

**Siewert v Greater Atl. Beach Water Reclamation
Dist.**

2009 NY Slip Op 31245(U)

May 21, 2009

Supreme Court, Nassau County

Docket Number: 3507/06

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

DAVID W. SIEWERT,
Plaintiff,
-against-
GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,
Defendant.

Motion Sequence #4, #5
Submitted March 3, 2009
INDEX NO: 3507/06
Action #1

GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,
Third-Party Plaintiff,
-against-
THE COUNTY OF NASSAU and THE
INCORPORATED VILLAGE OF ATLANTIC BEACH,
Third-Party Defendants,

FRANK LIVECHI,
Plaintiff,
-against-
THE ATLANTIC BEACH SEWER DISTRICT and
THE GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,
Defendants.

INDEX NO: 16433/06
Action #2

GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,
Third-Party Plaintiff,
-against-
THE COUNTY OF NASSAU and THE
INCORPORATED VILLAGE OF ATLANTIC BEACH,
Third-Party Defendants,

ESTATE OF ANN MARIE H. WALSH and
JOHN F. WALSH,

Plaintiffs,

-against-

THE TOWN OF HEMPSTEAD, THE
INCORPORATED VILLAGE OF ATLANTIC
BEACH SEWER DISTRICT and THE GREATER
ATLANTIC BEACH WATER RECLAMATION
DISTRICT,

Defendants.

INDEX NO: 16770/06
Action #3

GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,

Third-Party Plaintiff,

-against-

THE COUNTY OF NASSAU and THE
INCORPORATED VILLAGE OF ATLANTIC BEACH,
Third-Party Defendants,

NEAL FLOMENBAUM, M.D. and MRS.
MEREDITH FLOMENBAUM,

Plaintiffs,

-against-

THE GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,

Defendant.

INDEX NO: 288/07
Action #4

GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,

Third-Party Plaintiff,

-against-

THE COUNTY OF NASSAU and THE
INCORPORATED VILLAGE OF ATLANTIC BEACH,
Third-Party Defendants,

**ANDREW GASPAR and NINA GASPAR,
Plaintiffs,**

**-against-
THE INCORPORATED VILLAGE OF ATLANTIC
BEACH, THE ATLANTIC BEACH SEWER
DISTRICT, THE GREATER ATLANTIC
BEACH WATER RECLAMATION DISTRICT,
Defendants.**

**INDEX NO: 11514/07
Action #5**

**GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,
Third-Party Plaintiff,**

**-against-
THE COUNTY OF NASSAU and THE
INCORPORATED VILLAGE OF ATLANTIC BEACH,
Third-Party Defendants,**

**BETH GARNETT, MILES GARNETT and
PAULA GARNETT,
Plaintiffs,**

**-against-
THE DEPARTMENT OF PUBLIC WORKS, THE
GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT, THE COUNTY OF
NASSAU, THE TOWN OF HEMPSTEAD,
Defendants.**

**INDEX NO: 16838/06
Action #6**

**GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,
Third-Party Plaintiff,**

**-against-
THE COUNTY OF NASSAU and THE
INCORPORATED VILLAGE OF ATLANTIC BEACH,
Third-Party Defendants.**

The following papers were read on these motions:

GREATER ATLANTIC Notice of Motion.....1
 GREATER ATLANTIC Amended Notice of Motion.....2
 COUNTY Affirmation in Opposition.....3
 SIEWERT Affirmation in Opposition.....4
 WALSH and GASPAR Affirmation in Opposition.....5
 LIVECHI Affirmation in Opposition.....6
 GREATER ATLANTIC Reply to COUNTY.....7
 GREATER ATLANTIC Reply to SIEWERT.....8
 GREATER ATLANTIC Reply to WALSH and GASPAR.....9
 GREATER ATLANTIC Reply to LIVECHI.....10

Defendant/third party plaintiff, GREATER ATLANTIC BEACH WATER RECLAMATION DISTRICT (hereinafter referred to as "GREATER ATLANTIC"), moves for a protective order, pursuant to CPLR§3101(d) and §3103, quashing the subpoena *duces tecum* served by defendant/third party defendant, THE COUNTY OF NASSAU (hereinafter referred to as the "COUNTY"), upon non-party Cameron Engineering, 100 Sunnyside Blvd. Suite #100, Woodbury, New York. The subpoena demands production of all documents relating to the above captioned cases and "all engineering reports or studies relating to the above referenced homeowners; and in addition any and all engineering studies and reports for the Atlantic Beach Sewer District, including but not limited to any reports or studies relating to the above referenced homeowners, and in addition any and all engineering studies and/or reports done for or on behalf of the Greater Atlantic Beach Water Reclamation District (GABWRD) for the past 20 years". The subpoena, dated December 22, 2008, returnable on January 23, 2009 (and extended to January 29, 2009), does not require the appearance of Cameron Engineering, but only the production of the documents. Counsel for defendants/third party defendants, the COUNTY, DAVID SIEWERT, FRANK LIVECHI, ESTATE OF ANNE MARIE H. WALSH and JOHN WALSH

and ANDREW GASPAR and NINA GASPAR, oppose the motion for a protective order, which is determined as follows:

Counsel for GREATER ATLANTIC asserts that the subject subpoena seeks work product documents and documents protected by the attorney/client privilege and should be quashed, with a direction that plaintiff, SIEWERT, return and destroy all copies of the privileged document. Counsel for GREATER ATLANTIC states that predecessor counsel appears to have retained Cameron Engineering to, *inter alia*, evaluate plaintiff's claims herein and, some time after a "Report" was generated by Cameron Engineering (approximately January 2006), said Report, "for some unknown reason", came into the possession of plaintiff, Mr. SIEWERT. Moving counsel states that the documents sought in the COUNTY's subpoena are "without question" work product documents as well as documents protected by attorney client privilege, which were prepared for litigation and inadvertently disclosed to Mr. SIEWERT. It is GREATER ATLANTIC's position that, at no time did it ever intend to disclose the privileged Report which was stamped "PRIVILEGED AND CONFIDENTIAL-PREPARED FOR LITIGATION" at the top. Counsel for GREATER ATLANTIC argues that inadvertent disclosure of a protected document does not constitute a waiver of the privilege, and that an intent to waive the privilege by disclosure of the document must be shown in order to have a valid waiver, citing *inter alia Oakwood Realty Corp. v HRH. Construction Corporation*, 51 AD3d 747, 858 NYS2d 677 (2nd Dept. 2008). The *Oakwood* Court held that inadvertent disclosure will not act as a waiver if it can be shown that (1) the client intended to maintain the confidentiality of the document; (2) reasonable steps were taken to prevent disclosure; (3) the party asserting the privilege

acted promptly after discovering the disclosure to remedy the situation; and (4) the parties who received the document will not suffer undue prejudice if a protective order against the use of the document is issued. While counsel for GREATER ATLANTIC consents to providing the documents for an in camera inspection by the Court, it argues that the COUNTY's subpoena of the Report should be quashed and all discovery relating to the subpoena stayed pending determination of the instant motion.

In opposition to the motion, counsel for the COUNTY argues that the motion to quash the subpoena should be denied because an exception to the privilege exists, under CPLR §3101(d)(2) (incorrectly cited as CPLR §3103[d]ii[2]), upon a showing that the party seeking discovery "has a substantial need of the material [Report] in preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means". The COUNTY states that, upon information and belief, following the sewer backup in the VILLAGE OF ATLANTIC BEACH, which occurred on October 14, 2005, GREATER ATLANTIC hired Cameron Engineering to inspect at least five (5) homeowner's basement sewer connections and basement bathrooms. Counsel for the COUNTY claims, upon information and belief, that Cameron Engineering performed its services between October 2005 and December 2005 and issued its report on the findings with respect to those five (5) homeowners, together with comments and comparisons concerning the possible "causes of ground water infiltrate" into a terra cotta sewer system as is found in the GREATER ATLANTIC sewer system. Counsel for the COUNTY asserts that discovery of the Report is necessary for the COUNTY to defend against GREAT ATLANTIC's third party complaint, and that the tests, measurements and

