

34-06 73, LLC v Seneca Ins. Co., Inc.
2013 NY Slip Op 33048(U)
December 4, 2013
Supreme Court, New York County
Docket Number: 652422/2011
Judge: Ellen M. Coin
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NYSCEF DOC. NO. 67

RECEIVED NYSCEF: 12/05/2013

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

PRESENT: HON. ELLEN M. COIN

PART 63

34-06 73, LLC, BUD MEDIA, LLC. AND
COORS MEDIA, LLC.

Plaintiff,

-against-

SENECA INSURANCE COMPANY, INC.

Defendant.

INDEX NO. 652422/2011
MOTION DATE July 24, 2013
MOTION SEQ. NO. 001
E-FILED

The following papers, numbered 1, were read on this motion to compel disclosure.

Papers

Notice of Motion-Affidavits-Exhibits
Memorandum of Law in Support
Affirmations in Opposition
Reply Memoranda

Papers Numbered

1
2
3
4

Facts and Procedural Posture

In this first-party insurance action seeking coverage of a property damage claim, plaintiffs move pursuant to CPLR 3124 to compel production of certain records that defendant generated before rejection of the claim and for an award of appropriate sanctions in the event of non-compliance. Defendant opposes this motion, relying on the attorney-client privilege and work product privilege and on the limitations of disclosure under CPLR §3101(d)(2). Upon the Court's request, defendant submitted for *in camera* review copies of the withheld materials, together with its privilege log.

Legal Standard

The court is vested with broad discretion in supervising the discovery process. [*See Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223, 224 (1st Dep't 2003)].

The CPLR recognizes three categories of protected materials: attorney-client communications, attorney's work

product, and trial preparation materials. [CPLR 3101(b), (c), and (d); *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 376-77 (1991)]. When a party seeks to shield discovery from production, the burden rests on that party to establish any right to protection and the sought protection must be narrowly construed. [See *Spectrum Sys. Intl. Corp.*, 78 NY2d at 376-377].

Under CPLR §3101(c), an attorney's work product is immune from discovery. Similarly, CPLR §3101(d)(2) conditionally protects materials prepared in anticipation of litigation. In the insurance context, it is well settled that reports of investigators or adjusters, prepared during the processing of a claim, are discoverable when made in the regular course of the insurer's business. [See *Roman Catholic Church of the Good Shephard v Tempco Sys.*, 202 AD2d 257, 258 (1st Dept 1994); *Karta Indus., Inc. v Insurance Co. of State of Pennsylvania*, 258 AD2d 375, 376 (1st Dept 1999)]. When such reports are generated by attorneys, they remain discoverable and are not protected by CPLR §3101 as either work product or materials prepared in anticipation of litigation. [See *Westhampton Adult Home, Inc. v Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 105 AD2d 627, 628 (1st Dept 1984)]. As an insurance company cannot claim documents are prepared in anticipation of litigation until it makes a firm decision to deny coverage, CPLR §3101(c) and (d)(2) do not bar the disclosure of such documents. [See *Brooklyn Union Gas Co. v Am. Home Assurance Co.*, 23 AD3d 190, 191 (1st Dept 2005); *Natl. Union Fire Ins. Co. of Pittsburgh, Pa. v Transcanada Energy USA, Inc.*, 2013 WL 4446917 at *2 (N.Y.Sup.)]. As all of the documents at issue were created before Defendant's denial of coverage, they are not shielded by CPLR §3101(c) or (d)(2).

Defendant's only remaining viable objection is that the documents are protected by attorney-client privilege. In order for the attorney-client privilege to apply, the communication from attorney to client must be made "for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship." [See *Spectrum Systems Intl. Corp.*, 78 NY2d at 378]. Further, the communication itself must be primarily of a legal character. [*Id.*] Documents prepared in the ordinary course of business are not privileged, even if prepared by an attorney. [*Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 2013 WL 4446917 at *3]. In order for the privilege to

attach, "the communication must be made primarily for the purpose of furnishing legal advice, although the privilege does not disappear merely because the communication includes non-legal matters." [Id. at *3]. Courts have consistently held that when insurance companies use attorneys to investigate claims and decide whether to accept or deny coverage as part of their regular business activities, such use does not cloak the documents in privilege. [See *Brooklyn Union Gas Co.*, 23 AD3d at 191; *Westhampton Adult Home*, 105 AD2d 627; *Rosario v N. Gen. Hosp.*, 40 AD3d 323, 323-324 (1st Dept 2007)].

However, such documents may be protected by attorney-client privilege, even if made before the insurance company decides to deny coverage, if they are primarily of a legal, as opposed to investigatory, character and not related to an insurance company's routine business activities. [See *Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 2013 WL 4446917 at *3; *All Waste Sys., Inc. v Gulf Ins. Co.*, 295 AD2d 379, 380 (2nd Dept 2002)].

The Documents at Issue

1. Document Nos. 367-368, 376, and 385-386

Document No. 376 is labeled "Case Notes Report" in Defendant's document log [See Affirmation of Mark Ian Binsky, Exhibit 4]. The document is authored by Alfredo Carbonaro, a property adjuster for Defendant, and was received by Al Lewis, an attorney retained by Defendant. The document is dated July 27, 2010 and details legal strategy and information about reserves. The portions of the document redacted by the Defendant are protected by attorney-client privilege with the exception of the last sentence of the July 27, 2010 entry, which merely recites the date of a scheduled Examination Under Oath.

Document Nos. 385-386 are email communications between Al Lewis, an attorney with D'Amato & Lynch, and Gregory Crapanzano, Vice President of Property Claims for Defendant. With respect to the email dated October 5, 2010 from Mr. Crapanzano to Mr. Lewis, the content details steps taken in the investigation but no legal advice or strategy. As such, this email is not protected by attorney-client privilege. Defendant's remaining redactions to these documents are protected by attorney-client privilege as they contain discussions of legal strategy.

