

Greene v 304 W. 88th St. Apt. Corp.
2023 NY Slip Op 30231(U)
January 24, 2023
Supreme Court, New York County
Docket Number: Index No. 155525/2019
Judge: Paul A. Goetz
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ **PART** **47**

Justice

-----X

ALISON GREENE

Plaintiff,

- v -

304 WEST 88TH STREET APARTMENT CORP.,

Defendant.

-----X

INDEX NO. 155525/2019

MOTION DATE 10/21/2022

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 163, 164, 165, 166, 167, 168, 169, 229, 230, 231, 232, 233

were read on this motion to/for DISCOVERY.

Plaintiff Allison Greene, the owner of Unit 1-C, a cooperative apartment located at 304 West 88th Street commenced this action in June 2019 against the defendant cooperative to recover damages allegedly incurred as a result of leaks in her apartment dating back to 2013. Pursuant to this court's status conference order dated September 22, 2022, plaintiff filed this motion to compel certain discovery from defendant and two non-parties which defendant and the non-parties claim is privileged. The materials have been submitted for in camera review.

CPLR 3101 provides for broad discovery of all documents which are "material and necessary" to the claims or defenses in an action (CPLR 3101[a]). However, it also establishes three categories of protected materials: privileged materials, such as attorney-client communications under CPLR 4503, are absolutely immune from discovery (CPLR 3101[b]); attorneys' work product, which is also absolutely immune (CPLR 3101[c]); and materials prepared in anticipation of litigation, or trial preparation materials, which are subject to discovery only upon a showing of substantial need and undue hardship in obtaining the

substantial equivalent of the materials by other means (CPLR 3101[d]), (*Venture v. Preferred Mut. Ins. Co.*, 153 A.D.3d 1155, 1158 [1st Dep't 2017]). Further, the burden of establishing the privilege is on the party asserting it and the protection must be narrowly construed, (*Id.* at 1159).

Turning first to the privilege log produced by non-party Steven Haskell, a former board member, there are nine documents which the non-party asserts are privileged:

(1) The first document is an email chain from June 2013 between board members discussing the water leak in plaintiff's apartment. The privilege log explains that the email was sent to defendant's attorney, Theresa Racht. However, upon review of the email, Mr. Haskell has not demonstrated that the email was sent "for the purpose of facilitating the rendition of legal advice or services" and thus is not protected by the attorney-client privilege (*Ambac Assurance Corp. v. Countrywide Home Loans*, 27 N.Y.3d 616, 624 [2016]).

Further, the email is not protected by the qualified privilege of CPLR 3101(d)(2) as there is no evidence that litigation was anticipated in 2013.

(2) The second document is another email chain from February 2014 between the board members and Geiger Engineering. As with the first document, emails were copied to defendant's attorney, Theresa Racht. Upon review of the emails and Mr. Haskell's submission, he has not demonstrated that the email was sent for the purpose of facilitating legal advice and thus it is not protected by attorney-client privilege. Further, there is no work product contained in this email and there is no evidence that litigation was anticipated in 2014. Thus, this email is also not protected under CPLR 3101(c) or (d) and must be produced.

- (3) The next three items in the privilege log (documents 3, 4 and 5) are correspondence between defendant's attorneys and the defendant's insurance carrier regarding the claims of another unit owner and are protected as attorney-client communications.
- (4) The next item (document 6) is an email dated October 10, 2018 between the board and Steve Wilson of Bluewoods Management, the former managing agent, regarding plaintiff's subletting of her apartment and conflict with another tenant in the building, Jeff Blaine. Mr. Haskell asserts that his email is privileged under CPLR 3101(d)(2) as material prepared in anticipation of litigation. Upon review of the email, Mr. Haskell has demonstrated that it was "primarily prepared in anticipation of litigation" and is thus privileged (*MBIA Ins. Corp. v. Countrywide Home Loans*, 93 A.D.3d 574 [1st Dep't 2012]). While plaintiff argues that the privilege was waived because the email was sent to Mr. Wilson, defendant's former managing agent, this argument lacks merit as CPLR 3101(d)(2) covers materials prepared by or for a party's agent (*see also People v. Kozlowski*, 11 N.Y.3d 223, 246 [2008] ["The qualified privilege governing trial preparation materials is waived upon disclosure to a third party where there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality"]).
- (5) Similarly, the next two items (documents 7 and 8) are also protected by CPLR 3101(d)(2) as material prepared in anticipation of litigation as the emails concern the board's response to plaintiff's claims. However, the portion of document 8 which contains an excerpt from an email between the parties is not privileged and must be produced.
- (6) The last item (document 9) is an attorney-client communication and is privileged.

Turning next to the privilege log produced by non-party Jane Koltsova, a former board member, there are eleven documents which the non-party asserts are privileged:

- (1) Upon review of documents 1-3, these emails were “primarily prepared in anticipation of litigation” and are thus privileged under CPLR 3101(d)(2) (*MBIA Ins. Corp.*, 93 A.D.3d at 574).
- (2) The next item, document 4, contains multiple emails between Ms. Koltsova and Christopher Keane, her attorney and the defendant’s attorney, concerning this litigation. Defendant’s managing agent, Mr. Wilson, has also been copied on these emails. It is apparent based on the review of these emails that they are attorney-client communications. However, plaintiff argues that Ms. Koltsova waived the privilege by including Mr. Wilson, a non-party, on the correspondence.

