

Plotkin v Republican-Franklin Ins. Co.
2014 NY Slip Op 34023(U)
July 21, 2014
Supreme Court, Kings County
Docket Number: 3359/11
Judge: Bernadette Bayne
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At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of July, 2014.

PRESENT:

HON. BERNADETTE BAYNE,

Justice.

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CHAYA PLOTKIN,

Plaintiff,

**SUPPLEMENTAL
DECISION AND ORDER**

- against -

Index No. 3359/11

REPUBLICAN-FRANKLIN INSURANCE COMPANY
and UTICA MUTUAL INSURANCE COMPANY,

Mot. Seq. No. 2

Defendants.

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The following papers numbered 1 to 4 read herein:

Papers Numbered

Decision and Order, dated Oct. 7, 2011, _____
Defense Counsel's letter, dated Oct. 5, 2012,
with Amended Privileged Log _____
Opposing Counsel's letter, dated Oct. 26, 2012 _____
Defense Counsel's letter, dated Dec. 27, 2013 _____

_____ 1
_____ 2
_____ 3
_____ 4

By a decision and order, dated Oct. 7, 2011, this Court granted the cross motion (in Seq. No. 2) of plaintiff CHAYA PLOTKIN, (hereinafter referred to as the plaintiff), to the extent that defendants REPUBLICAN-FRANKLIN INSURANCE COMPANY and UTICA MUTUAL INSURANCE COMPANY, (hereinafter, collectively referred to as the defendants) were directed to provide the Court, for an in camera inspection, complete, unredacted copies of the documents which the plaintiff demanded but which the defendants withheld as privileged. Thereafter, defense counsel provided the Court with the withheld documents (Bates-stamped UM 001 to UM 024), together with an amended privilege log. Defense counsel indicated in a cover letter that only some of the withheld

documents were in dispute; specifically, the highlighted portions of the withheld documents Bates-stamped UM 001, UM 002, UM 004, and UM 007, as well the entirety of the withheld documents Bates-stamped UM 014, UM 015, UM 016, UM 017, UM 018, UM 019, UM 023, and UM 024 (collectively referred to as the withheld documents). Defense counsel further indicated that the remaining documents had already been produced to the plaintiff and were no longer the subject of a discovery dispute.

Background

The plaintiff commenced this action to recover on the \$3.25 million money judgment that was entered in her favor against American Pack Systems, Inc. in the action, captioned *Chaya Plotkin v Israel Braun and American Pack Sys., Inc.*, Index No. 2333/09 (Sup Ct, Kings County) (hereinafter referred to as the underlying action). The insurers are named as direct defendants in this action.

By Notice for Discovery and Inspection, the plaintiff sought “the file maintained by defendants with respect to plaintiff’s claim and/or action against the defendants in the underlying action from the date the file was first opened until March 11, 2009.” According to the plaintiff, the defendants withheld documents which they “redacted upon the grounds of a supposed ‘attorney/client’ or ‘anticipation of litigation’ privilege.” The plaintiff annexed a privilege log (later amended) of the redacted documents that defendants produced in response to her discovery demand. The plaintiff rejected, as unfounded, the defendants’ arguments on the applicability of the attorney-client and the anticipation-of-litigation privileges. Specifically, the plaintiff contended that the withheld documents were prepared as part of the defendants’ routine investigation in the ordinary course of their business to arrive at the decision whether to pay or disclaim, and hence all withheld documents should be released.

In opposition, the defendants assert that the withheld documents were not only immune from discovery because they had been prepared in anticipation of litigation, but that they were also protected from disclosure by the attorney-client relationship between the defendants and their coverage counsel (Eric Portuguese, Esq. of the Lester Schwab firm, which serves as defense counsel in this action). The defendants maintain that, although their back-and-forth communications with Attorney Portuguese occurred before they disclaimed coverage, these communications were primarily and predominantly legal in nature, thereby invoking the protection of the attorney-client privilege. The defendants, thus, urge the Court to preclude disclosure of all withheld documents. As noted, following this Court's decision and order, dated Oct. 7, 2011, the defendants submitted the withheld documents to the Court for an in camera review.

