SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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ORANGE AND ROCKLAND UTILITIES, INC.,

Petitioner,

SOUTHERN ENERGY BOWLINE, LLC.,
MIRANT NEW YORK, INC.,
MIRANT BOWLINE, LLC,

Intervenor-Petitioners,

-Against-

THE ASSESSOR OF THE TOWN OF HAVERSTRAW
THE BOARD OF REVIEW OF THE TOWN OF
HAVERSTRAW and THE TOWN OF HAVERSTRAW

Respondents,

COUNTY OF ROCKLAND and NORTH ROCKLAND
CENTRAL SCHOOL DISTRICT,

Intervenors-Respondents.

For a Review of Tax Assessments Under Article 7
of the Real Property Tax Law.

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FILED AND ENTERED ON DATE October 21, 2004 ROCKLAND COUNTY CLERK

AMENDED
DECISION & ORDER
Index Nos: 4133-95
0346-96
4424-97
4639-98
4238-99
3258-00
4694-01
5120-02
5278-03

DICKERSON, J.

DISCOVERY OF NON-PARTY APPRAISALS

By Trial Subpoena and Subpoena Duces Tecum dated July 6, 2004 and directed to Respondents' appraisers, Glen C. Walker and George E. Sansoucy, of George E. Sansoucy Associates, Petitioners request appraisals prepared in the past 10 years by George E. Sansoucy and/or Glenn C. Walker for hydroelectric, fossil fuel or nuclear generating facilities. The request was subsequently limited to appraisals generated for facilities located in New York State. The Petitioners want these non-party appraisals so they can use them during cross examination of Respondents' appraisers.

The Objections

The Court received non-party objections regarding these subpoenas from several law firms. Debra C. Sullivan, Esq. of Hancock & Estabrook, LLP, submitted non-party objections on behalf of the Town Colton, in the case of Niagara Mohawk Power Corp. V. The Town of Colton, wherein no appraisals were filed and exchanged. Alan J. Pope, Esq. of Pope, Scrader & Murphy, LLP, filed non-party objections on behalf of the Town of Union, in the cases of AES v. The Town of Union and NYSEG v. The Town of Union. H. Dean Heberlig, Jr. Esq. of Bond, Schoeneck & King, LLC, filed non-party objections on behalf of the Towns of Bethlehem, Schuyler-Falls and Plattsburgh regarding the case of Niagara Mohawk Power Corp., v. The Town of Bethlehem, wherein appraisals were filed and exchanged and NYSEG v. The Town of Schuyler Falls and The Town of Plattsburgh wherein no

appraisals were filed and exchanged. Paul T. Sheppard, Esq. of Hinman, Howard & Kattell, LLP, filed non-party objections on behalf of NYSEG in the case of NYSEG v. The Town of Union. In both AES v. The Town of Union and NYSEG v. The Town of Union, the appraisals were not filed and exchanged. The court thereafter received a response to the non-party objections from Petitioners, followed by reply letters from Debra C. Sullivan, Esq. On behalf of the Towns of Colton and Webb, H. Dean Heberlig, Jr., Esq. On behalf of the Towns of Bethlehem, Schuyler Falls and Plattsburgh, and Alan J. Pope, Esq. On behalf of the Town of Union. Petitioners thereafter submitted a response to the non-party objector's reply letters. The Respondents took no position on the matter.

DISCUSSION

Controlling Statutory Provisions

CPLR §3140 and 22 N.Y.C.R.R. 202.59(g)(l) direct the parties in a tax assessment review proceeding to exchange all appraisal reports intended to be used at trial. It is well settled, however, that any unexchanged and unfiled appraisal reports prepared by a consulting expert qualify as material prepared in anticipation of litigation pursuant to CPLR 3101(d)(2) and are, generally, not discoverable [see Schad v. State of New York, 240 A.D. 2d 483, 484, 659 N.Y.S. 2d 765 (2nd

Dept. 1997); National City Bank v. State of New York, 72 A.D.2d 762, 421 N.Y.S.2d 381 (2nd Dept 1979); Matter of Oyster Bay v. Town of Oyster Bay, 54 A.D.2d 762, 387 N.Y.S.2d 881 (2nd Dept 1976); Erie Lakawanna Railway Company v. The State of New York, 54 AD 2d 1089, 388 N.Y.S.2d 743 (4th Dept 1976)].

