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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

HANOVER INSURANCE COMPANY
a/s/o ROBERT L. POWLEY, P.C.,

Plaintiff,

-against-

Y AMERICA AND WONDER WORKS CONSTRUCTION CORP.,

Defendants.

& Third-party Action.

INDEX NO. 117829/2009

MOTION SEQ. NO. 003

The following papers, numbered 1 - 7 were considered on this motion to compel and cross-motion to strike the note of issue:

PAPERS	NUMBERED
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits	1, 2
Answering Affidavits — Exhibits	5, 6
Replying Affidavits	7
Cross-Motion: [X] Yes [ ] No	3, 4

Upon the foregoing papers, and for the reasons stated below, plaintiff's motion to compel defendant Wonderworks Construction Corporation ("Wonderworks") to produce the accident report prepared by Wonderworks employees shortly after the subject fire is granted and the cross-motion by Wonderworks to vacate the note of issue is denied.

Plaintiff seeks to compel Wonderworks to supply a report which, according to Leonard Vorobyov, an employee of Wonderworks, as testified to at his deposition, was prepared after the subject fire, by himself and the assistant to the president. Vorobyov EBT, Exh. C, Notice of Motion, at 24, lin15-24. According to Mr. Vorobyov, usually after an accident, reports are completed. *Id.* at 25, lines 2-9. Based upon such testimony, plaintiff argues that, while Wonderworks has taken the position that the report is privileged, arguing that it was prepared in anticipation of litigation, the document was prepared a mere two days after the fire, no attorney was involved at that time, and Wonderworks' witness testified that the report was prepared in the regular course of business.

Plaintiff further argues that, even if the report was prepared in anticipation of litigation as asserted by Wonderworks, the report is discoverable since the material is not otherwise available, as the fire happened on a Sunday and was cleaned up before plaintiff could conduct an investigation. Plaintiff maintains that Mr. Vorobyov's contemporaneous observations are likely to describe factual situations, that are not available from any other source. Moreover, plaintiff maintains that Wonderworks has not satisfied its burden of proof in establishing that the subject report is privileged. This court agrees.

CPLR §3101(g), titled "Accident reports", provides, in relevant part, that:

> "[e]xcept as otherwise provided by law, in addition to any other matter which may be subject to disclosure, there shall be full disclosure of any written report of an accident prepared in the regular course of business operations or practices of any...corporation...unless prepared by a police or peace officer for a criminal investigation or prosecution and disclosure would interfere with a criminal investigation or prosecution."

New York courts have generally held that disclosure of accident reports and investigative insurance reports are discoverable if "made in the regular course of business," including those obtained in the course of an internal investigation or for internal business purposes, even if litigation is likely and it is one of the reasons for the investigation. *148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 (1st Dept 2009). Even reports filed with a liability insurance carrier can be subject to discovery, if the party withholding discovery fails to show that the materials sought were prepared *solely* for litigation. *Id.*; *see also Rosario v. North General Hospital*, 40 AD3d 323, 323-24 (1st Dept 2007); *Westhampton Adult Home, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA*, 105 AD2d 627 (1st Dept 1984).

While CPLR §3101(b) provides that upon "objection by a person entitled to assert [a] privilege, privileged matter shall not be obtainable," "the burden of establishing any right to protection [from

disclosure] is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity". *Spectrum Sys. Intl. Corp. v. Chem. Bank*, 78 NY2d 371, 377 (1991); *New York Times Newspaper Div. of the New York Times Co. v. Lehrer McGovern Bovis, Inc.*, 300 AD2d 169, 171 (1st Dept 2002).

Here, it is not disputed that the subject accident report was prepared in the regular course of business, as testified to by Wonderworks' witness at his deposition, and that when there is an accident, it is Wonderworks' practice to complete reports. Wonderworks' claim of privilege is merely conclusively asserted by counsel and is not supported by any factual basis. New York courts have held that merely making conclusory assertions that a report is indeed made in anticipation of litigation is not enough to meet the burden of proof requirement. *See Brooklyn Union Gas Co. v Amer. Home Assurance Co.*, 23 AD3d 190, 191 (1st Dept 2005). Moreover, "mere recitation of [a] self-serving statement is insufficient to establish that the reports qualify for privilege of CPLR 3101(d)(2)." *James v Metro North Commuter R.R.*, 166 AD2d 266, 268 (1st Dept 1990). Here, significantly, in opposition to the within motion, Wonderworks failed to demonstrate that the subject report was prepared "solely in anticipation of litigation", as required. *148 Magnolia, LLC v. Merrimack Mutual Fire Insurance Co.*, 62 AD3d at 487. There is no indication or assertion that legal advice was given to Wonderworks with respect to the subject report and it is not disputed that litigation had not been commenced at the time that the report was made. Thus, as Wonderworks has failed to satisfy its burden of showing that the accident report is privileged, plaintiff's motion is granted to the extent that Wonderworks is compelled to supply a copy of the of the subject report.

The cross-motion by Wonderworks to vacate the note of issue is denied as untimely, since it was not served within 20 days after service of the note of issue and certificate of readiness, as required. *See* 22

NYCRR §202.21(c). Moreover, the affirmation of good faith is insufficient. *See* 22 NYCRR §202.7 (c).

Accordingly, it is

ORDERED that plaintiff's motion is granted to the extent that, *within 30 days of service of a copy of this order with notice of entry*, defendant Wonderworks shall supply to plaintiff the previously withheld accident report; and it is further

ORDERED that defendant Wonderworks' cross motion is denied; and it is further

ORDERED that, within 30 days of entry of this order, plaintiff shall serve a copy of this order upon all parties, with notice of entry.

Dated: July 3, 2012

DORIS LING-COHAN, J.S.C.

Check one: [ ] **FINAL DISPOSITION** [X] **NON-FINAL DISPOSITION**

Check if Appropriate: [ ] **DO NOT POST**

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