

Sabre, Inc. v Insurance Co. of the State of Pa

2014 NY Slip Op 32265(U)

August 20, 2014

Supreme Court, New York County

Docket Number: 652241/2012

Judge: O. Peter Sherwood

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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SABRE, INC., SABRE HOLDINGS CORPORATION,
and SABRE TRAVEL INTERNATIONAL, LTD.,

Plaintiffs,

DECISION AND ORDER
Motion Seq. Nos.: 008 and 009

-against-

Index No.: 652241/2012

THE INSURANCE COMPANY OF THE STATE OF
PENNSYLVANIA, and CHARTIS SPECIALTY
INSURANCE COMPANY,

Defendants.

-----X
O. PETER SHERWOOD, J.:

These are motions to compel discovery.

In this case, plaintiffs seek indemnity for their settlement costs arising out of underlying litigation involving non-party, American Airlines under the terms of an insurance policy issued by defendants. Plaintiffs also seek reimbursement of defense costs. The complaint in the underlying case included antitrust claims (which the parties agree are not covered by the policy) and disparagement claims (which plaintiffs assert are covered)¹. In Motion Sequence Number 008, defendants seek disclosure of (1) internal settlement documents; (2) litigation management documents; and (3) unredacted versions of all attorney fees related documents, including monthly budget reports, invoices and time records. Plaintiffs assert that the requested documents should not be disclosed because all are protected by the attorney-client communications or attorney work product privileges. In Motion Sequence Number 009, plaintiffs seek disclosure of policy reserve information.

I. Motion Sequence Number 008

Communications between an attorney and a client in the course of professional employment for the purpose of facilitating legal advice or services are privileged and are not discoverable unless the privilege is deemed to have been waived by the client. (*see M/O Bank of N.Y. Mellon*, 42 Misc

¹Plaintiffs add that the complaint in the underlying litigation included other covered claims that were dropped at an early stage of the case.

3d 171, 176 [Sup Ct, NY County 2013]). The mere fact that a party is seeking reimbursement for the costs of defending and settling a covered litigation does not thereby place “at issue” the party’s privileged communications with counsel and attorney work product concerning the lawsuit as to which indemnity is claimed (*see Deutsche Bank Trust Co. of Ams. v Tri-Links Invest Tr.*, 43 AD3d 56, 66 [1st Dept 2007]). That a privileged communication contains information that is relevant to the controversy, does not, without more, place the contents of the communication “at issue” (*see Veras Invest Ptnrs. LLC v Akin Gump Strauss Hauer & Feld, LLP*, 52 AD3d 370, 374 [1st Dept 2008]). “Generally, no ‘at issue’ waiver is found where the party asserting the privilege does not need the privileged documents to sustain its cause of action” *Ambac Assurance Corp. v DLJ Mlg. Capital, Inc.*, 92 AD3d 451, 452 [1st Dept 2012]). However, any selective use of privileged materials to prove plaintiffs’ case will result in waiver (*see Deutsche Bank*, 43 AD3d at 64).

Plaintiffs having represented that they do not intend to use any confidential settlement documents or otherwise privileged information to prove their case, there is no “at issue” waiver of the privilege (*see id.*). Of course, at trial plaintiffs will have the burden of proving entitlement to indemnity, reimbursement of defense costs, and the amounts thereof. Plaintiffs may not rely on any withheld information to prove their claim (*see id.*).

CPLR 3101 (c) provides that “[t]he work product of an attorney shall not be obtainable.” The Document Review Protocols prepared by Sabre’s lawyers for the underlying litigation is attorney work product material and are not “obtainable.” Further, these documents are not “at issue” and are not subject to disclosure for the reasons discussed above. Similarly, to the extent the invoices and time records of plaintiffs’ attorneys contain privileged attorney-client communications, the privilege cannot be deemed waived on the ground that the contents thereof are “at issue”.

Generally, attorney fees related documents do not qualify as privileged attorney-client communications. (*see Priest v Hennessy*, 51 NY2d 62, 69 [1980]). However, they may be shown to be privileged when they contain detailed accounts of legal services rendered (*see Eisic Trading Corp. v Somerset Marine*, 212 AD2d 451 [1st Dept 1995]; *DiBella v Hopkins*, 403 F3d 102, 120 [2d Cir 2005]). The mere fact that such documents may be described as containing “detailed” information, does not raise a presumption that the contents are privileged. The party asserting the

privilege bears the burden of establishing all the essential elements of the claim (*see People v Mitchell*, 58 NY2d 368, 373 [1983]).

Keeping these governing legal principles in mind, plaintiffs shall submit for *in camera* review a digital version of all pages of attorney fees related documents containing redacted entries which redactions shall be highlighted.

II. Motion Sequence Number 009

In motion sequence number 009, plaintiffs seek to compel disclosure of defendants' claim reserve information and to overrule defendants' objection to disclosure of the amount of the reserve set, the date(s) the reserve was set and the factors considered in setting or adjusting that reserve. In a ruling communicated to counsel in an email, dated April 20, 2014, the court rejected defendants' blanket objection to production of claim reserve information and gave defendants an opportunity to assert claims of privilege as to specific matters. Thereafter, defendants produced documents responsive to plaintiffs' requests but (1) withheld four documents "discussing reserves, reflecting analysis conducted in anticipation of litigation and the advice of counsel" and (2) redacted portions of notes that included topics described above as well as "discussions with, and work performed by coverage counsel. Unredacted versions of these documents have been submitted to the court *in camera* along with a cover letter advising that most of the disputed documents have now been produced in unredacted form. Defendants continue to maintain that those portions of the disputed documents that reflect discussions with coverage counsel are privileged attorney client communications and/or attorney work product and should not be subject to disclosure.

Having reviewed the submission of defendants *in camera*, the court agrees. The withheld text highlighted in blue reflect privileged communications with coverage counsel and/or assessments of the evidence available and the particular legal issues involved in Sabre's claims. They constitute privileged attorney client communications or work product. As such they are protected.

Accordingly, it is hereby

ORDERED that defendants' motion to compel disclosure (motion sequence number 008) is DENIED, except as to attorney fees related documents regarding which plaintiffs are directed to submit the documents for *in camera* review; and it is further

ORDERED that plaintiffs' motion to compel disclosure (motion sequence number 009) is GRANTED except the documents bearing bates numbers CSIC00001009 through 1022 as to which those portions reviewed *in camera* and highlighted in blue may be withheld.

This constitutes the decision and order of the court.

DATED: August 20, 2014

ENTER,



**O. PETER SHERWOOD
J.S.C.**