Discussion

Generally, the party asserting an attorney-client privilege has the burden of establishing that the information sought to be protected from disclosure was a confidential communication from a client to an attorney for the purpose of obtaining legal advice or services (*see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 N.Y.2d 371, 581 N.E.2d 1055, 575 N.Y.S.2d 809 (Ct of Appeals, 1991). "By analogy, for the privilege to apply when communications are made from attorney to client – whether or not in response to a particular request – they must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship" (*Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 540 N.E.2d 703, 542 N.Y.S.2d 508 (Ct. Of Appeals, 1989). That an attorney communication does not reflect legal research is not determinative, "where the communication concerns legal rights and obligations and where it evidences other professional skills such as lawyer's judgment and recommended legal strategies" (*id.* at 594). "So long as the communication is primarily or predominantly of a legal character, the privilege is not lost

merely by reason of the fact that it also refers to certain nonlegal matters. Indeed, the nature of a lawyer's role is such that legal advice may often include reference to other relevant considerations" (*id.*).

In insurance-coverage disputes, the Second Department's decision in All Waste Sys., Inc. v Gulf Ins. Co. (295 A.D.2d 379, 743 N.Y.S.2d 535 (2nd Dept., 2002) is instructive. There, the defendant insurer invoked attorney-client privilege in withholding disclosure of coverage opinion reports and draft disclaimer letters which its outside legal counsel prepared. The plaintiff sought to compel disclosure of the subject documents because, inter alia, the reports and draft disclaimer letters were prepared in the regular course of the defendant's business. The Second Department, relying on the Spectrum and Rossi decisions cited above, held that the documents were privileged and reversed the lower court decision which compelled their disclosure. The Second Department concluded (at page 380) that:

"The documents that [the plaintiff] seeks to obtain are primarily and predominately legal in nature and, *in their full content and context*, were made to render legal advice or services to [the defendant insurer]" (internal citations omitted; emphasis added).

The import of this decision is that documents, prepared before the insurer disclaims coverage, may constitute privileged attorney-client communications; *provided* that they are primarily and predominately legal in nature and, *in their full content and context*, were made to render legal advice or services to the client insurer.

More recently, the Second Department reached a somewhat contrary conclusion in Melworm v Encompass Indem. Co. (112 A.D.3d 794, 977 N.Y.S.2d 321 (2nd Dept., 2013). There, the

whether coverage exists. The email chain primarily consists of Attorney Portuguese’s coverage opinion, legal strategy, and legal advice in response to questions posed to him by Mr. Facey and Mr. Yacco. The Court finds that these documents are not subject to discovery.

Finally, the two-page Bates-stamped document UM 023 - UM 024 is an unsigned, undated “Liability Examiner Review.” The Court finds that the defendants’ conclusory assertion of privilege as to this document is insufficient to demonstrate that it was prepared “exclusively in anticipation of litigation” (Ural v Encompass Ins. Co. of Am., 97 A.D.3d 562, 948 N.Y.S.2d 621 (2nd Dept., 2012). At best, this document is a mixed/multi-purpose report that was motivated only in part (if at all) by the potential for litigation with plaintiff (*see Melworm*, supra). As such, the Court finds that this document is *not* privileged and must be produced.

Conclusion

In accordance with the foregoing, it is hereby

ORDERED that the defendants shall produce the withheld documents to the extent set forth herein, within thirty (30) days from the date of service of this decision and order on defense counsel with notice of entry.

This constitutes the Decision and Order of the Court.

ENTER,

Bernadette Bayne
HON. BERNADETTE BAYNE
J. S. C.
BERNADETTE BAYNE
Supreme Court Justice

FILED
KINGS COUNTY CLERK
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