

**Gulf Insurance Company v Transatlantic
Reinsurance Company**

2006 NY Slip Op 30025(U)

June 28, 2006

Supreme Court, New York County

Docket Number: 1_30060/1602

Judge: Richard B. Lowe

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

PRESENT: RICHARD B. LOWE III
Justice

PART 54

Gulf Insurance Company

- v -

Transatlantic Reinsurance Company

INDEX NO. 6011602/03
MOTION DATE 1/11/06
MOTION SEQ. NO. 017
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this 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 IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED
JUN 30 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/28/06

RICHARD B. LOWE III
J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----X

GULF INSURANCE COMPANY,

Plaintiff,

Index No. 601602/03

-against-

TRANSATLANTIC REINSURANCE COMPANY,
XL REINSURANCE AMERICA INC., ODYSSEY
AMERICA REINSURANCE CORPORATION, and
GERLING GLOBAL REINSURANCE CORPORATION
OF AMERICA,

Defendants.

-----X

HON. RICHARD B. LOWE, III:

This motion seeks to compel plaintiff, Gulf Insurance Company (Gulf), to produce various documents which have been withheld on the basis of attorney-client and work-product privilege. Defendants Transatlantic Reinsurance Company, XL Reinsurance America Inc. (XL), Odyssey America Reinsurance Corporation, and Gerling Global Reinsurance Corporation of America (collectively, defendants or reinsurers) are reinsurers who object to paying their proportionate share of a \$266 million settlement that was reached with First Union Bank in an underlying action involving insurance on the residual value of cars returned after having been leased. The prior decision in this case set forth the facts more fully, and familiarity with is presumed.

Defendants seek to compel Gulf to produce documents on three grounds. First, defendants assert that Gulf has waived any privilege by engaging in selective and self-serving disclosure of privileged documents during the underlying action. Second, according to

defendants, Gulf has not provided an adequate description of many of the purportedly privileged documents in its privilege logs. Third, defendants contend that many of the documents are not privileged because they involve non-confidential business matters.

The reinsurers maintain that Gulf misrepresented the status of the underlying action, and the strength of its case, by disclosing only certain documents to defendants, and thereby lulling them into a false sense of security regarding the merits and potential exposure in the underlying case. In particular, they maintain that Gulf told them, two weeks before the settlement, that the worst-case scenario was that the exposure would be \$100 million. Then, Gulf's parent company, Travelers Insurance Company (Travelers), took over the settlement negotiations and settled for \$266 million. The reinsurers posit that the settlement may have been driven by factors extraneous to the merits of the litigation, including the possibility that Gulf's expert would be precluded from testifying, the potential effect of the litigation on the \$1.4 billion debt offering that Travelers was then floating, and the possibility of treble damages being awarded under North Carolina law because of Gulf's failure to timely process First Union's claims under the insurance treaties.

In a prior motion, this court determined that the follow-the-fortunes doctrine did not bar defendants' discovery requests, because defendants raised a good-faith basis to seek further information regarding the motivation underlying the settlement. That portion of the decision was not challenged on appeal. The Appellate Division, First Department, held, with respect to the access to records clause contained in the parties' agreement, that such a clause does not waive a claim of privilege where there is subsequent adverse litigation between the insurer and the reinsurers. *Gulf Ins. Co. v Transatlantic Reins. Co.*, 13 AD3d 278, 280 (1st Dept 2004).

DISCUSSION

Defendants maintain that Gulf has waived any privilege by its selective and self-serving disclosure of some privileged information, while withholding other privileged information, during the course of litigating the underlying action. Defendants rely on the prohibition against disclosing privileged information as a sword, and then shielding other privileged information from discovery. The reinsurers contend that Gulf's goal was to induce them to accept Gulf's representations, and by portraying a misleading picture, induce the reinsurers to refrain from taking a more active role in the litigation, and induce them to renew the insurance treaties. Defendants specifically point to the litigation updates provided by Gulf as being purposefully misleading. They contend that Gulf is using these updates as a sword to demonstrate that the settlement was made in good faith, but seek to shield many of the other, possibly damaging, documents from inquiry.

