

<b>Zimmerman v Jurek Bldrs., Inc.</b>
2020 NY Slip Op 34459(U)
March 3, 2020
Supreme Court, Erie County
Docket Number: 811810/2017
Judge: E. Jeannette Ogden
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At a Special Term of the Supreme Court held in and for the County of Erie at 50 Delaware Avenue in the City of Buffalo on the 3<sup>rd</sup> day of March, 2020.

**PRESENT: HONORABLE E. JEANNETTE OGDEN, J.S.C.**

STATE OF NEW YORK :  
SUPREME COURT : COUNTY OF ERIE

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DARREN ZIMMERMAN and JENNIFER ZIMMERMAN

Plaintiffs

vs.

**ORDER**  
**Index #811810/2017**

JUREK BUILDERS, INC.; and  
HDJ BUILDERS, INC.

Defendants

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HDJ BUILDERS, INC., d/b/a JUREK BUILDERS

Third-Party Plaintiffs

vs.

HALFMOON CUSTOM PAINTING, INC.

Third-Party Defendant

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Plaintiffs, DARREN ZIMMERMAN and JENNIFER ZIMMERMAN, having moved this Court for an Order compelling non-party SOUTHWEST MARINE AND GENERAL INSURANCE COMPANY (the insurer for defendants JUREK BUILDERS INC. and HDJ

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BUILDERS INC. in this action) to comply with a subpoena issued by Plaintiff's counsel seeking production of documents withheld from disclosure as privileged;

AND, upon reading and filing the Notice of Motion dated January 6, 2020, the Affirmation of Brian R. Hogan, Esq., dated January 6, 2020, with exhibits attached thereto, and the Memorandum of Law, all submitted in support of the Plaintiff's motion;

AND, upon reading and filing the Affirmation of Sarah Washington, Esq., dated February 21, 2020, submitted in opposition to the Plaintiff's motion;

AND, upon reading and filing the Affirmation of Luis G. Sabillon, Esq., dated February 24, 2020, with exhibits attached thereto, submitted in opposition to the Plaintiffs' motion;

AND, upon reading and filing the Reply Affirmation of Brian R. Hogan, Esq., dated February 27, 2020, with exhibits attached thereto, in further support of said motion;

AND, upon hearing BROWN CHIARI LLP (Brian R. Hogan, Esq., of counsel) for the Plaintiffs, in support of said motion, and GOLDBERG SEGALLA, LLP (Sarah Washington, Esq., of counsel) for the Defendants/Third-Party Plaintiff, in opposition of said motion, and CULLEN AND DYKMAN LLP (Olivia Gross, Esq., of counsel) for non-party Southwest Marine and General Insurance Company, in opposition of said motion;

AND, the Court having conducted an in-camera review of the documents at issue bearing bates stamps 000020-000036 and 000337-000338 that had been withheld under a claim of privilege;

NOW, it is hereby

**DETERMINED** that the claim investigation report on pages 000020-000036, prepared by the third-party insurance claim investigator prior to the Plaintiff's commencement of the action on July 11, 2017 do not fall within the conditional privilege of material prepared in anticipation of

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litigation as asserted by the Defendant in its privilege log. To fall within the conditional privilege of CPLR § 3101 (d)(2), the material sought must be prepared solely in anticipation of litigation. Here, the material sought appears to be prepared as part of the regular business of the insurance company in investigating a claim as well as for safety purposes. Such mixed purpose reports are not exempt from disclosure and therefore the material is discoverable. Defendant has not met its burden of establishing that the report was prepared solely in anticipation of litigation and pages 000337-000338 consisting of memos between the insurance company and its insured prior to the commencement of a legal action/claim are part of the regular business of an insurance company and thus reports prepared by the insurance investigator relative thereto, are not privileged and are discoverable. Therefore, it is hereby

**ORDERED**, that the motion to compel is **GRANTED** and that Southwest Marine and General Insurance Company shall provide to plaintiff's counsel the documents at issue bearing bates stamps 000020 - 000036 and 000337-000338 within twenty (20) days of service of this Order with Notice of Entry.

JUL 07 2020

  
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HON. E. JEANNETTE OGDEN, J.S.C.