

**Khuzami v Huffman**

2007 NY Slip Op 34194(U)

December 12, 2007

Supreme Court, New York County

Docket Number: 0112880/2006

Judge: Judith J. Gische

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

PRESENT: J. G. Siche  
Justice

PART 10

KHUZAMI

INDEX NO. 112880/2006

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. #003

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

- v -

HUFFMAN etc

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*decided in accordance  
with the annexed decision  
and order.*

**FILED**

DEC 20 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 12/11/07

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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 10

-----X

Vicki Khuzami,

Plaintiff,

-against-

DECISION/ORDER  
Index # 112880/06  
Mot. Seq # 003

Todd Huffman, Todd Huffman Photography, and  
G.C. Plumbing & Heating, Inc.

Defendants.

-----X

Hon. J. Gische:

Pursuant to CPLR 2219(a) the following papers were considered on this motion:

PAPERS		NUMBERED
Notice of Motion, KBS affirm., exhibits.....		1
Affirm. Of good faith.....		2
CBK affirm., exhibits.....		3
DEK affirm.....		4

**FILED**

DEC 20 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff is moving to compel certain discovery. Defendants Todd Huffman and Todd Huffman Photography (collectively "the Huffman defendants"), jointly represented, oppose the motion in its entirety. Defendant G.C. Plumbing & Heating Inc. (G.C. Plumbing") opposes only those parts of the motion that affect it. Before the motion was submitted to the court, plaintiff withdrew that portion seeking the deposition of Mr. Sartain. The remaining relief requested by plaintiff includes: [1] the production of materials identified by the Huffman defendants as privileged; [2] a continued deposition of Mr. John Kiernan; [3] a direction that during such deposition defendants' counsel abide by Parts 221.1 and 221.2 of the Uniform Rules for New York State Trial Courts and [4] costs and attorneys fees. The Huffman defendants have submitted the

documents identified in their privilege log for in camera inspection by the court.

The underlying litigation concerns a flood that occurred on June 18, 2006. The flood apparently emanated from a leak in an art/photography studio occupied by the Huffman defendants. Its source was a hot water heater purchased from and installed by G.C. Plumbing. The plaintiff occupied an art studio on a lower floor. She brought this negligence action on or about October 4, 2006 for property damages that she sustained as a result of the flood. The Huffman defendants were insured by Utica National Insurance Company ("Utica Insurance") at the time of the flood. The Huffman defendants have no direct claim against Utica Insurance.

#### Claim of Privilege

The Huffman defendants quickly notified Utica Insurance about the incident after the flood. Utica Insurance then hired an independent investigator, known as Independent Adjustment Company ("IAC"). The documents/files at the heart of the privilege issue are IAC reports made to Utica Insurance and other documents in Utica Insurance files relating to this matter. The Huffman defendants claim the withheld documents are protected primarily as materials prepared in anticipation of litigation. As to documents denoted as 3 and 5 on the privilege log, the Huffman defendants also raise issues of attorney client privilege. As to documents denoted as 4 on the log, the objections are identified as reference to privileged materials and irrelevant.<sup>1</sup>

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<sup>1</sup>The in camera documents are not organized or identified in the same manner as the log. This has made the disposition of the parties arguments more tedious and confusing than it needed to be. More significantly, additional privileges are raised in the two page document covering the in camera documents. To the extent new privileges are claimed, other than those asserted in the original privilege log, they will not be considered by the court. This is more than just a procedural irregularity by the Huffman

The court will deal with the collateral objections first and then address the more significant issue of attorney client privilege.

A privilege log may not be used to make a relevancy objection. To the extent the Huffman defendants raise relevancy as a basis to withhold document # 4 in their privilege log, it is rejected. In addition "reference to privileged materials" as a further basis for withholding document #4 is not a valid objection. The court has reviewed document # 4 in camera and finds that any references to privilege materials does not itself contain any privileged content. Consequently the document identified as # 4 on the privilege log must be produced.