“Generally, communications made in the presence of third parties, whose presence is known to the client, are not privileged from disclosure because they are not deemed confidential” (*Ambac Assurance Corp.*, 27 N.Y.3d at 624). However, statements made to the agents or employees of the attorney or client . . . retain their confidential . . . character, where the presence of such third parties is deemed necessary to enable the attorney-client communication and the client has a reasonable expectation of confidentiality” (*Id.*) While Ms. Koltsova may have had a reasonable expectation of confidentiality in this situation as she states in her affidavit, there is nothing to show that Mr. Wilson’s presence was necessary in order to facilitate her communications with Mr. Keane, which is required in order for this exception to the waiver to apply (*compare Bew Parking Corp. v. Apthorp Associates*, 141 A.D.3d 425 [1st Dep’t 2016] [defendant which

had no employees of its own demonstrated through affidavits that its counsel had to communicate with defendant's agents in order to provide legal advice]). Further, while there may be other exceptions to waiver, defendant and Ms. Koltsova have not argued or demonstrated their applicability (*see e.g. Frank v. Morgans Hotel Group*, 66 Misc.3d 770 [Sup. Ct. N.Y. Cty. 2020] [discussing the "functional equivalent of an employee" doctrine]). Accordingly, the attorney-client privilege has been waived for this document.

- (3) Document number 5 consists of emails between Mr. Wilson and board members regarding repair work for plaintiff's apartment. While the privilege log asserts that these emails were "materials prepared in anticipation of litigation", upon review, it does not appear that the primary, much less sole, purpose of these emails was for litigation rather than conducting the daily activities of the board (*MBIA Ins. Corp.*, 93 A.D.3d at 574; *John Mezzalingua Associates, LLC v. Travelers Indemnity Co.*, 178 A.D.3d 1413, 1416 [4th Dep't 2019]). Thus, this document must be produced.
- (4) With regard to documents number 6 and 7, upon review, these emails are materials prepared for litigation and thus are privileged.
- (5) With regard to document numbers 8 and 9, which are emails between Mr. Wilson and the board regarding repairs to plaintiff's apartment and the building's financials, upon review of the emails, they do not appear to be prepared primarily or solely for purposes of litigation and are thus not protected by CPLR 3101(d)(2). Nor is there anything to indicate that document 9 is an attorney-client communication, as stated in the revised privilege log. Thus these documents must be produced.
- (6) With regard to document number 10 and the redacted portion of document 11, these emails were prepared in anticipation of litigation and thus are privileged.

Turning next to the privilege log dated June 7, 2021 from defendant, plaintiff failed to timely object to this privilege log and thus her objection is waived.

Finally, turning to the board minutes, the redactions based on relevance shall be removed.

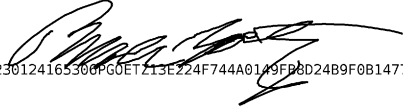
With regard to the privilege log for the board minutes, there are eighteen items on the log:

- (1) For item 1, this item is protected by the work product privilege and is also material prepared in anticipation of litigation and need not be disclosed.
- (2) For item 2, this item is protected by the work product privilege and is also material prepared in anticipation of litigation and need not be disclosed.
- (3) For item 3, this item is protected by the work product privilege and is also material prepared in anticipation of litigation and need not be disclosed.
- (4) For item 4, this item is protected by the work product privilege and is also material prepared in anticipation of litigation and need not be disclosed.
- (5) The first part of item 5 (under “Arrears”) is not protected and must be unredacted. The second part of item 5 (in the next heading) is protected by the work product privilege and is also material prepared in anticipation of litigation and need not be disclosed.
- (6) The first part of item 6 (under “Arrears”) is not protected and must be unredacted. The second part of item 6 (in the next heading) is protected by the work product privilege and is also material prepared in anticipation of litigation and need not be disclosed.
- (7) The first part of item 7 (under “Arrears”) is not protected and must be unredacted. The second part of item 7 (in the next heading) is protected by the work product privilege and is also material prepared in anticipation of litigation and need not be disclosed.

- (8) The first part of item 8 (under “Arrears”) is not protected and must be unredacted. The second part of item 8 (in the next heading) is protected by the work product privilege and is also material prepared in anticipation of litigation and need not be disclosed.
- (9) Item 9 is protected by the work product privilege and is also material prepared in anticipation of litigation and need not be disclosed.
- (10) Item 10 is protected by the work product privilege and is also material prepared in anticipation of litigation and need not be disclosed.
- (11) Item 11 is protected by the work product privilege and is also material prepared in anticipation of litigation and need not be disclosed.
- (12) Item 12 is protected by the work product privilege and is also material prepared in anticipation of litigation and need not be disclosed.
- (13) Item 13 is protected by the work product privilege and is also material prepared in anticipation of litigation and need not be disclosed.
- (14) Item 14 is protected by the work product privilege and is also material prepared in anticipation of litigation and need not be disclosed.
- (15) Item 15 is protected by the work product privilege and is also material prepared in anticipation of litigation and need not be disclosed.
- (16) Item 16 is protected by the work product privilege and is also material prepared in anticipation of litigation and need not be disclosed.
- (17) Item 17 is protected by the work product privilege and is also material prepared in anticipation of litigation and need not be disclosed.
- (18) Item 17 is protected by the work product privilege and is also material prepared in anticipation of litigation and need not be disclosed.

Defendant may pick up the documents submitted for in camera review from Part 47 on Friday January 27, 2023.

SO ORDERED.


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1/24/2023
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE