

Sapp v Clark Wilson, Inc.
2020 NY Slip Op 35772(U)
November 4, 2020
Supreme Court, Kings County
Docket Number: Index No. 12230/15
Judge: Peter P. Sweeney
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At an IAS Term, Part 73 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 4th day of November, 2020.

P R E S E N T: HON. PETER P. SWEENEY,

Justice.

-----X

Dianna Sapp, et al.,

Plaintiffs,

- against -

Index No. 12230/15

Clark Wilson, Inc., et al,

Defendants.

-----X

The following efiled papers read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

609-610

Opposing Affidavits (Affirmations)_____

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Reply Affidavits (Affirmations)_____

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Upon the foregoing papers, defendant New York City Department of Homeless Services (DHS) moves for a protective order, pursuant to CPLR 3101 (b) and (c) and 3103, with respect to certain documents inadvertently and erroneously produced by DHS and delivered to co-defendants Clark Wilson, Inc., Clark Associates Inc a/k/a B. Clark Associates Inc., Wilson-Mer

Associates, Inc., Wilson Flat Inc., Wilson-Hins Associates, Inc., and Wilson Han Associates, Inc. (collectively, the owners).

Background Facts

In November 2019, DHS produced numerous electronic documents in response to the owners' discovery demand. On November 19, 2019, DHS produced a log of privileged, fully-withheld documents and a log of documents that were partially redacted to conceal alleged privileged material. On December 26, 2019, DHS advised owners that its electronic discovery mistakenly included privileged material which it wanted to claw back. On January 21, 2020, the parties entered into a clawback agreement that was so-ordered by the court. On January 24, 2020, DHS made a clawback demand and after negotiations, the owners agreed to return some of the documents while DHS withdrew its claim of privilege with respect to several documents. However, the parties could not reach an agreement with respect to 22 of the electronic documents, all of which are email communications. In this regard, DHS maintained that 14 of these electronic communications were fully or partially protected as attorney-client communications and attorney work product. DHS further claimed that six of these communications were protected under the public interest privilege. Finally, DHS claimed that two of the communications were not responsive to the owner's discovery demands.

In many cases, the documents in dispute are different versions of similar documents, as they are email chains containing the same messages. DHS now moves for a protective order with respect to these disputed electronic documents.

Arguments

In support of its motion, DHS maintains that Document #1 and Document #2 consist of email chains which include high-level employees of several City agencies and is directed to New York City Corporation Counsel. According to DHS, these communications are privileged under the attorney-client privilege and as attorney work product inasmuch as they contain a discussion of litigation strategy for the main action. DHS maintains the Document #3 is also privileged inasmuch as it is identical to Document #1 with the addition of a single message from the Commissioner of the NYC Department of Social Services (DSS) to the general counsel of the City's Human Resources Agency (HRA). According to DHS, Document # 4 is also privileged under the attorney-client privilege inasmuch as it is an email in which HRA's general counsel seeks factual information regarding the registration of We Always Care's contract in order to make a legal decision. In addition, DHS maintains that the redacted portions of Document #5 are privileged inasmuch as the email contains a discussion of legal strategy pertaining to the main action. DHS also contends that Documents #6 and #7 are not responsive to any document requested by the owners.

In further support of its motion for a protective order, DHS argues that Documents #8, #9, #10, #11, #12 and #13 are protected under the public interest privilege inasmuch as the redacted portions of these emails concern the referral of the issue of the integrity of defendant We Always Care (WALC) to the New York City Department of Investigation (DOI). According to DHS, the failure to uphold the public interest privilege with respect to these documents would have a

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chilling effect on the ability of DHS to freely discuss DOI referrals in the future and to maintain the integrity of future municipal procurements.

DHS also argues that Document #14 is protected under the attorney-client privilege. In particular, DHS maintains that this document contains a discussion of litigation strategy between the DSS Commissioner and HRA's General Counsel. In addition, DHS contends that parts of this document are not responsive as they involve discussions of other shelter providers that are not relevant to this litigation. Further, DHS avers that Document #15 is privileged inasmuch as it concerns the development of legal strategy. Moreover, DHS maintains that the involvement of a third party in this email message did not result in a waiver of the attorney-client privilege since this third party was an employee of the City of New York.

DHS notes that Documents #16 and #17 are identical to Document #14, with the addition of an unredacted message on these emails. As such, DHS maintains that these documents are privileged for the same reason that Document #14 is privileged. Similarly, DHS notes that Document #18 is the same email chain as Document #15 with the addition of one partially redacted message. According to DHS, this document concerns the development of legal strategy in the procurement of the shelter contract and the pending litigation. In addition, DHS points out that Documents #19 and #20 are part of the same email chain as Documents #14, #16 and #17 and as such, are privileged.

As a final matter, DHS contends that Documents #21 and #22 are privileged under the attorney-client privilege. In particular, DHS notes that Document # 21 is the same email chain as Documents #14, #16, #17, and #19. In addition, DHS argues that the redacted portions of

Document #22 concern confidential communications between HRA's General Counsel and its Agency Chief Contracting Officer in response to a message from WALC's counsel that concern the procurement of its contract in the context of the pending litigation.²

In opposition to DHS's motion, the owners argue that DHS has failed to meet its burden of demonstrating that the subject documents are protected by the attorney-client privilege, as attorney work product, or under the public interest privilege. In any event, the owners contend that the subject emails are not privileged. In particular, the owners maintain that Document #1, which is an email chain involving 11 individuals from five different City agencies, focuses on general strategies of how to identify and categorize units and potential violations and was not prepared principally to assist in or in anticipation of litigation. The owners further maintain that Document #2, which is an email correspondence between HRA employees discusses the logistics of removing people from apartments that will no longer be used as a shelter and how that will make operational sense if the agency would then be required to provide new units. Accordingly, the owners contend that this document was not prepared principally to assist in litigation. Moreover, the owners contend that Document #3 is not privileged inasmuch as it is identical to Document #2. In addition, the owners argue that Document #4, which is an email correspondence concerning the timing of the registration of the contract, was not prepared to assist in litigation and arose in the ordinary course of business. According to the owners, the redacted portions of Document #5 address cluster policies and logistics of informing occupants

²The court notes that DHS did not contend that Document #22 was privileged in its privilege log.

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of their rights with a flyer, and as such, this document is not protected under the attorney-client privilege.

In further opposition to DHS's motion, the owners maintain that Documents # 6 and #7 are email communications which provide an update concerning the Comptroller's acceptance or rejection of a contract in order to highlight the operational steps that the Comptroller might take. Under the circumstances, the owners argue that these documents are responsive to their discovery demands. The owners also contend that the redacted portions of Documents #8, #9, #10, #11, #12 and #13 are not protected under the public interest privilege. In particular, the owners note that these documents, which are all slight variations of the same email communication, discuss whether Barry Hers, Barry Herks and Isaac Hersko are the same person. The owners further note that the redacted portions of these emails merely provide guidance relating to the procedure for referring this matter to the Department of Investigations. Under the circumstances, the owners contend that these communications do not implicate the public interest privilege.

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The owners also argue that Document #14, which is an email chain between different NYC agencies (not including DHS) regarding DHS's effort and desire to have the contract approved with the Comptroller and the drafters' desire to have the apartments converted to rent stabilized apartments, was not prepared principally to assist in anticipated or ongoing litigation. Instead, the owners maintain that these communications dealt with matters that arose during the ordinary course of business. In addition, the owners aver that Document #15 is not privileged inasmuch as the information in this email chain was shared with third parties. Further, the owners note that Documents #16 and #17 are continuations of the same email chain as Document #14. According to the owners, these communications were not prepared principally to assist in anticipated or ongoing litigation. The owners also argue that Document #18 is not privileged. Specifically, the owners note that this document is part of the email chain contained in Document #15 with the addition of a sentence from Vincent Pullo, the Agency Chief to Contracting Officer of the DSS. In this regard, the owners maintain that Mr. Pullo was not acting as an attorney at the time of this communication.

