

**United States Fid. & Guar. Co. v
American Re-Insurance Co.**

2008 NY Slip Op 32894(U)

October 14, 2008

Supreme Court, New York County

Docket Number: 604517/02

Judge: Richard B. Lowe

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

PRESENT: _____

PART 56

Index Number : 604517/2002

UNITED STATES FIDELITY

vs.

AMERICAN RE-INSURANCE

SEQUENCE NUMBER : 020

COMPEL

INDEX NO.

604517/2002

MOTION DATE

9/9/08

MOTION SEQ. NO.

020

MOTION CAL. NO.

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 GRANTED IN ACCORDANCE WITH SECTION 57 OF THE JUDICIAL BRANCH DECISIONS

FILED
OCT 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/14/08

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
UNITED STATES FIDELITY & GUARANTY
COMPANY, et al.,

Plaintiff,

-against-

AMERICAN RE-INSURANCE COMPANY, et al.

Defendants.
-----X

Index No. 604517/02

FILED
OCT 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

RICHARD B. LOWE III, J.:

On this motion, defendants Excess and Treaty Management Corporation, Excess Casualty Reinsurance Association, and Certain ECRA Pool Members (collectively "defendants") seek to compel plaintiffs United States Fidelity & Guaranty Company and St. Paul Fire & Marine Insurance Company (collectively "USF&G") to comply with the May 29, 2007 decision of the First Department (*American Re-Insurance Co. v. United States Fid. & Guar. Co.*, 2007 NY Slip Op 4523, 1 [1st Dept 2007]).

RELEVANT BACKGROUND¹

This discovery dispute concerns the scope of this Court's previous finding of a waiver of attorney-client privilege, which was affirmed but significantly narrowed by the Appellate Division. In that decision, the Appellate Division affirmed in part this Court's January 10, 2006 Order denying USF&G's motion to vacate an order of the Special Referee requiring them to

¹ For a full recital of relevant background, the Court refers readers to *Am. Re-Insurance Co. v. United States Fid. & Guar. Co.* (2007 NY Slip Op 4523, 1 [1st Dept 2007]).

produce documents and provide testimony, without regard to the attorney-client and work product privileges, related to the settlement and bill preparation in an underlying action between USF&G and its insureds. This Court's earlier decision permitted discovery of documents and testimony regarding presentation of the reinsurance claim as defined by the document request only to the extent that the discovery relates to disclosures made during the EBT testimony of James Kleinberg.

James Kleinberg ("Kleinberg") is the USF&G reinsurance director who prepared the reinsurance bill for a settlement of underlying asbestos litigation. During his deposition, many questions were asked regarding USF&G's "decision to allocate all claims to a single treaty year as opposed to spreading them over the several coverage years. This witness repeatedly revealed the advice he received regarding preparation of the bill" (*id.*). According to the Appellate Division, Kleinberg "placed this matter at issue" by revealing the advice he received (*id.* [citing *Weizmann Inst. of Science v Neschis*, 2004 U.S. Dist LEXIS 4254 [SD NY 2004]]). Therefore, the Appellate Division held that defendants "may seek testimony and production of documents regarding presentation of the reinsurance claim as defined by TIG's request dated October 20, 2005, as ordered by the Referee on December 4, 2005, only to the extent that the discovery relates to disclosures made during James Kleinberg's EBT testimony" (*id.*).

The Appellate Division further explained that the scope of this waiver is narrow. It explicitly rejected defendants request for a broad subject matter waiver, and in reliance on USF&G's representation that "advice of counsel" is not at issue, held that the scope of the "waiver is narrowed" (*id.*).

DISCUSSION

[*4]

Defendants argue that USF&G has improperly withheld discovery of communications between USF&G and outside counsel. According to the defendants, they are entitled to discovery on attorney-client communications between any counsel, including outside litigation counsel, and any employee of USF&G as long as it concerns preparation of the bill. Particularly, defendants argue that further discovery is not limited to advice provided to James Kleinberg; and not limited to advice from Robert Omrod (“Omrod”) or other in-house lawyers.²

USF&G argues that they have complied with their discovery obligations and that any additional documents or testimony defendants seek on this motion fall outside the Appellate Division’s holding of a narrow waiver.

Defendants first argument is that the waiver is not limited to advice provided to Kleinberg because USF&G is the holder of the privilege and Kleinberg effected the waiver of USF&G’s privilege. Defendants are correct regarding the holder of the privilege (*see Orco Bank, N.V. v. Proteinas Del Pacifico, S.A.*, 179 AD2d 390 [1st Dept 1992]), but the record thus far does not support expanding the waiver to include all advice USF&G received regarding preparation of the bill. As previously established, Kleinberg prepared the bill and only disclosed the substance of advice he received in preparation of the bill. On this motion, the parties have not presented disclosures of attorney advice given to other personnel at USF&G considered in preparing the bill. Taking into account the Appellate Division’s instruction that the scope of the waiver is narrow, and the Court has only been presented with USF&G’s disclosures of advice Kleinberg received, USF&G only waived attorney-client privilege regarding advice Kleinberg received.

