SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. PART _____
Justice

Index Number : 152078/2012
ARMAN, CORICE
vs
LOUISE BLOUIN MEDIA
Sequence Number : 003
STRIKE ANSWER

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/6/13

CK
_____, J.S.C.
CYNTHIA S. KERN
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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CORICE ARMAN,

Plaintiff,

Index No. 1502078/2012

-against-

DECISION/ORDER

LOUISE BLOUIN MEDIA INC.,

Defendant.

----------x

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action to recover damages stemming from the destruction of a statue during a photo shoot in her apartment. Plaintiff now moves for an order compelling the production of the following items: (1) the statements made by Albert Toy and Risha Ohashi, respectively, on May 12, 2011, which defendant has objected to disclose on the ground that they are protected under the attorney-client privilege and/or as attorney work product; and (2) the deposition of Rina Ohashi. For the reasons set forth below, plaintiff's motion is granted in part and denied in part.

The relevant facts are as follows. Plaintiff is the widow of the French-American artist,

Arman, and her home is filled with valuable artwork and antiquities collected with her husband during their marriage. Defendant is the owner of a media conglomerate, including the online and print magazine Art+Auction, which arranged to publish a feature article on plaintiff and her art collection. For this story, defendant arranged a photography shoot at plaintiff's home. The photo shoot occurred on May 12, 2011, and defendant's art director, Albert Toy, attended and directed the Photo Shoot along with his assistant Rena Ohasi. Also present at the photo shoot was the photographer Eric Guillemain, hired by Art+Auction for the show, and his assistant. During the course of the photo shoot, plaintiff's full-figure seated female terracotta statue from Nigeria, which is referred to in the primitive art work as a "Nok Figure," was destroyed (the "incident"). According to the affidavit of Ms. Ohashi, she was in the kitchen with plaintiff when the Nok Figure was destroyed and she did not see it happen, nor did she assist in moving the figure at any point.

On or about April 24, 2012, plaintiff commenced this action to recover for the damages she sustained as a result of the destruction of the Nok Figure. During discovery, it was revealed that on the day of the incident the individuals present at the photo shoot were requested to write a written statement regarding what had occurred at the photo shoot. Specifically, by email dated May 13, 2011, one day after the incident, Benjamin Genocchio, editor in chief of Art+Auction and vice president of defendant, wrote to Mrs. Arman's publicist, Robin Davis, stating that "I requested a written report from all my people who were there so I can try to determine what happened." Additionally, during Mr. Genocchio's deposition, he testified that, "the people that were at the photo shoot were asked to provide a written document" and "that material was provided to the [in-house] attorney." During Mr. Toy's deposition he confirmed that

immediately after the incident, Ellen Fair, deputy editor of Art+Auction, and Mr. Gennochio instructed him to "write down–what had occurred, and from, throughout the entire day leading to the fall of the statue and send it to Dawn Fasano, [defendant's in-house attorney]." Mr. Toy further testified that he wrote the requested email and sent it to Ms. Fasano as well as Mr. Gennochio and Ms. Fair. Additionally, Mr. Toy testified that he recalled his assistant, Ms. Ohashi, on the computer making a statement of the events as well. Plaintiff has made a demand for these statements but defendant has objected to disclosure on the ground that they are protected by attorney-client privilege.

Plaintiff brings the instant motion to compel the disclosure of Mr. Toy and Ms. Ohashi's statements on the grounds that they are discoverable pursuant to CPLR § 3101(g) and are material and necessary to the present case. Plaintiff also seeks an order compelling the deposition of Ms. Ohashi. In opposition, defendant contends that the two statements are precluded from disclosure as they are protected under the attorney-client privilege. Specifically, defendant argues that plaintiff's classification of the email correspondence as an "accident report" does not take the correspondence outside the ambit of the attorney-client privilege and, in any event, the statements are not "accident reports" within the meaning of CPLR § 3101(g) as they were not made in the regular course of business operations. Additionally, defendant contends that the statements are protected as attorney-work product as they contain annotations from defendant's in-house counsel.

New York Law directs that there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." CPLR § 3101(a). However, pursuant to CPLR § 3101(d)(2), material otherwise discoverable and that was

prepared in anticipation of litigation "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." Additionally, a "confidential communication" made from a client to its attorney for "the purpose of obtaining legal advice or services" is protected from disclosure under attorney-client privilege. *Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 69 (1980). The burden of establishing that certain documents are privileged and protected from discovery is on the party asserting the privilege and the protection claimed must be narrowly construed. *See e.g.*, *148 Magnolia, LLC v. Merrimack Mutual Fire Insurance Co.*, 62 A.D.3d 486, 487 (1st Dept 2009); *see also Miranda v. Miranda*, 184 A.D.2d 286 (1st Dept 1992). Indeed, "the need to apply [privilege] cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure." *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 593 (1989).

