

Powers v City of Geneva
2019 NY Slip Op 33900(U)
August 9, 2019
Supreme Court, Ontario County
Docket Number: 116046-2017
Judge: Craig J. Doran
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ONTARIO
TODD POWERS and LINDSAY POWERS

Plaintiffs,

Index No. 116046-2017

vs.

DECISION

THE CITY OF GENEVA and MATTHEW HORN

Defendants.

HON. CRAIG J. DORAN, Presiding

By Notice of Motion filed on February 1, 2019, plaintiffs sought the disclosure of a number of documents claimed by the defendants to be protected by the attorney client privilege. Defendants opposed the motion and oral argument was held. On June 20, 2019 the contested documents were submitted to this Court for an *in camera* review.

The attorney-client privilege protects “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 NY3d 616, 623).

In *Rossi v Blue Cross and Blue Shield of Greater New York* (73 NY2d 588, 592 [1989]) the Court of Appeals made clear, “[t]he privilege applies to communications with attorneys, whether corporate staff counsel or outside counsel [citation omitted].” The Court went on to caution that “[i]n that the privilege obstructs the truth-finding process and its scope is limited to that which is necessary to achieve its purpose [citation omitted], the need to apply it cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure [citation omitted]” (*Rossi v Blue Cross and Blue Shield of*

Greater New York, 73 NY2d 588, *supra* at 593).

“Parties, including corporations, may not shield otherwise discoverable documents from disclosure by including an attorney on a distribution list. Thus, the fact that an attorney either is copied on or is one of multiple recipients of an email does not on its own support a claim of attorney-client privilege” (*United States ex rel. Barko v Halliburton Co.*, 74 F Supp 3d 183, 188-89 [DDC 2014]).

There are 11 different documents that are the subject of this proceeding.

1. GEN-09688 is described in the 4th Amended Privilege Log dated December 4, 2018 as an email from Mathew Horn to Mark Gramling, Mike Mirras and Wendy Marsh prepared in anticipation of litigation.

A review of the document indicates that it is an email from City Manager Mathew Horn to City Council member Mark Gramling, cc to City Attorney Mike Mirras and Mayor Ron Alcock. Although the email suggests that Mark Gramling contact the city attorney for advice, the document was not prepared in anticipation of litigation and is not a confidential communication between an attorney and a client. This item is discoverable.

2. GEN-09688-GEN-09689 is described in the 4th Amended Privilege Log as an email from Mark Gramling to City Council and Mike Mirras prepared in anticipation of litigation.

A review of the document indicates that it is an email from Mark Gramling to Mathew Horn, cc to Mike Mirras, city council and the mayor. The email raises concerns about activity/protests at the site. That email was sent in response to an email from Mathew Horn. Although the email from Mark Gramling to Mathew Horn is discoverable, the text of the email dated October 14, 2016 from Mathew Horn which is included at the bottom of the email may be

redacted as privileged [hereinafter referred to as "Email 1"].

3. GEN-09690 is described in the 4th Amended Privilege Log as an email from Mathew Horn to City Council and Mike Mirras.

A review of the document indicates that is it an email from Mathew Horn to City Council and the mayor, cc to Mike Mirras. It is Email 1 and is therefore privileged as stated above.

- 4-5. GEN-09768-GEN-09769 is described in the 4th Amended Privilege Log as an email from Mark Gramling to Mathew Horn regarding the engagement of counsel.

A review of the document indicates that it is a series of emails between Mark Gramling and Mathew Horn regarding press strategies. The middle portion of the email chain that contains the content of an email from Mathew Horn to Mark Gramling may be redacted, but the remainder is subject to discovery.

6. GEN-09809 is described in the privilege log as an email from Mathew Horn to City Council and Mike Mirras

A review of the document indicates that it is an email from Mathew Horn to City Council, cc to Mike Mirras (Email 1) and a response from John (Greco Ward6) to Mathew Horn. As stated above, Email 1 is privileged. However, the response is not privileged and must be disclosed.

7. GEN-09811-GEN-09814 is described in the privilege log as an email from Mark Gramling to Mathew Horn, City Council and Mike Mirras

A review of the document indicates that it is Email 1 and a response from Mark Gramling (the same response as contained in GEN-09688). As previously stated that email from Mathew Horn to city council is privileged but the response from Mark Gramling is not.

8. GEN-09815 is described in the privilege log as email from Mathew Horn to Mike Mirras.

A review of the document indicates that it is a series of emails between Mathew Horn and Mike Mirras. This document is privileged.

9-10. GEN-09821-09822 is described in the privilege log as an email from Mathew Horn to Emil Bove and Mike Mirras which is privileged as an attorney client communication.

A review of these documents indicate that the first portion is an email from Mathew Horn to Emil Bove cc to Mike Mirras which forwards an email from Doris Myers to city council and cc to Wendy Marsh and Emil Bove with attached agenda (GEN-09822). Only the top portion of GEN-09281 (the email from Mathew Horn to Emil Bove cc Mike Mirras) is privileged, the remainder is subject to discovery.

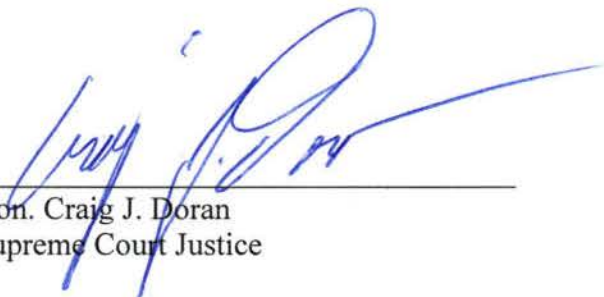
11. GEN-09836 is described in the privilege log as series of emails between Mathew Horn and Mike Mirras

A review of the document indicates that this is essential the same as GEN-09815 and is therefore privileged.

Defendants are to turn over the documents that are not privileged to the plaintiffs within one week of the signing of the order.

This constitutes the Decision of the Court. Plaintiffs to submit the Order on notice to the Defendants.

DATED: August 9, 2019
Canandaigua, New York.



Hon. Craig J. Doran
Supreme Court Justice