This immunity from disclosure is conditional, however, and pursuant to CPLR 3101 (d)(2) "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."

Appraisals Are Not Stripped Of CPLR §3101(d)(2) Privilege

In their response to the non-party objections, Petitioners argue that to the extent the appraisals sought by subpoena would have otherwise enjoyed the protections afforded by the CPLR §3101(d)(2), "the statutory mandates now in place effectively strip these materials of the privilege afforded materials prepared in anticipation of litigation", referring to CPLR §3140 and 22 NYCRR 202.59(g).

CPLR §3140, entitled "Disclosure of appraisals in proceeding for condemnation, appropriation or review of tax assessments" states:

"Notwithstanding the provisions of subdivisions © and (d) of section 3101, the appellate division in each judicial department shall adopt rules governing the exchange of appraisal reports intended for use

at the trial in proceedings for condemnation, appropriation or review of tax assessments."

22 NYCRR 202.59(g), entitled "Exchange and Filing of Appraisal Reports", guides the parties as to the proper form of the appraisal reports as well as the procedure for exchanging and filing the reports. Only when the court has ordered an exchange of appraisals pursuant to 22 N.Y.C.R.R. 202.59(g), and all parties to the litigation have filed with the clerk of the court all appraisals they intend to use at trial, shall the clerk "distribute simultaneously to each of the other parties a copy of the reports filed." That is the stage at which the appraisals are to be disclosed. Before that point, the appraisals are unfiled, unexchanged, and are covered by the CPLR §3101(d)(2) privilege. Neither CPLR §3140 nor 22 N.Y.C.R.R. 202.59(g) purport to "strip" unfiled and unexchanged appraisal reports of the protections afforded by CPLR §3101(d)(2) and Petitioners' assertions to that effect are unsupported and are rejected by this Court.

The Exception To the Rule

The only exception to the rule that unexchanged and unfiled appraisal reports are not subject to disclosure is that an opposing party can sometimes use prior unfiled appraisals of the subject property to impeach the expert with inconsistent statements contained therein. All but one of the cases cited by Petitioners for the aforesaid rule

involved prior appraisals regarding the subject property [see In the Matter of Hicksville Properties, Inc. v. The Board of Assessors and/or The assessor of the County of Nassau, 116 AD2d 717, 718, 498 N.Y.S.2d 24 (2nd Dept 1986)("where an unfiled appraisal report was prepared by a party's trial expert and is inconsistent with his trial testimony, the unfiled report may be introduced into evidence for impeachment purposes and used to cross-examine the witness"); Carriage House Motor Ins, Inc. v. City of Watertown, 136 A.D.2d 895, 524 N.Y.S. 2d 930 (4th Dept 1988) ("...the Court did not err in admitting an earlier appraisal report on the subject property prepared by another member of the appraisal firm in which petitioner's witness was employed. This report may be used, at the Court's discretion, to impeach the witness' credibility as prior inconsistent statements"); Wettlaufer v. State of New York, 66 A.D. 2d 991, 411 N.Y.S. 2d 775 (4th Dept 1978) ("The trial court erred in refusing to direct production of the prior appraisal of the subject property made by the expert witness called to testify...")].

Niagara Mohawk Distinguished

Petitioners rely additionally on the recent Third Department decision In the Matter of Niagara Mohawk Power Corp. v. Town of Moreais Assessor, 8 A.D. 3d 935, 779 N.Y.S. 2d 608 (3rd Dept 2004). In Niagara Mohawk, Petitioners served trial subpoenas and subpoenas duces tecum on Respondents' engineer, appraiser, and consulting appraiser, seeking

"documents relating to appraisals of other hydroelectric facilities conducted within the last five years". The Court noted that "while it is true that materials prepared for litigation by an appraiser who is not called as a witness are protected from disclosure .....", Petitioners established that their appraiser "relied upon and incorporated information contained in" the prior appraisals sought pursuant to subpoena. Therefore, the Court held that those prior appraisals are relevant for the purpose of impeaching Respondents' appraiser on cross-examination and are therefore subject to disclosure.