In the case of written reports of an accident, such reports are generally discoverable if they are made in the regular course of business operations or practices and not exclusively prepared for the purpose of litigation. CPLR § 3101(g) provides, in relevant part, that "[e]xcept as is 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." In analyzing the interplay between Section 3101(g) and Section 3101(d)(2), which conditionally exempts material that was prepared in anticipation of litigation, the First Department held that "written reports of accidents prepared by an employee as part of the regular course of business operations or practices of the corporate tort-

feasor and assembled for transmittal to its attorney, even where the sole motive behind the business operations or practices is litigation, are discoverable." *Matter of Goldstein v. New York Daily News*, 106 A.D.2d 323, 324 (1st Dept 1984). However, the First Department recognized that "[a] distinction exists between said reports and written statements of accidents prepared exclusively for litigation, but not in the regular course of the [corporation's] business operations or practices." Those reports, the court noted, are "conditionally exempt from disclosure under CPLR § 3101(d)." Accordingly, in order for a written statement of an accident to be exempt from disclosure, a corporation must demonstrate that it was not prepared in "the regular course of business operations or practices," but "only at the request of its attorneys for the use of the attorneys" in litigation. *Id.* To make this showing, the party asserting the privilege must present sufficient evidence in support and "the court should not accept a mere assertion by counsel that specific information fits within the privilege." *Miranda*, 184 A.D.2d at 286; *see also Smith v. Ford Found*, 231 A.D.2d 456 (1st Dept 1996); *Agovino v. Taco Bell*, 225 A.D.2d 569 (2nd Dept 1996).

In the present case, the court finds that the statements made by Mr. Toy and Ms. Ohashi on the day of the incident are written statements of an accident that are material and necessary to the instant action and defendant has failed to satisfy its burden of demonstrating that they were not prepared in the ordinary course of its business operations or practices but solely at the request of its in house counsel to be used by the attorney for litigation. In its opposition papers, defendant makes several factual assertions in support of its claim of privilege, but none are supported by competent evidence. Specifically, defendant asserts that the statements are protected by attorney-client privilege as the defendant's in-house counsel requested that Mr.

Genocchio obtain the statements for legal purposes. However, defendant fails to present the affidavit of its in-house counsel attesting to this. Instead, defendant presents only the self-serving conclusory affidavit of its current attorney, which is insufficient as a matter of law as its current attorney does not have personal knowledge of these facts. Additionally, defendant's reliance on Mr. Genocchio and Mr. Toy's deposition testimony is unavailing. As an initial mater, Mr. Genocchi's testimony reveals only that in-house counsel was "involved" with the statements and that "she wanted to establish a clear outline of [the incident]." Additionally, Mr. Toy's testimony only confirms that Mr. Genocchio and Ms. Fair requested that he write an email describing what events had happened and "send it to Dawn [defendant's in-house counsel]." These facts are simply insufficient to satisfy defendant's burden that the statements are privileged as the mere fact that an attorney is involved or received a communication does not demonstrate that the statements were "at the request of its attorneys for the use of the attorneys" in litigation. *Goldstein*, 106 A.D.2d at 324. Additionally, the court notes that it is immaterial that defendant refers to its claim of privilege as "attorney-client" as opposed to material prepared in anticipation of litigation, as a close reading of its papers reveals that what it is really arguing is that the statements were not made in the regular course of its business but were prepared at the sole discretion of its in house counsel to be used in litigation. Accordingly, the analysis is the same.

Additionally, to the extent defendant contends that the statements are protected as attorney-work product as they contain annotations by defendant's in-house counsel, such contention is without merit. Whether or not defendant's in-house counsel has made hand-written notes on the statements has absolutely no bearing on whether the statements themselves are privileged. If defendant cannot produce a copy of the statements without the alleged

annotations by defendant's in-house counsel, the notes are to be redacted such that only the statements of Mr. Toy and Ms. Ohashi will be provided to plaintiff.

Accordingly, the portion of plaintiff's motion seeking to compel the disclosure of Mr. Toy and Ms. Ohashi's statements is granted. However, the remaining portion of plaintiff's motion seeking the deposition of Ms. Ohashi is denied as defendant has provided the affidavit of Ms. Ohashi, wherein she attests that she did not touch or move the statue, nor was she present in the room when the figure was moved and subsequently fell. Based on the foregoing, it is hereby

ORDERED that defendant shall produce to plaintiff on or before September 20, 2013, the statements of Albert Toy and Rena Ohashi that were made on May 12, 2011 regarding the incident at issue in the present case. This constitutes the decision and order of the court.

Dated: 9/6/13

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.