

Richman v Harleysville Worcester Ins. Co.

2009 NY Slip Op 30810(U)

April 6, 2009

Supreme Court, New York County

Docket Number: 600467/06

Judge: Emily Jane Goodman

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

EMILY JANE GOODMAN

PRESENT: _____
Justice

PART 17

Index Number : 600467/2006
RICHMAN, GAYLE GRENADIER
VS.
HARLEYSVILLE WORCESTER INS.
SEQUENCE NUMBER : 009
COMPEL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____
n 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 *and cross motion*
be decided per attached

FILED
APR 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/6/09

[Signature]
EMILY JANE GOODMAN

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 : I.A.S. PART 17

-----X
GAYLE GRENADIER RICHMAN,

Plaintiff,

Index No.: 600467/06

-against-

HARLEYSVILLE WORCESTER INSURANCE
COMPANY, ALEXANDER WALL CORPORATION
and ALL CLEANING, AV, INC.,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C:

The motion by Defendant ALEXANDER WALL CORPORATION (Wall) for turnover of a videotape (video) of the conditions in Plaintiff's East Hampton home and the cross motion by Defendant HARLEYSVILLE WORCESTER INSURANCE COMPANY for the same relief, is denied.

Plaintiff maintains that the video is protected by the work product privilege, or if it is not, it is barred from discovery as material prepared for trial, for which Defendants have not established substantial need, nor established undue hardship in obtaining the substantial equivalent.

Discussion

CPLR 3101 (c) provides that the work product of an attorney is not obtainable. Plaintiff maintains that the video is work product because her attorney requested that it be taken only in certain areas of the home, revealing the attorney's mental impressions of the

case. There is no need to reach the issue of whether the video is in fact work product because it is not discoverable under CPLR 3101 (d)(2).

CPLR 3101 (d) (2) provides that documents “prepared in anticipation of litigation or for trial by or for another party, or by or for that party’s representative . . . may be obtained only upon a showing that the party seeking the discovery has substantial need of the material in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” The burden is on the party asserting the privilege to establish that the material is non-discoverable, and where a document is not used solely for purposes of litigation, it is not subject to protection (see Mavrikus v Brooklyn Union Gas, 196 AD2d 689 [1st Dept 1993]).

At her deposition Plaintiff testified, equivocally, that the video was taken “[w]hen I was trying to get the cost of repairs” and that the purpose was “[s]o I can send it out so that...so I could get a kind of handle on... repair aspect” (Tr at 242). However, she also testified that the video was taken at the request of her attorney (Tr at 258). In opposition to the motions, Plaintiff’s attorney submits an affirmation stating that “[t]he video was made...at my request and that of Donald L. Kreindler, Esq. (we are Ms. Richman’s counsel), and pursuant to our instruction” and that the purpose “was to assist me and Mr. Kreindler in this litigation. The video was not made for any other purpose, nor would it have been made had we not requested that it be made.” Defendants do not question counsel’s statements and the Court finds counsel’s affirmation credible. Therefore,

Plaintiff has established that the video was prepared solely for the purposes of litigation, despite Plaintiff's equivocal testimony.

Defendants have not established that they have a substantial need for the video, nor that they could not, without due hardship, obtain the substantial equivalent. As stated by Plaintiff's counsel, the video depicts the home in mid to late March 2006, after the action was commenced. Plaintiff's counsel states that he raised the issue of an inspection of the home at the Preliminary Conference on October 12, 2006 and Defendants' counsel do not dispute this. It is undisputed that on January 3, 2007, Defendants inspected the home and photographed it. There is no reason proffered as to why Defendants did not conduct their inspection when the video was made (or earlier). Therefore, Defendants have not established that they could not obtain the substantial equivalent, without undue hardship. Further, Defendants have not established a "substantial need" for the video in light of Plaintiff's testimony that she did not alter the home between the time that the video was made and the date of Defendants' inspection. Defendants' argument that the condition of the home may have been altered prior to their inspection, due to a break-in and the natural elements, is mere speculation. The fact that Plaintiff removed a plastic ceiling tarp, allowing feces to fall on some unknown date after Wall left the job is also insufficient. Although the feces was later removed, there is no evidence that the video was taken when the feces was still present, and even if there were such evidence, Defendants have not established that they could not obtain the substantial equivalent

It is hereby

ORDERED that the motions and cross motion are denied.

This constitutes the Decision and Order of the Court.

Dated: April 6, 2009

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED

APR 13 2009

COUNTY CLERK'S OFFICE
NEW YORK