

**County of Nassau v Grand Baldwin Assoc., L.P.**

2011 NY Slip Op 34259(U)

June 1, 2011

Supreme Court, Nassau County

Docket Number: 003547/2010

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,  
Justice.**

**TRIAL/IAS PART 7**

\_\_\_\_\_  
COUNTY OF NASSAU

Plaintiff,

INDEX NO.: 003547/2010

-against-

Privilege Log Issues

GRAND BALDWIN ASSOCIATES, L.P.

Defendant.  
\_\_\_\_\_

The parties have reached an impasse on claims of privilege related to plaintiffs documents. They have submitted letter briefs for the Courts consideration.

The issue involved is whether or not the material requested in various document demands of the defendant are subject to an attorney-client or attorney work product privilege, the “deliberative process” privilege, an inter-agency privilege, or an intra-agency privilege. In response to Document Demands 1, 2 and 7, plaintiff has produced a privilege log, in which it has identified the following documents as existing:

- conceptual estimate;
- memo regarding terms of the transaction;
- costs estimates and comparisons;
- documents analyzing tax issues, bond payments and assessment issues;
- documents concerning valuation information;
- documents concerning financial information;
- documents concerning calculations;

- a real estate “spreadsheet”.

It is the foregoing documents which defendant has demanded and which plaintiff classifies as privileged.

The action is one for declaratory judgment that the lease between the County of Nassau and Grand Baldwin, executed under the tenure of a prior administration is void. The action was commenced approximately one month after the current administration assumed control.

The majority of the claimed privileges (62% pursuant to plaintiff) are claimed on the basis of the deliberative process doctrine, a sub-species of the work-product privilege that “ ‘covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated,’ ” (*Dept. Of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 [2001] quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 [1975]). The rationale behind the privilege is “the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance ‘the quality of agency decisions’ by protecting open and frank discussion among those who make them within government”. *Id.* at 8—9.

“In order for a document to be protected by the deliberative process privilege, it must be: (1) an inter-agency or intra-agency document; (2) ‘predecisional’; and (3) deliberative. (*Tigue v. United States Department of Justice*, 312 F.3d 70, 76 [2002] citing *Klamath*, 532 U.S. at 8).

As noted in *Tigue*, inter-agency and intra-agency communications are treated identically by courts interpreting FOIA. Defendants take the position, however, that the standards for production of documents under FOIA are different than those during the course of discovery in a litigated action.

In *Cirale v. 80 Pine St. Corp.*, 35 N.Y.2d 313 (1974), cited by plaintiff, the Court was dealing with documents from a Board of Inquiry appointed by the Commissioner of Buildings after a steam pipe explosion which resulted in the death of seven persons. In conjunction with a wrongful death action on behalf of plaintiff’s intestate, plaintiff moved against the Board of Inquiry for names and addresses of witnesses, statements made by witnesses, any and all

documents, reports, records, notes, letters, memoranda and/or things to which the Board had access, and the entire contents of the report of the Board. Special Term granted the plaintiff's motion, joined in by various defendants, the Appellate Division affirmed and certified the following question to the Court of Appeals: "Was the order of the Supreme Court, as affirmed by this court, properly made?"

In answering the question in the negative, and reversing the Appellate Division, the Court of Appeals did not rule on the question of privilege. Rather, relying on an interpretation of CPLR § 3101, which has since fallen into disfavor, the Court concluded that the movants had not established adequate "special circumstances" to warrant discovery from a non-party. As we know, a contrary position has since been adopted by both the First and Second Departments. (See, *Kooper v. Kooper*, 74 A.D.3d 6 [2d Dept.2010]).

In *Grossman v. Schwarz*, 125 F.R.D. 376, 380 et seq., (1989), the Court undertook an extensive analysis of governmental inter and intra-agency privilege, the concept of predecisional privilege. The action involved a challenge by a former law department attorney employed by the City of New York. Seven defendants sought to prevent disclosure of documents in their possession based upon a predecisional privilege. The corporation counsel, Schwarz, relied solely on executive privilege. The Court rejected defendants' contention that the source of the privilege was the New York Freedom of Information Law, which exempts from the requirement of public access "inter-agency materials which are not . . . final agency policy or determinations. N.Y. Pub.Off.L. § 87(2)(g)(iii).

The Court rejected this argument because, like its federal counterpart, 5 U.S.C. § 552, New York's FOIL creates no statutory privilege from discovery in a civil action. To the contrary, the purpose of both statutes was to the contrary, that is, "to maximize accessibility of government documents to the public". (*In re Schwartz*, 130 Misc.2d 786 [Sup.Ct.Nass.Co. 1986]). As the Court concluded, "(a)uthorization for barring discovery of defendants' "predecisional" documents must therefore be found elsewhere".

The Court noted that defendants cited no New York case recognizing a common law "predecisional" privilege, nor could the Court locate any. Defendants claimed that New York common law was the source of the executive privilege which they claimed. The alternate theory

of privilege asserted as to documents which "reveal the deliberative process" appeared to be the so-called deliberative privilege, which has long been recognized in federal common law. That theory of privilege, however, has applicability only to communications relating to policy formulation at the higher levels of government; it does not operate indiscriminately to shield all decision-making by public officials. (*Grossman* 125 F.R.D. at 381). Citing *Burka v. New York City Transit Authority*, 110 F.R.D. 660, 667 (S.D.N.Y.1986), the Court noted that in a civil rights action, in which the deliberative process of State or local official is itself genuinely in dispute, privileges designed to shield that process from public scrutiny must yield to the overriding public policies of the civil rights law. (See also, *United States v. AT & T*, 524 F.Supp. 1381, 1389-90 [D.D.C. 1981]).

The burden is upon the party asserting the privilege to identify what interests of the government would be harmed, how disclosure under a protective order would cause the harm, and how much harm there would be. (*Kelly v. San Jose*, 114 F.R.D. 653, 669 [N.D.Cal.1987]). The Court also referred to a comprehensive analysis by Judge Weinstein of the factors to be considered in balancing the claim of privilege against the entitlement to disclosure in civil litigation as contained in *In re Franklin National Bank Securities Litigation*, 478 F.Supp. 577 (E.D.N.Y.1979). These include the relevance of the evidence sought to be protected, the availability of other evidence, the "seriousness" of the litigation in terms of whether the action is non-frivolous and brought in good faith, the role of the government in the litigation, and the possibility of future timidity by government employees, who will be forced to recognize that their secrets are violable.

After reviewing the communications of both parties, the Court is of the opinion that the County, who has brought the action, and is seeking the protection of predecisional privilege for material which formed part of the deliberative process which formed the basis for the final report submitted to the County Legislature, has not enumerated any damage which will be caused by the revelation of the requested material.

The Court therefore directs that the County is to produce the material identified in their privilege log on the ground that the material does not rise to the level for the application of the claimed privileges, was not subject to attorney-client privilege and will not cause any damage to

the County of Nassau as a result of its production. The County is directed to comply with Document Demands 1, 2, 7 and 12 and provide the material identified in their privilege logs within 20 days of the receipt of this decision.

Dated: June 1, 2011

  
J.S.C.

**ENTERED**  
JUN 08 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE