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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**
**PRESENT: HON. JOAN A. MADDEN PART 11**
***Justice***

ROBERT BLANCO,

**Plaintiff,**

**- v -**

PRADA USA CORP., AMERICAN EAGLE OUTFITTERS, INC., 575 BROADWAY LLC, 575 BROADWAY ASSOCIATES, L.P. and 575 BROADWAY CORPORATION,

**Defendants.**

**INDEX NO.** 101644/07

**MOTION DATE:**

**MOTION SEQ. NO.:**001



The following papers, numbered 1 to ____ were read on this motion to _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

Cross-Motion: [ ] Yes [ x ] No

In this personal injury action brought by plaintiff/firefighter who was injured when he responded to a fire, defendant American Eagle Outfitters ("American Eagle") moves to quash plaintiff's subpoenas for the depositions of Connell Nolan Associates, Inc. ("Connell") and Guardian Investigations Group, Inc. ("Guardian"), and the production of notes and reports,[1] on the grounds that the subpoenas are an attempt to obtain discovery of material which is privileged as it was prepared in anticipation of litigation or is attorney work-product. Plaintiff opposes the motion, which is denied.

[1]According to plaintiff, neither Cornell nor Guardian has prepared a formal cause and origin report at this time.

In support its motion, American Eagle relies on the affirmation of its counsel, Robert C. Sheps, Esq., who states that his firm retained Guardian to investigate the cause of a fire in the premises occupied by American Eagle in anticipation of litigation involving damages incurred as a result of the fire. Mr. Sheps further states that Connell "was also retained immediately after the fire and directed by the law firm of Robert A. Stutman, P.C., who represented the subrogated interests of American Eagle. The sole intent of their retention was to investigate potential litigation strategies in this case related to the fire." Affirmation of Robert C. Sheps, Esq., ¶ 9.

As to Connell, the conclusory statement in the affirmation of American Eagle's attorney is not competent evidence to assert the privilege on the grounds of work product or material prepared in anticipation of litigation, particularly as his firm did not retain Connell. At oral argument, it was revealed the subrogated interests of American Eagle, which Robert A. Stutman, P.C, represents, actually refers to one of American Eagle's insurers of property damage. Thus, the results of the investigation Connell conducted on behalf of American Eagle's insurer during the processing and investigation of the claim is discoverable as it falls squarely within the type of business in which an insurance company is engaged and thus its deposition is properly ordered. Karta Industries, Inc. v. The Insurance Company of the State of Pennsylvania, 258 AD2d 375 (1st Dept 1999) ( "the payment or rejection of claims is part of the regular business of an insurance company ... [r]eports prepared by an insurer before its insured's direct claim is either paid or rejected are discoverable as having been made in the regular course of business.").

As to American Eagle's assertion that the information regarding Guardian's investigation is privileged as it was prepared in anticipation of litigation and/or is attorney work product, the following standards are applicable.

"Because of the strong public policy favoring full disclosure, the burden of proving each element of a privilege rests the party asserting it." Spectrum Systems Intern'l Corp. v. Chemical Bank, 157 AD2d 444, 447 (1st Dept 1990), aff'd as modified, 78 NY2d 371 (1991). "In order to raise a valid claim of [attorney-client] privilege, the party seeking to withhold the information must show that it was a 'confidential communication' made between the attorney and the client in the context of legal advice or services." Bertalo's Restaurant Inc. v Exchange Ins. Co., 240 AD2d 452, 454 (2d Dept), lv. dismissed 91 NY2d 848 (1997) . In addition, facts in a client's

possession are not insulated from discovery simply as a result of being reported to counsel. Rossi v. Blue Cross and Blue Shield of Greater New York, 73 NY2d 588, 594 (1989). Likewise, facts learned by an attorney from independent sources and then reported are not privileged. Kenford Co. v. County of Erie, 55 AD2d 466 (4th Dept. 1977).

An attorney's work product is entitled to absolute immunity (CPLR 3101 [c])."Lawyer's interviews, mental impressions and personal beliefs procured in the course of litigation are deemed to be an attorney's work product." Id.

At the same time, however, the work product privilege has been construed narrowly. Zimmerman v. Nassau Hospital, 76 AD2d 921, 922 (2d Dept 1980). Thus, to be shielded from discovery based on the work-product privilege, it must be shown that the materials in issue are "uniquely the products of a lawyer's learning or professional skills." Aetna Cas and Surety Co. v. Certain Underwriters at Lloyd's, 263 AD2d 367, 368 (1st Dept 1999), lv dismissed, 94 NY2d 875 (2000)(citations omitted). Here, it cannot be said that the investigation conducted by Guardian falls within this narrow category.

To demonstrate that the anticipation of litigation privilege under CPLR 3101(d) is applicable, it must be shown that "the material [was] prepared solely in anticipation of litigation." Agovino v. Taco Bell 5083, 225 AD2d 569 (2d Dept 1996). When such a showing is made, materials prepared in anticipation of litigation are immune from disclosure unless a party shows "substantial need" and is unable to duplicate them "without undue hardship." CPLR 3101(d)(2); Corcoran v. Peat, Marwick, Mitchell and Co., 151 AD2d 443, 445 (1st Dept 1989); Lamitie v. Emerson Electric Company-White Rodgers Div., 208 AD2d 1081 (3d Dept 1994).

Plaintiff argues that American Eagle has not met its burden of showing that the material prepared by Guardian was solely in anticipation of litigation since it submits no affidavits from the investigators or other persons with knowledge of the circumstances surrounding Guardian's retention. Plaintiff further argues that information regarding conditions immediately after the fire are crucial to establishing the cause of the fire, and whether there was any negligence, and that he can not obtain the information from any other source, noting that the Fire Marshall's report is brief. Finally, plaintiff argues that as defendant Prada has an interest adverse to American Eagle, the reliability and accuracy of the report prepared by Thomas Russo, who was hired by the

attorneys for defendant Prada's first-party insurance company, Royal, is undermined. With respect to the FDNY's Fire and Incident Report, plaintiff asserts that it does not reach a conclusion as to how the fire originated or provide key interviews, or provide other crucial information. In support of these contentions, plaintiff submits copies of the reports at issue.

The court finds that even assuming arguendo that American Eagle has met its burden of showing that Guardian was retained in anticipation of litigation, that plaintiff has established that a substantial need for the information obtained by Guardian and that undue hardship will occur if plaintiff is not permitted to depose Guardian. Lamitie v. Emerson Electric Company-White Rodgers Div, 208 AD2d at 1083 (affirming trial court's decision directing the deposition holding that defendants demonstrated substantial need for information obtained by investigator hired by plaintiff who visually observed scene shortly after fire). That being said, however, as requested by American Eagle, the deposition of Guardian's investigator is limited to that person's factual observations and procedures and excludes any inquiry regarding expert opinion. Flex-O-Vit USA v. Niagara Mohawk Power Corp., 281 AD2d 980 (4th Dept 2001).

In view of the above, it is

ORDERED that the motion to quash is denied.

Dated: April 30,2008

J.S.C.

**Check one: [ ] FINAL DISPOSITION [ x ] NON-FINAL DISPOSITION**