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

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PRIVILEGE UNDERWRITERS RECIPROCAL EXCHANGE, as subrogee of TRION AND COLLEEN JAMES,

Plaintiff,

-against-

BONIELLO LAND & REALTY, LTD., BONIELLO DEVELOPMENT CORP. and BONIELLO EQUITIES LLC,

Defendants.

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DECISION AND ORDER

Index No. 69060/2016
Motion Return Date: 8.13.18

Motion Seq. No. 1

LEFKOWITZ, J.

The following papers were read on this motion by defendants for an order pursuant to CPLR 3124 compelling plaintiff to produce: a proper and adequate privilege log for an in camera review, a copy of the claim file managed by plaintiff for the loss at issue, a copy of the inspection report obtained by the homeowners prior to the purchase of their residence and to produce plaintiff's claim representative, Karsten Richards, for a further examination before trial following production of the claim file.

Order to Show Cause, Affirmation in Support, Exhibits A-P;
Affirmation in Opposition, Exhibits 1-8;
Affirmation of Service.

Upon the foregoing papers and the proceedings held on August 13, 2018, this motion is determined as follows:

This matter arises out of damage to property located at 65 Middle Patent Road, Bedford, New York on May 12, 2016. The subject property was owned by Trion James and Colleen James (hereinafter "insureds") and insured by plaintiff, Privilege Underwriters Reciprocal Exchange pursuant to a property insurance policy. It is alleged that the property was constructed in 2014 by defendants, and less than two years after such construction, water damage was discovered. Subsequently a claim was made to plaintiff by the insureds. Pursuant to its obligations under the policy, plaintiff reimbursed its insureds in the amount of $144,717.16 for the water damage they sustained.

Thereafter, plaintiff filed a summons and complaint on December 16, 2016.[1] Defendants filed their answer on January 26, 2017[2], and the parties engaged in discovery. By preliminary conference stipulation "so ordered" on May 18, 2017 (Lefkowitz, J.), the parties were ordered to disclose in writing the existence and contents of any insurance agreement pursuant to CPLR 3101(f) by June 18, 2017, and a supplemental bill of particulars was directed to be served by plaintiff on defendants by June 18, 2017. Examinations before trial of plaintiff were scheduled for September 1, 2017 at 10:00 a.m., and defendants' depositions were scheduled for October 15, 2017 at 10:00 a.m. Examinations before trial of all parties were ordered to be completed by November 1, 2017, and depositions of all non-parties were directed to be completed by December 1, 2017. On or before July 18, 2017, all parties were ordered to exchange names and addresses of all witnesses and statements of opposing parties and photographs, or if none, so state in writing. All parties were directed to exchange information regarding expert witnesses pursuant to CPLR 3101 and governing case law. In addition, demands for discovery and inspection pursuant to CPLR 3120 were ordered to be served on or before June 18, 2017, and all responses to such discovery and inspection demands were directed to be served no later than thirty days after receipt of the opposing party's demands. The parties were specifically advised that all objections to disclosure, inspection or examinations were to be made pursuant to CPLR 3122. Further, supplemental demands for discovery and inspection were permitted to be made with respect to those items which the demanding party could not have reasonably demanded in such party's prior demands for discovery and inspection, provided such supplemental demands were served at least twenty days prior to the expiration of the time herein set forth for the completion of disclosure. Responses to such supplemental demands were directed to be served within the time provided by CPLR 3120 except that objections to supplemental demands were required to be interposed sufficiently in advance of the time hereinafter set forth for the completion of disclosure so as to permit the demanding party a reasonable time to seek and obtain a conference with the court with respect to such objections and to request an extension of time to complete disclosure. With respect to additional disclosure issues, to the extent not already provided, plaintiff was ordered to respond to defendants' May 5, 2017 letter discovery demand within forty-five days, and defendants were directed to respond to plaintiff's April 10, 2017 notice for discovery and inspection within forty-five days. All discovery was ordered to be completed by April 10, 2018, and a compliance conference was scheduled for October 19, 2017.

During the course of such discovery, plaintiff learned that an additional, related entity should have been included as a defendant, and accordingly, plaintiff served its supplemental summons and amended complaint.[3] Plaintiff asserts three causes of actions: one sounding in negligence, one sounding in breach of Article 36-B of Gen. Bus. Law, 777-a, et seq.[4] and a breach of contract claim.

