East Hampton Union Free School Dist. v Sandpebble Builders, Inc.
2012 NY Slip Op 30941(U)
April 9, 2012
Sup Ct, Suffolk County
Docket Number: 07-01113
Judge: Thomas F. Whelan
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SHORT FORM ORDER

COPY

INDEX No. 07-01113
CAL. No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 2/24/12
ADJ. DATE _____
Mot. Seq. # 008- MotD
Conf. Date: 4/27/12

EAST HAMPTON UNION FREE SCHOOL DISTRICT, Plaintiff, - against - SANDPEBBLE BUILDERS INC. and VICTOR CANSECO, Defendants.	PINKS ARBEIT & NEMETH Attorneys for Plaintiff 140 Fell Court, Suite 303 Hauppauge, NY 11788 ESSEKS HEFTER & ANGEL Attorneys for Defendants 108 East Main Street, PO Box 279 Riverhead, NY 11901

Upon the following papers numbered 1 to 30 read on this motion to compel discovery; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 17 - 22; Replying Affidavits and supporting papers 23 - 28; Other defendant's memorandum of law 29 - 30; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants' motion for an order pursuant to CPLR 3124 compelling the plaintiff to comply with and respond to the defendants' first demand for discovery and inspection dated January 23, 2007 and second demand for discovery and inspection dated July 17, 2008 is determined as set forth below; and it is further

ORDERED that plaintiff is directed to serve the documents for which the Court has found that the School District has waived the attorney-client privilege, and those documents which do not fall under the work product doctrine within thirty days of service of a copy of this order with notice of entry; and it is further

ORDERED that if plaintiff fails to comply with this order, defendants may move for relief pursuant to CPLR 3126; and it is further

ORDERED that the parties are directed to appear for a compliance conference in the chambers of the undersigned on Friday, April 27, 2012 at 9:30 a.m.

In this breach of contract action, plaintiff East Hampton Union Free School District (hereinafter "the School District") seeks, in the first cause of action, a judgment declaring a written contract, dated April 2002, to be void, abandoned and/or terminated and unenforceable, in the second cause of action, a judgment declaring that defendants, Sandpebble Builders, Inc. and Victor Canseco (hereinafter "Sandpebble"), breached the duty of good faith and fair dealing, and in the third cause of action, damages for defendants' alleged breach of an oral estimating services contract.

The complaint alleges that in April of 2002 Sandpebble entered into a contract with the School District to perform certain construction management services in connection with a proposed $18 million construction project for renovations and expansions to the school system. The complaint alleges that the April 2002 contract and the $18 million project were abandoned in late 2004. Subsequently, the School District contemplated a new $90 million project for renovations and expansions to the school system. On June 21, 2005, a $90 million municipal bond offering was put to a vote and rejected by the voters of the School District. Thereafter, the School District contemplated a new $80 million renovation project for its school system. In early 2005, it is alleged that the School District requested and Sandpebble agreed to perform certain estimating services in anticipation of the $80 million project and the District paid Sandpebble approximately $200,000.00 to perform under the Estimating Services Contract. The complaint alleges that Sandpebble never performed the Estimating Services Contract. On March 21, 2006, an $80 million municipal bond offering was put to a vote and approved by the voters of the School District. The complaint further alleges that the parties engaged in negotiations for an agreement to have Sandpebble perform construction management services in connection with the $80 million project, however negotiations failed. On September 19, 2006, the School District issued a request for proposals and hired another construction manager. On December 4, 2006, the complaint alleges that Sandpebble served a notice of claim on the School District. The instant action was commenced on January 7, 2007. Subsequently, Sandpebble moved for summary judgment dismissing the complaint and for partial summary judgment on its first counterclaim against plaintiff.

In determining Sandpebble's motion for summary judgment, by Order dated May 12, 2010 (Pines, J.), the Court granted that branch of Sandpebble's summary judgment motion dismissing that part of the first cause of action of the complaint which sought a declaration that the April 2002 document is void. However, the Court found that triable issues of fact remained regarding whether the project contemplated by the 2002 Agreement was subsequently abandoned and if so, whether plaintiff properly terminated the contract with Sandpebble and denied the remainder of defendants'

motion seeking dismissal of the second and third causes of action, as well as defendants' counterclaim for breach of contract.

