BMW Group v Castlerom Holding Corp.
2018 NY Slip Op 31040(U)
May 30, 2018
Supreme Court, New York County
Docket Number: 650910/2013
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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BMW GROUP, 2055 CRUGER, LLC, SKIVJANI REALTY CORP., GLENHILL ASSOCIATES, LLC & 498 SEVENTH, LLC, on behalf of themselves and all Others similarly situated,

Index No.: 650910/2013

DECISION & ORDER

Plaintiffs,

-against-

CASTLEROM HOLDING CORP., f/k/a, CASTLE OIL CORPORATION,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Defendant Castlerom Holding Corp. (Castle) brings this motion to compel plaintiffs to turn over documents. Plaintiffs cross-move for protection of the subject documents from disclosure on the grounds of attorney-client privilege, of work product privilege and that the documents were prepared in anticipation of litigation.[1] A privilege log was created and amended, and the documents were presented to the court for in camera review. The issues before the court are whether the documents are merely factual and not privileged, whether there is a special need to turn over documents regarding investigations conducted by plaintiffs prior to litigation, at issue waiver, and selective disclosure of the documents. For the following reasons, the court finds that much of the material is factual, special need mandates disclosure of many of the documents, and there was an at issue waiver and selective disclosure.

[1] The parties stipulated to reveal some of the disputed documents (Privilege Log Nos. 1-4 and 23-25) -- documents which had been turned over to the District Attorney's office. *See Gruss v Zwirn*, 2013 WL 3481350 (SDNY 2013).

Background

Plaintiffs own commercial buildings in New York City, which use heating systems designed to burn No. 4 and No. 6 grades of fuel oil. Defendant supplied fuel oil to plaintiffs' buildings. Plaintiffs allege that, although they paid for No. 4 and No. 6 grade fuel oil, they were supplied a blended oil product that did not meet the requisite standards for the purchased fuel oil. They bring this action as a putative class action on behalf of "[a]ll persons or entities in the Service Area who ordered and paid for No. 4 Fuel Oil and No. 6 Fuel Oil from Castle, and who instead received Adulterated Oil." Dkt. 120 at 9 [2] (Second Amended Complaint [SAC]). The SAC alleges causes of action for Breach of Express Warranty under the Uniform Commercial Code (UCC), Breach of Implied Warranty (warranty of merchantability) under the UCC, and breach of contract.

Plaintiffs filed their original summons and complaint on March 15, 2013.[3] The class representatives then were BMW Group LLC (BMW), Glenhill Associates, LLC (Glenhill), and 498 Seventh, LLC. That complaint alleged causes of action for fraud, violation of the Magnuson-Moss Warranty Act, breaches of express and implied warranties under the UCC, a violation of New York General Business Law (GBL) § 349, breach of contract, and unjust enrichment. Dkt. 1. Plaintiffs contended that Castle purchased reprocessed "Waste Oil", blended it with heating oil to create "Adulterated Oil" and sold 3,000 gallons of this Adulterated Oil to BMW on November 12, 2012. *Id.* at 6. Plaintiffs asserted that "***[l]aboratory testing*** of the oil delivered to [BMW] on November 12, 2012 confirmed that it had properties significantly outside the legal

[2] References to "Dkt." followed by a number refer to documents filed in this action on the New York Courts Electronic Filing System (NYSCEF).

[3] Some of the withheld documents go back to August of 2012, when counsel began to investigate the viability of this action.

specifications for No. 4 oil." *Id.*[4] Based on these pleadings, plaintiffs contended that they were overcharged and the Adulterated Oil provided less heat and harmed their heating equipment and the environment. *Id.* Plaintiffs specifically pleaded that "***without performing scientific testing on the oil delivered by CASTLE, there was no way to know that they were receiving Adulterated Oil.***" *Id.* at 11 (emphasis added). Further, plaintiffs claimed that they were not aware of Castle's breaches of warranty at any time during which they were purchasing the oil. *Id.* at 14.[5] They also contended that ***the oil was not merchantable*** because it would not have passed without objection in the trade, was not of fair average quality, suitable or fit for use as heating oil. *Id.* at 15.

A few days later, on March 18, 2013, plaintiffs brought an Order to Show Cause seeking preliminary and temporary injunctions enjoining Castle from selling "any fuel oil purporting to be 'No. 4 Fuel Oil' or 'No, 6 Fuel Oil' which is adulterated with waste oil" or fails to conform to New York code standards. Dkt. 18. Annexed to the application was an affidavit from a licensed private investigator, Anthony P. Valenti, who worked for Stroz Friedberg, LLC. Dkt. 8. He averred that he had investigated the allegations of plaintiffs and had determined: that Castle had been delivering Adulterated Oil – a mix of heating and waste oil to its customers; that Castle received deliveries of waste oil by the truckload from County Oil and its sister companies; that Castle received waste oil by barge; that Castle blended the waste oil and delivered this adulterated product to its customers; that ***Valenti arranged to test a shipment of fuel oil delivered to a Castle customer on***

[4] The testing was done on a tank of oil, prior to the action, which oil was used. As a result, the test cannot be replicated.

