

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III  
Justice

PART 56

Index Number : 604265/2005

BISCHOFF, ERIC

vs  
BOAR'S JEAD PROVISIONS

Sequence Number : 003

COMPEL DISCLOSURE

INDEX NO. \_\_\_\_\_

MOTION DATE 4/26/07

MOTION SEQ. NO. \_\_\_\_\_

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

motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**  
MAY 14 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

*[Signature]*  
HON. RICHARD B. LOWE, III

Dated: 5/8/07

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
ERIC BISCHOFF, individually and as a member of Frank  
Brunckhorst Co., L.L.C., and in the right of and on  
behalf of Frank Brunckhorst Co., L.L.C.,

Plaintiff,

Index 604265/05

-against-

BOAR'S HEAD PROVISIONS CO., INC., and  
FRANK BRUNCKHORST III, and ROBERT S.  
MARTIN, individually and as managers and members  
of Frank Brunckhorst Co., L.L.C. and as directors and  
officers of Boar's Head Provisions Co., Inc., and  
BARBARA BRUNCKHORST, individually and as a  
member of Frank Brunckhorst Co., L.L.C. and as a  
director of Boar's Head Provisions Co., Inc.,

Defendants,

-and-

FRANK BRUNCKHORST CO., L.L.C.,

Nominal Defendant.  
-----X

**Hon. Richard B. Lowe, III:**

Defendants move for an order compelling the production of certain documents being withheld by plaintiff Eric Bischoff ("Bischoff") on the grounds of privilege.

Plaintiff's privilege log includes ten documents authored by Bischoff in 1999 and 2000 that are personal notes taken of meetings held in the course of business of defendant Boar's Head Provisions Co., Inc. ("Provisions") and Frank Brunckhorst Co., LLC ("FB Co."). Plaintiff is withholding the notes, asserting they were prepared in anticipation of litigation and protected pursuant to CPLR § 3101(d)(2) and asserting the attorney client privilege in reliance upon CPLR

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3101(b) and CPLR 4503(a)(1).

### **Background**

Plaintiff prepared the notes in 1999 and 2000. At the time, he affirms he was represented by an attorney who was providing advice as to the merits of a possible lawsuit based on the same facts and circumstances that form the basis of this action (Bischoff Aff ¶ 4). His attorney suggested that Bischoff prepare notes of the various meetings he was attending during this period, so that Bischoff could communicate to the attorney their contents, in connection with the legal advice the attorney was providing with regard to the anticipated litigation (Id at ¶¶ 4-5).

The notes were prepared shortly after each meeting. In some instances, Bischoff communicated the contents of the notes to his attorney after they were prepared (Id at ¶ 5). In others, he communicated with his attorney about the meetings, then wrote down what he told his attorney, at the attorney's direction, to preserve what he had communicated (Id). All of the notes were prepared at the direction of counsel expressly for the purpose of communicating with counsel in order to obtain confidential legal advice with regard to anticipated litigation against the Defendants (Id ¶¶ 4-5, 7). Plaintiff has preserved the confidentiality of all of the notes and the communications with counsel that they reflect (Id ¶ 7). The plaintiff does not dispute that he never turned the actual notes over to his attorney.

The complaint was filed in this case on December 5, 2005. In the course of the action, defendants served plaintiff with a Request for Documents on April 11, 2006. On March 5, 2007, Plaintiff produced a privilege log describing that the notes were withheld from the production based on the claims of privilege. The defendant argues that the notes are not privileged because they are neither documents that fall under the scope of New York's work product doctrine nor are

they protected attorney-client communications. Specifically, the defendant argues the notes cannot be withheld because they were taken of non-privileged meetings in the ordinary course of business of Provisions and FB Co. and they were never given to an attorney.

### Discussion

Under CPLR 3101(a), “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” Moreover, “trial courts are clothed with broad discretion in supervising the scope of disclosure (*Bloss v Ford Motor Co.*, 126 AD2d 804, 505 [3rd Dept 1987]). If immunity or privilege are raised, the party challenging disclosure “bears the burden of establishing that the information sought is immune from disclosure” (*Id.*). Conclusory statements that materials were prepared solely for litigation are insufficient to meet that burden (*Du Four v Blaw-Knox Corp.*, 89 AD2d 862, 863 [1st Dept 1996]).

### Work Product Doctrine

In the moving brief, the defendant argues the notes are not protected as Work Product subject to the protections of CPLR § 3101(c). In his opposition brief, plaintiff asserts the position that he does not maintain that the notes are attorney work product in light of the fact they were not prepared by an attorney (*Pl. Memo. in Opp.*, p7, fn 3). Therefore, the court will not address this argument.

### Materials Prepared in Anticipation of Litigation

Plaintiff maintains the notes were prepared in anticipation of litigation and are protected from disclosure under CPLR 3101(d)(2) which states:

[materials] prepared in litigation or for trial by or for another

party . . . may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

“Reports and statements made in the ordinary course of operating a business get no immunity and must therefore be distinguished from those prepared for litigation, a sometimes difficult chore when the item’s existence is traceable to mixed motives and litigation is one of them . . . in order to qualify as ‘litigation’ material the item must have been prepared exclusively for litigation.” (*Siegel, N.Y. Practice* § 348 [2006](citing *Weisgold v Kiamesha Concord Inc.*, 51 Misc.2d 456 [Sup. Ct. Special Term Sullivan County 1966]).

