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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

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LORRAINE BROXMEYER, TERRENCE ECKSTEIN, and VITALIY LYUTYK,

Plaintiffs,

-against-

UNITED CAPITAL CORPORATION and AFP NINE CORPORATION.,

Defendants.

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PART 6

INDEX NO. 10581/07

MOTION DATE: 06/08/12
SEQUENCE NO: 002

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Upon the foregoing papers, the motion by defendants for an order precluding plaintiffs at the time of trial from offering or admitting evidence, or making any reference to, any violation by the defendants of the Village of Great Neck Plaza's Code noise ordinance, Chapter 145; precluding plaintiffs at the time of trial from offering or admitting into evidence, or making any reference to, privileged communications, documents and information pertaining to defendants' consulting expert's evidence, which were inadvertently disclosed during discovery; and precluding plaintiffs at the time of trial from offering or admitting into evidence, or making any reference to, plaintiff's purported medical conditions, and personal or bodily injuries and damages therefrom; is granted to the extend directed below.

This is an action for nuisance and negligence claims concerning the operation of rooftop heating, ventilation and air conditioning (HVAC) units (hereinafter referred to as the "units") on a building adjacent to the plaintiff's residential property, which is owned by defendants.

Following plaintiff's appeal of this Court's order which granted summary judgment to the defendants and dismissed all of plaintiff's claims against the defendants, the Appellate Division modified said order by reinstating the second and third causes of action asserted by plaintiffs Lorraine Broxmeyer and Vitaliy Lyutyk only, holding that plaintiffs had raised triable issues of fact with respect to said plaintiffs' private nuisance and negligence claims. *(Broxmeyer v. United Capital Corp.*, 79 A.D.3d 780, 914 N.Y.S.2d 181 (2d Dept. 2010)). The Appellate Division upheld the portion of the order determining that defendants were entitled to summary judgment dismissing the first cause of action, which alleges that the units' sounds violate section 145-5 of the Village's Noise Code, and modified the judgment by adding a provision "declaring that the defendants did not violate section 145.5 of the Code of the Village of Great Neck Plaza." (*Id.*). The Appellate Division also upheld this Court's award of summary judgment dismissing the complaint insofar as asserted by plaintiff Terence Eckstein against the defendants.

To begin, as the Appellate Division upheld the dismissal of plaintiffs' first cause of action and modified the judgment to declare specifically that the sounds from the units "did not violate section 145.5 of the Code of the Village of Great Neck Plaza," plaintiffs and their experts are hereby precluded at the time of trial from offering or admitting evidence of, or making any reference to, purported violations by defendants, and/or the units, of Chapter 145 of the Code of the Village of Great Neck Plaza (hereinafter "Village Code").

In addition, plaintiffs and their experts are further precluded from offering or admitting evidence of, or making reference to, other non-governing noise ordinances of other municipalities and entities, as such evidence is irrelevant. "Generally, evidence is relevant and admissible 'if it has any tendency in reason to prove the existence of any material fact, i.e., it makes determination of the action more probable or less probable then it would be without the evidence.'" (*American Motorists Ins. Co. v. Schindler Elevator Corp.*, 291 A.D.2d 467, 739 N.Y.S.2d 388 (2d Dept. 2002), *quoting, People v. Scarola*, 71 N.Y.2d 769, 525 N.E.2d 728 (1988)). Whether the noise emanating from the units violates other municipal noise ordinances which are not in effect or controlling in the Village of Great Neck Plaza fails to make the determination of plaintiff's action more or less probable than it would be without such evidence. The trial court has broad discretion in determining the materiality and relevance of proffered

evidence. (*Caplan v. Tofel*, 58 A.D.3d 659, 871 N.Y.S.2d 656 (2d Dept. 2009); *Hyde v. Rensselaer County*, 51 N.Y.2d 927, 491 N.E.2d 972 (1980)). Further, "even where technically relevant evidence is admissible, it may still be excluded by the trial court in the exercise of its discretion if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury." (*People v. Scarola*, 71 N.Y.2d 769, 525 N.E.2d 728 (1988)).

Defendants next contend that defendants' consulting expert's work product was inadvertently disclosed to plaintiffs and that defendants made a prompt demand for its return, but plaintiffs have failed to return same. Defendants contend that they retained the a consulting expert in connection with this litigation who produced a report concerning the units' sound relative to the Village Code. Defendants contend that the documents are privileged and were emailed by counsel to the Vice-President of both defendants, Michael Lamoretti, as a private attorney-client communication. Mr. Lamoretti, who submits an affidavit in support of defendants' motion, inadvertently forwarded the documents to a non-party air-conditioning contractor that services the units, along with the counsel's email. Mr. Lamoretti attests that on June 17, 2008, he received an attorney-client email from defendants' counsel forwarding attachments of the consulting expert's work-product. He attests that the attachments concerned the subject HVAC units, and, on the same day, he inadvertently forwarded the privileged email from counsel and the consulting expert's work-product to the representative of the air conditioning contractor company that services the units, Mr. Ronald Nathan. Non-party, Ronald Nathan, was thereafter subpoenaed by plaintiffs and produced the privileged documents in response to the plaintiffs' subpoena. As the disclosure of said documents from Mr. Lamoretti to Mr. Nathan was inadvertent, and as defendants demanded return of same at the deposition of non-party Ronald J. Nathan on November 20, 2008, defendants move for an order precluding the use of the inadvertently disclosed documents.