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[1]NYSCEF Doc. 1, Exhibit A to Defendants' moving papers, NYSCEF Doc. No. 30.

[2]NYSCEF Doc. 4, Exhibit B to Defendants' moving papers, NYSCEF Doc. No. 31.

[3]NYSCEF Docs. 17, 18, Exhibit C to Defendants' moving papers, NYSCEF Doc. No. 32.

[4]Gen. Bus. Law 777-a provides in part that "...a housing merchant implied warranting is implied in the contract or agreement for the sale of a new home and shall survive the passing of title".

Defendants served their amended answer on February 15, 2018.[5] Specifically, plaintiff asserted that in constructing the premises, defendants failed to properly install a shower pan and related components which caused a water leak in the master bedroom area, and further, failed to properly design and/or install roof venting or water proofing above the garage which caused a build-up of ice resulting in water leaks throughout the premises.

Defendants claim that in an effort to determine the location within the premises where the water leak allegedly occurred and the specific origin and cause of the water leak and other particulars related to plaintiff's breach of warranty claim, it served its demand for a bill of particulars on January 26, 2017.[6] Plaintiff served its response to defendants' demand for a verified bill of particulars on April 10, 2017.[7] Defendants point out that in its verified bill of particulars, plaintiff objected to defendants' demands to the extent they sought disclosure of any information or material which is privileged, including but not limited to, attorney-client communications, attorney-work product and/or material prepared in anticipation of litigation, and further set forth that "[i]nformation or materials subject to these privileges will be withheld and a privilege log will be provided upon the written request of Defendants' counsel."[8] Defendants assert that on January 26, 2017, they served a notice for discovery and inspection on plaintiff which included, inter alia, a demand for a copy of any contract of sale regarding the purchase of the real and personal property located at 65 Middle Patent Road, Bedford, New York as alleged in paragraph 6 of the complaint, a copy of any contract entered into by plaintiff's insured and the defendants regarding the construction of the house located at 65 Middle Patent Road, Bedford, New York and copies of any inspection reports obtained or received by plaintiff and/or plaintiff's insureds at any time prior to the purchase of the property located at 65 Middle Patent Road, Bedford, New York.[9] Plaintiff served its response to defendants' notice for discovery and inspection on April 10, 2017 which contained the same general objections regarding privilege as its verified bill of particulars[10] but no specific objection in accordance with CPLR 3122(b). As to defendants' demands for copies of all photographs depicting the scene and any real or personal property which was allegedly damaged or copies of all photographs depicting the interior of the bathroom both prior to and subsequent to the occurrence described in plaintiff's complaint in paragraph 9, copies of plaintiff's investigation of the occurrence or loss for subrogation purposes and an itemized list of all plaintiff's property which was allegedly destroyed as a result of the occurrence set forth in the complaint together with the original cost of each such item and the replacement cost of each such item, including all supporting documentation therefore, plaintiff responded to defendants' paragraphs 6,7,8 and 9: "Counsel is referred to Exhibit "A" attached hereto

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[5]NYSCEF Doc. No. 21, Exhibit D to Defendants' moving papers, NYSCEF Doc. No. 33.

[6]Exhibit E to Defendants' moving papers, NYSCEF Doc. No. 34.

[7]Exhibit F to Defendants' moving papers, NYSCEF Doc. No. 35.

[8]Exhibit F to Defendants' moving papers, NYSCEF Doc. No. 35, Para. 3.

[9]Exhibit G to Defendants' moving papers, NYSCEF Doc. No. 36, Paras. (1), (2), (5).

[10]Exhibit H to Defendants' moving papers, NYSCEF Doc. No. 37, see also para. 3.

which includes a copy of Plaintiff's claims file." On October 27, 2017, plaintiff served a supplemental response to defendants' notice for discovery and inspection which included additional photographs.[11]

Following the service of the amended answer to plaintiff's supplemental summons and amended complaint, defendants served a demand for a verified bill of particulars, notice for discovery and inspection, demands for statements, experts and witnesses, demand pursuant to CPLR 4545(c) and notice of examination before trial on February 15, 2018.[12] In addition to the sixteen items previously demanded in defendants' notice for discovery and inspection of January 26, 2017, they included an additional demand, item (17) in which they sought a copy of the claim file maintained by plaintiff prior to the commencement of the instant litigation. In response to defendants' demand for plaintiff's claim file, defendants were "...referred to Exhibit "A" attached to Plaintiff's previously response to Defendant's First Notice for Discovery and Inspection, dated April 10, 2017, which includes a copy of the Plaintiff's claims file". As to defendants' additional item (17) demand, plaintiff objected to the disclosure of information or material asserting that such material is protected disclosure by any privilege, including but not limited to attorney -client communications, attorney-work product and/or material prepared in anticipation of litigation, but again, referred defense counsel to plaintiff's previous response dated April 10, 2017 and its attendant exhibit "A" which plaintiff now identified as containing "a copy of the non-privileged portion of Plaintiff's claims file."[13]

On June 18, 2018, an examination before trial was taken of Karsten Richards, an employee and property claim representative of plaintiff. She testified that she maintained notes in connection with plaintiff's loss; she did not however bring them to the deposition and testified that she would need to review them to refresh her recollection. She stated that she compiled these notes from the outset of the loss, and her notes constitute part of the claims file and include, inter alia, conversations with the homeowners, her visit to the property in 2016, discussions with vendors concerning remedial work to the property, and her decision to commence a subrogation action. Defendants argue that, during the deposition defendants presented Ms. Richards copies of the claims file furnished to them by plaintiff's counsel. Ms. Richards testified that the claims file was not complete because it did not contain her notes. Defendants complain that Ms. Richards' claim notes should have been provided to them well in advance of the depositions of any party. Defendants further argue that in light of the foregoing, they have not been afforded a complete deposition of the claims representative who is unquestionably a core witness in this case.

By compliance conference referee report and order "so ordered" on June 15, 2018 (Lefkowitz, J.), this Court ordered that depositions be completed on June 18, 2018 with respect to plaintiff's adjuster and on June 25, 2018 with respect to plaintiff's insured Trion James and on June

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[11]Exhibit I to Defendants' moving papers, NYSCEF Doc. No. 38.

[12]Exhibit J to Defendants' moving papers, NYSCEF Doc. No. 39.

[13]Exhibit K to Defendants' moving papers, NYSCEF Doc. No. 40, para. 17.

26, 2018 for defendants. Defendants' entitlement to depose plaintiff's insured's wife was reserved. Plaintiff was further directed to provide its affidavit of its search for an inspection report on or before June 21, 2018. A further compliance conference was scheduled for June 28, 2018.[14]

On June 22, 2018, plaintiff served a supplemental production of documents on a CD containing 88 unnumbered pages purportedly representing the claim file maintained by plaintiff for the period of May 12, 2016 through November 18, 2016. Plaintiff additionally emailed a Bates-stamped copy of such claim file.[15]

On June 27, 2018, plaintiff served a privilege log.[16]

Defendants argue that the privilege log served by plaintiff on June 27, 2018 fails to comply with CPLR 3122(b) and applicable case law as set forth in *Park Assocs. v N.Y. State Ag. (In re Subpoena Duces Tecum to Jane Doe)*, 99 NY2d 434 [2003]. Defendants point out that from a review of the claim file, there are numerous instances where the notes have been completely redacted and in some instances, redactions were made within the claim notes itself. Defendants assert that plaintiff has not complied with the requirements set forth in CPLR 3122(b) as the log, in numerous instances, fails to identify the type of document being withheld. Moreover, while the log refers to a person named Eric Olson as being an author, his name does not appear anywhere in the claim file, and defendants have no idea as to his title or position. Additionally, items 39-71 of the log do not indicate what part of the claim file is being withheld as the information sought was not produced based on alleged privilege. Defendants request that, due to the glaring insufficiencies, plaintiff be directed to provide an adequate privilege log to be reviewed by the Court in camera together with plaintiff's unredacted claim file to determine the merits of the asserted privileges.