observations gathered by Cameron Engineering back in 2005 cannot now be duplicated by the COUNTY. Counsel for the COUNTY points out that the COUNTY was not brought into the litigation until December, 2008, three (3) years after GREATER ATLANTIC was sued by these homeowners and, as a third party defendant, there is no basis for the COUNTY to do function tests or inspections on the basements of these homeowners. It is the COUNTY's position that it has a substantial need of the subpoenaed Report to defend against GREATER ATLANTIC's theory of liability against the COUNTY, that there was infiltration of ground water/street water into the GREATER ATLANTIC terra cotta sewer pipes at the homeowner's sewer connection. The COUNTY asserts that it cannot duplicate or create the substantial equivalent of the subject Report.

In further opposition to the motion, defendant SIEWERT relates that GREATER ATLANTIC visited his home in November 2005, following the sewer backup, to survey his basement plumbing and, unknown to him, an engineer from Cameron was present. Mr. SIEWERT states that, on June 23, 2007, representatives of GREATER ATLANTIC again visited his home, together with counsel for GREATER ATLANTIC who provided oversight for the three (3) persons who surveyed SIEWERT's basement. SIEWERT states that, at that time, those individuals had in their possession a document entitled "Report of Home Inspections Related to Alleged Damage From Sewer Back Up", which was shown to him and handed to him by one of the representatives. SIEWERT contends that portions of the report were pointed out to him, and that none of the representatives requested that the Report be given back to them or indicated that the information was to be kept confidential. Notwithstanding the affidavits of the three (3) engineers and the attorney who was present

at the time of the inspection, each denying that they presented the report to Mr. SIEWERT on the day of the inspection, counsel for GREATER ATLANTIC acknowledges that “[i]t is possible that this document was inadvertently left with Mr. Siewert at his home”. SIEWERT contradicts same and argues that the document was brought to his home and handed to him; that there was no intent to maintain confidentiality, that no steps were taken to prevent disclosure and that he will suffer undue prejudice if a protective order is granted because the Report disputes GREATER ATLANTIC’s allegations that the sewer back up was the result of improper construction techniques at SIEWERT’s residence. Plaintiffs, WALSH, GASPAR and LIVECHI, also argue that GREATER ATLANTIC has not demonstrated that disclosure of the report was inadvertent and, further, that none of the material found in the report can be duplicated some three (3) years after the occurrence. Counsel for plaintiffs contends that the Cameron Engineering Report is “site inspection” discovery to which his clients should have access, and that the witness for GREATER ATLANTIC, William R. Kelley, Superintendent of the Sewer District, gave testimony at his deposition based upon the Cameron Report and prepared responses to Interrogatories based upon said Report. Counsel for LIVECHI points out that the Report’s data was gathered in post-flood home inspections, by engineers looking for the cause of the sewer back up into each home, and argues that GREATER ATLANTIC, as a public entity, required the report to assist the public district in determining the need for action going forward to prevent additional sewer failures and to determine the need for necessary repairs. Counsel for LIVECHI states that movant has not proved that the subject report, or any subpoenaed documents, were prepared solely for litigation.

As detailed by the Court of Appeals in *Spectrum Systems International Corporation v Chemical Bank*, 78 NY2d 371, 575 NYS2d 809, 581 NE2d 1055 [C.A. 1991],

[t]he CPLR directs that there shall be “full disclosure of all evidence material and necessary in the prosecution or defense of an action,” (CPLR 3101[a]). “The test is one of usefulness and reason”. (*Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406). This statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise (see, 3A Weinstein-Korn-Miller, *NY Civ Prac paras, 3101.01-3101.3*).

By the same token, the CPLR establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101[b]); attorneys work product, also absolutely immune (CPLR 3101[c]); and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means (CPLR 3101[d][2]).

Obvious tension exists between the policy of favoring full disclosure and the policy permitting parties to withhold relevant evidence. Consequently, the burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity . . . (citations omitted).

