

**Ambac Assurance Corp. v Countrywide Home
Loans, Inc.**

2013 NY Slip Op 32568(U)

June 24, 2013

Sup Ct, New York County

Docket Number: 651612/2010

Judge: John A.K. Bradley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

E-FILE

PRESENT: JOHN A.K. BRADLEY
Referee Justice

PART

Ambac Assurance Corporation
et ano.

INDEX NO. 651612/10

MOTION DATE

Countrywide Home Loans et al.

MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s).

Answering Affidavits - Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the decision and order attached.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/24/13

Signature of Referee

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

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

-----X

AMBAC ASSURANCE CORPORATION and
THE SEGREGATED ACCOUNT OF AMBAC
CORPORATION,

Index No. 651612/2010

Plaintiffs,

-against-

DECISION and ORDER

COUNTRYWIDE HOME LOANS, INC.,
COUNTRYWIDE SECURITIES CORP.,
COUNTRYWIDE FINANCIAL CORP., and
BANK OF AMERICA CORP.,

Defendants.

-----X

JOHN A. K. BRADLEY, REFEREE:

By a letter, dated May 1, 2013, Ambac requests “that [I] review BAC’s improper assertion of privilege as to communications and other exchanges involving both BAC and Countrywide (“CW”) personnel that took place before BAC acquired CW on July 1, 2008. The letter attached a list of 483 “challenged communications.” (The list has subsequently been reduced to 445 challenged communications.)

In support of its application, in the letter, Ambac asserts that BAC had provided a privilege log that contained 85,000 entries. Reviewing this log Ambac observed that BAC had asserted privilege over more than 3500 communications dated prior to July 1, 2008, the date of the merger between CW and a BAC subsidiary, Red Oak Merger Corp. Ambac believes that the transmission of communications among these two corporations at a time when they were unaffiliated, separate entities that shared only a putative and

prospective *commercial* interest destroyed any privilege that might have otherwise attached to those communications.

In support of its position, Ambac mentions that BAC has claimed that the common interest doctrine provides a basis for protecting the documents from disclosure. Ambac rejects what it asserts is BAC's claim that the common interest doctrine covers communications shared between separate companies merely because they were parties to an agreement regarding a business transaction.

In a letter, dated June 3, 2013, BAC opposes Ambac's May 1, 2013, letter challenging BAC's reliance on the common interest doctrine. BAC argues that the common interest doctrine protects communications between parties to a proposed merger. Signing the merger agreement, BAC contends, committed BAC and Countrywide to the merger's "successful completion." BAC urges that in the initial stages of becoming parent and subsidiary BAC and Countrywide shared a common legal interest in closing the merger and the many intermediate steps for two heavily regulated entities. BAC contends that BAC and Countrywide needed to obtain joint legal advice on all these issues to close the merger. For this reason, BAC urges, the merger agreement required BAC and Countrywide to share privileged information and expressly protected that information so as not to jeopardize the attorney-client privilege.

In a reply letter, dated June 11, 2013, Ambac argues that BAC does not allege in its privilege log or in the June 3, 2013, letter that the challenged communications were made in the context of actual or expected litigation in which BAC and Countrywide shared a common legal interest; therefore, the letter continues, BAC has failed to carry its

burden of establishing that New York's common-interest doctrine protects the challenged communications from disclosure.¹

As an initial matter, Ambac asserts that BAC's claim of privilege over the challenged communications should be rejected because BAC never cited the common-interest privilege on its privilege logs. BAC, in turn, asserts that "BAC has not waived privilege by not explicitly using the phrase 'common-interest doctrine' in its privilege log. This is because the common-interest doctrine is not an independent basis for withholding documents, but rather prevents waiver of otherwise applicable privileges when the privileged communication is disclosed to a third party that shares a common legal interest.

CPLR 3122 (b) requires that the following information be included in a privilege log: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum.