In further opposition to DHS's motion, the owners note that Documents #19 and #21 are a continuation of the email chain contained in Documents #16 and #17 and are not privileged for the same reason that these documents were not privileged. Finally, the owners maintain that Document #20 is not privileged. In particular, the owners contend that the portion of the email which DHS seeks to redact merely relates to the timing of a contract with the Comptroller and was not drafted for the legal purposes.

Findings and Rulings³

CPLR 4503 (a)(1) provides in pertinent part that: “Unless the client waives the privilege, an attorney or his or her employee or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication in any action.” Further, under CPLR 3101 (b), confidential communications that are protected by the attorney-client privilege are immune from discovery (*New York Times Newspaper Div. of N.Y. Times Co. v Lehrer Mcgovern Bovis, Inc.*, 300 AD2d 169, 171 [2002]). “In order for the privilege to apply, the communication from attorney to client must be made ‘for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship’” (*Spectrum Sys. Intl. Corp., v Chemical Bank*, 78 NY2d 371, 377-378 [1991], quoting *Rossi v Blue Cross & Blue Shield*, 73 NY3d 588, 593 [1989]). Moreover, the communication itself must be primarily or predominantly of legal character (*Spectrum Sys. Intl. Corp.*, 78 NY2d at 378). In addition, “[a]lthough typically arising in the context of a client’s communication to an attorney, the privilege extends as well to communications from attorney to client” (*id.* at 377). Because the issue of whether or not a particular communication is protected by the attorney-client privilege is highly fact specific, an in camera review of the communication is usually necessary before a court may make a determination as to whether or not the privilege applies (*id.* at 378).

³DHS did not provide the court with copies of the subject emails when it initially made the instant motion. However, after the motion was submitted, at the court’s request, DHS submitted copies of the subject emails for in camera review.

Just as confidential communications between an attorney and client are not discoverable under CPLR 3101 (b), CPLR 3101 (c) protects the work product of an attorney from discovery (*Beach v Touradji Capital Mgt., LP*, 99 AD3d 167, 170 [2012]). “The work-product exemption applies only to those materials that are prepared by an attorney who is acting as an attorney, and which contain the attorney’s analysis and trial strategy” (*Doe v Poe*, 244 AD2d 450, 451 [1997]). Furthermore, “[t]he burden of establishing the application of the exemption rests on the party resisting discovery” (*id.* at 451-452). Finally, as is the case with communications between attorney and client, the question of whether or not a document is protected under the work product privilege is fact specific and usually requires an in camera review (*Baliva v State Farm Mut. Auto. Ins. Co.*, 275 AD2d 1030, 1031 [2000]).

As an initial matter, the court finds no merit to the owners’ argument that DHS waived the attorney-client privilege inasmuch as the email communications were shared with third parties. In particular, these third parties were all employees of City agencies and the privilege attaches to the City of New York.

Turning to the Documents themselves, the court finds that Documents #1 and #3 are protected under the attorney-client privilege. In particular, these email communications are primarily concerned with litigation strategy in the main action, including the City’s position regarding defendant WALC’s integrity as a vendor. The court further finds that Document #2 is protected under the attorney client privilege. This communication concerns litigation strategy in the main action and makes specific reference to a DHS policy that could undermine its arguments in the litigation.

Turning to Document #4 and the redacted portion of Document #20, the court finds that these emails are not protected under the attorney-client privilege or as attorney work product. In particular, in these emails, HRA's general counsel merely inquires about the timing of the Comptroller's registration of WALC's contract to provide shelter services. Contrary to DHS's argument, there is no discussion in this email regarding the effect that the registration would have on pending litigation. Further, these emails do not contain any legal analysis or reveal any litigation strategies. In addition, the redacted portions of Document # 5 are not protected under the attorney-client privilege or as attorney work product. These emails merely address the logistics of distributing "know your rights" flyers to shelter occupants and do not contain any discussion of legal strategy.⁴

