREEDMAN, ANDREW H. ROOS, FIRSTSERVICE :  
 CORPORATION and FS WILLIAMS :  
 ACQUISITIONCO, LLC., :  
 :  
 Respondents-Appellants. :  
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**PREARGUMENT  
STATEMENT**

Index No. 600053/09

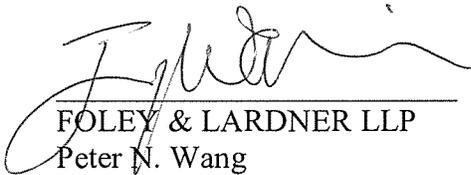
1. The full name of the Petitioner-Respondent is Candace Carmel Barasch. The full names of the remaining Respondents-Appellants are: Williams Real Estate Co., Inc., Williams Corporate Realty Services, Ltd., Williams International Realty Services, Ltd., Williams PM, Inc., Williams Management Realty Corp., Williams U.S.A. Realty Services, Inc., and Realty Programs Corporation. The Respondents listed in the above case caption but not listed here have been dismissed from the case.
2. Counsel for Respondents-Appellants are Peter Wang, Jeremy Wallison and Akiva Cohen, of Foley & Lardner LLP, 90 Park Avenue, New York, New York 10016. Their telephone number is 212.682.7474.
3. Counsel for Petitioner-Respondent are John Reichman and David Yeger, of Wachtel & Masyr LLP, One Dag Hammarskjold Plaza, 885 Second Avenue, New York, New York 10017. Their telephone number is 212.909.9527.
4. There are no additional appeals pending in this action.
5. There are no related actions or proceedings pending in this or any other court.
6. The nature and object of this special proceeding is to recover the fair value of Petitioner-Respondent's shares in the Respondent-Appellant entities pursuant to New York Business Corporation Law § 623.
7. This appeal is taken from an order of Hon. Bernard J. Fried, Supreme Court of the State of New York, County of New York. The order is dated January 13, 2011. The order was

settled by the parties pursuant to a decision of Justice Fried dated November 9, 2010. True and correct copies of the order and the underlying decision are attached hereto.

8. In pertinent part, the order granted Petitioner-Respondent's motion to compel Respondents-Appellants' production of certain attorney-client communications between Respondents-Appellants and their counsel.

9. Respondents-Appellants seek reversal of that part of the order, and all parts of that part of the order, granting Petitioner-Respondent's motion to compel Respondents-Appellants' production of certain attorney-client communications between Respondents-Appellants and their counsel on the ground that, as a matter of law, upon retaining separate counsel and threatening legal challenges to block a corporate transaction, Petitioner-Respondent had become sufficiently adverse to the Respondents-Appellants to justify Respondents-Appellants' exclusion of Petitioner-Respondent from their attorney-client communications with counsel.

Dated: New York, New York  
February 3, 2011



FOLEY & LARDNER LLP  
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(212) 682-7474  
*Attorneys for Respondents-Appellants*

# **DECISION AND ORDER**

PRESENT: BERNARD J. FRIED  
HON. BERNARD J. FRIED Justice

**E-FILE** PART 60

Candace Carmel Barasch,  
Petitioner,

INDEX NO. 600053/2009

- v -

MOTION DATE \_\_\_\_\_

Williams Real Estate Co., Inc., et al.,  
Respondents.

MOTION SEQ. NO. 004

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Plaintiff Candace Carmel Barasch has moved by Order to Show Cause for an Order compelling respondents to comply with my April 15, 2010 Order and directing respondents not to produce certain discovery notwithstanding attorney-client privilege. Respondents have cross-moved for a protective order.

This proceeding is an action for an appraisal, which Barasch brought as a shareholder of respondent Williams Real Estate Co., Inc. ("Williams") and its affiliates and a director on Williams's Board of Directors, seeking an order directing respondents to pay her the fair value of her shares in Williams and its affiliates, to turn over to her all information and documents concerning a certain transaction between Williams, FirstService Corporation, and others, and awarding her costs and fees.

While respondents assert that Barasch was adverse to Williams as of September 2008, they do not deny, at least for purposes of this motion, that she was at that time and remains to the present a director on Williams's Board of Directors.

"[A] corporate director has an absolute and unqualified right to inspect the corporate books and records." *Lau v. DSI Enterprises, Inc.*, 102 A.D.2d 794, 794 (1st Dept. 1984).

Respondents insist that Barasch was nonetheless adverse to Williams after September 2008, because, they allege, she made her opposition to the transaction known, retained separate counsel, and threatened to block the transaction.

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The issue before me is whether a corporate director, by dissenting from a corporate transaction, retaining separate counsel, and threatening potential legal challenges to block the transaction, becomes "adverse" to the corporation, such that she waives her absolute right to inspect corporate books and records, including attorney-client communications. Neither *Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123 (1996) nor *Fochetta v. Schlackman*, 257 A.D.2d 546 (1st Dept. 1999) resolves this issue, as both involved former directors trying to access corporate attorney-client communications.

Respondents ask me to hold that a corporate director becomes "adverse" to the corporation and loses access to privileged communications between the corporation and its counsel when an attorney could no longer ethically represent both the corporation and that director. They have cited various cases in support of this proposed principle of law, but none of them are precisely on point. *E.g.*, *Schmidt v. Magnetic Head Corp.*, 97 A.D.2d 151 (2d Dept. 1983); *Dukas v. Davis Aircraft Products Co.*, 129 Misc.2d 846 (Sup. Ct. 1985), *aff'd as modified*, 123 A.D.2d 304 (2d Dept. 1986). I am unpersuaded by respondents' reasoning and decline to reach the holding they urge.