In the instant case, Petitioners do not contend that either Mr. Sansoucy or Mr. Walker relied on the subpoenaed unfiled appraisals of unrelated properties in preparing their appraisal reports for this case. Petitioners cannot overcome the conditional immunity these unfiled appraisals are entitled to pursuant to CPLR 3101(d)(2). Accordingly, unfiled appraisals of the unrelated properties not falling within the very limited factual situation set forth in Niagara Mohawk, supra, are privileged and are entitled to protection from disclosure.

Appraisals Never Adopted

The Second Department has held that unfiled appraisal reports lose the conditional immunity they enjoy pursuant to CPLR 3101(d)(2) "under circumstances where 'the State has adopted the appraisal in question by

using it in dealing with some third party in such a way that it can be said to have vouched for its authenticity'" [see Schad v. State of New York, 240 A.D.2d 483, 484, 659 N.Y.S.2d 765 (2nd Dept 1997); Erie Lackawanna Ry. Co. v. The State of New York, 54 A.D.2d 1089, 388 N.Y.S.2d 743 (4th Dept. 1976) ("unfiled appraisal reports which have been adopted by the State or condemning authority are not immune from discovery. ***citations omitted*** Once used in dealing with some third party, the report is not material prepared solely for litigation even though it may also be used for settlement or negotiation. The state having thus adopted the appraisal, it is available by way of discovery and its contents may be used in evidence as admission against interest".); First National City Bank v. State of New York, 72 A.D.2d 762, 763, 421 N.Y.S.2d 381 (2d Dept 1979) ("the county's disclosure of the four appraisals to the state did not amount to disclosure to a 'third party'. The county, a municipal corporation (see County Law s.3) is merely an agent of the state....")]. In the matter before this Court, none of the unfiled, unexchanged appraisals subpoenaed by Petitioners were shown to have been adopted and used by the State in dealing with some third party "in such a way that it can be said to have vouched for its authenticity."

Petitioners have not demonstrated to this Court that the unfiled, unexchanged appraisal reports of other properties which they subpoenaed have lost their CPLR §3101(d)(2) immunity from disclosure.

The Attorney-Client Privilege

The attorney-client privilege in New York is statutory, and is set out in CPLR §3101(b)together with CPLR §4503(a). CPLR §4503(a) states in pertinent part: "Unless the client waives the privilege, an attorney or his employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication in any action, disciplinary trial or hearing, or administrative action..."

This privilege exists to "ensure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his embarrassment or legal detriment" [see Priest v. Hennessy, 51 N.Y.2d 62, 431 N.Y.S.2d 511 (1980)]. The Court of Appeals has delineated general principles relevant to an analysis of whether an attorney-client privilege exists. First, there must exist an attorney-client relationship for an attorney-client privilege to exist and such a relationship arises "only when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services." [see

Priest v. Hennessy, supra, at 51 N.Y. 2d 68; CPLR §4503(a); People v. Belge,59 A.D.2d 307,309, 399 N.Y.S.2d 539 (4th Dept. 1977)].

Second, for a valid claim of privilege to exist, "it must be shown that the information sought to be protected from disclosure was a 'confidential communication' made to the attorney for the purpose of obtaining legal advice or services". [see Priest v. Hennessy, supra, at 51 N.Y. 2d 69; Matter of Jacqueline F.,47 N.Y.2d 215, 219, 417 N.Y.S.2d 884 (1979)].

The attorney-client privilege "applies only to confidential communications with counsel, not to information obtained from or communicated to third parties". [see Marten v. Eden Park Health Services, Inc., 250 A.D.2d 44,47 680 N.Y.S.2d 750 (3d Dep't 1998); Elisic Trading Corp. V. Somerset Mar., 213 A.D.2d 451, 622 N.Y.S.2d 728 (1st Dep't 1995)].

