

State Farm Fire & Cas. Co. v Weil-Mclain
2018 NY Slip Op 33847(U)
June 12, 2018
Supreme Court, Dutchess County
Docket Number: 50956/16
Judge: Maria G. Rosa
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa

Justice

STATE FARM FIRE AND CASUALTY COMPANY
A/S/O MARK D. KROL and MARK D. KROL,

DECISION AND ORDER

Plaintiffs,

Index No. 50956/16

-against-

WEIL-MCLAIN, THE MARLEY-WYLAIN COMPANY,
HONEYWELL INTERNATIONAL, INC., HONEYWELL
ENVIRONMENTAL AND COMBUSTION CONTROLS,
HONEYWELL RESIDENTIAL AND BUSINESS CONTROL,
APPOLO HEATING, INC., WATTS WATER TECHNOLOGIES,
INC., WATTS REGULATOR COMPANY, INC., and WATTS
DISTRIBUTION COMPANY, INC.,

Defendants.

The following papers were read on defendant's motion to compel:

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - E

AFFIRMATION IN SUPPORT

AFFIRMATION IN OPPOSITION
EXHIBITS A - C

REPLY AFFIRMATION

This is a product liability action arising from the explosion of a Weil-McLain boiler at the residence of plaintiff Mark D. Krol on June 26, 2015. The parties dispute the cause of the explosion. Plaintiff's theory is that a pressure release valve defendant Watts Regulator Company, Inc. manufactured failed causing the explosion. Defendants Honeywell International, Inc., Honeywell Environmental and Combustion Controls and Honeywell Residential and Business Control (the "Honeywell defendants") move to compel defendant Watts Regulator Company, Inc.

to produce notes its employee Michael Mullavey prepared during a January 2016 inspection and testing of the subject pressure release valve. Mullavey was produced for a deposition on April 16, 2018. He testified that in preparation for the deposition he reviewed notes he made during the testing for the purpose of refreshing his recollection. He initially indicated that he did not have the notes with him but during a break it was discovered that the notes were in his car. The Honeywell defendants along with plaintiff's counsel and the other co-defendants then demanded production of Mullavey's notes. Counsel for the Watts defendants refused to produce the notes and this motion to compel followed.

New York has a policy permitting open and far-reaching pre-trial discovery and thus a party is entitled to "full disclosure of all matter material necessary in the prosecution or defense of an action...." CPLR §3101; Kavanagh v. Ogden Allied Maintenance Corp., 92 NY2d 952 (1998). The notice of deposition served on Watts Regulator Company, Inc. required production of all "books, records, documents and papers relating to the facts and circumstances herein, and relevant to said action and the issues therein." This demand and Mullavey's testimony that he reviewed the subject notes prior to the deposition for the purpose of refreshing his recollection required him to produce the notes at the deposition to allow the parties conducting the deposition a meaningful opportunity to question him based upon his notes. See Grieco v. Cunningham, 128 AD2d 502 (2nd Dept 1987); Herrmann v. General Tire and Rubber Co., Inc., 79 AD2d 955 (1st Dept 1981).

In opposition, the Watts defendants assert that the documents are protected by the attorney-client privilege. Confidential communications made between an attorney and client in the course of professional employment are privileged and absolutely immune from disclosure. See Ambac Assurance Corp. v. Country Wide Home Loans, Inc., 27 NY3d 616 (2016). The 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. Id.; CPLR §4503(a)(1). The purpose is to "insure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his embarrassment or legal detriment." Matter of Priest v. Hennessy, 51 NY2d 62 (1980). As the privilege shields from disclosure pertinent information and therefore can be an obstacle to the truth-finding process, it must be narrowly construed. Ambac Assurance Corp. V. Country Wide Home Loans, Inc., 27 NY3d at 624. "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."

The Watts defendants fail to meet the burden of establishing that Mullavey's notes are covered by the attorney-client privilege. The claim is supported only by a conclusory assertion of counsel that Mullavey attended the examination of the pressure release valve for the purpose of protecting Watts' interests and evaluating potential liability and that his notes were subsequently communicated to counsel in confidence following the examination for the purpose of obtaining legal advice relating to Watts' defense. There is no allegation that the communication was predominantly

of a legal character. Mullavey has not submitted an affidavit stating that he took the notes for the purpose of facilitating the rendition of legal advice or services. Notably, Mullavey took the notes during a physical inspection of a boiler pressure release valve. There is nothing in the record and defendant makes no factual allegations that the inspection and notes were related to anything other than the technical operation of the pressure release valve. As movants fail to meet their burden of establishing entitlement to protection of the notes under the attorney-client privilege and further fail to demonstrate that such privilege would not have been waived based upon Mullavey's use of the notes to refresh his recollection, it is

ORDERED that the motion to compel production of the notes is granted. The Watts defendants shall produce the notes within fourteen days of the date of this decision and order. It is further

ORDERED that the motion to conduct a further deposition of Mullavey is granted only to the extent that any such deposition shall be strictly limited to the content of the one page of notes that is the subject of the instant motion. This court has reviewed Mullavey's deposition transcript and, with the exception of his inability to recall the precise model number of the pressure release valve and the physical appearance of the valve upon inspection, he was able to answer all questions posed to him. However, as the appearance of the valve could be relevant to plaintiff's claims, the parties are entitled to redepose Mullavey on his observations of the subject pressure release valve and any other subject mentioned in his notes. At such deposition the parties are not permitted to question Mullavey about any other subject matter not directly derived from his notes. It is further

ORDERED that in the court's discretion the motion for reimbursement for attorney's fees incurred in making the instant application is denied.

The foregoing constitutes the decision and order of the Court. The parties are reminded that a compliance conference is scheduled for June 21, 2018 at 10:15 a.m.

Dated: June 12, 2018
Poughkeepsie, New York

ENTER:



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