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JBGR LLC v Chicago Tit. Ins. Co.
2017 NY Slip Op 51006(U)
Decided on August 2, 2017
Supreme Court, Suffolk County
Emerson, J.
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Supreme Court, Suffolk County

JBGR LLC, Elliot WR Golf LLC, Insure New York Agency LLC, Hurney WR Golf LLC, Dempsey WR Golf LLC, and Walsh WR Golf LLC, Plaintiffs,

against

Chicago Title Insurance Company, Defendant.

35140-11

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Elizabeth H. Emerson, J.

Upon the following papers read on this motion*to amend and cross-motion for protective order* ; Notice of Motion and supporting papers *41-74* ; Notice of Cross Motion and supporting papers *83-94; 117* ; Answering Affidavits and supporting papers*77-82; 96-107* ; Replying Affidavits and supporting papers*108-116; 120*; it is,

ORDERED that the motion by the defendant for leave to amend its answer is denied; and it is further

ORDERED that the cross motion by the plaintiffs for a protective order is denied.

In 1994, Paul Elliot, an experienced real estate investor and developer, and another individual purchased 286 acres in Wading River, New York, on which they planned to build a residential community around an 18-hole golf course (the "Great Rock development"). By 1999, development of the golf course had been started; the roads and infrastructure were substantially complete, and 140 building lots had been sold. Elliot then sold his interest in the project to Thomas Costello, who continued to work on the development d/b/a Great Rock Golf, Inc. By 2005, 140 homes had been built, and Elliot entered into negotiations with Costello to repurchase the property. On January 19, 2006, Great Rock Golf, Inc., entered into a contract of sale with Great Rock Golf 2006 LLC, of which Elliot was the managing member. On April 12, 2006, Great Rock

Golf 2006 LLC assigned its right to purchase the property for $9.97 million to the plaintiff LLCs. Elliot is a member of the plaintiff Elliot WR Golf, LLC. As part of the purchase price, the plaintiffs gave Great Rock Golf, Inc., a promissory note in the principal amount of $2.97 million secured by a second mortgage on the property and guaranteed by the individual members of the plaintiff LLCs. The plaintiffs intended to build another 55 residences on the property, but they learned in 2009 that development had been limited to 140 homes pursuant to a declaration signed by Elliot and recorded on December 24, 1997. Also in 2009, Great Rock Golf, Inc., assigned the note and mortgage to its shareholders, including Costello. When the plaintiffs and the individual guarantors defaulted, Costello and the other shareholders of Great Rock Golf, Inc., commenced an action in this court (Index No. 28474-11) to recover on the note and guarantees. By an order dated July 23, 2012, this court granted their motion for summary judgment and awarded them damages in the principal amount of $2.97 million.

The plaintiffs in this action were defendants in the aforementioned action. They commenced this action against the defendant, Chicago Title Insurance Company, who issued a title insurance policy in connection with the sale of the property from Great Rock Golf, Inc., to them in 2006. The plaintiffs alleged that they were unaware of the 1997 declaration that restricted development of the property to 140 homes and that they detrimentally relied on the defendant's title search, which failed to advise them of the declaration. The plaintiffs alleged that the defendant is obligated to indemnify them for their losses because the policy failed to exclude the 1997 declaration from its coverage. The defendant's motion to dismiss the complaint was denied by an order of this court dated January 17, 2013. By a subsequent order of this court dated October 1, 2013, the defendant's motion for renewal and reargument was also denied. Both orders were affirmed by the Appellate Division (128 AD3d 900).

The parties proceeded with discovery and certified this case ready for trial on November 16, 2016. The plaintiff filed a note of issue on January 9, 2017. The defendant now moves for leave to amend its answer to withdraw two defenses, to amplify three defenses, and to assert six additional defenses. The defendant contends that the proposed amendments are based on evidence obtained during discovery. The plaintiffs cross move for a protective order. They contend that a memorandum obtained by the defendant during discovery is protected by the attorney-client privilege and the attorney work-product doctrine.