In opposition, plaintiffs contend, *inter alia*, that the email sent to Mr. Lamoretti by counsel is not privileged as it does not contain legal advice but instead defendants' counsel forwards a series of charts by a noise engineer that measures the noise inside of plaintiff's apartment. Plaintiffs further contend that since the documents were forwarded by Mr. Lamoretti

to a non-party, they are not protected by the attorney-client privilege. Contrary to plaintiffs contentions, however, Mr. Lamoretti attests that the email from his counsel and the attached documents of the defendants' consulting expert were inadvertently disclosed to the non-party. Further, it is undisputed that the alleged unintentionally disclosed documents, which were forwarded with counsel's email to Mr. Lamonetti, contained reports and charts by a noise engineer, or consulting expert, retained by the defendants. Reports of consultants retained by counsel, which are prepared in anticipation of litigation, are exempt from disclosure based upon the attorney-client and work-product privileges. (*Oakwood Realty Corp. v. HRH Const. Corp.*, 51 A.D.3d 747, 858 N.Y.S.2d 677 (2d Dept. 2008)(holding that such reports are "'an adjunct to the lawyer's strategic thought processes, thus qualifying for complete exemption from disclosure' under the attorney work-product doctrine as well as CPLR 3101(d)(2)"); *Santariga v. McCann*, 161 A.D.2d 320, 555 N.Y.S.2d 309 (1st Dept. 1990)). "Disclosure of a privileged document generally operates as a waiver of privilege unless it is shown that the client intended to maintain the confidentiality of the document, reasonable steps were taken to prevent disclosure, the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation, and the parties who received the documents will not suffer undue prejudice if a protective order against the use of the document is issued." (*Oakwood Realty Corp. v. HRH Const. Corp.*, 51 A.D.3d 747, 858 N.Y.S.2d 677 (2d Dept. 2008); *Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, 301 A.D.2d 23, 749 N.Y.S.2d 488 (1st Dept. 2002)). "The attorney-client privilege applies to confidential communications between clients and their attorneys made 'in the course of professional employment' (CPLR 4503(a)(1)), and such privileged communications are absolutely immune from discovery (CPLR 3101(b))." (*New York Times Newspaper Div. of N.Y. Times Co. v. Lehrer McGovern*, 300 A.D.2d 169, 752 N.Y.S.2d 642 (1st Dept. 2002)).

As the email was sent from counsel to an officer of the defendant and contained reports made by the consulting expert who was retained by the defendants for the defense of this action, and as defendants have submitted proof that the disclosure of said documents was inadvertent, said email and documents are covered by the attorney-client and work-product privileges. Further, as the defendants made a demand for the return of said email and documents promptly upon discovery at Mr. Nathan's deposition, as there is no evidence that the plaintiffs have a

substantial need for the email and documents or that plaintiffs cannot obtain the substantial equivalent of same by other means, and as there is no evidence that the plaintiffs would be unduly prejudiced if a protective order against the use of the email and documents is issued, it is hereby ordered that plaintiffs are precluded at the time of trial from offering or admitting into evidence, or making any reference to, the privileged communications, email, documents and information pertaining to defendants' consulting expert which were inadvertently disclosed to Mr. Nathan, and then to plaintiffs' counsel, during discovery. (See, *Oakwood Realty Corp. v. HRH Const. Corp.*, 51 A.D.3d 747, 858 N.Y.S.2d 677 (2d Dept. 2008); *Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, 301 A.D.2d 23, 749 N.Y.S.2d 488 (1st Dept. 2002); *New York Times Newspaper Div. of N.Y. Times Co. v. Lehrer McGovern*, 300 A.D.2d 169, 752 N.Y.S.2d 642 (1st Dept. 2002)). Further, the Court notes that the Rules of Professional Conduct 4.4(b) state that "a lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the documents was inadvertently sent shall promptly notify the sender," and there is no evidence that same was done here.

Lastly, plaintiffs are hereby precluded at the time of trial from offering or admitting into evidence, or making any reference to, plaintiffs' medical conditions and personal or bodily injuries and damages, as no such allegations were asserted in plaintiffs' complaint and no such claims were made in the plaintiffs' bill of particulars. Additionally, the Court notes that plaintiffs have failed to oppose this portion of defendants' motion within their opposition papers, as plaintiffs contend therein that they do not intend to introduce any such evidence of medical conditions or personal injuries at trial.

This constitutes the decision and Order of this Court.

Dated: August 2, 2012

Anthony L. Parga, J.S.C.