

**Board of Educ., Farmingdale Union Free School
Dist. v John A. Grillo, Architect P.C.**

2009 NY Slip Op 32722(U)

November 9, 2009

Supreme Court, Nassau County

Docket Number: 002947/06

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

BOARD OF EDUCATION, FARMINGDALE
UNION FREE SCHOOL DISTRICT,

Plaintiffs,

-against-

JOHN A. GRILLO, ARCHITECT P.C.,
JOHN A. GRILLO, Individually, CHRISTOPHER
HUNT, Individually, GREYHAWK NORTH
AMERICA, LLC, IRWIN CONTRACTING,
INC., JOHN C. IRWIN, Individually and KIRCO
INDUSTRIES CORP.,

Defendants.

TRIAL/IAS, PART 3
NASSAU COUNTY

INDEX No. 002947/06

MOTION DATE: Aug. 21, 2009
Motion Sequence # 006

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Reply Affirmation X

This motion, by defendant Greyhawk North America, LLC, for an order pursuant to CPLR §3124 compelling plaintiff to provide the outstanding documents detailed in the annexed Affirmation, and granting such other, further an different relief as this Court deems just and proper, is determined as hereinafter set forth.

FACTS

The plaintiff, Board of Education, Farmingdale Union Free School District, brought suit against the defendants, in an action arising out of an alleged infiltration of water into new additions built at the Weldon E. Howitt Middle School, part of the Farmingdale Union Free School District.

DEFENDANT'S CONTENTIONS

The moving defendant contends that the documents it requested are not subject to the attorney-client privilege and/or work product immunity. The defendant asserts that the documents were made in the regular course of the District's business, were intended for purposes beyond litigation, and therefore they are "multi-motivated" documents that do not warrant immunity. In addition, the defendant's attorney points out that during the deposition with Dr. Gerold, an expert for the plaintiff, Dr. Gerold explains that the documents at issue were "a regular mechanism of communicating." For this reason, the defendant's attorney asserts that the documents are not subject to either attorney-client privilege or work product privilege.

The defendant's attorney asserts that since the issues of this case have already been decided in a companion case, the "Woodward lawsuit," any request by the plaintiffs for a protective order should be denied on the basis of collateral estoppel. Specifically, the defendant asserts that on March 17, 2009, the plaintiff sought a protective order in the precedent case before Referee Goldstein on the basis of attorney-client privilege and executive session privilege and the request was denied. Also, the defendant asserts that on April 11, 2008, the plaintiffs sought a protective order to prevent defendants from questioning certain district board of education members based on attorney-client privilege and confidential communications made at an executive session of the School Board Meeting, but the application was denied by the same Referee.

PLAINTIFF'S CONTENTIONS IN OPPOSITION

The plaintiff's attorney argues that the documents requested by the defendant's attorney are protected under attorney-client privilege and/or attorney work product.

The plaintiff's attorney argues that the documents contain communications with District personnel, which are for the purpose of facilitating the rendering of legal advice

in the course of the professional relationship between an attorney and a corporate client, and they are protected by the attorney-client privilege. Furthermore, the plaintiff's attorney asserts that the documents detailing the conversations and advice of a consulting expert, hired specifically to provide the Board with litigation advice and strategy, is also protected by the attorney client privilege. The plaintiff points out that an expert is also subject to attorney work product because he was retained as a consultant to assist in analyzing or preparing the case.

The plaintiff's attorney argues that collateral estoppel is inapplicable as a matter of law; that the defendant's motion fails to establish that the issue of the redacted documents has ever been raised in any other forum. Furthermore, the plaintiff also argues that the defendant misrepresented plaintiff's March 17, 2009 application for a protective order before Referee Goldstein as being based on attorney-client privilege and executive session privilege; and that the application for the protective order, which was denied, was not based on attorney client privilege, but rather, was based upon a different issue.

DEFENDANT'S REPLY

The defendant's attorney re-asserts that the essential elements of attorney-client privilege are not satisfied and provides specific evidence; that the requirement that the communication be between client and counsel is not met. With respect to the weekly memoranda, which were from non attorneys Dr. Gerold to John Lorentz, these communications are not communication between client and counsel.

Second, the defendant's attorney points out the second prong of privilege, a communication intended to be confidential, is also not met. The defendant's attorney points out that, in an article titled "Farmingdale BOE Responds to Cullen's Letter," the Board of Education writes about the pending litigation involving Howitt Middle School.

Lastly, the defendant's attorney asserts that the third prong of privilege fails because the memoranda were not made for the purpose of obtaining or providing legal advice; that Dr. Gerold testified that the Weekly Memoranda were simply "a regular mechanism of communication."

With respect to the issue of Collateral estoppel, the defendant's attorney points out that the plaintiff did in fact attempt to restrict information, claiming attorney client information in the other action. For these reasons, the Defendant asks this Court to grant

the instant motion to compel the documents at issue.

DECISION

The defendant has requested un-redacted documents from the plaintiff over the course of discovery. The plaintiff has provided redacted documents to the defendant claiming that plaintiff has fully complied with requests for production; and argues that certain portions of the documents requested were protected under attorney client privilege and work product immunity.

“For an attorney-client communication to be protected, the communication or advice must have been given at a time when the requisite relationship existed. Furthermore, the communication must relate to the subject matter upon which the advice of the attorney is sought and have been made for the purpose of obtaining professional advice.

The person claiming the privilege has the burden of establishing that all the requisites upon which it becomes operative have been met”. (citations omitted)

(Fisch on New York Evidence 2d 1977, §§ 519, 520).

The plaintiff has not established an attorney-client privilege. The communications, while arguably made between counsel and clients, were not kept confidential based on article titled “Farmingdale BOE Responds to Cullen’s Letter,” in which the Board of Education writes, in detail, about the pending litigation involving Howitt Middle School.

With respect to the plaintiffs claim of work product privilege, this court finds that no privilege exists. Pursuant to CPLR 3101(d)(2), “material prepared principally and exclusively to assist in anticipation of litigation” is protected. Based on the evidence presented herein, the materials produced were not solely prepared for anticipation in

litigation, in that the communications between the District and its attorneys, who are also the litigating attorneys herein, are not, **prima facie**, privileged; that which is objected to appears to be directly related to the business meetings of the Board.

Moreover, discretion in compelling compliance in discovery matters is soundly vested in the trial court (see **Landrigen v. Landrigen**, 173 AD2d 1011, 1012, 3d Dept., 1991). Plaintiff shall formulate a proper response to the defendant's request in order to facilitate closure of discovery in this action.

The underlying theory of the policy of collateral estoppel is to conserve judicial time and resources by precluding a party from re-litigating an issue, which was decided against that party in a prior proceeding. In order to successfully assert collateral estoppel, two elements must be met. First, the identical issue must have been previously decided. Second, the party against whom collateral estoppel is being asserted must have had a full and fair opportunity to litigate that issue. (Siegel, *New York Practice*, 4th Ed., §457 p. 769). Collateral estoppel is not a doctrine that herein compels a different determination inasmuch as the Referee's determination was made on different grounds.

Accordingly, the instant motion to compel is **granted**.

Dated NOV 09 2009


J.S.C.

ENTERED

NOV 10 2009

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**