

VGFC Realty II, LLC v D'Angelo

2013 NY Slip Op 30359(U)

February 14, 2013

Supreme Court, Queens County

Docket Number: 28211/2011

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS

IA PART 2

VGFC REALTY II, LLC, x

Index
Number 28211/ 2011

Plaintiff,

Motion Date: October 3, 2012

-against-

Motion Seq. No. 2

CARMINES P. D'ANGELO, USI INSURANCE
SERVICES, LLC, AND QBE INSURANCE
GROUP,

Defendants.

x

The following papers numbered 1 to 12 read on this motion by plaintiff VGFC Realty II, LLC (VGFC) for an order compelling defendant QBE Insurance Group (QBE) to provide copies of documents set forth in its privilege log to all counsel; determining that QBE's claim of work product privilege does not shield it from producing records and documents as set forth in its attorney' privilege log where said privilege is asserted; and amending the preliminary conference order with respect to the dates for disclosure.

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Upon the foregoing papers this motion is determined as follows:

Mariusz Guminiak is alleged to have sustained personal injuries on October 29, 2007, when during the course of his employment he fell through the roof of the premises located at 240 Washington Street, Mount Vernon, New York. Mr. Guminiak was employed by A-Val Architectural Metal III LLC (A-Val). At the time of the accident, the subject property was owned by the City of Mount Vernon Industrial Development Agency, and leased to VGFC.

On October 16, 2008, Mr. Guminiak commenced a special proceeding for leave to serve a late notice of claim against the property owner, the City of Mount Vernon Industrial Development Agency, in the Supreme Court, Westchester County. Said petition was denied pursuant to an order of the Appellate Division, Second Department on December 22, 2009 (*Matter of Guminiak v City of Mount Vernon Industrial Development Agency*, 68 AD3d 1111[2nd Dep't 2009]).

On October 14, 2008, Mr. Guminiak commenced an action in this court to recover damages for the injuries he sustained in the October 29, 2007 accident against VCFC and 240 Washington Street LLC, Index No. 25170/2008. Said action against 240 Washington Street LLC was discontinued with prejudice pursuant to a stipulated dated December 16, 2008 and filed on December 24, 2008.

QBE had issued a general commercial liability policy to A-Val, naming VGFC as a named insured. QBE asserts that VGFC was apprised of the accident by A-Val's project manager on October 29, 2007. On October 8, 2008, A-Val's insurance broker USI Insurance Services LLC(USI) requested that QBE provide A-Val with a defense and indemnification under a commercial general liability insurance policy issued by QBE.

Rockville Risk Management Associates, Inc.(Rockville) acting as QBE's third-party claims administrator and agent, retained Abrams, Gorelick, Friedman & Jacobson, LLP (AGF & J) as counsel on October 13, 2008 to render an opinion as to whether coverage would be afforded under the QBE policy.

On November 3, 2008, Rockville on behalf of QBE denied coverage to A-Val on the grounds that it had failed to timely notify the insurance of the occurrence as soon as practicable, and pursuant to the policy's "employer's liability exclusion".

On November 3, 2008, Rockville on behalf of QBE sent VGFC a letter, stating that although it had not yet received a claim from VGFC, the insurer was disclaiming coverage on the grounds that it had failed to give timely notice of the claim "as soon as practicable" as required by the insurance policy.

In February 2010, VGFC commenced a third party action for indemnification and for declaratory judgment against Carmine P. D'Angelo, Armitage & Company Inc., and QBE, and thereafter served an amended third-party complaint and supplemental summons, whereby USI was substituted for Armitage & Company Inc. VGFC, in the amended third-party complaint asserted two causes of action against QBE for a declaration to the effect that QBE is obligated to defend and indemnify it in the underlying action entitled *Mariusz Guminiak v VGFC Realty II, LLC*, Index No. 25170/2008, and to recover defense costs incurred in the

underlying action. The court, in an order dated February 24, 2011, dismissed the third-party complaint against Carmine D'Angelo, and severed the third party action as to the remaining third-party defendants.

On November 28, 2011, USI served QBE with a notice for discovery and inspection, and QBE served its response on February 7, 2012. QBE subsequently produced its claim file which was maintained by Rockville, and the entire insurance policy, as well as a privilege log. The privilege log listed various documents including correspondence and reports between QBE, Rockville Risk, legal counsel, and Quinn & Co., UBE's investigator.

