SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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59 SOUTH 4TH LLC,

Plaintiff,

DECISION/ORDER
Index No. 650979/2015

-against-

A-TOP INSURANCE BROKERAGE, INC., INESSA NIKOL

Defendants.
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HON. CYNTHIA KERN, J.:

Plaintiff 59 South 4th LLC ("59 South") commenced the instant action seeking to recover damages stemming from defendants A-Top Insurance Brokerage, Inc. ("A-Top") and Inessa Nikol's ("Nikol") alleged failure to procure proper insurance. Defendants now move to compel plaintiff to provide certain discovery. For the reasons set forth below, defendants' motion is granted.

The relevant facts and procedural history of this case are as follows. Plaintiff is the owner and developer of a residential development project known as Wythe Lane Townhouses located in Brooklyn, New York (hereinafter referred to as the "Project"). Plaintiff contracted with non-party K-Square Developers Inc. ("K-Square") for K-Square to act as general contractor for the Project (the "GC Contract"). Pursuant to the GC Contract, K-Square was required to maintain adequate insurance that would cover the Project and protect the interests of plaintiff and other stakeholders of the Project.

K-Square allegedly secured insurance, including both primary and excess insurance, through defendant A-Top. Defendant Nikol served as A-Top's representative in communication with K-Square and in securing insurance for K-Square and 59 South on the Project. When obtaining insurance through the defendants, K-Square allegedly made clear to the defendants that its general contracting business involved both work through subcontractors and work that K-Square performed directly and that it required policies that would provide coverage for jobs on which K-Square was more than just a "paper GC." Further, Rudolph Kalaitchev ("Kalaitchev"), K-Square's principal, allegedly informed Nikol that K-Square was

price-sensitive and that for defendants to earn and keep K-Square's business, they would have to find and secure competitively-priced policies. In or around April 2014, defendants obtained primary and excess insurance for K-Square.

Prior to entering into the GC Contract with K-Square and prior to beginning construction on the Project, plaintiff sought information about the insurance K-Square secured. Specifically, plaintiff wanted to know whether K-Square's insurance would cover the specific work that plaintiff and K-Square intended to perform on the Project, that the Project would be covered by K-Square's policy and that the interests of 59 South and other stakeholders would be included within the coverage. On or about July 10, 2014, Nikol told plaintiff's representative that the policies she obtained for K-Square permitted K-Square to perform the work on the Project and provided coverage for the Project.

However, plaintiff asserts that Nikol failed to inform the insurance carriers about the scope of K-Square's work on the Project. As a result, when the insurance carriers learned of the actual scope of the work that K-Square was performing on the Project, they canceled the policies, leaving K-Square and plaintiff without the insurance that the Project required. Thereafter, plaintiff procured replacement insurance for K-Square when K-Square could not afford to do so itself, in order to allow the Project to proceed. Pursuant to an assignment agreement, K-Square then "absolutely and unconditionally" assigned to plaintiff all of K-Square's claims relating to insurance, including K-Square's claims against the defendants herein. Additionally, in exchange for the assignment, plaintiff agreed not to sue K-Square in connection with the insurance for the Project until five years after the date of the assignment or ninety days after resolution of this lawsuit.

Plaintiff then commenced the instant action against defendants asserting causes of action for, *inter alia*, breach of contract, negligence and fraud. After motion practice, the parties engaged in discovery, which included defendants requesting from plaintiff certain documents and plaintiff responding with approximately four thousand documents. Plaintiff objected to providing defendants with communications between plaintiff and K-Square on the grounds that they either did not exist, were irrelevant or that they

were privileged and defendants requested that plaintiff provide a privilege log for any such communications. Plaintiff then responded as follows:

> [T]he only withheld privileged communications consist of communications between 59 South and the undersigned firm. We are not aware of any communications between 59 South and K-Square, or any other communications, that were withheld as privileged. If you believe communications between clients and litigation counsel in this action must be logged, and if defendants are similarly willing to log all such communications, please let us know so that we can work out a mutual arrangement for handling such communications.

On or about July 26, 2016, the parties appeared in court for a preliminary conference at which an order was entered requiring plaintiff to produce all communications between plaintiff and K-Square. Pursuant to the order, plaintiff provided defendants with an additional nine thousand documents. Additionally, in or around October 2016, defendants issued subpoenas and notices to take the depositions of non-parties K-Square and Kalaitchev.

After receiving a copy of the subpoenas and notices to take said depositions, plaintiff sent an e-mail to defendants advising that "[i]n order to avoid any surprises at [K-Square and Kalaitchev's] deposition, we are sending to you in advance a copy of the common interest agreement between [Plaintiff] and K-Square." Defendants assert that this e-mail was the first time the existence of a "common interest agreement" was disclosed to them. Thereafter, defendants sought confirmation from plaintiff as to whether any documents were withheld pursuant to the common interest agreement and demanded the immediate production of those documents or a privilege log identifying them. Plaintiff responded that while it withheld certain documents, those documents were "not responsive to [defendants'] document requests" and resisted defendants' demand for a privilege log but eventually agreed to produce one. Plaintiff then produced a privilege log listing thirty-five items withheld pursuant to a "common interest privilege" and consisting of documents from April 2016 through October 2016. Plaintiff asserts that these thirty-five documents consist of communications between counsel for 59 South and counsel for K-Square and that none of the documents consist of communications between 59 South and K-Square themselves. In a letter dated November 1, 2016, defendants again demanded production of previously-requested documents and a supplemental

privilege log identifying any and all withheld documents or an affirmation that no such unproduced documents exist and/or have been withheld. Defendants assert that they have not received any response to their letter.