"The burden of proving each element of the privilege rests upon the party asserting it." [see Priest v. Hennessy , supra, at 51 N.Y. 2d 69; Matter of Gavin, 39 A.D.2d 626,628, 331 N.Y.S.2d 188 (3d Dept. 1972)]. "It has long been settled that information received by the attorney from other persons and sources while acting on behalf of a client does not come within the attorney-client privilege. The burden of proving the existence of the privilege is upon the party asserting it and the simple characterization of a statement or communication as 'privileged' will not suffice." [see Matter of the Civil Service Employee Assoc. Inc. v. Ontario County Health Facility, 103 A.D.2d 1000,1001, 478 N.Y.S.2d 380

(4th Dep't 1984)]. In that case, the Fourth Department found that it was not sufficient for an attorney to assert the attorney-client privilege as a shield where he received information from third-party sources while acting on behalf of his client. The attorney-client privilege must be based on specified information as to the content and context of the documents, not generalized descriptions or labels. [see Matter of Comprehensive Habilitation Services, Inc. v. State of New York, 278 A.D.2d 557,558, 717 N.Y.S.2d 680,682 (3d Dep't 2000); Geary v. Hunton & Williams, 245 A.D.2d 936,939, 666 N.Y.S.2d 804 (3d Dep't 1997)].

It is the opinion of this Court that the non-party objectors have not met their burden of proving that any appraisal reports prepared by Mr. Sansoucy or Mr. Walker to assist them in counseling their clients and in preparing for trial are privileged under CPLR §4503(a) and CPLR §3101(b).

Attorney Work Product Privilege

New York Courts have specifically recognized that unfiled appraisal reports prepared by a consulting expert to assist in litigation are fully shielded from disclosure as work-product under CPLR §3101©. [see Xerox Corporation v. The Town of Webster, 266 A.D.2d 935, 616 N.Y.S.2d 119 (4th Dep't 1994) ("material sought from the appraiser was prepared to assist plaintiff's attorney in analyzing plaintiff's case.

Thus, it is protected from disclosure as part of the attorney's work-product".); Santariga v. McCann, 161 A.D.2d 320,321, 555 N.Y.S.2d 309 (1st Dep't 1990) (an expert who is retained as a consultant to assist in analyzing or preparing the case is generally seen as an "adjunct to the lawyer's strategic thought processes, thus qualifying for complete exemption from disclosure under CPLR §3101©".); Lichtenberg v. Zinn, 243 A.D.2d 1045, 1048, 663 N.Y.S.2d 452 (3d Dep't 1997) (exchanges between consultants and counsel enjoyed unconditional protection under CPLR §3101©].

In addition, the protection from disclosure provided by the attorney work-product privilege extends both to the litigation for which the materials were prepared and to any subsequent actions. [see Beascock v. Dioguardi Enterprises, Inc., 117 A.D.2d 1016, 499 N.Y.S.2d 560 (4th Dep't 1986) ("We hold that the absolute privilege protecting attorney's work product from disclosure (CPLR §31011©) extends not only to materials prepared for the litigation then in progress, but also to work product prepared for other litigation."); Corcoran v. Peat, Marwick, Mitchell & Co., 151 A.D.2d 443,445, 543 N.Y.S. 2d 642 (1st Dep't 1989)].

It is the view of this Court that the unfiled, unexchanged appraisal reports prepared by Mr. Sansoucy and Mr. Walker fall squarely within material covered by the CPLR §3101© attorney work-product privilege and therefore they are strictly shielded from disclosure.

Conclusion

Accordingly, Petitioners are not entitled to the aforementioned appraisals prepared by George E. Sansoucy and/or Glenn C. Walker in the cases of Niagara Mohawk Power Corp. v. The Town of Colton, NYSEG v. The Town of Schuyler Falls and the Town of Plattsburgh, AES v. The Town of Union and NYSEG v. The Town of Union for the aforementioned reasons since they were not filed and exchanged and are therefore privileged. To that extent, the subpoenas are quashed. George E. Sansoucy Associates, and/or Glen C. Walker are ordered to produce the subpoenaed appraisal reports in the case of Niagara Mohawk Power Corp. v. The Town of Bethlehem since they have been filed and exchanged and are no longer privileged.

The foregoing constitutes the decision and order of the Court.

Dated: October 21, 2004

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HON. THOMAS A. DICKERSON
Supreme Court Justice

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