

<b>Bew Parking Corp. v Apthorp Assoc. LLC</b>
2015 NY Slip Op 30417(U)
March 24, 2015
Supreme Court, New York County
Docket Number: 601155/09
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 39

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BEW PARKING CORP. and KEVIN R. WOLF,

Plaintiffs,

**DECISION and ORDER**

- against -

Index Number: 601155/09  
Motion Seq. No. 010

APTHORP ASSOCIATES LLC,

Defendant.

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**SALIANN SCARPULLA, J.:**

In this action for breach of a commercial lease, plaintiffs BEW Parking Corp. (“BEW”) and Kevin R. Wolf (together “plaintiffs”) move to compel defendant Apthorp Associates LLC (“Apthorp”) to: (a) produce documents withheld on an assertion of attorney/client privilege, and (b) produce contracts, reports, and other communications with its employees, agents, or contractors regarding the garage and courtyard at issue.

Apthorp cross-moves to: (a) compel Plaintiffs to produce all documents responsive to its second request for production, and (b) to compel Plaintiffs’ counsel and BEW’s parent company, Rapid Park Holding Corporation, to respond to Apthorp’s subpoenas.

Apthorp is the owner and landlord of a parking garage (“the premises”) located in the basement of the building at 390 West End Avenue, New York, NY. Plaintiffs are tenants of the premises pursuant to a commercial lease with Apthorp.

On or about April 18, 2008, the New York City Department of Buildings (“DOB”) ordered the parking garage to be vacated. In its vacate order, the DOB stated that there was “an imminent danger to the life and safety of the occupants” of the premises due to the deteriorating condition of the concrete floor, and the absence of a “second means of egress or required ventilation.”

Plaintiffs allege that Apthorp is obligated under the lease to make all structural repairs to the premises; repairs to support columns; and repairs to the foundation of the building. Plaintiffs assert that Apthorp is responsible for the structural disrepair of the garage, which caused the DOB to order the premises to be vacated.

During discovery, Apthorp withheld 9 documents and redacted 13 documents on the basis of attorney/client privilege.<sup>1</sup> Plaintiffs argue that Apthorp should produce these documents because they are communications sent to third-parties that do not contain any legal advice. Plaintiffs further assert that Apthorp waived its privilege by placing the subject matter of the communications at issue, and by selectively producing certain privileged communications. Lastly, Plaintiffs argue that Apthorp should be compelled to produce contracts, reports, and other communications that it had with its employees, agents, or contractors regarding the garage and courtyard.

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<sup>1</sup> Several of the withheld and redacted documents are duplicates because they contain emails from the same email thread. In total, Apthorp submitted 6 unique withheld documents and 5 unique redacted documents for *in camera* review.

In opposition, Apthorp argues that the documents are protected by attorney-client privilege because they consist of communications between Apthorp's lawyers and its agents. Apthorp asserts that it does not have any employees of its own, and that it hires third-parties to act as its agents to manage the premises. Apthorp further argues that it never waived its attorney-client privilege because it did not place any communication at issue, and only produced non-privileged documents in this litigation. Finally, Apthorp asserts that it has produced all of the relevant, non-privileged documents in its possession, as well as an affidavit stating that it conducted a diligent search for documents requested by Plaintiffs, pursuant to this Court's order dated September 24, 2014.

In its cross-motion, Apthorp seeks to compel Plaintiffs, their counsel, and BEW's parent company to produce all documents responsive to Apthorp's outstanding discovery requests (including documents from a May 2009 meeting to review bids for garage repairs, and documents produced in an insurance coverage action related to the garage closure).

## **Discussion**

### **I. Plaintiffs' Motion to Compel**

The attorney-client privilege applies to confidential communications between attorneys and their clients made in the course of professional employment. CPLR §4503(a). In order for the privilege to apply, the attorney-client communication "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 New York*,

73 N.Y.2d 588, 593 (1989). “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.” *Id.*; *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 124 A.D.3d 129, 135 (1st Dep’t 2014).

The attorney-client privilege may extend to a communication between a client’s attorney and a person acting as an agent of the client for the purpose of making the subject communication. *Le Long v. Siebrecht*, 196 A.D. 74, 76 (2d Dep’t 1921); *Hudson Val. Mar, Inc. v. Town of Cortlandt*, 30 A.D.3d 377, 378 (2d Dep’t 2006); *Sieger v. Zak*, 60 A.D.3d 661, 663 (1st Dep’t 2009); *Gama Aviation Inc. v. Sandton Capital Partners, L.P.*, 99 A.D.3d 423, 424 (1st Dep’t 2012).

Upon an *in camera* inspection of the documents, I find that the withheld and redacted documents are protected by the attorney-client privilege, except for certain portions of document nos. 7, 9, 11, and 16. The privileged documents consist of email communications between Apthorp’s lawyers and its agents for the purpose of seeking or rendering legal advice concerning the garage closure and subsequent repairs.