² Robert Omrod is one of USF&G's in-house attorneys.

Defendants also argue that discovery is not limited to advice from Omrod or any other in-house lawyers. According to the defendants, the Appellate Division did not mention Omrod by name or limit the waiver to any particular group of attorneys, whether they be in-house or outside litigation counsel. Furthermore, waiver should include communications from other in-house and outside counsel in order to limit the “use [of] the privilege to prejudice [their] opponent’s case or to disclose some selected communications for self-serving purposes” (*Weizmann Inst. of Sci.*, 2004 U.S. Dist. LEXIS 4254, *supra*).

The Appellate Division, however, clearly explained that its decision to narrow the scope of the at issue waiver was premised on the fact that plaintiffs are not permitted to present any evidence that lends itself toward an “advice of counsel” argument. Defendants concern of prejudice is well accounted for with this limitation.

The Appellate Division did not explain whether its decision on the waiver differentiated between communications from Omrod, other in-house counsel, or outside counsel. USF&G argues that the record of the Appellate Division lacked any reference to disclosures from sources other than Omrod; therefore, the Appellate Division was only ruling on Omrod’s communications with Kleinberg. However, “[t]o selectively disclose privileged communications would cause the attorney-client privilege to be used as both a sword and a shield, resulting in fundamental unfairness” (*Weizmann Inst. of Sci.*, 2004 U.S. Dist. LEXIS 4254, *supra*). Under this objective fairness standard, there is no distinction between in-house or outside counsel as long as the communications are on the same subject (*id.*).

The limitation, therefore, is placed on the subject and based on the substance of the disclosures. The Appellate Division rejected defendants request for a broad subject matter

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waiver, and limited the waiver to advice previously disclosed. Therefore, if Kleinberg disclosed attorney advice regarding preparation of the bill, such disclosure is subject to discovery, regardless of the attorney's position as in-house or outside counsel. In other words, if Kleinberg or USF&G disclosed the substance of other attorney-client communications, then such disclosures are subject to the waiver. But, this waiver is not effected by Kleinberg or USF&G's mere mention of discussing preparation of the bill with counsel. In following the Appellate Division instructions to construe the waiver narrowly, disclosure is only effected when USF&G disclosed the substance of the particular attorney-client advice and discovery is limited to that disclosed advice received directly from counsel either through correspondence memoranda or by attendance of meetings.

This decision is supported by the Appellate Division's citation to *Kirschner v. Klemons* (2001 U.S. Dist. LEXIS 17863 [SD NY Oct. 31, 2001]).³ *Kirschner* involved privileged communications between the defendant dentist and his attorney. During his deposition, the defendant revealed the substance of certain communications with his lawyer, and objected under attorney client privilege to disclosure of other communications regarding the same subject. The other side sought a broad subject matter waiver as a result. The Southern District rejected that arguments (reversing a magistrate's discovery order), explaining that the "'waiver should be tailored to remedy the prejudice' to the opposing party" (*id.* [quoting *In re Grand Jury*

³ The Court is not persuaded by defendants' argument that *Kirshner* is no longer good law because of how that specific litigation proceeded. The decision has never been overruled, rather the decision became moot when the party moved to amend the answer to include an "advice of counsel" defense (*Kirschner v. Klemons*, 2001 WL 36140906 [SD NY Nov. 13, 2001]). The Appellate Division clearly incorporated the reasoning of the earlier decision, and other courts have cited to *Kirshner* with approval of its holding and reasoning (*see Carrion v. City of New York*, 2002 U.S. Dist. LEXIS 5991, at *9 [SD NY Apr. 5, 2002]).

[* 7]
Proceedings, 219 F.3d 175, 188 [2d Cir. 2000])). The court held that in partially disclosing the substance of discussions with one attorney regarding a particular letter, the defendant waived his attorney client privilege regarding those specific discussions and other documents relating to the letter. As in this case, the waiver in *Kirschner* did not extend to other communications between the defendant and his attorney, or to communications between the defendant and other attorneys (*Kirschner*, 2001 WL 36140906, *supra*).

CONCLUSION

USF&G waived its attorney-client privilege regarding previously disclosed advice concerning preparation of the bill. Disclosure has not been effected by the mere mention that attorney-client communications took place, rather disclosure is effected when the substance of the advice is divulged. Discovery is also limited to that disclosed advice received directly from counsel.

On this motion the Court has not been presented with the full deposition testimony, nor the full extent of the disclosures, nor the testimony or documents defendants seek. The Court is not prepared to determine whether USF&G has complied with this order and what additional documents (if any) are now discoverable. Therefore, the parties are directed to appear on November 13, 2008 at 2:30 p.m. for a compliance conference.

Dated: October 14, 2008

FILED
OCT 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

RICHARD B. LOWE III

J.S.C.