While leave to amend a pleading should be freely given (*see*, CPLR 3025 [b]), the decision whether to grant such leave is within the court's sound discretion, to be determined on a case-by-case basis (*see*, **Lane v Beard**, 265 AD2d 382, 383). Delay alone will not be a barrier to the amendment of an answer (**Id**.). It must be delay coupled with significant prejudice to the other side, the very elements of the latches doctrine (*see*, **Edenwald Contr. Co. v City of New York**, 60 NY2d 957, 959). When the action has already been certified ready for trial, judicial discretion in allowing amendments should be discrete, circumspect, prudent, and cautious (*see*, **Pellegrino v New York City Transit Auth.**, 177 AD2d 554, 557). The court should note how long the amending party was aware of the facts upon which the motion was predicated and whether such party offers a reasonable excuse for its delay (**Id.**)

The record reveals that the defendant was aware of the facts upon which its motion is based as early as June 5, 2015, when it sent a letter to the court stating that it intended to move for leave to amend the answer to interpose "zoning" and fraud defenses. In the same letter, the defendant also sought permission to move simultaneously for summary judgment. By letters dated June 17, 2015, the plaintiffs objected to the defendant making a motion for summary judgment on the ground that it would be premature since discovery was not yet complete. Court records indicate that, at a conference on June 22, 2015, the court ruled that there would be no summary judgment motions until the close of discovery. Contrary to the defendant's contentions, that ruling did not prevent the defendant from moving to amend its answer before moving for summary judgment.[FN1] That the defendant wanted to make a combined motion does not, in this court's opinion, constitute a reasonable excuse for the delay. Moreover, discovery is now closed and the case certified ready for trial. The defendant seeks to expand the existing defenses and assert six new defenses in its proposed amended answer. The court finds that, under these circumstances, the plaintiffs would be prejudiced if leave to amend were granted (*see*, **Lattanzio v Lattanzio**, 55 AD3d 431, 432; **Moon v Clear Channel Communications**, 307 AD2d 628, 630). Accordingly, the motion is denied.

Turning to the cross motion, in order to raise a valid claim of attorney-client privilege, the party seeking to withhold information must show that it was a confidential communication made between an attorney and a client in the context of legal advice or services (**Bertalo's Rest. v Exchange Ins. Co.**, 240 AD2d 452, 454). A communication is not privileged if it is made known to third parties (**People v Harris**, 57 NY2d 335, 343). Similarly, a documentary communication is not

confidential if copies thereof are sent to third parties (**Matter of Morgan v [*2]New York State Dept. of Envtl. Conservation**, 9 AD3d 586, 587-588).

The defendant obtained the document that the plaintiff contends is privileged (the "Dempsey memo") on April 8, 2015, in response to a subpoena served on a third party, Victor Prusinowski. The Dempsey memo memorializes a meeting that was held on January 5, 2010, at which issues concerning municipal applications for the Great Rock development were discussed. The meeting was attended by Mark Walsh, Joseph Dempsey, Paul Elliot, their attorneys, and Victor Prusinowski. The defendant contends that Prusinowski's presence at that meeting destroyed the privilege. The plaintiffs contend that Prusinowski was acting as their agent and that his presence at the meeting was necessary to facilitate attorney-client communications.

The attorney-client privilege may extend to the agent of a client when the communications are intended to facilitate the provision of legal services to the client (**Don v Singer**, 19 Misc 3d 1139[A] at *5). For the agency exception to apply, it must be shown that the client (1) had a reasonable expectation of confidentiality under the circumstances and (2) that disclosure to the third party was necessary for the client to obtain informed legal advice (**Id**.). To the extent that the advice sought is that of a non-lawyer service provider, the privilege does not protect the communication (**Bloomingburg Jewish Educ. Ctr. v Village of Bloomingburg**, 171 F Supp 3d 136, 141 [SDNY]). The privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client (**Id**.). The party asserting the privilege bears the burden of establishing its essential elements based on competent evidence, usually through affidavits, deposition testimony, or other admissible evidence (**Id**. at 140-141).