Defendants now move to compel plaintiff to produce the documents which were withheld by plaintiff pursuant to the "common interest privilege" as well as a complete response to defendants' November 1, 2016 deficiency letter.

The court first turns to that portion of defendants' motion to compel the production of the documents which were withheld by plaintiff on the basis of a "common interest privilege." Generally, "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." CPLR § 3101(a). However, the law recognizes that certain privileged material is protected from disclosure. *See* CPLR § 3101(b). Specifically, "[t]he attorney-client privilege shields from disclosure any confidential communications between an attorney and his or her client made for the purpose of obtaining or facilitating legal advice in the course of a professional relationship." *Ambac. Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 623 (2016). "The party asserting the privilege bears the burden of establishing its entitlement to protection by showing that the communication at issue was between an attorney and a client 'for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship,' that the communication is predominantly of a legal character, that the communication was confidential and that the privilege was not waived." *Id.* at 624. "'Generally, communications made in the presence of third parties…are not privileged from disclosure' because they are not deemed confidential." *Id.*, quoting *People v. Harris*, 57 N.Y.2d 335, 343 (1982). However, courts have held that there is an "exception to the general rule that the presence of a third party destroys any claim of privilege." *Id.* at 625. Specifically, the Court of Appeals has held that "where two or more clients *separately* retain counsel to advise them on matters of common legal interest, the common interest exception allows them to shield from disclosure certain attorney-client communications that are revealed to one another for the purpose of furthering a common legal interest." *Id.* However, "[d]isclosure is [only] privileged between codefendants, coplaintiffs or persons who reasonably anticipate that they will become colitigants, because [any]

disclosures are deemed necessary to mount a common claim or defense, at a time when parties are most likely to expect discovery requests and their legal interests are sufficiently aligned that 'the counsel of each [i]s in effect the counsel of all.'" *Id.* at 628 (internal citation omitted). The rationale behind this limitation is that "[w]hen two or more parties are engaged in or reasonably anticipate litigation in which they share a common legal interest, the threat of mandatory disclosure may chill the parties' exchange of privileged information and therefore thwart any desire to coordinate legal strategy" and thus, "the common interest doctrine promotes candor that may otherwise have been inhibited." *Id.* Indeed, the Court of Appeals has held as follows:

> In short, we do not perceive a need to extend the common interest doctrine to communications made in the absence of pending or anticipated litigation, and any benefits that may attend such an expansion of the doctrine are outweighed by the substantial loss of relevant evidence, as well as the potential for abuse. *Id.* at 629.

"[A] litigation limitation...serves as a valuable safeguard against separately-represented parties who seek to shield exchanged communications from disclosure based on an alleged commonality of legal interests but who have only commercial or business interests to protect." *Id* at 631.

In the instant action, defendants' motion to compel plaintiff to produce the documents withheld on the basis of privilege under the common interest doctrine is granted as the court finds that such documents were improperly withheld. The Court of Appeals has made clear that under the common interest doctrine, disclosure of attorney-client communications which were disclosed to a third party will only be privileged if the communications were between "codefendants, coplaintiffs or *persons who reasonably anticipate that they will become colitigants*...." *Ambac. Assur. Corp.*, 27 N.Y.3d at 628. Here, it is undisputed that K-Square is not a coplaintiff of 59 South. Additionally, it is undisputed that K-Square cannot reasonably anticipate that it will become a coplaintiff of 59 South as K-Square has "absolutely and unconditionally" assigned to 59 South all of K-Square's claims relating to insurance, including K-Square's claims against the defendants herein. Thus, as K-Square does not and cannot reasonably anticipate that it will become plaintiff's colitigant, the communications between 59 South and K-Square, including those between counsel for said parties, are not protected as privileged under the common interest doctrine.

To the extent plaintiff asserts that the common interest doctrine applies to the communications at issue because the requirement set forth by the Court of Appeals in *Ambac. Assur. Corp.* that there be "pending or anticipated litigation" has been met based on the fact that the instant litigation is pending, such assertion is without merit. The standard for applying the common interest doctrine is not whether there is a litigation pending but rather whether the communications that are being withheld were between parties who are capable of mounting a common claim or defense in a pending or anticipated litigation. As K-Square is not capable of mounting a common claim with 59 South against defendants, the common interest doctrine does not apply to *any* communications between 59 South and K-Square, including those between counsel for said parties.

To the extent plaintiff asserts that even if the common interest doctrine does not apply to the communications at issue, defendants are not entitled to them because they are not relevant to the instant litigation, such assertion is without merit as plaintiff has not established that they are indeed irrelevant. To the extent the withheld communications involve K-Square, K-Square's dealings with the defendants and any details about the reliability of K-Square's testimony regarding obtaining insurance for the Project from defendants, such communications are relevant.

Finally, that portion of defendants' motion to compel plaintiff to respond to defendants' November 1, 2016 letter which clarified any deficiency in the production of discovery is granted.

Accordingly, defendants' motion is granted. It is hereby

ORDERED that plaintiff shall respond to defendants' November 1, 2016 letter within thirty (30) days from the date of this decision; and it is further

ORDERED that plaintiff shall provide all communications between 59 South and K-Square, including the communications between counsel for said entities, within thirty (30) days from the date of this decision. This constitutes the decision and order of the court.

DATE : 1/10/17

KERN, CYNTHIA S., JSC
HON. CYNTHIA S. KERN
J.S.C.