Among the documents defendants seek are documents that appear in the privilege log, but to which one of the reinsurers, XL, had access. XL was not permitted to copy the documents, but it reviewed and took notes of the documents. Other documents that defendants seek are documents which were allegedly disclosed to Employers Reinsurance Corporation (ERC), originally a defendant in this action, in order to induce ERC to settle the action. Defendants maintain that Gulf is now improperly refusing to allow them to see those documents, even though it disclosed them to ERC. In addition, defendants seek documents that were relied upon by Gulf's expert, because any privilege that may otherwise attach to such documents is waived by disclosing them to the expert.

While the decision of the Appellate Division did not preclude the reinsurers from seeking

documents that are not privileged, the decision made it clear that in providing any documents during the underlying action, based upon the parties' relationship at that time, Gulf did not open the door to the reinsurers obtaining access to those documents in this litigation. *Gulf*, 13 AD3d at 280 (“[p]roduction of documents under those circumstances does not prevent the assertion of privilege of similar documents in an adversary situation”). As a result, neither the documents provided, nor those that Gulf offered to provide, can be held to be subject to a waiver based upon Gulf having provided them during the pendency of the First Union action. Defendants can, however, challenge the assertion of privilege on other grounds.

In this case, it is clear from the documents presented, as well as the papers submitted by the parties, that Gulf not only provided updates to the reinsurers, but invited them to inspect whatever records they chose during the course of the underlying litigation. XL apparently took advantage of that offer, and did inspect documents that defendants now seek to have produced. However, the very fact that XL was able to inspect them during the underlying action demonstrates that Gulf was not selectively disclosing documents, so as to result in waiving the privilege. Gulf allowed access to the documents. Consequently, the documents that were available for inspection cannot now be said to have been concealed in an effort to use the privilege as a sword, thereby waiving the privilege. As a result, the fact that Gulf revealed some documents to the reinsurers during the First Union litigation, and revealed additional documents to XL when XL came to inspect them, does not create any right for defendants to obtain the documents now. *Id.*; see also *U.S. Fire Ins. Co. v Phoenix Assur. Co.*, Index no. 7712/91 (Sup Ct, NY County [Moskowitz, J.] 1992), *affd for reasons stated* 193 AD2d 559 (1st Dept 1993).

With respect to the documents that Gulf revealed to ERC, Gulf avers that those

documents were created and provided to ERC after the cutoff date for discovery, and, therefore, were not covered by the discovery requests made by defendants. In their reply memorandum, defendants do not dispute this allegation. Accordingly, defendants have not established their right to discovery of those documents.

Defendants next contend that Gulf placed the subject matter of the privileged communications “at issue” by bringing this action, in which it asserts that it acted in good faith when it settled the case with First Union. According to defendants, Gulf is relying on the litigation reports it provided to the reinsurers, as well as meetings with the reinsurers, to establish that it acted reasonably, and kept the reinsurers informed. By placing the reasonableness of its actions at issue, defendants maintain that Gulf has waived any privilege with respect to all documents that can shed light on the motivation for settling the case with First Union.

Gulf commenced this action in order to recover money that it paid in settlement of the underlying action. It did not place its good faith at issue by bringing this action. *U.S. Fire Ins. Co., supra* at F-4. It is defendants that seek to call Gulf’s good faith into question. Under these circumstances, any privilege attaching to Gulf’s documents is not waived by defendants’ challenge of Gulf’s good faith. *See North River Ins. Co. v Columbia Cas. Co.*, 1995 WL 5792 (SD NY 1995); *North River Ins. Co. v Philadelphia Reins. Corp.*, 797 F Supp 363 (D NJ 1992). Consequently, Gulf has not waived any privilege by bringing this action.

Defendants contend that Gulf has provided an inadequate privilege log, which results in its losing any privilege that it may otherwise have had, and, therefore, that Gulf must produce all the documents that it has withheld. Specifically, defendants maintain that Gulf has failed to identify the authors and recipients of several documents. By failing to identify the authors and

recipients, Gulf has not met its burden of establishing privilege. In addition, defendants assert that Gulf did not log certain redactions to documents. Since it failed to provide any basis for the redactions, Gulf has failed to meet its burden of proof supporting the privilege, and defendants aver that Gulf must, therefore, produce unredacted copies of the documents.

After this motion was filed, Gulf produced many additional documents and supplemented its privilege log. However, according to defendants, there are still documents that should be produced, and the privilege log is still inadequate.

In view of the change in circumstances since this motion was filed, the court cannot determine which documents are still at issue, and what aspects of the privilege log are still in dispute. Therefore, the court will address the general parameters of this portion of the motion, and the specifics will be referred to a Special Referee to hear and report, as was agreed to by both sides.

Defendants contend that Gulf cannot maintain a privilege as to some of the documents because Gulf has not stated the author and recipient. Without that information, Gulf has no basis for maintaining that the document is attorney work product.

There is no question that the party asserting a privilege must demonstrate its entitlement to that privilege. *Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190 (1st Dept 2005). In the case of attorney work product, the privilege log must include sufficient information to establish that the document being withheld is indeed attorney work product. Saying that the document is “privileged on its face” without providing the information required to fulfill its burden is inadequate. Thus, unless Gulf has provided the required information regarding the allegedly privileged documents, those documents must be produced.

Defendants contend that Gulf has had three opportunities to meet its burden, and should now be required to turn over any documents with respect to which that burden has not been met. Gulf does not dispute that it has had an opportunity to amend its privilege log, but maintains that it cannot always ascertain which attorney authored a particular document.

In view of the narrow manner in which privileges are construed, and the unquestionable fact that the party asserting it must prove its right to the privilege (*Graf v Aldrich*, 94 AD2d 823, 824 [3d Dept 1983]), Gulf must either present proof that each document withheld on the basis of privilege is indeed authored by an attorney, or must produce the documents to defendants. The particular documents involved shall be presented to the Special Referee for in camera inspection.

The same considerations apply to the redactions of documents. Gulf must either have logged the redactions adequately, or unredacted copies of the documents must be produced.

With respect to documents that have a business purpose, the law is settled that such documents are not privileged, even if they were authored by an attorney. Consequently, in order to assert a privilege, Gulf must demonstrate that each document was a legal document, and did not serve a business purpose. Thus, documents created in order to determine whether to pay on a claim are not privileged. Only if the document was created solely for litigation purposes can the document be withheld. *Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, *supra*; see also *Eisic Trading Corp. v Somerset Marine, Inc.*, 212 AD2d 451, 452 (1st Dept 1995). Again, any documents that are still subject to dispute should be submitted to the Special Referee.

Defendants maintain that Gulf has withheld documents that, based on its own log descriptions, do not support a finding of privilege. Defendants contend that they have a good

faith basis to believe that some of the documents appear to contain nonlegal business information, which does not become privileged merely because an attorney handled the document. According to defendants, there is a series of documents which appear to reflect Gulf's conduct in the ordinary course of the insurance business of assessing claims made against its policy, and determining coverage therefor. Defendants also maintain that there are several entries related to the decision to engage outside consultants to evaluate First Union's claims. Defendants assert that this is not analogous to hiring outside counsel, but involves nonlegal, business-related considerations. Defendants also rely on the fact that Gulf proffered someone from Bank Lease Consultants (BLC) as a testifying expert in the First Union litigation, which would remove any privilege that might have attached to the documents that BLC utilized.

Gulf maintains that BLC was a litigation consultant, and one Randall McCathren of BLC was made available to First Union for deposition in response to the North Carolina Court's order that Gulf "produce in lieu of an expert the author(s) of the [gains] analysis whether or not they are experts." *Ledley Aff.*, ex. 17. However, according to Gulf, McCathren was not an expert, but a non-testifying consultant.

It is unclear from the papers before the court whether McCathren, to whom defendants refer as having had access to privileged documents, was a legal consultant or a business consultant, or whether he was a testifying witness, so as to remove the privilege. This is not a matter which can be determined on the record before the court, and it will, therefore, be referred to a Special Referee to hear and report.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion to compel discovery, insofar as it is based on a claim of waiver of privilege based upon the disclosures made in the underlying action, is denied; and it is further

ORDERED that the issues of whether plaintiff has waived its privilege based upon its disclosures to Bank Lease Consultants, whether there is any privilege that attaches to the disputed items in the privilege log, and whether the privilege log is adequate, are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Motion Support Office (Room 119) to arrange a date for the reference to a Special Referee.

Dated: June 28, 2006

ENTER:


RICHARD B. LOWE III
J.S.C.

FILED
JUN 30 2006
COUNTY CLERK'S OFFICE
NEW YORK