Defendants also posit that plaintiff's insureds have still not produced a copy of any inspection report obtained prior to the purchase of the residence in question. They contend that it is inconceivable that the insureds would purchase a residence for $1,700,000 without obtaining an inspection prior to purchase. Accordingly, they request an order directing plaintiff to disclose such inspection report.

Finally, defendants believe they are entitled to a further deposition of Karsten Richards following this Court's in camera review of a proper and adequate privilege log and an unredacted claim file including her unredacted case notes.

Plaintiff argues first that it inadvertently omitted Ms. Richards' claim notes, and when it realized its error, it produced a copy of the non-privileged portion of the claim notes on June 22, 2018 as well as a privilege log on June 27, 2018. Plaintiff further agreed to produce Ms. Richards

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[14]Exhibit 2 to Plaintiff's opposition papers, NYSCEF Doc. No. 2.

[15]Exhibit N to Defendants' moving papers, NYSCEF Doc. No. 43.

[16]Exhibit O to Defendants' moving papers, NYSCEF Doc. No. 44.

for a further deposition to answer questions related to the non-privileged portion of her claim notes; however, defendants refused to proceed with additional discovery.

With regard to the subject privilege log, plaintiff counters that defendants appear to be using the terms "claim file" and "claim notes" interchangeably. Plaintiff explains that it maintains a "claim file" with numerous documents related to each claim which typically include, inter alia, proofs of loss, financial details and repair estimates. In contrast, "claim notes" refer to a specific electronic log with different entries made by various employees of plaintiff related to the subject claim. This, plaintiff asserts, is the document at issue for which it is claiming various privileges which contains entries made as both part of the first party adjustment of a claim as well as updates from the subrogation portion of the file. Plaintiff insists that it is providing more information than is required pursuant to CPLR 3122(b).

Plaintiff claims it is asserting the attorney-client privilege with respect to communications entered and/or memorialized in the claim notes. It claims that counsel was immediately retained following the insureds' claims and communicated with both the subrogation specialist, Eric Olson and the first-party adjuster, Karsten James in providing legal advice regarding and directing the subrogation investigation. Moreover, plaintiff contends that certain of these communications contain detailed analysis by the attorney regarding the claims at issue in addition to the legal advice concerning the subrogation investigation.

Plaintiff also argues that it is claiming privilege as material prepared exclusively for litigation. In this instance, plaintiff's counsel was retained to direct the subrogation investigation on May 17, 2016, and litigation was contemplated as early as May 27, 2016. The note entries prior to counsel's formal retention relate either to the decision to retain counsel or information sought in order for the subrogation investigation. It argues that defendants have not demonstrated any basis for entitlement to this information. Plaintiff points out that by email dated June 13, 2016, its counsel contacted then attorneys for defendants advising them of the notice of claim letter previously sent to defendants. By return e-mail of same date, prior counsel for defendants advised that he believed defendants bore no responsibility since the subject premises was sold on June 11, 2014 and did not intend to take further action with regard to plaintiff's claim. Based upon the foregoing, plaintiff maintains there can be no argument now that defendants were unfairly prejudiced or require the notes of plaintiff's representatives after explicitly waiving the right to conduct its own investigation.

Plaintiff points out that with regard to a further deposition of Karsten Richards, it has agreed to produce her for a further examination before trial regarding the non-privileged portion of its claim notes. Plaintiff claims it is also voluntarily providing defendants with a "mixed use report" authored by plaintiff's engineering expert who was retained by its counsel for the subrogation investigation. Insofar as plaintiff concedes that part of the expert's findings relate to the ice damming at the subject property and used to evaluate coverage, plaintiff is producing the expert's field notes concerning this part of the investigation.

