D&L Assoc. Inc. v NYC Sch. Constr. Auth.
2006 NY Slip Op 30827(U)
July 12, 2006
Supreme Court, New York County
Docket Number: 102477/2004
Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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D&L Associates Inc.

Plaintiff,

Index No. 102477/2004

- against -

DECISION and ORDER

NYC School Construction Authority,

Defendant.

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MOSKOWITZ, J.:

In this case, plaintiff D&L Associates Inc. ("D&L") seeks payment on four construction contracts with the NYC School Construction Authority ("SCA"). SCA has asserted a counterclaim for fraud in the inducement and is seeking recision on three other construction contracts between D&L and SCA. The counterclaims seek restitution of $5,4463,08.20. The crux of the counterclaim appears to revolve around D&L's hiring of a plumbing subcontractor that SCA disqualified from performing SCA work. SCA accuses D&L of identifying a company called "Program Unlimited" as its plumbing subcontractor, but using another subcontractor, Core Industries, instead. (Answer ¶ 37). According to Soraya Berg, an attorney with SCA, in October 2003, it came to the attention of SCA's Office of the Inspector General ("OIG") that D&L was using a contractor that SCA had disqualified. Ms Berg speculates in her affidavit that "D&L would pay Program Unlimited $25,000 in exchange for listing Program Unlimited as the licensed plumbing subcontractor on three SCA projects without any involvement of Program Unlimited in the actual work." (*See* Affirmation of Soraya Berg, dated October 22, 2004, ¶ 15 attached to the affirmation of Lorraine D'Angelo, dated January 27, 2006). SCA claims "had SCA known about D&L's misrepresentations, it would have revoked D&L's prequalification status and would

not have awarded it any contract subsequently." (Answer at ¶ 38).

Plaintiff moved (seq. no. 002) to compel the production of documents that defendant SCA has withheld on the grounds of privilege. Plaintiff's motion included defendant's privilege log as an exhibit. On March 30, 2006, I ordered the defendant to supply the documents at issue for an *in camera* inspection in order to decide this motion. This decision addresses that *in camera* inspection.

The documents that defendant has withheld concern an investigation into D&L that OIG performed. Plaintiff argues that the court should compel SCA to produce these documents because: (1) no privilege applies to the documents and (2) by asserting a claim for fraud in the inducement, defendant has placed "at issue" the information contained in the files of OIG, including all investigations and documentation concerning D&L that would bear on its prequalification status.

I. Relevancy

Defendant claims that plaintiff has not identified a need for the documents. (Def. Opp. Me. at 4). Plaintiff claims that it is entitled to discovery of OIG's files concerning D&L that could have formed the basis for SCA's revocation of D&L's prequalification status, not only those relating to D&L's use of the disqualified plumber on this project. (Pl. Mem. At 3-4). This argument is a non-sequitor because plaintiff is not seeking reinstatement of its approved status in this lawsuit. However, to the extent the documents bear upon when SCA knew from the investigation that D&L was using a disqualified subcontractor, they are relevant to SCA's claim that it would not have awarded the contracts to D&L had SCA known. Thus, the documents may address SCA's reasonable reliance, an essential element of fraud. Consequently, the documents

are discoverable unless they are privileged.

I. Public interest/Law Enforcement/ Investigatory Privilege

Defendant claims that, because the documents are part of the investigative files of OIG, the documents are immune from discovery. Defendant argues "the production of the documents requested would not be in the public's best interest because the documents contain information such as witness statements and names and information about numerous individuals and companies that have nothing to do with plaintiff's claims." (Def. Opp. Mem. at 4-5). SCA also baldly states that OIG must ensure that the information it gathers is vital to the public safety but never says why. (*Id.* at 5).

In *Colgate Scaffolding & Equipment Corp., v. York Hunter City Services, Inc.*, 14 AD3d 345 (1st Dept 2005), another case that involved SCA as a defendant, the Appellate Division, First Department distinguished public interest privilege from law enforcement privilege. The court refused to protect the documents from disclosure under the public interest privilege because defendant had failed to identify potential harm such as a threat to the public security or danger to a confidential informant. Likewise, SCA has failed to do so here beyond the "broad, conclusory assertion that confidentiality is necessary to the pending investigation and vital to public safety because it encourages potential witnesses to provide information to the inspector general." (*Colgate* at 346). This reason was insufficient in *Colgate* and is insufficient here. Thus, the "Public Interest" privilege is not available to protect SCA's documents.

