

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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ROSWELL PARK CANCER INSTITUTE  
CORPORATION,

Plaintiff,

**MEMORANDUM**  
**DECISION**

vs.

Index No. 2862/07e

**SODEXHO AMERICA, LLC, SODEXHO  
OPERATIONS, LLC and SODEXHO  
MANAGEMENT, INC.,**

Defendants.

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**SODEXHO AMERICA, LLC, SODEXHO  
OPERATIONS, LLC and SODEXHO  
MANAGEMENT, INC.,**

Third-Party Plaintiffs,

vs.

**FITZMEYER & TOCCI ASSOCIATES, INC.,**

Third-Party Defendant.

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BEFORE:

**HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES:

**PHILLIPS LYTLE LLP**

William J. Brennan, Esq., of Counsel  
Kenneth Manning, Esq., of Counsel  
Attorneys for Plaintiff

**COOLEY MANION JONES LLP**

Christopher Cunio, Esq., of Counsel  
Ellen Bates, Esq., of Counsel

**BENDER CRAWFORD & BENDER**

Diane Bosse, Esq., of Counsel  
Thomas Bender, Esq., of Counsel  
Attorneys for Defendants and Third-Party  
Plaintiffs Sodexho America, LLC,  
Sodexho Operations, LLC and  
Sodexho Management, Inc.

**LEWIS, BRISBOIS, BISGAARD & SMITH**

David Pollack, Esq., of Counsel  
Attorneys for Third-party Defendant  
Fitzemeyer & Tocci Associates, Inc.

**CURRAN, J.**

This matter came before the Court upon a motion by Plaintiff Roswell Park Cancer Institute for in camera review of certain documents withheld by Defendants Sodexho America, LLC, Sodexho Operations, LLC and Sodexho Management, Inc. (hereinafter referred to as “Sodexho”) under a claim of privilege.

By way of background, in April 2003, plaintiff Roswell Park Cancer Institute (RPCI) and Sodexho entered into a \$14.4 million contract pursuant to which Sodexho was to design and construct improvements to RPCI’s heating and cooling systems. Third party defendant Fitzemeyer & Tocci Associates, Inc. is an engineering firm retained by Sodexho. The improvements, based upon Sodexho’s advice, involved two projects. Initially, a Co-Generation System was designed and built, including a new boiler and a new turbine/generator to be used to convert steam into electricity. The Co-Generation System lies unused, for various reasons.

The second project required the design and installation of certain energy efficiencies for the existing systems. Sodexho guaranteed that, as a result of its work, RPCI would realize energy savings of several millions dollars over a five-year period.

RPCI contends that virtually all aspects of the contract were mis-designed and mis-engineered. RPCI filed the instant action in March 2007.

### **The Instant Dispute**

In the course of document production, in response to RPCI's requests, Sodexho produced a privilege log. After correspondence between the parties, further documents were produced and Sodexho produced a revised privilege log in March 2008 (*see* Brennan Affid., Exhibit 4). After further negotiations between the parties, this motion followed in September 2008.

The burden of establishing any privilege is on the party asserting it; "the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity" (*Spectrum Systems Internat'l Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]). "Whether a particular document is or is not protected is necessarily a fact-specific determination . . . most often requiring in camera review" (*Spectrum*, 78 NY2d at 378). After oral argument on October 23, 2008, the Court determined that in camera review of the documents at issue was required.

After that review, the Court held a conference at which counsel for all parties were present in person or by telephone. The purpose of the conference was to determine whether the record properly revealed that Sodexho had made a claim to withholding some of the documents as prepared in anticipation of litigation. Although a third revised privilege log

was allegedly issued in October 2008 putting forth such a claim as to certain documents, that revision is not part of the record on this motion. Sodexho's first two privilege logs made no such particular claim, raising only the attorney-client and/or the work product privilege.

However, the Court takes note of the fact that Sodexho's in-house counsel Mr. Johnson, in his affidavit, had made such a claim (*see e.g.* Johnson Affid. ¶¶ 7-10) .

After that clarification, which related to less than ten (10) of the disputed documents, the Court is prepared to rule, including as to the objection based on anticipation of litigation.

According to RPCI's counsel, the disputed documents consist entirely of e-mails, and the e-mails at issue fall into three categories:

(1) fifty-seven (57) e-mails, identified by Sodexho as constituting attorney work product and/or attorney client communications, but on which no attorney is listed as an author, recipient or "cc". Rather all such persons were Sodexho workers involved in the RPCI projects (*see* Plaintiff's Memo of Law, Addendum A).

(2) nineteen (19) e-mails, identified as subject to both attorney-client privilege and/or work product privilege, none of which were authored by an attorney, but on which in-house counsel is listed as a "cc" (*see* Plaintiff's Memo of Law, Addendum B)

(3) seventy (70) e-mails, identified as constituting attorney client communications and/or attorney work product, where an in-house lawyer is listed as one of several recipients.

Most of the affected e-mails date from 2006 or 2007; a few date from 2005, and a few date from 2003.

### Law

The law of privilege concerning documents subject to disclosure appears in part under CPLR 3101 (*see also* CPLR 4503[a]).

Three categories of protected materials are found in the CPLR: privileged matter, absolutely immune from discovery (CPLR § 3101 [b]); attorney's work product, also absolutely immune (CPLR § 3101 [c]); and trial preparation materials, which are subject to disclosure only upon a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means. (CPLR § 3101 [d][2]).