The defendants do not assert any substantial need of the materials in the preparation of the case nor do they assert they are unable to obtain a substantial equivalent to them by other means. Indeed, they do not refute that the subject of the notes could quite easily be obtained by taking a deposition of the plaintiff. The privilege log also identifies the other participants in the meetings, including the individual defendants themselves, their counsel and others –who can provide information as to the discussions at the meetings. The defendants rather argue that the materials were not generated in anticipation of litigation and therefore, such a showing need not be made.

First, the defendants argue that the amount of time that elapsed between the preparation of the notes and the commencement of this action means that the notes are not subject to CPLR § 3101(d)(2) protection. The notes were taken during meetings held in 1999 and 2000. The complaint was not filed until December, 2005. Therefore, because of the lapse of time, the defendant argues this creates a presumption that the materials were not prepared in anticipation

of litigation.

The plaintiff contends, through his affidavit, that the materials were generated in contemplation of litigation. However, where there is a significant time lag between when materials were prepared and the commencement of the action, an “almost prima facie presumption” that the materials were not prepared for litigation may be created (*Bd. of Educ., Union Free School Dist. No. 3, Town of Babylon, Suffolk County v Ace Test Boring, Inc.*, 47 Misc.2d 864, 865 [Sup. Ct., Special Term Suffolk County 1965]). In *Town of Babylon*, there was a 19 month lag between when the requested material was generated and when the complaint was filed. Where a year and a half had passed before the action was commenced after the documents were created, the court found there was “an insurmountable skepticism in the mind of the court regarding plaintiff’s primary objection to the production” (*Id at 865*). Because of this, the court found it difficult to accept the materials were prepared for litigation. This, in addition to the fact that there was not other way to duplicate the material led the court to order production of the documents.

If the papers before the court don’t suffice for resolution of the issue, the court can require the item be produced for inspection in camera before it is turned over to the other party (*Haire v L.I.R.R. Co.*, 29 AD2d 553 [2nd Dept 1967]). Indeed whether a particular document is or is not protected is a fact specific determination most often requiring in camera review (*See Spectrum Systems Int’l v Chem Bank*, 78 NY2d 371, 378 [1991]). Upon review, if a court is satisfied the notes were drawn up only after consultation with counsel and upon counsel’s advice, it will be protected by CPLR 3101(d) (*Albano v Schwab Bros. Trucking Co.*, 27 AD2d 901 [4th Dept 1967]).

Plaintiff relies upon his affidavit to meet his burden of establishing the documents are privileged. However, the plaintiff does not explain the approximate five year time lag before the purported consultation with an attorney which led to the creation of the notes and the time when the complaint was actually filed.

Defendant asserts that *Town of Babylon* stands for the proposition that where there is an extended time lag between when the documents are created and when the complaint is filed, the court must find they were not prepared in anticipation of litigation. The court does not accept this view, for if in fact, the notes reflected that they were prepared in anticipation of litigation, then the time lag is irrelevant. It is the content and the purpose of the documents at issue which is relevant. Rather the substantial time after which the complaint is filed is evidence suggesting that the documents were not created in anticipation of litigation. It is evidence the court may consider which may shed light especially where the plaintiff is affirming that they were prepared for litigation purposes. Therefore, the court has taken the notes for an in camera inspection.

The subject notes appear to solely report the happenings at the various business meetings. The notes contain nothing more than a report of what was discussed between the attending parties. They do not indicate any mental impressions of the plaintiff nor any other communication intended for the plaintiff's lawyer for which a privilege should attach. There is no indication that they are being prepared in anticipation of litigation. They do not reflect any legal advice obtained from counsel. Rather, they seem only to be, in effect, the minutes of a business meeting conducted in the ordinary course of business. Despite the plaintiff's conclusory statements to the contrary, the notes appear to have been made in the ordinary course of business, some five or six years prior to litigation and not created in anticipation of litigation. The

plaintiff has failed to meet his burden of establishing anything to the contrary.

Therefore, because the notes appear to be relevant to the issues in this litigation, they are discoverable and the plaintiff is directed to turn them over to the defendant.

Attorney Client Communication

Plaintiff has further failed to meet his burden of establishing that the notes were prepared for the sole purpose of obtaining legal advice or have been given to counsel to seek such advice (*Spectrum Systems Int'l Corp. v Chem. Bank*, 78 NY2d 371, 377-78 [1991]). While any conversations Plaintiff may have had with his then-counsel for the purposes of obtaining legal advice regarding the business meetings may be privileged, such conversations are distinguishable from the notes Plaintiff took of such meetings, which he never communicated to counsel. Despite plaintiff's argument to the contrary, the notes do not reflect confidential communications between an attorney and client for the purpose of obtaining legal advice. The notes themselves do not purport to seek legal advice, and Plaintiff's subsequent use of the notes to enable him to communicate the facts contained therein does not convert the notes into privileged documents (*Spectrum* at 377)("The privilege is of course limited to communications—not underlying facts."). For these reasons, the notes are not protected by the attorney client privilege.

Conclusion

Therefore, based on the foregoing, it is hereby

ORDERED that the plaintiff produce the subject notes within ten days of service of a

copy of this order with notice of entry.

This shall constitute the decision and order of the court.

Dated: May 8, 2007

ENTER:



HON. RICHARD D. LOWE, III

J.S.C.

**FILED**

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