Finally, as to the inspection report, plaintiff claims it has undertaken significant efforts to locate an inspection report but none exists.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*see Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Foster*, 74 AD3d at 1140; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

The right to disclosure, although broad, is not unlimited. Indeed, CPLR 3101 "...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]; *see Spectrum Sys. Int'l Corp. v Chem. Bank,* 78 NY2d 371, 376-377 [1991]). Courts have long recognized however that litigants are not without protection against the unnecessarily onerous application of the discovery statutes (*see Kavanagh v Ogden Allied Maint. Corp.,* 92 NY2d 952 [1998]). "Under our discovery statutes and case law, competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party" (*see O'Neill v Oakgrove Constr., Inc.,* 71 NY2d 521, 529 [1988]). Therefore, when the court is required to resolve a dispute, discovery requests "must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure" (*see Andon v 302-304 Mott St. Assocs.,* 94 NY2d 740, 747 [2000]; *see also Forman v Henkin,* 30 NY3d 656 [2018]). Despite the social utility of the privilege, it is in "obvious tension" with the policy of this State favoring liberal discovery (*see Spectrum Sys. Int'l Corp.*, 78 NY2d 371, 376-377*)* because the privilege shields from disclosure pertinent information that "constitutes an obstacle to the truth-finding process thus the burden rests on that party to establish its entitlement to protection pursuant to CPLR 3101 (*see Spectrum Sys. Int'l Corp.*, 78 NY2d 371, 376-377).

In this context, on April 10, 2017, plaintiff objected generally to defendants' demands in its verified bill of particulars and in its response to defendants' notice for discovery and inspection stating it will be withholding information or materials subject to attorney-client communications, attorney-work product and/or material prepared in anticipation of litigation and would provide a privilege log upon the written request of defendants' counsel. As to certain of defendants' demands concerning, for example, copies of plaintiff's investigation of the occurrence or loss for subrogation purposes, in its April 10, 2017 responses, plaintiff responded "Counsel is referred to Exhibit 'A' attached hereto which includes a copy of Plaintiff's claims file." There was no indication by plaintiff that such exhibit did not comprise plaintiff's entire claims file. It was not until May 23, 2018 when

plaintiff responded to defendants' demand numbered (17) in which they requested a copy of the claim file maintained by plaintiff prior to the commencement of the instant litigation that defendants first learned that the exhibit which plaintiff had referred to as plaintiff's claims file was only a partial file containing "a copy of the non-privileged portion of Plaintiff's claims file". Concomitantly, plaintiff objected to such demand to the extent that the disclosure of information or material was protected from disclosure by any privilege as set forth in CPLR 3101. Moreover, on June 18, 2018 during the deposition of the claims representative, she testified that the claims file was incomplete because it did not contain her notes. It was not until June 27, 2018 that plaintiff produced a privilege log which it claims contains more information than is required, and thus, is not subject to an in camera review.

As previously pointed out, under CPLR 3101(c), an attorney's work product is immune from discovery, and CPLR 3101(d)(2) conditionally protects materials prepared in anticipation of litigation. In the insurance context, it has long been established that reports of investigators or adjusters, prepared during the processing a claim, are discoverable when made in the regular course of the insurer's business (*see Gottwald v Sebert,* 161 AD3d 679 [1st Dept 2018]; *Advanced Chimney, Inc. v Graziano,* 153 AD3d 478 [2d Dept 2017]; *Brooklyn Union Gas Co. v American Home Assur. Co.,* 23 AD3d 190 [1st Dept 2005]). This Court however cannot determine from the papers submitted whether the redacted information in the claim notes and claim file concern privileged material pursuant to CPLR 3101 as plaintiff asserts (*see Rossi v Blue Cross & Blue Shield,* 73 NY2d 588 [1989]; *Delta Fin. Corp. v Morrison,* 69 AD3d 669 [2d Dept 2010]). Thus, an in camera review of the unredacted claims notes and claim file is necessary.

Accordingly, it is

ORDERED that, the branch of defendants' motion seeking disclosure of plaintiff's unredacted claim file including, but not limited to the unredacted claim notes and the subject privilege log is granted to the extent that plaintiff shall provide a copy of the unredacted claim file including, but not limited to the unredacted claim notes, the redacted claims notes, the redacted claim file and the subject privilege log for in camera review and determination by this Court to the Compliance Part Motion Clerk, Room 809, on or before August 27, 2018; and it is further

ORDERED that, counsel for all parties are directed to appear for a conference in the Compliance Part, Courtroom 800 on September 18, 2018 at 9:30 a.m. during which the further examination before trial of Karsten Richard shall be scheduled among other issues; and it is

ORDERED that, defendants shall serve a copy of this order with notice of entry upon plaintiff within five (5) days of entry; and it is further

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
August 13, 2018

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

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