However, in *Colgate*, the Appellate Division, First Department also identified the "interest in preserving the efficacy of investigative methods" and "the need to encourage potential witnesses to come forward as a legitimate reason to restrict discovery." (*Id* at 347-48).

Here, SCA has argued that disclosure "would have a chilling effect on future confidential sources providing information to the OIG and other law enforcement agencies and would impair the agency's ability to develop and protect such sources and information in future investigations." (Def. Opp. Mem. at 5). Preserving the efficacy of investigative methods is a sufficient basis for the court to perform an *in camera* review of the material to determine if redaction is required to protect a legitimate law enforcement interest. (*Colgate* at 347). Accordingly, the court directed SCA to provide the documents for in camera review on March 30, 2006.

Upon that review, the court directs the production of those items that D&L has identified as falling under the "investigative" or "law enforcement" privilege, but with the names of witnesses and other identifying information, such as titles and job descriptions, redacted. D&L does not need this information to establish what SCA knew about D&L at the time it entered into the contracts with D&L. This redaction should be sufficient to protect against the only concern that SCA identified, namely that it would chill the likelihood that witnesses will come forward in future investigations. It also protects the identities of the witnesses who came forward in this investigation.

D&L's argument that SCA is not acting in its role as a public entity but rather has assumed the role of a private litigant does nothing to diminish the concerns behind the investigatory privilege. Also, plaintiff contends that because, in June 2002, the OIG was stripped of its investigative powers and all such power now vests in the Department of Investigations, the reason defendant gave for assertion of the investigative privilege, namely a chilling effect on future investigations, is no longer valid. However, it does not really matter which department performed the investigation. If identifying information becomes public, the

chilling effect is the same regardless of who now has the authority to perform an investigation. Thus, defendant must produce those documents it has identified as falling only under the "investigative/law enforcement" privilege with appropriate redactions.

II. Attorney-Client

The court now turns to those documents for which SCA has asserted the attorney-client privilege protects. D&L contends that many of the documents are not privileged but rather documents that are in SCA's ordinary course of business or contain information of a purely factual nature. The court has reviewed each of the documents that plaintiff challenges at page 6 of its opening memorandum. With few exceptions, the documents contain attorney-client communications or are documents prepared solely in anticipation of litigation, including documents containing legal strategy. The documents that are not privileged are: 802, 804, 805, 826 (but with the privileged material redacted), 1063 (fax cover sheet), and 1403-1408 (note and list of contracts that do not contain legal analysis, request for or communication of legal advice). In addition, the following two documents do not appear to have been circulated solely between attorney and client: 959 and 1183. Accordingly, these two documents must be produced as well. In addition, defendant should produce all documents between SCA and the New York City Comptroller's office as defendant has not indicated that there is an attorney-client relationship between itself and the Comptroller's office (e.g. 268, 1019).

Finally, documents 938-946 do not qualify as materials prepared solely in anticipation of litigation or as attorney-client communications because defendant sent them to a third party. However, the documents should still be redacted to ensure confidentiality of witness information and other information the release of which would have a chilling effect on investigations.

III. Documents Prepared Solely in Anticipation of Litigation

Both parties have confused attorney work product privileged under CPLR 3101(c) with "materials prepared in anticipation of litigation" discussed in CPLR 3101(d)(2). Documents falling under CPLR 3101(c) have absolute immunity and are generally something that only a lawyer can do. (*See* Siegel's New York Practice, at § 558 [4th edition]). However, it appears that both parties meant for the court to analyze the remaining documents under CPLR 3101(d)(2). Accordingly, whenever the defendant claims a document qualifies as "work product," I will consider it to mean "solely in anticipation of litigation."

Plaintiff argues that the log makes it appear that documents 959, 968-970, 1019, 1067, 1155-1156, 1247 and 1413 are not "properly qualified under the work product privilege." However, the *in camera* review shows that the documents indeed are materials prepared solely in anticipation of litigation or are also attorney-client communications. Therefore, defendant need not produce these documents.