The plaintiffs have failed to meet their burden. The record reflects that the plaintiffs sought Prusinowski's advice as a non-lawyer service provider. At his deposition Prusinowski testified that he was an expediter or land-use consultant. He was retained by the plaintiffs after they closed on the property in 2006, long before this action was commenced. He was retained to make a case to the Town of Riverhead that "golf villas" should be considered an accessory use to the Great Rock development in order to get around the 140-home restriction on the property. He testified that he attended meetings and expressed this view to "a lot of people" in the Town of Riverhead, including the Planning Director, the Town Attorney, and

various members of the Town Board and Planning Board. The court finds that, while Prusinowski's advice may have been important to the legal advice given to the plaintiffs by their lawyers, it was not given to facilitate such legal advice (*cf.*, **United States v Kovel**, 296 F2d 918, 922 [2nd Cir; privilege extended to communications between attorney's client and accountant hired by attorney to enable the attorney to understand the client's financial information in order to provide legal advice]). Prusinowski's advice was given to facilitate approval by the Town of Riverhead of the plaintiffs' application to include 55 additional homes or "golf villas" in the Great Rock development. When, as here, what is sought is the advice or service of the non-lawyer, no privilege exists (**Id**.). Accordingly, the Dempsey memo is not protected by the attorney-client privilege.

Even if the Dempsey memo were privileged, disclosure of a privileged document results in waiver of the privilege unless the party asserting the privilege meets its burden of proving (1) that it intended to maintain confidentiality and took reasonable steps to prevent the document's disclosure, (2) that it promptly sought to remedy the situation after learning of the disclosure, and (3) that the party in possession of the materials will not suffer undue prejudice if a protective [*3]order is granted (**AFA Protective Sys., Inc., v City of New York**, 13 AD3d, 564, 565 [and cases cited therein]).

The plaintiff's repeated failure, over a period of almost two years, to seek a return of the Dempsey memo or a protective order constitutes a waiver of the privilege (*see*, **South Shore Neurologic Assocs., P.C., v Ruskin Moscou Faltischek, P.C.**, 32 Misc 3d 746, 752-753). The plaintiffs contend that they preserved their claim of privilege by raising it in a letter to the court dated June 17, 2015; by objecting to the defendant's use of the Dempsey memo at depositions; and by communicating to the court and to the defendant their intention to claw the memo back. The record reflects, however, that the plaintiffs took no concrete steps to obtain a ruling from the court on the privilege issue or to claw the Dempsey memo back until the defendant moved to amend the answer earlier this year. The plaintiffs proffer no excuse for their failure to promptly remedy the situation after learning of the disclosure of the memo. Accordingly, the plaintiffs have waived any claim of privilege by failing to exercise reasonable care and due diligence (**Id**., **Clark-Fitzpatrick, Inc. v Long Island R.R. Co.**, 162 AD2d 577).

Finally, the Dempsey memo is not an attorney work product. While it was prepared by John Dempsey, an attorney, he was not acting as an attorney when he prepared it (*see*, **Geffner v Mercy Med. Ctr.**, 125 AD3d 802). Moreover, it does not

contain language uniquely reflecting a lawyer's learning and professional skills, including legal research, analysis, conclusions, legal theory or strategy (*see*, **Fewer v GFI Group, Inc.**, 78 AD3d 412, 413). Accordingly, the cross motion is denied.

The parties are directed to proceed to trial. Their next conference with the court on September 6, 2017, will be a trial-scheduling conference.

DATED: August 2, 2017

Elizabeth H. Emerson

J.S.C.

Footnotes

Footnote 1: Rule 24 of the Rules of the Commercial Division ("Advance Notice of Motions") provides, in pertinent part, "Nothing in this rule shall be construed to prevent or limit counsel from making any motion deemed appropriate to best represent a party's interests."

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