(*Stenovich v Wachtell, Lipton, Rosen & Katz*, 195 Misc2d 99, 104 [Sup Court NY County 2003]). With respect to the attorney client privilege,

[a] corporation's communications with counsel, no less than the communications of other clients with counsel, are encompassed within the legislative purposes of CPLR 4503. . . . The privilege applies to communications with attorneys, whether corporate staff counsel or outside counsel ....

[S]taff attorneys may serve as company officers, with mixed business-legal responsibility; whether or not officers, their day-to-day involvement in their employers' affairs may blur the line between legal and nonlegal communications; and their advice may originate not in response to the client's consultation about a particular problem but with them, as part of an ongoing, permanent relationship with the organization. . . .

Obviously, not every communication from staff counsel to the corporate client is privileged. It is equally apparent that no ready test exists for distinguishing between protected legal communications and unprotected business or personal communications; the inquiry is necessarily fact-specific. . . .

For the privilege to apply when communications are made from client to attorney, they "must be made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose"

(*Rossi v Blue Cross and Blue Shield of Greater New York*, 73 NY2d 588, 592-93 [1989] [internal citations omitted]). Further, “an investigative report does not become privileged merely because it was sent to an attorney” (*Spectrum Systems Intern. Corp. v Chemical Bank*, 78 N.Y.2d at 379). The same rule applies to any document which is merely forwarded to an attorney without comment. In this case, a number of e-mails were forwarded to outside counsel years after the e-mails were created, but without further comment; such e-mails cannot be thereby rendered privileged in that fashion, unless the e-mails were already subject to a claim of privilege (*see generally Quail Ridge Assoc. v Chemical Bank*, 174 AD2d 959, 962 [3d Dept 1991]).

“Attorney work product material differs from attorney-client material principally in that work product includes work preparatory to providing legal advice or representation, but which material is not itself a communication to the client” (2 NY Practice, Commercial Litigation in New York State Courts §20:20). Work product is “limited to those materials which are uniquely the product of a lawyer’s learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy” (*Hoffman v Ro-San Manor*, 73 AD2d 207, 211 [1<sup>st</sup> Dept 1980]; *see Matter of Condon v Niagara County Dist. Attorney’s Office*, 115 AD2d 270 [4<sup>th</sup> Dept 1985], *lv denied* 67 NY2d 609 [1986]; *Graf v Aldrich*, 94 AD2d 823, 824 [3<sup>rd</sup> Dept 1983]).

Finally, under CPLR 3101 (d) (2), “materials otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party’s representative (including an attorney, consultant, surety, indemnitor, insurer or agent), 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.” (CPLR § 3101 [d] [2]).

It is clear that “[t]he restriction in CPLR 3101(d)(2), placed on discovery of any writing or thing created by or for a party or its agent in preparation for litigation, includes such matters as (1) the trial preparations of an attorney, or of those working for the attorney, that are not classified as attorney’s ‘work product’-i.e., that do not involve possible revelation of legal analysis and strategy; (2) material created at the lawyer’s request by the client; and (3) materials prepared in contemplation of litigation by non-lawyers and lawyers acting in a non-legal capacity.” (1-20Weinstein-Korn-Miller CPLR Manual § 20.02 [e] [1] [2006], citing *Point Tennis Co. v Irvin Indus.*, 86 Misc 2d 231 [Sup Ct Nassau County 1976].)

(*Beller v William Penn Life Ins. Co. of New York*, 15 Misc3d 350, 356 [Sup Ct Nassau County 2007]).

In opposition to RPCI’s request that the Court conduct an in camera review to verify Sodexho’s claims for privilege for the over 300 e-mails at issue, Sodexho submitted the affidavit of Assistant General Counsel of Sodexho, Inc., Kenneth Johnson, Esq. Mr. Johnson asserted that between January and March 2003 he provided legal advice to Sodexho executives in connection with the negotiation and drafting of the RPCI agreement. In November 2005, Mr. Johnson again became involved at the point when the relationship between the parties had deteriorated to where, he alleged, Sodexho anticipated that litigation was highly likely. Mr. Johnson stated in addition, that, on or about September 21, 2006, it became clear that litigation between the parties was inevitable.

After careful study of the affidavit of Mr. Johnson in connection with the documents under review and in consideration of the relevant case and statutory law, the Court determines that the period after which the parties anticipated litigation began on or about

September 21, 2006. However, not every document created after that date is covered by the privilege, and if the documents after that date relate to purely business information and were clearly not prepared in anticipation of litigation within the meaning of that term of art under the case law, they have been ordered produced (see the Exhibits attached hereto).

**Exhibits**

The Court's determinations with respect to the above mentioned e-mails appear in the exhibits (A through C) attached to this decision. With respect to some documents, Sodexo produced an entire e-mail chain, along with a copy of the same chain with one or more e-mails redacted therefrom. The Court has assumed that the e-mail was already produced in redacted form, and if the Court finds the redaction to be privileged, the chart will say, e.g., "produce only in redacted form". If the Court finds the redaction not to be privileged, the chart will state "produce".

Defendants shall settle order with Plaintiff.

DATED:        March 11, 2009

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**HON. JOHN M. CURRAN, J.S.C.**