

Eskin v 60 E. 9th St Owners Corp.

2024 NY Slip Op 32732(U)

August 6, 2024

Supreme Court, New York County

Docket Number: Index No. 151069/2022

Judge: Paul A. Goetz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

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

Justice

-----X

BARBARA ESKIN, SARAH KATZ,

Plaintiff,

INDEX NO. 151069/2022

MOTION DATE 07/12/2024

MOTION SEQ. NO. 003

- v -

60 E. 9TH ST OWNERS CORP., THE BOARD OF
DIRECTORS OF 60 E. 9TH ST OWNERS CORP., NICK
SPIRO

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 144, 145, 146, 147, 148, 149, 150, 151, 152, 154, 155, 156, 157, 158

were read on this motion to/for STRIKE PLEADINGS.

In this nuisance action arising from noise emanating from defendant Nick Spiro’s apartment, which is located directly above plaintiffs’ apartment (NYSCEF Doc No 1 ¶¶ 1-3), plaintiffs seek to compel production of an acoustical evaluation commissioned by defendants 60 E. 9th St Owners Corp. and The Board of Directors of the 60 E. 9th St Owners Corp. (the co-op).

BACKGROUND

In response to plaintiffs’ numerous complaints of excessive noise, the co-op sought to commission Acoustilog Inc. (Acoustilog) to evaluate the noise levels in plaintiffs’ apartment (*id.* ¶ 68). Notably, in demanding access to plaintiffs’ apartment to install the testing equipment, Kenneth Jacobs Esq., general counsel for the co-op, explained: “the Co-op must gather objective evidence to support your claims of excessive noise, which are being denied by your neighbor . . . The objective evidence that will be produced by this test can then be utilized to take appropriate legal action against the offending shareholder” (NYSCEF Doc No 149). In response, plaintiffs

demanded that the co-op guarantee that the acoustic report would not be used against them and that they would receive a copy of the final report (*id.*). Plaintiffs also demanded to know what provision of the lease gave the co-op authority to enter their apartment (*id.*). There is no evidence that Jacobs made the guaranties requested, but he responded that plaintiffs must grant access pursuant to § 25 of the lease, which provides that the co-op shall be given access to any given unit “to make or facilitate repairs” (NYSCEF Doc No 13 § 25). Specifically, he stated that plaintiffs’ “claims of excessive noise require[d] a more detailed examination to ascertain whether additional work may be needed in the building” (NYSCEF Doc No 158). Three days later, plaintiff allowed Acoustilog into their apartment (NYSCEF Doc No 1 ¶ 74), which produced a report summarizing its findings. Plaintiffs commenced this action on February 3, 2022 (*id.*).

Plaintiffs demanded that the co-op produce Acoustilog’s report (NYSCEF Doc No 137), but the co-op refused. Plaintiffs now move to dismiss the co-op’s answer; for an order precluding the co-op from offering the report into evidence; or for a conditional order compelling the co-op to produce the report, under penalty of dismissal for failure to comply (NYSCEF Doc No 144).¹ The co-op opposes on the grounds that the report is privileged (i) as attorney work product and (ii) because it was ordered in anticipation of litigation (NYSCEF Doc No 156).

i. Attorney Work Product

Pursuant to § 3101(c), “[t]he work product of an attorney shall not be obtainable.” “The burden of establishing any right to protection is on the party asserting it, and the protection claimed must be narrowly construed” (*Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 Ad3d 190, 191 [1st Dept 2005]). “[A]ttorney work product applies only to documents prepared

¹ The order to show cause and supporting affirmation refer to additional “categories of documents sought by Plaintiffs” (NYSCEF Doc Nos 144-145), however the parties advised in a status conference on August 1, 2024 that they have met and conferred regarding those other documents and the report is the only outstanding issue.

by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy" (*id.*). "Such material may consist of interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible things (*Acwoo Intl Steel Corp. v Frenkel & Co.*, 165 AD2d 752, 773 [1st Dept 1990] [internal citation omitted]).

The co-op argues that the work product "privilege extends to experts retained as consultants to assist in analyzing or preparing the case," and since the report was ordered by the co-op's general counsel for use in litigation, it should be protected (NYSCEF Doc No 156). Plaintiffs argue that the assertion that the report constitutes attorney work product is conclusory and unsupported by the facts (NYSCEF Doc No 157).