QBE's privilege log asserted the attorney-client privilege as to documents bearing GBE stamp numbers 0001-0005, 0007, 0008, 0009, 0010, 0013, 0014, 0045, 0055, 0057, 0069, 0071, 0153, 0157, 0160, 0175, 0196, 0197, 0236, 0251, 0254, 0256, 0257, 0270, 0290, 0318, 0328, 0330, 0372, 0375, 0376, and 0377. QBE's privilege log also asserted that all of the documents listed therein, including documents also listed as subject to the attorney-client privilege, are attorney work products.

VGFC, in its order to show cause dated July 27, 2012, seeks an order compelling QBE to provide it with copies of all of the documents listed in QBE's privilege log. VGFC asserts that no attorney-client privilege exists with respect to Rockville, and therefore correspondence referred to in the privilege log to which Rockville was a party is not privileged and should be disclosed. VGFC, in support of its motion, relies upon an email its counsel received from QBE's counsel, sent on July 23, 2012, which states, in pertinent part, as follows: "In response to your inquiry, no retainer agreement exists between our firm and Rockville with regard to this matter. However, Rockville and QBE did have an agreement whereby Rockville was an agent for QBE, and our firm was retained by Rockville as counsel. We stand by our position that any communications between our firm and Rockville are privileged and if you disagree in this regard, feel free to make a motion".

VGFC further asserts that the documents sought are not attorney work products and that the insurer cannot assert the attorney-client privilege and thereby prevent its insured from viewing documents associated with the handling of a claim. VGFC further seeks an order amending the preliminary conference order dates so that the parties are not obligated to proceed with discovery until 10 days following the entry of an order pursuant to this motion.

USI joins in VGFC's motion, and asserts that as QBE did not disclaim coverage until November 3, 2008, any communications dated or created before that date are not privileged communications or attorney work product and must be disclosed.

QBE's counsel, in opposition, asserts that the attorney-client privilege extends to QBE's agent, Rockville; that the documents sought are protected by the attorney-client

privilege or are exempt from disclosure as attorney work product; and that an in camera inspection of the withheld documents must be conducted prior to any disclosure. The documents listed in the privilege log have been submitted to the court for in camera view.

“CPLR 4503(a) states that a privilege exists for confidential communications made between attorney and client in the course of professional employment, and CPLR 3101(b) vests privileged matter with absolute immunity” (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]). Although attorney-client communications shared with a third-party generally are not privileged, “ ‘an exception exists for one serving as an agent of either attorney or client’ ” (*Robert v Straus Prob. v Pollard*, 289 AD2d 130, [1st Dep’t 2001], quoting *People v Osorio*, 75 NY2d 80, 84 [1989]; see also *Gama Aviation Inc. v Sandton Capital Partners, L.P.*, 99 AD3d 423, 424 [1st Dep’t 2012]; *Hudson Ins. Co. v Oppenheim*, 72 AD3d 489, 489-490 [1st Dep’t 2010]; *Sevenson Envtl. Servs., Inc. v Sirius Am. Ins. Co.*, 64 AD3d 1234 [4th Dep’t 2009], leave to appeal dismissed, 13 NY3d 893 [2009]; *First Am. Commercial Bancorp, Inc. v Saatchi & Saatchi Rowland, Inc.*, 56 AD3d 1137, 1139 [4th Dep’t 2008]).

Plaintiff’s assertion that the attorney-client privilege does not extend to communications between Rockville and QBE’s counsel, is rejected. The affidavit of QBE’s Claims Program Manager establishes that QBE retained Rockville in February 2007, as its third party claims administrator. Rockville was given the authority to manage claims on behalf of QBE, and to investigate, adjust and defend claims made on policies issued by QBE, Rockville, on behalf of its principal QBE, retained AGF & J on October 13, 2008, in order to advisor the insurer, and said law firm owes no duty of loyalty to VGFC. Rockville, acting as QBE’s agent, and upon the advice of the insurer’s counsel issued the disclaimer letters to VGFC and A-Val.

To the extent that QBE asserts that the documents withheld are shielded from disclosure by the attorney-client privilege, it has the burden of demonstrating that the information contained therein constitutes confidential communications between the attorney and the client, or the agent, for the purpose of securing legal services or advice (*see Rossi v Blue Cross & Blue Shield of Greater New York*, 73 NY2d 588 [1991]; *All Waste Sys. v Gulf Ins. Co.*, 295 AD2d 379 [2d Dept 2002]; *Bertalo's Rest. v Exchange Ins. Co.*, 240 AD2d 452 [2d Dept 1997]). The attorney-client privilege is not lost because the documents also contain or refer to some nonlegal concerns (*see Rossi v Blue Cross & Blue Shield of Greater New York, supra*; *All Waste Sys., Inc. v Gulf Ins. Co., supra*). Consequently, the communications between AGF & J and Rockville, and between AGF & J and QBE that relate to the provision of legal advice are privileged, and need not be disclosed.

The party asserting the privilege that material sought through discovery was prepared exclusively in anticipation of litigation or constitutes attorney work product bears the burden

of demonstrating that the material it seeks to withhold is immune from discovery (*see Koump v Smith*, 25 NY2d 287, 294 [1969]) by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation (*see Beach v Touradji Capital Mgt., LP*, 99 AD3d 167, 171 [1st Dep't 2012]; *Ural v Encompass Ins. Co. of Am.*, 97 AD3d 562, 566-567 [2d Dep't 2012]; *Bombard v Amica Mut. Ins. Co.*, 11 AD3d 647, 648-649 [2d Dep't 2004]). When such a showing is made, materials prepared in anticipation of litigation are immune from disclosure unless a party shows “substantial need” and the “inability to obtain the substantial equivalent elsewhere without undue hardship” (CPLR 3101[d]; *Valencia v Obayashi Corp.*, 84 AD3d 786, 787 [2d Dept 2011]). Whether a particular document is shielded from disclosure necessarily is a fact-specific determination that most often requires an in camera inspection (*see Spectrum Sys. Intl. Corp. v Chemical Bank, supra*). Here, with respect to those documents withheld on the basis that they constituted materials prepared in anticipation of litigation, defendant QBE has met its burden with regard to the documents dated after November 3, 2008, the date QBE made a firm decision to disclaim coverage, in anticipation of any claim made by VGFC (*see Pepsico, Inc. v Winterthur Int'l Am. Ins. Co.*, 13 AD3d 601, 602 [2nd Dep't 2004]).

It is well settled that “[t]he payment or rejection of claims is a part of the regular business of an insurance company. Consequently, reports which aid it in the process of deciding which of the two indicated actions to pursue are made in the regular course of its business” (*Landmark Ins. Co. v Beau Rivage Rest.*, 121 AD2d 98, 101 [2nd Dep't 1986]). Reports prepared by insurance investigators, adjusters, or attorneys before the decision is made to pay or reject a claim are thus not privileged and are discoverable (*see Bombard v Amica Mut. Ins. Co.*, 11 AD3d 647, 648-649 [2d Dep't 2004]; *Landmark*, 121 AD2d at 101), even when those reports are “mixed/multi-purpose” reports, motivated in part by the potential for litigation with the insured (*see Bombard*, 11 AD3d at 648-649; *Landmark*, 121 AD2d at 102).

Here, QBE unequivocally disclaimed coverage on November 3, 2008, and virtually all of the documents, emails, notes, and internal communications post date that event and are subject to work product protection, or attorney client privilege. However, documents bearing GRE numbers 0236, 0252, 0253, 0254, 0255, 0256, 0257, 0258, 0259, 0260, 0279, 0278, 0288, 0289, 0290-0298, 0299-0317, 0328-0338, 0372, 0375-0377, 0384-0385, and 0391-0396 are all dated prior to the November 3, 2008 letter declining coverage to VGFC, and therefore are not privileged and must be disclosed.

Accordingly, that branch of plaintiff’s motion which seeks to compel defendant QBE to produce the documents set forth in the privilege log is granted to the extent that QBE is directed to serve the plaintiff and co-defendant USI with copies of the documents identified as GRE numbers 0236, 0252, 0253, 0254, 0255, 0256, 0257, 0258, 0259, 0260, 0279, 0278,

0288, 0289, 0290-0298, 0299-0317, 0328-0338, 0372, 0375-0377, 0384-0385, and 0391-0396, within 20 days after the service of a copy of this order together with notice of entry.

That branch of plaintiff's motion which seeks an amendment of the preliminary conference order with respect to the dates for disclosure is denied, as a compliance conference order was issued on November 13, 2012.

Dated: February 14, 2013

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J.S.C.