

Richard Avedon Found. v AXA Art Ins. Corp.

2015 NY Slip Op 32459(U)

December 18, 2015

Supreme Court, New York County

Docket Number: 151435/2014

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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THE RICHARD AVEDON FOUNDATION,

Petitioner/Plaintiff,

Index No. 151435/2014

- against -

Decision and Order

AXA ART INSURANCE CORPORATION,

Respondent/Defendant.

-----X
JOAN B. LOBIS, J.S.C.:

This is an insurance-related dispute regarding photographer Richard Avedon’s renowned work “The Chicago Seven, September 25, 1969” (“the Work”). After the Work sustained water damage, The Richard Avedon Foundation (“Avedon”) filed an insurance claim with its insurer, AXA Art Insurance Corporation (“AXA”). When AXA provided a valuation that differs dramatically from Avedon’s appraisal, Avedon initiated this proceeding, which it subsequently amended and converted to a hybrid Article 75 proceeding and plenary action. In its February 4, 2015 decision, the Court thoroughly discussed the background of this matter, the claims Avedon asserts in its pleadings, and AXA’s pre-answer objections to the lawsuit. The Court incorporates this background by reference. The Court now considers the parties’ eighth motion, in which AXA seeks to compel discovery on seven bases. On December 3, 2015, however, the parties filed a stipulation of partial settlement of this motion, and now only the issue of whether Avedon’s documents concerning DeWitt Stern Group, Inc. (DeWitt) and Peter MacGill should be shielded from discovery under the attorney-client and work product privileges remains before the Court.

DeWitt produced some discovery but provided a privilege log listing emails it exchanged with Avedon shortly after Avedon retained DeWitt. AXA argues that no attorney-client privilege applies because DeWitt served solely as Avedon's insurance broker. It annexes numerous emails and letters between Avedon and DeWitt which allegedly establishes DeWitt's status. It argues that Avedon, through DeWitt, contacted AXA directly on several occasions, bypassing the attorneys on both sides, and that on these occasions DeWitt did not state that its relationship with Avedon was privileged. AXA states that in DeWitt's privilege log only one of the allegedly privileged emails is by an attorney; counsel is copied on the rest. AXA further notes that Avedon's July 14, 2014 email to DeWitt informs DeWitt that "this is a legal matter and all communications must remain privileged. I will not answer these questions via email," and AXA states that therefore all prior communications were not privileged. AXA states that, contrary to Avedon's assertion, nonparty Peter MacGill is a frequent sales agent and broker for Avedon and he has worked with Avedon since the 1970s. In addition, AXA states that Mr. MacGill has handed over his notes of July 15, 2014, when he viewed the Work, and that there was no assertion of privilege at that time. It points to deposition testimony in which counsel for Avedon interjected that Mr. MacGill was "not an expert in this litigation." MacGill Dep., p. 39, ll. 11-12. It argues that because Mr. MacGill testified that he did not know what a litigation consultant was he effectively acknowledged that he was not retained for this purpose.

In opposition, Avedon argues that it has asserted limited privilege with respect to the work that DeWitt and Mr. MacGill performed on its behalf. It states that, contrary to the implications in AXA's motion, it withheld only five documents from DeWitt, and it turned over

all non-litigation documents. It points out that it retained DeWitt after the litigation commenced, and states that therefore it possesses no knowledge of the AXA policy, the claim Avedon submitted to AXA, or other relevant information. It states that in July 2014, DeWitt provided assistance to counsel in developing a strategy for resolving its coverage dispute, and the five withheld documents involve a string of emails between Laura Avedon, counsel for Avedon, Mr. MacGill, and DeWitt. It rejects AXA's position as to the import of Avedon's July 14, 2014 email to DeWitt. As for Mr. MacGill, Avedon states that it has willingly produced all documents except those that relate to the period when Ms. Morthland was seriously injured and Mr. MacGill briefly took over as appraiser. It argues that Mr. MacGill is not an attorney and therefore was unfamiliar with the term of art "litigation consultant," but that this does not alter the fact that he briefly was involved with the litigation. In addition, Avedon states, the lack of a written agreement does not alter the fact that Mr. MacGill was involved in the litigation during a limited period during the umpire selection process.

In reply, AXA maintains that the documents have been incorrectly described as privileged. In support, it submits copies of several emails Avedon had marked privileged but provided after AXA made this motion. The emails relate to the scheduling of an Avedon meeting which all available attorneys would attend, but they refer only to scheduling and do not contain any privileged material. AXA contends that this proves the rest of the emails are similarly miscategorized. Further, it points to an email in which Avedon instructed DeWitt to stay out of the legal dispute and work on finding them a new insurer, stating that this shows DeWitt never discussed the legal issues with Avedon.

The Court denies the remainder of AXA's motion. As AXA notes, after it filed this motion Avedon provided several of the emails it previously designated as privileged. The emails at AXA's exhibit D all reference a conference call with the attorneys, but do not include any substantive discussions relating to the meeting. Contrary to AXA's contention that this indicates the remainder of the emails also should not be privileged, it suggests that Avedon more carefully culled through the documents in response to the motion. In support of its position that the conference did not involve a legal matter, AXA points to Avedon's comment that the attorneys would be "available to the extent they are free." Laura Avedon email, 7/15/2014, 2:12 p.m. However, the emails also deem their conference a "3:30 call tomorrow with our attorneys." Read together, this suggests that some of the attorneys might not be available for the entire call. As for Mr. MacGill, AXA itself acknowledges that he initially was put forward as a substitute appraiser when Ms. Morthland became unavailable. Given this fact, the few emails relating to his work during this short period may be withheld. If AXA has objections to specific emails that are still being withheld, it should discuss its position with Avedon and reach an out-of-court solution. The Court has issued several decisions in this case challenging other discovery, including depositions, on grounds of privilege and on other bases as well. Coupled with the current decision, the earlier ones should be sufficient to provide the parties with guidance regarding the resolution of any remaining disputes.

The Court has considered the parties' other arguments even if it does not address them in this order. Therefore, it is

ORDERED that motion sequence number eight is resolved in large part by the stipulation filed on December 3, 2015; and it is further

ORDERED that the remainder of the motion, which relates to the discoverability of those documents of DeWitt Stern Group, Inc. and Peter MacGill that Avedon has deem privileged, is denied.

Dated: 12/18/15

ENTER:



JOAN B. LOBIS, J.S.C.