Instructive here is *Bowne of New York City, Inc v. AmBase Corp.* (150 FRD 465, 474 [SD NY 1993]. In *Bowne*, the court provided that a privilege log typically will identify each document and the individuals who were parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure. "Other required information, such as the relationship between the individuals listed in the log and the litigating parties, the

¹ The "common interest" is variously referred to as the "common-interest doctrine"; the "common-interest exception" or the "common-interest rule." I have used all three in this decision. However, since the "common-interest whatever" is an exception to the rule that sharing a privileged document with a third party destroys the privilege, it seems to me that "common-interest exception" is the better usage.

maintenance of confidentiality and the reasons for any disclosures of the document to individuals not normally within the privileged relationship, is then typically supplied by affidavit or deposition testimony.” *Bowne v. AmBase* (150 FRD at 474). *Matter of Stenovich v Wachtell, Lipton, Rosen & Katz*, 195 Misc.2d 99. That BAC did not mention the “common-interest doctrine” in its privilege logs is of no significance.

In the absence of an attorney-client privilege, the common-interest rule does not apply. *Fewer v. GFI Group, Inc.*, 78 A.D.3d 412. Therefore in evaluating the documents for privilege, it is first necessary to determine whether they meet the requirements for the attorney-client privilege to apply. The 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 N.Y. 2d 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 ¶¶ 3101.01-3101.03).

Obvious tension exists between the policy 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. (*Matter of Priest v. Hennessy*, 51 N. Y. 2d 62, 69.

It is well settled that in order for a communication to be absolutely privileged, a confidential communication between client and attorney, in the course of a professional relationship, must be made for the purpose of seeking or providing legal advice or

assistance and the communication itself must have been primarily or predominantly of a legal character (*see, Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377-378).

The principle underlying the “common interest” privilege is that it is an exception to the traditional rule that the presence of a third party, not an agent or employee of counsel, at a communication between counsel and a client is sufficient to deprive the communication of the confidentiality which is one of the pillars of the privilege

The attorney-client privilege is one of the few mechanisms which Anglo-American law permits to thwart proper discovery and the use of relevant and material information. Accordingly it is subject to severe limitations and a “narrow construction”. Thus any “common interest” privilege must be limited to communication between counsel and parties with respect to legal advice in pending or reasonably anticipated litigation in which the joint consulting parties have a common legal interest. The attorney-client privilege, even as expanded by the “common interest” exception, may not be used to protect communications that are business oriented or are of a personal nature.

New York does not permit the carving out of a large class of communications between potential parties so as to immunize their communications between themselves and counsel for other parties. That would be inconsistent with the narrow claim of the attorney-client privilege (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 376-377, supra) of which the “scope is limited to that which is necessary to achieve its purpose” (*Rossi v Blue Cross & Blue Shield*, 73 NY2d 588, 593, *Matter of Priest v Hennessy*, 51 NY2d 62, 68 [1980]; *Matter of Jacqueline F.*, 47 NY2d 215, 219 [1979]). Thus this court will not apply the “common interest” privilege except where the underlying circumstances require that communications be protected, as with ordinary

attorney-client matters, and the common legal interest impacts potential litigation against all of the participants.

Since the common-interest doctrine applies only where there is pending or reasonably anticipated litigation and the parties have a common legal interest, the question of whether the merger agreement had been entered into does not have significance. Where the document would be protected, but for its having been shown to a third party, then the issue of whether there is pending or reasonably anticipated litigation comes into play. If there is such litigation and a common *legal* interest then the common-interest doctrine comes into play. If there is not then the doctrine does not protect the document.

See *Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's, London*, 176 Misc.2d 605, on which much of the foregoing discussion is based.

In its June 3, 2013, letter, BAC argues “In the initial stages of becoming parent and subsidiary BAC and Countrywide shared a common legal interest in closing the merger and the many necessary intermediate steps for two heavily regulated entities.” This statement is much too broad. Many of the documents cited in the letter, such as “joint SEC disclosures” and “negotiating and advising on employee retention, benefits and termination” would seem not to involve pending or reasonably anticipated litigation.

Conclusion

The parties should review the remaining (now 445) documents in the light of this decision. When they have done so an up-to-date privilege log should be prepared. If there are still documents in dispute it will be necessary for me to review them *in camera*. See *Spectrum Systems International Corporation*, 78 N.Y.2d 371. Accordingly, the

documents should be made available to me at the offices of the attorney for the party that seeks to protect them. Some of the documents were redacted. As to those I will need to see both the redacted and the unredacted versions.

DATED: 6/24/13

SO ORDERED

ENTER

JAKB

JOHN A. K. BRADLEY

REFEREE