The redacted portions of Documents #14, #16, #17, #19 and #21 are protected under the attorney-client privilege. In particular, these emails contain a discussion of litigation strategy. Further, the fact that no DHS employees participated in this email chain is of no moment inasmuch as employees of other agencies involved in the litigation did participate and, as the court previously noted, the privilege is held by the City. The redacted portions of Documents #15 and #18 are also protected under the attorney-client privilege inasmuch as they contain a discussion of legal strategy. In addition, contrary to the owners' argument, DHS did not waive its privilege by including a third party on the emails. In this regard, the third party was the Chief Procurement Officer for the Office of the Mayor. As a final matter, the redacted portion of Document #22 is protected under the attorney-client privilege. As DHS correctly notes, this

⁴DHS's papers make reference to an additional email bearing Bates Nos. 005547. However, DHS did not provide this document for in camera review.

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email is a confidential communication between HRA's General Counsel and an HRA employee in the context of pending litigation in response to a message from WALC's counsel concerning the procurement of WALC's contract.

“A public interest privilege inheres in certain official confidential information in the care and custody of governmental entities. This privilege permits appropriate parties to protect information from ordinary disclosure, as an exception to liberal discovery rubrics” (*Matter of World Trade Ctr. Bombing Litigation v Port Auth Litig. v. Port Auth of N.Y. & N.J.*, 93 NY2d 1, 4 [1999]). In this regard, the privilege covers “confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged” (*Cirale v 80 Pine St. Corp.*, 35 NY2d 113, 117 [1974] [citations omitted]). “Entitlement to the privilege requires, therefore, that an agency claiming some special governmental-public interest ‘cone of silence’ demonstrate the special public interest that would be jeopardized by an otherwise customary exchange of information” (*Matter of World Trade Ctr. Bombing Litigation*, 93 NY2d at 8). Thus, the public interest in encouraging the reporting of possible violations of the law by protecting the anonymity of informants may preclude divulging documents and communications which would reveal said informants’ identity (*Matter of Klein v Lake George Park*, 261 AD2d 774, 774-775 [1999]). Similarly, the public interest privilege may apply when releasing documents and communications poses potential threats to public safety and security (*Colgate Scaffolding & Equip. Corp. v York Hunter City Serv.*, 14 AD3d 345, 346 [2005]). “The public interest in encouragement of candor in the development of policy against the degree to which the public interest may be served by disclosing information which elucidates the government action

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taken” may also be weighed in determining whether the public interest privilege applies (*One Beekman Place v City of New York*, 169 AD2d 492, 493). However, “to avoid abuse of the privilege, specific support is required to invoke it” (*Colgate Scaffolding & Equip. Corp.*, 14 AD3d at 346).

Here, DHS has failed to adequately support its contention that Documents #8 through #13 are protected under the public interest privilege. In particular, the release of the redacted portions of these email communications poses no threat to public safety or security. Nor does divulging these emails risk exposing any confidential informants. Further, it cannot be said that the release of the redacted portions of these emails would have a chilling effect on the free exchange of ideas in developing DHS policy. In particular, the redacted portions of these emails merely contain a discussion of the logistics of referring the matter to the DOI and do not involve any discussions of DHS policy development. Further, the court notes that it is undisputed that the DHS did ultimately refer this matter to the DOI. Accordingly, that branch of DHS’s motion which seeks a protective order and clawback with respect to Documents #8, #9, #10, #11, #12 and #13 is denied.

As a final matter, DHS is entitled to a protective order and clawback with respect to the redacted portions of Documents # 6 and #7. In particular, in reviewing these documents, it is clear that the redacted portions of this email are concerned solely with a shelter not involved in the instant litigation. Accordingly, these documents are not responsive to the owners’ discovery demand.

Summary

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In sum, DHS's motion, in mot. seq. 29, for a protective order and clawback is granted with respect to Documents # 1, #2, #3, #6, #7, #14, #15, #16, #17, #18, #19, #21 and #22 and denied with respect to documents #4, #5, #8, #9, #10, #11, #12, #13 and #20.

This constitutes the decision and order of the court.

ENTER,

P.P.S.

J. S. C.