The attorney/client privilege fosters the open dialogue between attorney and client and is codified in CPLR §4503(a), which states that a privilege exists for confidential communication made between attorney and client in the course of professional employment which are made “for the purpose of facilitating the rendition of legal advice or services, in the course of a profession relationship”, and must be primarily of a legal character. *Spectrum Systems International Corporation v Chemical Bank, supra*. “[T]he attorney-client privilege [should] not be used as a device to shield discoverable information. . . [A]n investigative report does not become privileged merely because it was sent to an attorney. Nor is such a report privileged merely because an investigation was conducted

by an attorney; a lawyer's communication is not cloaked with privilege when the lawyer is hired for business or personal advice, or to do the work of a nonlawyer". *Spectrum Systems International Corporation v Chemical Bank, supra*.

It has long been settled that information received by the attorney from other persons and sources while acting on behalf of a client does not come within the attorney-client privilege . . . Neither can the term "attorney work product" serve as a talisman to bar all further inquiry respecting the factual underpinnings [of the information sought].

Kenford Company Inc. v County of Erie et al, 55 AD2d 466, 390 NYS2d 715 (4th Dept. 1977). The work product exemption applies to demands for discovery by opposing counsel in the course of litigation and is limited by statute "to those materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy". *In the Matter of Grand Jury Subpoena for Documents in the Custody of Bekins Storage Co.*, 118 Misc2d 173, 460 NYS2d 684 (Supreme NY Co. 1983).

After a careful reading of the submission herein, the Court notes that no retainer is presented with respect to retention of counsel or of Cameron Engineering back in November 2005, after the sewer backup and during inspection of the subject homes, nor is evidence presented of who commissioned the Report and for what purpose. The Court notes that the instant litigation was not commenced until in or about March 2006 and it appears to the Court that it is just as likely that the Cameron Engineering Report was commissioned by GREATER ATLANTIC, itself, to investigate the cause and nature of the sewer system failure and to assess what improvements needed to be made. The burden of establishing the application of the exemption rests on the party resisting discovery, and

the mere assertion that items constitute and attorney's work product or are materials prepared for litigation will not suffice. *Doe v Poe*, 244 AD2d 450, 664 NYS2d 120 (2nd Dept. 1997); see also, *Brown v Brown*, 162 AD2d 429, 556 NYS2d 383 (2nd Dept. 1990).

Based upon the circumstances herein, it is the judgment of the Court that moving counsel has not demonstrated plaintiff's entitlement to the requested relief. Counsel for plaintiff's statement that "predecessor counsel appears to have retained Cameron Engineering" falls far short of establishing that an attorney-client relationship exists between GREATER ATLANTIC and retained counsel, who then commissioned an investigative report by Cameron Engineering which should be protected. The statement of plaintiff's present counsel is hearsay, at best, and is not supported by any documentary proof of counsel's retention, or of Cameron's retention, or of any indication that the report contains counsel's trial strategy or was prepared for litigation. The Court is presented with no evidence as to who commissioned the Report or for what purpose. The fact that an engineering firm writes "PRIVILEGED AND CONFIDENTIAL" on its report does not make it so as a matter of law (see, CPLR Article 45). Based on the foregoing, it is hereby

ORDERED, that GREATER ATLANTIC's motion for an order quashing the subpoena *duces tecum* served by defendant/ third party defendant, THE COUNTY OF NASSAU, upon non-party Cameron Engineering, and for related relief, is denied. Given that the Court has not found the Cameron Engineering Report to be a protected document, the Court does not reach the issues of inadvertent disclosure or whether there is a material need of the information which cannot be substantially duplicated; and it is further

ORDERED, that counsel for all parties shall appear for a Certification Conference on June 25, 2009 at 9:30 A.M. The Court has been advised by Judicial Hearing Officer, Hon. Burton Joseph, appointed herein as a special referee to oversee disclosure, that the depositions of all parties to this action should be complete and that the case is ready to be certified for trial.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: May 21, 2009


WILLIAM R. LaMARCA, J.S.C.

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ENTERED

JUN 03 2009
**NASSAU COUNTY
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