As for attorney client privilege, it only applies to confidential communications between an attorney and client. Not all communications between an attorney and client are confidential. Usually this turns on whether the communication is related to the giving or getting advice. Priest v. Hennessy, 51 NY2d 62 (1980). CPLR §4503; The burden of proving the application of the attorney client privilege rests on the party asserting it. Muriel Siebert & Co. Inc. v. Intuit, Inc., 32 AD3d 284 (1<sup>st</sup> dept. 2006).

The handwritten notes referred to in item 3 of the privilege log do not identify the maker, recipient, nor the date created. The content of the notes does not relate to either the getting or giving of legal advice. It is not protected by any attorney client privilege. The only communication with an attorney with respect to document # 5 identified in the privileged log is a letter from John Kiernan of IAC to the Huffman defendant's attorney.

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defendants, since there is no indication that plaintiff was ever notified of the new claims. Moreover, defendant was given adequate time to develop an appropriate privilege log. Attempts to supplement their claims in this manner are rejected by the court as improper and belated.

It is simply a transmittal letter IAC's underlying file. The letter itself is not a confidential communication. The underlying file transmitted is not made subject to the privilege simply because it was submitted to an attorney after its creation. The court finds no attorney client privilege attaches to document # 5 identified on the privilege log. This finding is made without further addressing the more thorny issue of whether IAC was even an agent of the Huffman defendants at the time the communication was made so as to even come within the rubric of attorney client privilege. McKinney's Practice Commentary §4503(c); Stroh v. General Motors Corp, 213 AD2d 267 (1<sup>st</sup> dept. 1995). While items 3 and 5 on the privilege log cannot be withheld on the basis of attorney client privilege, the court further considers whether they may be withheld as materials prepared in anticipation of litigation.

The Huffman defendants seek to protect items 1, 2, 3 and 5 under CPLR 3101(d) as being material prepared in anticipation of litigation. They have the burden of proving the application of such privilege. In connection with this privilege, it has been widely held that because the payment or rejection of claims is part of the regular business of insurance companies, reports or documents generated to aid the process of making this initial decision are not immune from disclosure as material prepared in anticipation of litigation. Brooklyn Union Gas Company v. American Home Assurance Company, 23 AD3d 190 (1<sup>st</sup> dept. 2005); Bamobard v. AMICA Mutual Ins. Co., 11 AD3d 647 (2<sup>nd</sup> dept. 2004); Bertalo's Rest. v. Exchange Ins. Co., 240 AD2d 452 (2<sup>nd</sup> dept. 1997). This rule applies even though the reports obtained are motivated in part by the potential for litigation. Investigations done and reports prepared with a mixed motive are still subject to disclosure. Landmark Ins. Co. v. Beau Ridge, 121 AD2d 98 (2<sup>nd</sup>

dept. 1986). The operative event that the courts look to in distinguishing non-discoverable materials in an insurance file from those that are discoverable is the date that coverage is disclaimed. Bamobard v. AMICA, supra; Geneva Mortgage Corp., v. Certain Underwriters at Lloyds of London, 14 Misc3d 1233 (a); 2007 WL 4072036 (Sup. Ct. Nass. Co.). Once coverage is disclaimed, any materials collected are clearly in anticipation of litigation between the insurer and claimant.

The Huffman defendants have not proven that the materials they seek to withhold were made any time before they disclaimed coverage in this case. Indeed, no coverage has been disclaimed to the insured.

The Huffman defendants seek to distinguish their situation from the general rule regarding disclosure by arguing that this dispute does not involve the insured and its carrier, but rather a third party. They rely upon the case of Kandel v. Tocher (22 AD2d 513 [1<sup>st</sup> dept. 1965]) in support of this argument. Kandel, however, does not make any distinction between the insured party and an outside claimant in connection with the assertion of any work product privilege. Kandel broadly states that the date of the occurrence is the bright line standard to distinguish privileged material from discoverable material. While not expressly overruled, the case law, including the law of the Appellate Division of this department has abandoned the reasoning set forth in the court's 1965 decision.