Here, the report was generated by Acoustilog, an acoustic measurement and testing consultant, not an attorney (compare *id.* [documents were privileged because they "were prepared by counsel in his professional capacity in an attempt to resolve this [] dispute and involved legal reasoning, analysis and professional skills"] with *Plimpton v Massachusetts Mut. Life Ins. Co.*, 50 AD3d 532, 533 [1st Dept 2008] ["The exemption for attorney work product does not apply because the letter was not prepared by counsel acting as such and does not otherwise uniquely reflect a lawyer's learning and professional skills"]). Since the report was not prepared by an attorney, it does not contain "legal advice, [] legal recommendations or attorney thought processes" (*Brooklyn Union Gas Co.*, 23 Ad3d at 191) and the co-op has not demonstrated that Acoustilog was "retained as consultants to assist in analyzing or preparing the case, 'as adjunct to the lawyer's strategic thought processes'" such that its report is qualified for exemption from disclosure (*Hudson Ins. Co. v Oppenheim*, 72 AD3d 489, 490 [1st Dept 2010] [emphasis added],

citing *Santariga v McCann*, 161 AD2d 320, 321 [1st Dept 1990]). Therefore, the report is not privileged as attorney work product.

ii. *Anticipation of Litigation*

Pursuant to CPLR § 3101(d), materials “prepared in anticipation of litigation or for trial . . . may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” As with the attorney work product privilege, “[t]he burden of proving that [materials are] privileged as material prepared solely in anticipation of litigation or trial is on the party opposing discovery” (*Sigelakis v Washington Group, LLC*, 46 AD3d 800, 800 [2nd Dept 2007]). “More particularly, the party asserting the privilege [must] *establish[] with specificity that the material was prepared exclusively in anticipation of litigation*” (*New York Schools Ins. Reciprocal v Milburn Sales Co., Inc.*, 105 AD3d 716, 717-18 [2nd Dept 2013] [emphasis in original, internal citations omitted]). “It is well settled that multipurpose reports are not exempt from disclosure under CPLR 3101(d)(2) where litigation is but one of the motives for their preparation” (*Crazytown Furniture, Inc. v Brooklyn Union Gas Co.*, 145 A.D.2d 402, 403 [2nd Dept 1988]).

The co-op argues that the report was ordered “for the exclusive use of the anticipated litigation that was forthcoming from either the Plaintiff suing the Coop or the Coop suing defendant Spiro,” noting that the tone of plaintiffs’ emails indicated that they were considering litigation (NYSCEF Doc No 156). Plaintiffs argue that the report is not privileged because only one of two scenarios is possible: (a) the report was performed for the dual purpose of determining if repairs were needed and in anticipation of litigation, or (b) the report was performed for the sole purpose of determining if repairs were needed, and the co-op gained

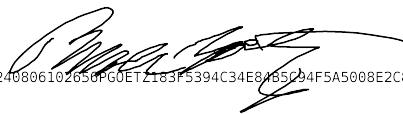
access to plaintiffs’ apartment under the false pretense of making repairs, in which case it would be unethical to allow the co-op to use the report against them (NYSCEF Doc No 145).

While the co-op asserts that it retained Acoustilog for the sole purpose of collecting evidence that it could use in future litigation, that is not what was communicated to plaintiffs. Plaintiffs indicated that they were wary of permitting access to their apartment because they did not want the test results to be used against them, and that they wanted a copy of the resulting report. Though it is unclear how that part of the conversation resolved (if at all), the email correspondence reflects that Jacobs asserted the co-op’s right to access pursuant to § 25 of the lease (which deals with repairs) in order “to ascertain whether additional work may be needed in the building” (NYSCEF Doc No 158). This appears to be the only reason that plaintiffs—who previously opposed permitting access—allowed Acoustilog into their apartment. Since the co-op gained access for the stated purpose of determining what repairs or acoustic work were needed to reduce noise, it cannot now claim that it did so solely in contemplation of litigation. Therefore, the report is not privileged as material prepared in anticipation of litigation.

CONCLUSION

Based on the foregoing, it is

ORDERED that plaintiffs’ motion is granted to the extent that the co-op is ordered to produce the Acoustilog report within 20 days of entry of this order.


20240806102650PG0ET2183F5394C34E8165C94F5A5008E2C8CA4

<u>8/6/2024</u> DATE					<u>PAUL A. GOETZ, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE