

<b>Gilbert v City of Rye</b>
2016 NY Slip Op 33018(U)
February 1, 2016
Supreme Court, Westchester County
Docket Number: 68391/2013
Judge: Joan B. Lefkowitz
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to commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X  
KATHERINE GILBERT and MITCHELL A. GILBERT,

Plaintiffs,

**DECISION & ORDER**

-against-

**Index No. 68391/2013  
Motion Date: Feb. 1, 2016  
Seq No. 2**

THE CITY OF RYE, THE PRESBYTERIAN  
CHURCH OF THE TOWN OF RYE,  
ALFREDO LANDSCAPING, INC. and  
JOHN DOES #1 through #50,

Defendants.

-----X  
LEFKOWITZ, J.

The following papers were read on plaintiffs' motion for an order compelling defendant, the Presbyterian Church of the Town of Rye (hereinafter "the Presbyterian Church"), to produce all non-privileged documents in its possession, custody or control responsive to item number 13 of plaintiffs' post-deposition demand dated September 29, 2015 and to provide a privilege log for any responsive documents considered to be privileged.

Order to Show Cause dated January 5, 2016; Affirmation in Support; Exhibits 1-9  
Memorandum of Law in Support  
Affirmation in Opposition

Upon the foregoing papers and the proceedings held on February 1, 2016 this motion is determined as follows:

Factual and Procedural Background:

This action was commenced on or about November 1, 2013. Plaintiffs seek damages for, among other things, injuries allegedly sustained by plaintiff Katherine Gilbert (hereinafter "Mrs. Gilbert") on February 14, 2013 when she slipped and fell on a patch of black ice on the sidewalk along the Boston Post Road in Rye, New York, which abuts the property of the Presbyterian Church. Plaintiffs contend that Mrs. Gilbert's fall was caused by defendants' negligence.

On or about September 29, 2015 plaintiffs served a post-deposition discovery demand seeking from the Presbyterian Church, among other things, "copies of all documents from the

file(s) of any investigation concerning Mrs. Gilbert conducted by or on behalf of defendant” (item number 13). In its response dated November 16, 2015 the Presbyterian Church objected to this demand “since any such investigation is privileged and prepared in contemplation of litigation. Notwithstanding and without waiving said objection, defendant is not in possession of the documents demanded.”

The parties appeared for a conference on December 2, 2015. The Compliance Conference Referee Report & Order dated December 2, 2015 and so-ordered by this court (Lefkowitz, J.), directed plaintiffs, among other things, to serve a letter specifying the alleged deficiencies in the responses of the Presbyterian Church to their post-deposition discovery demands.

By email dated December 2, 2015 and by letter dated December 3, 2015 plaintiffs’ counsel wrote to counsel for the Presbyterian Church. Regarding item number 13, plaintiffs’ counsel asked for a clarification as to whether the Presbyterian Church had possession, custody or control of documents from the investigation conducted by Dan Fleming of Liberty Mutual Insurance and for the production of any such documents in its possession, custody or control. Plaintiffs’ counsel further asked that if a privilege was being asserted, for defense counsel to identify the documents on a privilege log and to specify the basis for the privilege asserted. Plaintiffs’ counsel noted that in an email to Maida Robinson (an employee of the Presbyterian Church), dated May 3, 2013, Dan Fleming asked her whether defendant Alfredo Landscaping Inc. (hereinafter “Alfredo”) “remove(s) the snow on the sidewalk adjacent to Boston Post Road” and requested Ms. Robinson to “please check with your custodial staff to see if they did any snow or ice removal on the sidewalk during the ... time frame.” Plaintiffs stated that this email was produced by Alfredo on September 21, 2015. Plaintiffs’ counsel asserted that the email communication, between Mr. Fleming and Ms. Robinson, provided by Alfredo, vitiated any privilege claim. Plaintiffs’ counsel now asserts that this May 3, 2013 email is merely an example of an apparently responsive document and that item number 13 is not restricted to that document or any response thereto.

In its supplemental response dated December 11, 2015 counsel for the Presbyterian Church asserted that any documents calling for the production of communications with the claims representative in this action and investigation by the claims representative in this action are privileged. Furthermore counsel asserted, without waiving this objection, that it was not in possession of a response to the May 3, 2013 email. In his letter dated December 17, 2015 plaintiffs’ counsel refuted the validity of the arguments set forth in the supplemental response.

Parties’ Contentions:

Presently plaintiffs seek an order compelling the Presbyterian Church to produce all non-privileged documents in its possession, custody or control responsive to their item number 13 in their post-deposition demand and to provide a privilege log itemizing any responsive, privileged documents and specifying the bases for all privileges asserted.

