

Newman v Grayco Corp.
2018 NY Slip Op 33981(U)
June 25, 2018
Supreme Court, Kings County
Docket Number: 500220/2015
Judge: Richard Velasquez
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[* 1]

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th day of June, 2018.

PRESENT:
HON. RICHARD VELASQUEZ

Justice.

-----X
ROBIN N. NEWMAN,

Plaintiff,

Index No.: 500220/2015

-against-

Decision and Order


GRAYCO CORP., BERNARD SILVERSTEIN, IKEA NEW YORK LLC, IKEA EAST, LLC, IKEA HOLDINGS US, INC., INTER IKEA SYSTEMS B.V., IKEA OF SWEDEN and BRAD E. COHEN, PE,

Defendants.

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The following papers numbered 1 to 3 read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed _____	1-2
Opposing Affidavits (Affirmations) _____	3
Reply Affidavits (Affirmations) _____	

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After oral argument and a review of the submissions herein, the Court finds as Follows:

Defendant, IKEA NEW YORK, LLC and IKEA U.S. EAST, LLC, hereinafter "IKEA", move this Court by Order to Show Cause, for an Order (1) pursuant to CPLR 3124, compelling plaintiff, and co-defendants, Grayco Corp. and Bernard Silverstein to produce

all items requested in IKEA's Notice for Discovery and Inspection dated May 22, 2017; and (2) pursuant to CPLR 3126, precluding the plaintiff, Grayco Corp., and Bernard Silverstein from testifying at trial of this matter should they fail to produce the above referenced items; or (3) Alternatively, extending the current June 23, 2017 deadline to conduct the inspection and non-destructive testing of the subject power strip to 60 days after the requested materials are provided. Defendant GRAYCO CORP. opposes the same. All other named parties did not submit any opposition to defendant IKEA's Order to Show Cause.

ANALYSIS

Pursuant to CPLR 3124, a provides as follows: "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." CPLR 3124 (McKinney).

The CPLR directs that there shall be "full disclosure of all evidence material and necessary in the prosecution or defense of an action." (CPLR 3101[a].) "The test is one of usefulness and reason." (Allen v. Crowell-Collier Publ. Co., 21 NY2d 403, 406, 288 NYS2d 449, 235 NE2d 430.) This statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise (see, 3A Weinstein-Korn-Miller, N.Y.Civ.Prac. ¶¶ 3101.01-3101.03).

By the same token, the CPLR establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101[b]); attorney's work product, also absolutely immune CPLR

3101[c]); and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means (CPLR 3101[d][2]).

“Consequently, the burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity” (*Matter of Priest v. Hennessy*, 51 NY2d 62, 69, 431 NYS2d 511, 409 NE2d 983; *Matter of Jacqueline F.*, 47 NY2d 215, 218–219, 417 NYS2d 884, 391 NE2d 967; *Koump v. Smith*, 25 NY2d 287, 294, 303 NYS2d 858, 250 N2d 857; see generally, Note, *The Attorney–Client Privilege and the Corporate Client: Where Do We Go After Upjohn?*, 81 Mich.L.Rev. 665 [1983]).” *Spectrum Sys. Int’l Corp. v. Chem. Bank*, 78 NY2d 371, 377, 581 NE2d 1055, 1059 (1991). In the present case, defendant offers a generalized statement that all materials requested are protected by the attorney work-product privilege.

“An investigative report does not become privileged merely because it was sent to an attorney. Nor is such a report privileged merely because an investigation was conducted by an attorney; a lawyer’s communication is not cloaked with privilege when the lawyer is hired for business or personal advice, or to do the work of a nonlawyer” (*People v. Belge*, 59 AD2d 307, 308–309, 399 NYS2d 539). “The critical inquiry is whether, viewing the lawyer’s communication in its full content and context, it was made in order to render legal advice or services to the client.” *Spectrum Sys. Int’l Corp. v. Chem. Bank*, 78 NY2d 371, 379, 581 NE2d 1055, 1061 (1991).

People v. Kozlowski “highlights a tension in CPLR 3101’s treatment of attorney work product (which is not obtainable) and trial preparation materials (which may be

disclosed “only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means” [CPLR 3101(c), (d)(2)]). “The separation of work product and trial preparation materials was apparently an attempt to shield materials protected by the attorney-client privilege from disclosure (see 11th Ann Rep of NY Jud Conf, at 152 [1966] [“Whoever drafted the ‘work product’ provision ... was doubtless thinking of such things as private consultations between attorney and client and memoranda of them”]; Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3101:27, at 53–54; Siegel, N.Y. Prac. § 347 [4th ed.]). “Thus, when particular work product is generated for litigation, courts have tended to classify it as trial preparation material, unless it contains otherwise privileged communications” (see Connors, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR C3101:27, at 53–54). *People v. Kozlowski*, 11 NY3d 223, 244, 898 NE2d 891, 904 (2008).

In the present case, it is clear, that due to the unique circumstances in which Co-defendant IKEA was not a party to this case at the time and not able to participate in the inspection of the accident site, which the other parties participated in, clearly demonstrates the substantial need and an undue hardship to obtain the substantial equivalent, as the accident site no longer exists.

“Although review of this discretionary determination is “highly deferential” (*John Doe Co.*, 350 F3d at 306), the U.S. Supreme Court has indicated that a trial court properly exercises its discretion when it orders disclosure of “the portion” of trial preparation materials that is directly relevant to another, previously-disclosed, portion (see *Nobles*,


422 US at 240, 95 SC 2160). "Thus, a party is essentially precluded from using its trial preparation materials as both a sword and a shield." *People v. Kozlowski*, 11 NY3d 223, 246, 898 NE2d 891, 906 (2008).

"As is plain from mere statement of the principles, whether a particular document is or is not protected is necessarily a fact-specific determination (*Rossi v. Blue Cross & Blue Shield*, 73 NY2d, at 592-593, 542 NYS2d 508, 540 NE2d 703, *supra*), most often requiring in camera review." *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 NY2d 371, 378, 581 NE2d 1055, 1060 (1991). Therefore, it is the determination of this court that all discovery items requested shall be turned over to the court for an in-camera review, for the purposes of determining what if any of the materials are subject to a privilege and are not discoverable.

Accordingly, Defendant IKEA's Order to Show Cause is hereby granted to the extent that plaintiff and Co-defendants GRAYCO Corp. and SILVERSTIEN shall produce to the court all discovery requests made by IKEA in their Notice for Discovery and Inspection dated May 22, 2017 for an in-camera review to determine what if any of the items are subject to privilege. Such items shall be turned over to this court for an in-camera review within 30 days from the date of this order.

This constitutes the Decision/Order of the Court.

Date: June 25, 2017



RICHARD VELASQUEZ, J.S.C.

So Ordered
Hon. Richard Velasquez

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