[5] An issue exists as to whether any of the plaintiffs had notice of the testing and the claimed unmerchantability of the oil and continued to purchase after such notice. This issue bears on plaintiffs' UCC claims – whether any or all of them failed to reject the oil (UCC §§ 2-601, 602), thereby giving up their claims and making them improper class plaintiffs.

November 12, 2012; that the results of the testing confirmed that the fuel oil sold as No. 4 fuel oil did not conform to the specifications for such oil; that the oil sold created substantial risk to heating systems; and that, among other things, ***"the results of the testing" informed his belief that Castle sold adulterated fuel oil***. *Id.* In its brief supporting the injunction requests, plaintiffs relied on the laboratory tests of the November 12, 2012 delivery. Dkt. 21 at 6. ***Based on these assertions***, the court partially granted the request for a temporary injunction.

Plaintiffs submitted supplemental documentation in support of their preliminary injunction on April 8, 2013, from both their counsel and Valenti. In his affidavit, Valenti stated that he had personal knowledge of the facts to which he was attesting. Dkt. 37 at 1. He accused Castle of doing business with "persons and entities that have been subjected to criminal investigation and prosecution," and being a party to a "'blending' scheme" used "to defraud customers" by blending "inferior and potentially contaminated product, such as waste oil, with fuel oil." *Id.* at 2. Valenti specifically stated that the entity prosecuted was County Oil Company, a company that did not hold a DEC or EPA permit allowing it to collect, store, process or sell waste oil. *Id.*

Also annexed to the April 8, 2013 documentation was an affidavit from Marjorie J. Clarke, an environmental scientist. Dkt. 37. She based her affidavit on her expertise in the field of waste-to-energy/incinerator emissions control and on [her] review of documentation provided to [her] by" plaintiffs. *Id.* at 1. She stated that she "***reviewed a 'Safety-Kleen Laboratory Analytical Report' dated August 20, 2012 concerning a shipment of processed waste oil (the 'Tested Waste Oil') which was reportedly blending into fuel oil by Castle Oil Company.***" *Id.* at 3 (emphasis added).[6] She averred: ***the tested oil*** had a lower heat content than No. 4 and No. 6 oil; that the oil interfered with the efficient operation of the heating system and led to increased fuel use; that the

[6] A second, replacement affidavit from Clarke was submitted as Dkt. 41. It is similar to Dkt. 37.

amount of water and sediment ***in the tested oil*** was higher than acceptable levels in New York, that it increased pollution and decreased burner efficiency; that it corroded burners and facilitated bacterial growth; and that its flash point was "substantially above the minimum threshold for fuel oil," including for No. 4 and No. 6 oil. *Id.* 3-4.

Ultimately, the court denied a preliminary injunction. Plaintiffs subsequently filed an Amended Complaint (AC) on May 21, 2013. Dkt. 57. Plaintiffs' allegations were similar to those in the original complaint; they asserted causes of action for fraud, negligent misrepresentation, breaches of express and implied warranties, breach of the Magnuson-Moss Warranty Act, breach of GBL § 349 and unjust enrichment. *Id.* On October 17, 2013, the court dismissed the causes of action asserting negligent misrepresentation, breach of the Magnuson-Moss Warranty Act, breach of GBL § 349 and unjust enrichment. Dkts. 114, 116. The SAC was filed on November 1, 2013. Dkt. 120. The court granted defendant's motion to dismiss the putative class actions on September 5, 2014. Dkt. 151. That decision was reversed by the Appellate Division on March 15, 2016. 139 AD3d 78 (1st Dept 2016). ***The Appellate Court relied in its decision on the Valenti affidavit, the labortories' testing, and the parade of horribles alleged by plaintiffs which supposedly showed the oil sold was adulterated.***

Discussion

> First, it is beyond dispute that no attorney-client privilege arises unless an attorney-client relationship has been established. Such a relationship arises only when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services. Second, not all communications to an attorney are privileged. In order to make a valid claim of privilege, it must be shown that the information sought to be protected from disclosure was a "confidential communication" made to the attorney for the purpose of obtaining legal advice or services. Third, the burden of proving each element of the privilege rests upon the party asserting it.

Priest v Hennessy, 51 NY2d 62, 68-9 (1980) (citations omitted).[7]

The attorney-client privilege protects communications, ***not underlying facts***, and must be of a legal character. *Spectrum Sys. Intern. Corp. v Chemical Bk.*, 78 NY2d 371, 377 (1991) (emphasis added); *see Eisic Trading Corp. v Somerset Marine, Inc.*, 212 AD2d 451 (1st Dept 1995) (attorney-client communications, attorney work product and materials prepared in anticipation of litigation do not apply to information obtained from or communicated to third parties or to underlying factual information), citing *Miranda v Miranda*, 184 AD2d 286 (1st Dept 1992) ("The attorney client privilege applies only to confidential communications with counsel, and does not immunize the underlying factual information"). Moreover, the privilege extends to attorney work product and trial preparation. *Spectrum*, 78 NY2d at 380. Work product encompasses material prepared by an attorney which reflects his mental impressions, legal analysis, conclusions, theory or strategy. *Id.* at 381; *Geffner v Mercy Medical Ctr.*, 125 AD3d 802 (2d Dept 2015). It is subject to an absolute privilege. *Id.* Materials prepared for trial, on the other hand, is subject to a conditional privilege (*id.*) and may give way to disclosure upon a showing of substantial need of the materials or inability to obtain the substantial equivalent of the materials by other means. CPLR § 3101(d)(2); *Matter of New York City Asbestos Lit.*, 109 AD3d 7, 12-13 (1st Dept 2013) (trial preparation materials are subject to conditional privilege and may be disclosed upon showing by party seeking material that it is unable, without undue hardship, to obtain substantial equivalent).

Further, because the attorney-client privilege conflicts with New York's policy favoring liberal disclosure, it "must be narrowly construed." *Ambac*, 27 NY3d at 624. The privilege may

[7] The party asserting the privilege bears the burden of proving each of its elements, including that it was not waived. *Ambac Assurance Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 (2016)

be waived. Waiver occurs when a privileged communication is revealed to a third party (*id.*), or where "a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of the claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information." *Deutsche Bank Trust Co. of Americas v Tri-Links Inv. Trust*, 43 AD3d 56, 63 (1st Dept 2007); *see Banach v The Dedalus Foundation, Inc.*, 132 AD3d 543 (1st Dept 2015) (privilege waived by using portions of board minutes at deposition and by placing contents at issue). Selective disclosure of privileged information waives the privilege because "a party may not rely on the protection of the privilege regarding damaging communications while disclosing other self-serving communications." *Village Bd. Of Vil. Of Pleasantville v Rattner*, 130 AD2d 654, 655 (2d Dept 1987); *see Orco Bank, N.V. v Proteinas Del Pacfico, S.A.*, 179 AD2d 390 (1st Dept 1992).

Here, documents and materials prepared by the testing laboratories must be turned over. These clearly are facts and not privileged. *See Spectrum*, *supra*. Likewise, the underlying facts of Valenti's investigation should be turned over. *Id.* In addition, even if the testing and underlying facts of Valenti's investigation were privileged, it is trial preparation and necessity dictates that it be turned over. The tests occurred upon oil that no longer exists and cannot be replicated. Defendant cannot obtain the substantial equivalent of the results, which may prove exculpatory, and, therefore, necessity requires their disclosure. *See Matter of New York City Asbestos Lit.*, *supra*.

Finally, the test materials, Valenti's investigation, and Clarke's findings were waived both because of at issue waiver and selective disclosure. Plaintiffs affirmatively placed the subject matter of these materials at issue in litigation when they used them to seek an injunction

and to create the original and first amended complaints. *See Deutsche Bank, supra*; *see also Jakobleff v Cerrato, Sweeney and* Cohen, 97 AD2d 834, 835 (2d Dept 1983) (client who publicly discloses privileged material or permits attorney [or attorney's agents] to testify regarding matter is deemed to impliedly waive privilege). Indeed, this court and the Appellate Division relied on the tests and Valenti's and Clarke's findings in making determinations in this case. The invasion of the privilege, if it exists, is required to determine the validity of plaintiffs' claims and to fashion a defense; assertion of the privilege would deprive defendant of vital information. *Deutsche Bank, id.* Then too, plaintiffs disclosed only portions of the tests and Valente's and Clarke's communications in their court papers. They cannot use excerpts of privileged communications and documents to make out their case and then assert the privilege to shield the remainder of the material. *See Soussis v Lazer, Aptheker, Rosella & Yedid*, 91 AD3d 753 (2d Dept 2012) (waiver of privilege where party engages in selective disclosure); *Orco Bank, supra*.

However, it is impossible to determine whether all communications between Stroz and others were privileged on the instant record. Communications, outside of those involved in the testing of the oil and Valenti's investigation, require plaintiffs to provide specific information as to when in the investigation the communications occurred, exactly who was involved, whether a retainer existed between any client and attorney at the time, who that client was, and other relevant facts. *See Ural v Encompass Insur. Co. of Amer.*, 97 AD3d 562, 566 (2d Dept 2012) (party asserting privilege must identify particular material with respect to privilege asserted and establish with specificity that material is privileged). Obviously, merely copying the attorney on an email does not provide the document with privilege. Accordingly, it is

ORDERED that defendant's motion is granted to the extent of directing plaintiffs to turn over all laboratory reports that tested the oil, Clarke's communications regarding the testing, and

the underlying facts of Valenti's investigation and his communications regarding that investigation; and it is further

ORDERED that by June 14, 2018, plaintiffs are to submit a specific and detailed privilege log regarding the remainder of the demanded documents; and it is further

ORDERED that plaintiffs' motion for a protective order is denied.

Dated: May 30, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.