In this case the court notes that although plaintiff is not the insured, in the documents which the Huffman defendants seek to withhold, plaintiff is referred to as a claimant. Moreover the documents reveal that ongoing efforts were being made to ascertain whether the company would directly pay her (and other affected non-

[\* 7 ]  
insureds). This only confirms that the information was being compiled by Utica Insurance in connection with claims decisions and not just solely in anticipation of litigation.

The court, therefore, finds that there is no valid broad ranging claim that withheld materials were prepared in anticipation of litigation and not subject to disclosure. Consequently, the documents identified in the privilege log and provided to the court in camera should be provided to the plaintiff within 30 days of the date of this decision and order.

Redaction of Material on Photos, etc.

Certain photos were provided to plaintiff as black and white photocopies with written comments redacted. To the extent that the Huffman defendants are claiming that the redactions are part of materials prepared in anticipation of litigation, the argument is rejected and the photos are to be provided in an unredacted form. The photos as they have been provided to the court and plaintiff are not clear. To the extent that they exist in a color format they are to be provided to plaintiff. There is some indication in the materials provided to the court in camera that IAC may have such pictures in a color format. If so, plaintiff is to obtain them. The photos are to be produced in a color format and without redaction within 30 days of the date of this decision and order.

Deposition of John Kiernan

Mr. Kiernan is the principal of ICA and he conducted the investigations of the flood that resulted in the reports that are the subject of the courts ruling on privilege. Since the court has directed that no privilege attaches and that the withheld documents

be produced, it follows naturally that Mr. Kiernan should again be produced for deposition. Mr. Kiernan's continued deposition shall be scheduled within 30 days following the production of the documents required under this order.

Plaintiff seeks an order directing counsel for all defendants to comply with sections 221.1 and 221.2 of the Uniform Rules for New York State Trial Courts. The plaintiff gives numerous examples of objections made and directions to the witness not to answer questions posed. Defendants claim that the objections and directions were as a result of plaintiff's counsel refusal to agree to the usual stipulations. A reading of the new court rules applicable to depositions would have revealed to defendants' counsel that the "usual stipulations" are no longer necessary and the rules contain the appropriate reservations of rights as well as a requirement that all questions, save those pertaining to privilege, be answered. The court, therefore, directs that defendants counsel review the new rules regarding depositions and to conform their conduct at Mr. Kiernan's continued deposition accordingly.

#### Costs and Attorney's Fees

The court denies plaintiff's request for costs and attorneys fees. The discovery dispute in this matter did not rise to such a level that defendants should be "sanctioned" in the manner requested by plaintiff.

#### Conclusion

In accordance herewith, it is hereby:

ORDERED that the Huffman defendants are directed to produce to plaintiff all of the documents identified on their privilege log within 30 days of the date of this decision and order, and it is further

ORDERED that within 30 days of the date of this decision and order the Huffman defendants are to produce unredacted color copies of the photographs in their files that were previously produced in a redacted and black and white format, and it is further

ORDERED that the Huffman defendants shall produce John Kiernan for continued deposition within 30 days after the production of documents required under this order, and it is further

ORDERED that prior to the continuation of Mr. Kiernan depositions defendants' counsel shall read, be familiar with and follow the Uniform Rules of the Trial Court applicable to conducting such depositions, and it is further

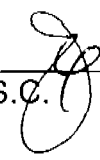
ORDERED that the filing of the note of issue in this case is hereby extended to March 7, 2008 and that a trial certification conference is set for March 6, 2008 at 9:30 a.m., and it is further

ORDERED that the court shall hold the documents provided in camera by the Huffman defendants for a period of 30 days; in the event no stay of this order is obtained before the expiration of such time period, the court will file the documents with the New York County Clerk's file maintained in this case, and it is further

ORDERED that any requested relief not expressly granted herein is denied and that this shall constitute the decision and order of the court.

Dated: New York, New York  
December 12, 2007

SO ORDERED:

  
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J.G. J.S.C.

**FILED**  
DEC 20 2007  
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