Document No. 367 is titled "Case Notes Report" and contains dated entries by Alfredo Carbonaro, a property adjuster for Defendant. Defendant's document log indicates that the recipient of this document is Gabrielle Puchalsky, an attorney for Defendant. Defendant has indicated redactions of the June 8, 2010 and June 10, 2010, 12:12 PM entries. The June 8, 2010 entry is an amalgam of both investigation and legal strategy, but the communication is predominantly of a legal character. Thus, Defendant's redactions are proper. The June 10, 2010, 12:12 PM entry indicates Defendant's intention to take further steps in its investigation but does not contain legal strategy or advice. Therefore, the June 10 2010, 12:12 PM entry shall be disclosed.

Document No. 368 is also labeled "Case Notes Report" by Defendant's document log. It contains notes from Gregory Crapanzano to Al Lewis on June 15, 2010, June 16, 2010, and June 17, 2010. All three entries contain discussions of Defendant's investigation but no legal strategy. Therefore, the entirety of Document No. 368 shall be disclosed.

2. Document Nos. 363, 365, 369, 371, 374, 377, 379, 383, 385, 387, 388, 389, 399, 402, 412, 416, 421, 424, 427, 432, 695, 696, 697, 741, 742, 743, 944, 1036, 1104, 1218, 1331, 1467, 1471, 1626, 1629, 1636, 1652, 2828

This group of documents contains "Case Notes Reports," "Case Notes Reports with Emails," "Draft Letters," "Letters," "Emails," and "Fax Cover Sheets," as described by Defendant's document log.

Document No. 363 is a "Case Notes Report" authored by Jude Samson, an employee of Defendant. The document contains notes of a conversation with Gabrielle Puchalsky, an attorney for Defendant, regarding legal strategy. Defendant's redactions are therefore proper.

Document Nos. 365, 371, 379, 388, 389, 399, 421, 424, 695, 696, 741, 742, 743 are authored by Gabrielle Puchalsky, attorney for the Defendant, and were sent to various employees of Defendant. Defendant's redactions all

relate to aspects of legal strategy in the context of Defendant's investigation and are privileged.

Document Nos. 369, 374, 402, 416, 432, 1036, 1104, 1331 are authored by Alfredo Carbonaro to either Gabrielle Puchalsky or Al Lewis, both of whom are attorneys for Defendant. Defendant's redactions all relate to legal advice or strategy and are therefore privileged.

Document Nos. 383, 385, 387, 427, and 944 contain communications authored by Gregory Crapanzano and were sent to either Gabrielle Puchalsky or Al Lewis. Defendant's redactions all relate to the discussion of legal strategy or advice and are therefore proper. Document No. 944, which Defendants withhold in its entirety, is also protected by the attorney-client privilege.

Document No. 697 is a letter from Laurie Beatus of D'Amato & Lynch, a firm that Defendant retained, to Gabrielle Puchalsky. The letter contains discussion of legal strategy or advice and is therefore privileged.

Document Nos. 1218, 1471, 1629, and 1652, which appear to be duplicates of the same document, are faxes from Linda Grossman, an employee of Defendant, to Michael Gorelick, an attorney for Defendant. The faxes contain legal strategy or advice and are therefore privileged.

Document Nos. 1467, 1626, and 1636 are fax cover sheets authored by Michael Gorelick to Gregory Crapanzano. The documents contain no legal advice or strategy and shall be disclosed.

Document No. 2828 is a "Case Note" authored by Jude Samson, an employee of Defendant. Defendant has indicated a redaction of the last two sentences of the October 12, 2009 entry, which detail a communication between Mr. Samson and Michael Gorelick, an attorney for Defendant. This redaction is proper as it contains legal advice or strategy.

C. Reserve and Billing Information

1. Document Nos. 218-223, 235-236, 237, 239, 241, 253, 266, 279-280, 281-283, 290-291, 292-294, 302, 304, 318, 321, 324, 327, 331, 352-353, 364, 376, 377, 412, 1174, 1718, 1720, 2063, 2835-2836.

Defendant seeks to protect these documents on the ground that they contain information relating to estimates of the cost of investigating the claim and paying it, i.e. reserves. [See Affirmation in Opposition, Exhibit 4]. Documents referring to reserves are not discoverable in actions to determine coverage. [See *40 Rector Holdings, LLC v The Travelers Indem. Co.*, 40 AD3d 482 (1st Dept 2007)]. Therefore, these documents are properly withheld.

2. Document Nos. 225, 226-230, 238, 242, 243, 244, 245-250, 254-259, 267, 268, 269-272, 273-276, 284-285, 295-296, 303, 306, 310, 312-315

Defendant describes these documents as invoices detailing legal advice and legal analysis provided by counsel. The documents contain information about billing as well as legal work performed by Defendant's counsel on its behalf. Defendant contends that such information is irrelevant to the issues in this case and thus need not be produced. [See Defendant's Memorandum in Opposition at 9]. The Court finds that Plaintiffs, aside from their conclusory statement that they "should be able to obtain this information," have not established their entitlement to such documents. [See Plaintiff's Memorandum of Law in Further Support at 12-13]. As the burden is on Plaintiffs to demonstrate the relevance of such information, which they have failed to do, these documents are properly withheld. [See *Vyas v Camplebell*, 4 AD3d 417, 418, 771 NYS2d 375 (2d Dept 2004)].

In accordance with the foregoing, it is hereby

ORDERED that Defendant produce the withheld documents to the extent set forth above no later than twenty (20) days from the date of this order.

This is the decision and order of the court.

Dated: December 4, 2013


Ellen M. Coin, A.J.S.C.

Non-final Disposition