Plaintiffs contend that it is the burden of the Presbyterian Church to show that any documents that are responsive to item number 13 were prepared exclusively for litigation or are

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otherwise privileged. Plaintiffs contend that an attorney's affirmation containing conclusory assertions that the requested materials are conditionally immune from disclosure as material prepared in anticipation of litigation, without more, is insufficient. Plaintiffs further contend that the mere fact that accident reports are compiled by a liability insurer does not render the reports immune from discovery and further argues that when statements are given to a liability insurer's claims department as part of an internal investigation for internal business purposes, as well as for defense purposes, they are not immune from discovery as material prepared solely in anticipation of litigation. Plaintiffs assert it is necessary, in order for the Presbyterian Church to satisfy its burden, to set forth the number of reports which were made, the authors and recipients of those reports, whether or not they were prepared at the suggestion of counsel or whether they were in fact created in anticipation of litigation or for some other purpose. Plaintiffs seek a privilege log.

The Presbyterian Church opposes the motion. It contends that any claims file is privileged and specifically as to a response to the May 3, 2013 inquiry, it does not have any responsive documents.

Analysis:

The general rule is that there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]). However, CPLR 3101 (d)(2) provides that "materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has a substantial need of the materials in preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Accordingly, materials prepared solely in anticipation of litigation are conditionally immune from discovery (*Agovino v Taco Bell 5083*, 225 AD2d 569 [2d Dept 1996]).

To that end, the courts have held that generally documents in a claim file of a liability insurer are accorded immunity from disclosure in a litigation against its insured as material prepared in anticipation of litigation (*Kandel v Tocher*, 22 AD2d 513 [1st Dept 1965]; *Finegold v Lewis*, 22 AD2d 447 [2d Dept 1965]). Plaintiffs, however, correctly contend that documents or reports prepared for the purpose of determining whether or not to pay or reject a claim are not privileged and are discoverable insofar as they are created in the regular course of business of an insurance company (*Sigelakis v Washington Group, LLC*, 46 AD3d 800 [2d Dept 2007]; *Bombard v Amica Mut. Ins. Co.*, 11 AD3d 647 [2d Dept 2004]). Similarly, if a document has a mixed use, the immunity also does not apply (*Agovino*, 225 AD2d at 571; *Landmark Ins. Co. v Beau Rivage Rest.*, 121 AD2d 98, 102 [2d Dept 1986]). Accordingly, reports made by investigators and adjusters, before a decision is made to pay or reject the insurance claim, are generally discoverable (*Donohue v Fokas*, 112 AD3d 665, 667 [2d Dept 2013]; *Landmark Ins. Co.*, 121 AD2d at 101).

This court cannot determine on the present record if the demanded documents from the

insurance claim file were created solely in anticipation of litigation. Notably, the conclusory allegation by counsel for the Presbyterian Church in his affirmation that the documents are privileged is insufficient to meet defendant's burden of showing the documents were prepared solely for the purposes of litigation (*Bombard*, 11 AD3d at 647; *Agovino*, 225 AD2d at 571; *Crazytown Furniture v Brooklyn Union Gas Co.*, 145 AD2d 402, 403 [2d Dept 1988]). Accordingly, an in camera review of the documents is necessary to ascertain whether the documents were made solely in preparation for litigation (*see Haire v L.I.R.R. Co.*, 29 AD2d 553 [2d Dept 1967]). Further, the Presbyterian Church should also submit to the court and serve upon plaintiffs a privilege log setting forth the date, author, recipient, type of document and privilege asserted with respect to each document for which a privilege is being claimed.

In view of the foregoing, it is:

ORDERED that plaintiffs' motion seeking to compel discovery is granted, at this time, only to the extent that the defendant, the Presbyterian Church, is directed to produce to the court for an in camera review, on or before February 16, 2016 all documents from the insurance file(s) of any investigation concerning Mrs. Gilbert's subject fall; and it is further,

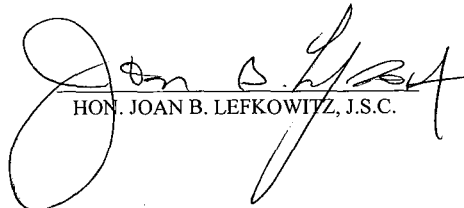
ORDERED that on or before February 16, 2016, the defendant, the Presbyterian Church, shall file with the court and serve plaintiffs with a privilege log setting forth the following for each document for which it is claiming a privilege: (1) date; (2) author; (3) recipient; (4) type of document; and (5) privilege being asserted; and it is further,

ORDERED that counsel are directed to appear for a conference in the Compliance Part, Courtroom 800, on March 4, 2016 at 9:30 A.M.; and it is further

ORDERED that plaintiffs are directed to serve a copy of this decision and order with notice of entry upon all parties within 5 days of entry.

This constitutes the decision and order of this court.

Dated: White Plains, New York  
February 1, 2016

  
HON. JOAN B. LEFKOWITZ, J.S.C.