Contrary to Plaintiffs’ assertion, Apthorp sufficiently demonstrated that the privileged communications were between its lawyers and its agents, Mann Realty Associates, GACE Consulting Engineers PC, Milrose Consultants, Inc., and Seamus Henchy & Associates who were hired by Apthorp to manage the building and repairs. Apthorp submitted an affidavit from Peter O’Connor of Broadwall Management of

Apthorp LLC, the entity that currently serves as managing agent of the building. In his affidavit, O'Connor stated that Apthorp "has no employees of its own" and instead acts "through various agents that are typically hired by contract." Apthorp also submitted affidavits from its lawyers Jeffrey Goldman and Howard Zipser who both affirmed that Apthorp does not have any employees of its own and hired the above-mentioned third-parties as its agents for the purpose of obtaining legal advice concerning the vacate order, repairs to the premises, landmark issues, and Apthorp's ongoing dispute with Plaintiffs.

Plaintiffs argue that, even if the documents are privileged, Apthorp waived privilege by placing the communications at issue. An "at issue" waiver of privilege "occurs where a party places the subject matter of its own privileged communication at issue in litigation." *Deutsche Bank Trust Co. of Americas v. Tri-Links Inv. Trust*, 43 A.D.3d 56, 63 (1st Dep't 2007). Here, although the privileged communications may have some relevance to the issues litigated by the parties, Apthorp has not put the contents of its privileged communications at issue in this action.

During the course of discovery, Apthorp produced several communications between its lawyer Jeffrey Goldman and its agents. See Plaintiffs' Counsel's Affirmation of Good Faith, Exhibit C (Document No. 292). Plaintiffs contend that Apthorp waived its attorney-client privilege because it selectively produced privileged documents and withheld others. Selective disclosure of privileged material "is not permitted as a party may not rely on the protection of the privilege regarding damaging communications while

disclosing other self-serving communications.” *Vill. Bd. of Vill. of Pleasantville v. Rattner*, 130 A.D.2d 654, 655 (2d Dep’t 1987); *Corrieri v. Schwartz & Fang, P.C.*, 106 A.D.3d 644, 645 (1st Dep’t 2013). Apthorp did not waive privilege by making a selective production of privileged documents. The documents produced by Apthorp between its lawyer and its agents were unprivileged communications because they primarily concerned business matters, not legal matters. The communications were made to provide updates about the garage closure, pass information about bids, and coordinate the DOB’s inspection of the garage.

In regards to document nos. 7, 9, 11, and 16, I order Apthorp to produce the portion of those documents that contain emails between Apthorp’s agents alone.<sup>2</sup> These emails between Apthorp’s agents are not protected by attorney-client privilege because they are not communications to or from an attorney made for the purpose of obtaining legal advice. Apthorp may redact the portions of document nos. 7, 9, 11 and 16 that contain emails with Apthorp’s counsel, Jeffrey Goldman.

In the second branch of their motion, Plaintiffs seek to compel the production of contracts, reports, and other communications between Apthorp and its employees, agents, or contractors regarding the garage and courtyard. Apthorp asserts that it has already produced all responsive documents in its possession. In my prior order dated September

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<sup>2</sup> For the sake of clarity, document no. 7 contains 4 emails to be produced; document no. 9 contains 1 email to be produced; document no. 11 contains 1 email to be produced; and document no. 16 contains 1 email to be produced.

24, 2014, I directed Apthorp to produce an affidavit stating whether it conducted “a diligent search for the DC Report and the subcontracts” and whether these documents were in its possession. Because Plaintiffs seek to compel production of documents already addressed by my prior court order, the second branch of Plaintiffs’ motion is moot.

Apthorp contends that it has already complied with my prior order by producing an affidavit of diligent search on October 3, 2014. To the extent that Plaintiffs have not received this affidavit, I order Apthorp to produce its affidavit to Plaintiffs within 14 days.

#### **Apthorp’s Cross-Motion to Compel**

Apthorp cross-moves to compel Plaintiffs, their counsel, and BEW’s parent company to produce documents from a May 2009 meeting to review bids for garage repairs and documents produced in a related insurance coverage action for the garage closure. Plaintiffs oppose the cross-motion on the grounds that Apthorp did not confer with them regarding the outstanding documents or submit an affirmation of good faith.

Based on Apthorp’s failure to meet and confer with Plaintiffs and to annex an affirmation of good faith, I deny Apthorp’s cross-motion to compel without prejudice. The parties shall meet and confer regarding Apthorp’s outstanding discovery requests within 14 days. If any discovery issues remain after the parties’ meet and confer, the court will address the remaining issues at the next compliance conference.

In accordance with the foregoing, it is

ORDERED that the branch of plaintiffs BEW Parking Corp. and Kevin R. Wolf's motion to compel the production of documents withheld on the basis of attorney-client privilege is granted only with respect to those portions of document nos. 7, 9, 11, and 16 as described above, and otherwise denied; and it is further

ORDERED that the branch of plaintiffs BEW Parking Corp. and Kevin R. Wolf's motion to compel the production of contracts, reports, and other communications with its employees, agents, or contractors regarding the garage and courtyard is denied as moot; and it is further


ORDERED that defendant Apthorp Associates LLC's cross-motion to compel is denied without prejudice; and it is further

ORDERED that counsel are directed to appear for a compliance conference at 60 Centre Street, Room 208, on May 6, 2015 at 2:15pm.

This constitutes the decision and order of this Court.

Dated: New York, New York  
March 24, 2015

ENTER:

  
Sallann Scarpulla, J.S.C.