Because Barasch was and is a director of Williams, she is and has been a corporate insider by definition, and therefore not adverse to Williams, during the relevant times. Williams's directors cannot reasonably have expected to exclude a fellow director from their attorney-client communications concerning the valuation of her shares. Therefore, petitioner's motion is granted, except that her request for sanctions is denied.

Respondents also cross-move for an order sealing various documents and directing Barasch to return certain privileged documents Williams inadvertently produced. Because all parties agree that the documents at issue are attorney-client-privileged, a separate Order will be issued with regard to the sealing request.

With regard to any future electronic filings of attorney-client-privileged documents, the parties are to follow the procedures set forth in the Model Confidentiality Stipulation described in my Part 60 Practices.

Respondents' request that Barasch return certain inadvertently privileged documents is denied insofar as those documents should be produced to her in accordance with the rest of this order, and it is otherwise granted.

Accordingly, it is

ORDERED that this motion be granted in part and denied in part as discussed in the above Order; the parties are to settle an Order; and it is further

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ORDERED that respondents shall submit a proposed order listing the Efiling Docket numbers of the submissions that contain privileged documents, so that an appropriate sealing order may be issued; and it is further

ORDERED that the parties shall appear for a status conference in this case on January 13, 2010 at 9:30 a.m.

SO ORDERED.

Dated: 11/9/2010

  
J.S.C.

Check one:  FINAL DISPOSITION

**HON. BERNARD J. FRIED**  
NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

At Part 60 of the of the Supreme Court of the City of New York, held in and for the County of New York, at the Courthouse thereof located at 60 Centre Street, New York, New York on the 13 day of JAN, 2010.

PRESENT: Hon. Bernard J. Fried, J.S.C.

CANDACE CARMEL BARASCH,

Petitioner,

- against -

WILLIAMS REAL ESTATE CO., INC., WILLIAMS CORPORATE REALTY SERVICES, LTD., WILLIAMS INTERNATIONAL REALTY SERVICES, LTD., WILLIAMS PM, INC., WILLIAMS MANAGEMENT REALTY CORP., WILLIAMS U.S.A. REALTY SERVICES, INC., REALTY PROGRAMS CORPORATION, MICHAEL T. COHEN, ROBERT L. FREEDMAN, ANDREW H. ROOS, FIRSTSERVICE CORPORATION and FS WILLIAMS ACQUISITION CO., LLC,

Respondents.

Index No. 600053/09

E-Filed

Part 60 (Fried, J.)

Mot. Seq. # 004

**ORDER**

Upon the Order to Show Cause of Petitioner, dated October 7, 2010, the Affirmation of John H. Reichman, Esq., dated October 7, 2010, and the Memorandum of Law, dated October 7, 2010, filed in support thereof; and upon the Notice of Cross-Motion of Respondents, dated October 21, 2010, the Affirmation of Jeremy L. Wallison, Esq., dated October 21, 2010, and the Memorandum of Law, dated October 21, 2010, filed in support thereof and in opposition to the Order to Show Cause; and

Whereas the Order to Show Cause and the Cross-Motion having come on to be heard before this Court for oral argument on October 27, 2010, and Wachtel & Masyr, LLP, attorneys for Petitioner, by John H. Reichman, Esq., having appeared in support of the Order to Show Cause and in opposition to the Cross-Motion, and Foley & Lardner, LLP, attorneys for

Respondents, by Peter N. Wang, Esq., having appeared in opposition to the Order to Show Cause and in support of the Cross-Motion; and due deliberation having been had thereon, and this Court having decided the Order to Show Cause and the Cross-Motion by Decision dated November 9, 2010 and entered in the Office of the Clerk of the County of New York on November 15, 2010,

NOW, it is hereby ORDERED as follows:

- (i) Petitioner's Order to Show Cause is GRANTED to the extent that Respondents may not withhold from Petitioner, on the basis of any privilege or protection heretofore asserted by Respondents or Moses & Singer, LLP ("M&S"), documents created on or before January 7, 2009, including any such documents referenced in the privilege logs produced by M&S, except to the extent such documents are the work product of Respondents' litigation counsel, Foley & Lardner, LLP or reflect communications with Foley & Lardner, LLP; Respondents are directed, within five (5) days of receipt of written Notice of Entry of the within Order, to produce all such documents in Respondents' possession and to request that M&S produce all such documents in M&S's possession; and the Order to Show Cause is DENIED in all other respects;
- (ii) Respondents' Cross-Motion is GRANTED with respect to the request that all attorney-client communications filed with the Court by one or both of the parties shall be sealed pursuant to a separate order, and is DENIED in all other respects; and
- (iii) With regard to any future electronic filings of attorney-client privileged documents, the parties are to follow the procedures set forth in the Model Confidentiality Stipulation described in the Court's Part 60 Practices; and.

- (iv) Petitioner shall serve written Notice of Entry of the within Order no later than five (5) days of receipt hereof.

ENTER,

  
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**HON. BERNARD J. FRIED** J.S.C.  
1/13/2011