Upon appeal of the Court's Order, by Order dated December 20, 2011, the Appellate Division, Second Department held:

> The order is modified, on the law, by deleting the provision thereof denying that branch of the defendants' motion which was for summary judgment dismissing the second cause of action, and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed insofar as appealed and cross-appealed from, without costs or disbursements, and the matter is remitted to the Supreme Court, Suffolk County, for further proceedings on so much of the first cause of action as sought a judgment declaring that the plaintiff properly terminated the contract in accordance with its terms, the third cause of action, and the counterclaims and, thereafter, for the entry of a judgment, inter alia, declaring that the contract dated April 2002 is valid and enforceable and dismissing the second cause of action.

Sandpebble now moves for an order pursuant to CPLR 3124 to compel the School District to comply with its discovery demands dated January 23, 2007, and July 17, 2008. Counsel for Sandpebble affirms that there are six categories of documents which have been withheld from Sandpebble which are: documents which were either authored by, sent to, or copied to Michael E. Peters, Esq., documents that were either authored by, or sent to, attorneys with the law firm of Hawkins, Delafield & Wood, documents which appear to be solicitations by the School District for counsel for a bond referendum, documents that are identified as privileged but the author and recipient are not identified, and documents that are identified in a letter dated April 29, 2010 from the School District's former counsel.

In support of its motion, Sandpebble contends that its position in this case is that it was hired by the School District to act as construction manager for a project that varied in scope. The School District considered various projects as low as $20 million and as high as $120 million, but finally settled on an $80 million project that was approved by the District's voters. Sandpebble asserts that there never was a discreet $18 million project. Sandpebble further argues that the School District's reliance on the attorney-client privilege and/or the work product privilege, and the deficient manner in which it has responded to other discovery demands, has frustrated Sandpebble's efforts to obtain facts that bear upon the issues of whether the April 2002 contract was terminated and abandoned and whether the School District has sustained any damages as a result of what it claims is the breach of an oral estimating services agreement with Sandpebble. In addition, Sandpebble claims that the

School District's refusal to complete document discovery is delaying the scheduling and completion of depositions. Sandpebble submits, among other things, its first and second demands for discovery and inspection, the School District's responses, copies of the School District's privilege logs, and the personal affidavit by Michael E. Peters, Esq. with attachments.

Sandpebble argues that, in particular, the 19-page personal affidavit by Michael E. Peters, Esq., submitted to raise an issue of fact in opposition to Sandpebble's motion for summary judgment with respect to abandonment of the project, discusses facts that were based upon his own personal knowledge and upon a review of the file retained by the firm while he was employed by Morgan Lewis, the former counsel to the School District. Peters states that he worked on the School District's contemplated construction projects for the renovation and expansion of its facilities from 2004 through 2007, and had extensive contact with the School District and its Board, individuals in the School District's business office and defendant Canseco, the principal of Sandpebble. His affidavit discloses the details of his negotiations between the School District and Sandpebble. Sandpebble contends that the affidavit demonstrates that Peters is a central figure in the litigation by his characterization of termination letters that he sent to Sandpebble on April 13, 2005, May 20, 2005, and November 11,2005, which led the Supreme Court to determine that there were issues of fact sufficient to defeat Sandpebble's motion for summary judgment. Sandpebble contends that such testimony demonstrates that the School district is deemed to have impliedly waived the attorney-client privilege and any related work product privilege that might apply to anything Peters authored or received pertaining to the alleged termination and abandonment of the April 2002 agreement.

The remainder of the documents which Sandpebble requests are based upon its observation that the privilege log does not contain sufficient information to be able to determine whether the communications were confidential communications made for the purpose of obtaining legal advice or services, or whether they contain any underlying factual information that is relevant to the issues in this case and would not be protected by a privilege, such as, among other things, a description of the project that is relevant to this case. In addition, Sandpebble claims that the School District has refused to disclose documents that pertain to the amount of damages that it will be claiming at trial.

In opposition, the School District claims that Sandpebble's motion to compel is a meritless attempt to eviscerate the School district's attorney-client/work product privilege by manufactured discovery disputes which are four years old. The School District further argues that it has not waived any privileged by the filing of Michael E. Peters' affidavit, and denies that it has placed any privileged communications at issue in this lawsuit. In addition, the School District argues that the privileged material is not required to determine the validity of the School District's claims or defenses nor is such information vital to Sandpebble. The School District further states that extensive discovery has already been provided and all that remains is the material listed in the privilege logs.

In reply, Sandpebble asserts that motion practice and five subsequent appeals have consumed the five years that have passed since the commencement of this action and none of the parties have been deposed. In addition, Sandpebble recalls that plaintiff's counsel did not want to proceed with any discovery until the pending appeals were determined, which did not occur until recently, on December 20, 2011. With regard to Peters' affidavit, in light of the fact that he interposed himself as a fact witness for the purpose of defeating Sandpebble's motion for summary judgment, and because there is no other documentary support or basis for the statements that Peters made on behalf of the School District that there was an $18 million project that had been abandoned are at issue in this case, Sandpebble is entitled to disclosure of the basis of his personal knowledge, of his "percipient" knowledge and of his knowledge based upon information and belief of matters that he believes are true. Sandpebble contends that the issue of outstanding document disclosure must be resolved before it can proceed with any party depositions of the School District.

The burden of establishing that certain documents are privileged and that the privilege has not been waived is on the party asserting the privilege (***Spectrum Sys. Intl. Corp. v Chemical Bank***, 78 NY2d 371, 377, 575 NYS2d 809 [1991]; ***148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.***, 62 AD3d 486, 487, 878 NYS2d 727 [1st Dept 2009]; ***John Blair Communications v Reliance Capital Group, L.P.***, 182 AD2d 578, 582 NYS2d 720 [1st Dept 1992]). The burden cannot be satisfied by counsel's conclusory assertions of privilege and competent evidence establishing the privilege must be set forth by the party asserting the privilege (***Claverack Coop. Ins. Co. v. Nielsen***, 296 AD2d 789, 745 NYS2d 604 [3d Dept 2002]; ***Agovino v Taco Bell 5083***, 225 AD2d 569, 639 NYS2d 111 [2d Dept 1996]; ***Martino v Kalbacher***, 225 AD2d 862, 639 NYS2d 144 [3d Dept 1996]; ***Smith v Ford Foundation***, 231 AD2d 456, 647 NYS2d 82 [1st Dept 1996]). The burden of proving each element of the privilege rests upon the party asserting it and even if the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case where strong public policy requires disclosure (***Rossi v Blue Cross & Blue Shield***, 73 NY2d 588, 592, 542 NYS2d 508 [1989]; ***Priest v Hennessy***, 51 NY2d 62, 68-69, 431 NYS2d 511 [1980]). Whether a particular document is or is not protected by a privilege is necessarily a fact-specific determination, usually requiring an in camera review (***Spectrum Sys. Intl. Corp.***, *supra*; ***Rossi v Blue Cross & Blue Shield***, *supra*). "[D]ocumentary communications are not confidential if copies thereof are sent to third parties" (*see* ***Netherby Ltd. v G.V. Trademark Invs.***, 261 AD2d 161, 689 NYS2d 488 [1st Dept 1999]).

Pursuant to CPLR 4503 (a), the client may expressly or impliedly waive the privilege. Waiver is implied when a client voluntarily testifies to a privileged matter, publicly discloses such matter, or permits their attorney to testify regarding the matter (***Jakobleff v Cerrato, Sweeney & Cohn***, 97 AD2d 834, 468 NYS2d 895 [2d Dept 1983]). "A privilege may be impliedly waived where a party makes assertions in the litigation or asserts a claim that in fairness requires examination of protected communications" (***Granite Partners v Bear, Stearns & Co., Inc.***, 184 FRD 49, 55, 42 Fed R Serv 3d 806 [SDNY 1999]). A waiver may also be found where the client places

the subject matter of the privileged communication in issue (***Jakobleff v Cerrato, Sweeney & Cohn***, *supra*). An at issue waiver requires that the party asserting privilege:

> "places the subject matter of its own privileged communication at issue in litigation, so that the invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information" (***Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust***, 43 AD3d 56, 63, 837 NYS2d 15 [1st Dept 2007]).

Here, the Court finds that the School District has failed to meet its burden of demonstrating that its communications with counsel are protected by the attorney-client privilege. Moreover, selective disclosure is not permitted as a party may not rely on the protection of the privilege regarding damaging communications while disclosing other self-serving communications (*see* ***Village Board of Pleasantville v Rattner***, 130 AD2d 654, 515 NYS2d 585 [2d Dept 1987]). Peters' affidavit submitted in opposition to Sandpebble's motion for summary judgment represents an implied waiver of the attorney-client privilege as a matter of law (***Jakobleff v Cerrato, Sweeney & Cohn***, *supra*). The Court also finds that the School District has placed the subject matter of its privileged communications at issue inasmuch as the communications between the school district officials and counsel are crucial to learning whether there was, in fact, an $18 million project or an $80 million project for which it contracted with Sandpebble to manage, and the issues that follow. Accordingly, under these circumstances, the Court finds that the privilege has been waived and disclosure is required.

With respect to the qualified privilege of "materials prepared in anticipation of litigation," the party asserting the privilege must first demonstrate that the materials were prepared "exclusively for litigation" (***Commerce & Indus, Ins. Co. v. S.H. Laufer Vision World***, 225 AD2d 313, 314, 639 NYS2d 8 [1st Dept 1996]); *see* CPLR. 3101 [d][2]). Materials prepared for more than one reason, and not exclusively for litigation, may subject the materials to disclosure (***Commerce & Indus. Ins. Co. v. S.H. Laufer Vision World***, *supra* at 314). If the party asserting the privilege has established that the materials were prepared exclusively for litigation, the party seeking the disclosure may obtain the disclosure "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" (CPLR 3101 [d][2]). But, if the materials were not prepared exclusively for litigation -- that is, the materials were created for mixed purposes (***Commerce & Indus. Ins. Co. v. S.H. Laufer Vision World***, *supra* at 314, *citing* ***Mavrikis v. Brooklyn Union Gas Co.***, 196 AD2d 689, 601 NYS2d 612 [1st Dept 1993]) -- then § 3101(d)(2) does not apply and the party seeking the disclosure is "under no obligation to justify disclosure of

[the materials] with a showing of undue hardship" (***Commerce & Indus. Ins. Co. v. S.H. Laufer Vision World***, *supra* at 314).

The School District makes no showing in its opposition that any of the documents at issue were prepared exclusively for litigation. Initially, the Court notes that the documented communications between the School District and Martin Geiger, Esq. regarding a bond referendum for land acquisition, bond authorization, and bond financing, documents to and from Hawkins, Delafield & Wood, as bond counsel to the School District, and documents related to solicitations by the School District for counsel for a bond referendum would not have been prepared exclusively for litigation and are discoverable. Therefore, Sandpebble is not required to justify disclosure of these materials.

Finally, the remaining issues, regarding the documents that are identified as privileged wherein the author and recipient are not identified, the documents that are identified in a letter dated April 29, 2010 and not entered in the privilege log, and documents to and from Robert Sapir, Esq, counsel to the School District, are referred to a conference on **April 27, 2012** at 9:30 a.m. in the chambers of the undersigned.

Counsel for the School District is directed to serve the aforementioned documents, other than documents pertaining to the remaining issues, upon counsel for Sandpebble within thirty days of service of a copy of this order with notice of entry.

Dated: 4/9/12

THOMAS F. WHELAN, J.S.C.