Plaintiff argues that documents 934, 1191-1192, 1434, 1435, 1455, 14980-1491 and 1512 appear to be documents that defendant prepared in the ordinary course of business. However, these documents are either: litigation status reports, other documents prepared solely in anticipation of litigation or, like 1512, contain an attorney client communication. Therefore, these documents also receive protection.

Finally, plaintiff argues that documents 986, 987-992, 1041, 1042, 1070-1071, 1055-1056, 1475-1476 and 1487-1489 contain factual information and therefore defendant must produce them. However, these documents are privileged to begin with and redacting out the factual information is not feasible without invading the privilege. Therefore, defendant need not

produce these documents either.

However, as to document 1095, defendant has failed to assert a privilege and therefore must produce the document. Defendant should also produce documents 1183 and 1252 (but with handwritten attorney notes redacted). OIG appears to have created these documents in the ordinary course of business and not solely in anticipation of litigation. Finally, 1475-1476 may be investigative but are not otherwise privileged. Therefore, defendant must produce them with appropriate redactions.

IV. At Issue Waiver

D&L argues that SCA has placed the information it seeks to protect at issue because it has asserted a counterclaim for fraud in the inducement. Plaintiff explains that the communications between OIG and SCA bear directly upon whether or not plaintiff duped SCA into awarding the four contracts. According to plaintiff, "[i]nformation contained in those withheld communications will tend to prove or disprove its suspicions as to the party to whom D&L intended to award subcontracts to on each of the projects for which the SCA is seeking recision and will prove or disprove what the SCA knew about D&L which might impact its decision to maintain D&L's pre-qualification status." (Pl. Mem at 8).

Defendant claims in its counterclaim that had it known D&L had retained a different plumbing subcontractor who was disqualified from performing SCA work, it would have revoked D&L's prequalification status and would not have awarded it the contracts. (Answer ¶ 37). Thus, what SCA knew about D&L and when it knew it are critical to SCA's counterclaim.

However, defendant's counterclaim involves its knowledge of the facts, not the law. What is relevant is what defendant knew or reasonably should have known. The legal advice

that attorneys may have rendered to the SCA is not relevant to the issue of whether the defendant had suspicions or, in the alternative, justifiably relied on plaintiff's representations that it would use a particular contractor. (*See S.N. Phelps & Co., v. The Circle K Corp.*, 1997 WL 31197 at *3-4 [SDNY Jan. 28, 1997] [where plaintiffs alleged fraud, defendants could not "circumvent the attorney-client privilege merely because the privileged communication may shed light on what they knew or should have known"]; *Standard Chartered Bank Plc., v. Ayala International Holdings, (U.S.) Inc.*, 111 FRD 76, 81 [SDNY 1986] [court rejected notion that defendant waived the attorney-client privilege by asserting counterclaims and putting the justifiability of its reliance at issue where what was relevant was not what counsel said to the defendant but what it knew or reasonably should have known]). Accordingly, as defendant has not put the advice of its counsel at issue, there has been no waiver.

In addition, plaintiff should have access to information sufficient to defend against this counterclaim. The privilege log contains the dates of the documents. Plaintiff also has received and will continue to receive documents touching on this issue that are not privileged. Plaintiff also will have the opportunity to depose witnesses for SCA. Plaintiff has not demonstrated at this juncture why it must invade SCA's privilege to obtain the information it needs. Under plaintiff's reasoning, every time a party asserts a claim for fraud in the inducement, privileged material would be relevant to reasonable reliance. Again, plaintiffs cannot circumvent the attorney-client privilege merely because the documents may shed light on what SCA knew or should have known. In addition, because plaintiff has other avenues to discover the information relating to the counterclaim, it does not have a substantial need for the documents necessary to overcome the privilege for documents prepared solely in anticipation of litigation. (CPLR

3101[d][2]).

Accordingly,

IT IS ORDERED THAT

The court grants plaintiff D&L Associates Inc.'s motion to compel in part as set forth in this decision and otherwise denies the motion.

Defendant has twenty days from the date of this decision and order to retrieve the copies of the documents from chambers, at which point the court will discard them.

Dated: July 12, 2006

J.S.C.