

<b>Old Republic Ins. Co. v United Natl. Ins. Co.</b>
2013 NY Slip Op 33423(U)
December 30, 2013
Supreme Court, New York County
Docket Number: 155995/2012
Judge: Shirley Werner Kornreich
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54  
*Justice*

*Old Republic*  
v.  
*United National*

INDEX NO. 155995/12  
MOTION DATE 12/17/13  
MOTION SEQ. NO. 007

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>97-125</u>
Answering Affidavits — Exhibits _____	No(s). <u>129-132</u>
Replying Affidavits _____	No(s). <u>133-141</u>

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

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

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

Dated: 12/30/13

**SHIRLEY WERNER KORNREICH**  
*[Signature]*  
J.S.C. 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 54

-----X  
OLD REPUBLIC INSURANCE COMPANY,  
directly and as subrogee of STS STEEL, INC.,

Index No.: 155995/2012

**DECISION & ORDER**

Plaintiff,

-against-

UNITED NATIONAL INSURANCE COMPANY,

Defendant.

-----X  
SHIRLEY WERNER KORNREICH, J.:

Defendant United National Insurance Company (United) moves to compel the production of certain documents withheld by plaintiff Old Republic Insurance Company (ORIC) on the ground of attorney-client privilege. Defendant’s motion is denied for the reasons that follow.

The court assumes familiarity with its order dated June 7, 2013 (the June Order),<sup>1</sup> which sets forth the facts of this case and the related personal injury and insurance coverage actions. On this motion, United seeks the production of attorney communications relevant to why ORIC decided to fund the Pollack Action settlement, which was allegedly due to oral assurances that United would “contribute up to its \$5 million policy limit to the settlement on behalf of STS before ORIC would be obligated to contribute any money.” See June Order at 3, citing AC ¶ 29. These assurances form the basis of breach of contract and equitable estoppel (really promissory estoppel, as equitable estoppel is a defense) claims. The requested communications, United argues, are relevant for two reasons: (1) to fully understand the scope of the parties’ alleged oral agreement; and (2) to see if and how ORIC changed its position regarding the settlement, a

<sup>1</sup> All defined terms have the same meaning as in the June Order.

necessary element of an estoppel claim. Thus, United avers, the at-issue doctrine makes these otherwise privileged communications discoverable.

### *I. Legal Standard*

“‘At issue’ waiver of privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that 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 Americas v Tri-Links Inv. Trust*, 43 AD3d 56, 63 (1st Dept 2007). However, “that a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself ‘at issue’ in the lawsuit; if that were the case, a privilege would have little effect.” *Id.* at 64. “Generally, no ‘at issue’ waiver is found where the party asserting the privilege does not need the privileged documents to sustain its cause of action.” *Ambac Assur. Corp. v DLJ Mortg. Capital, Inc.*, 92 AD3d 451, 452 (1st Dept 2012); *see also Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 62 AD3d 581, 582 (1st Dept 2009) (no at-issue waiver where “plaintiff disavows any intention to use such communications and defendant fails to show that any such communications are necessary to either plaintiff’s claim or its defense”).

Where reliance is an element of plaintiff’s claim (i.e., claims based on estoppel or fraud), the mere assertion of such a claim does not automatically place privileged communications at issue, regardless of their relevance. As Magistrate Judge Francis explained:

Even where a party’s state of knowledge is particularly at issue, such as in a case involving claims of laches or justifiable reliance, waiver of the privilege should

not be implied because the relevant question is not what legal advice was given or what information was conveyed to counsel, but what facts the party knew and when. Invasion of the attorney-client privilege is not necessary; rather, the discovering party should simply inquire directly of the other party as to its knowledge of relevant facts, which must be disclosed.

*Arkwright Mut. Ins. Co. v Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 1994 WL 510043, at \*12 (SDNY 1994).<sup>2</sup>

## II. Discussion

The weight of the case law is in ORIC's favor. United is not entitled to the privileged communications unless ORIC seeks to use them, which it does not. ORIC's decision not to utilize the subject communications, however, somewhat imperils its case, which rests entirely on its contention (unsupported by the AC, but allowed under New York's notice pleading standard) that the parties -- highly sophisticated insurance companies -- orally agreed as to the parameters of the funding to settle an extremely contentious litigation. ORIC, as the plaintiff, has the burden of proving its *prima facie* case establishing the material terms of the parties' oral agreement (for breach of contract) and its position both before and after United's promise (for its estoppel claim). If ORIC does not, for instance, produce attorney communications prior to United's promise (all the relevant communications involved attorneys), it may not be able to prove what its original position was. Ergo, it cannot prove a change in position. If ORIC makes

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<sup>2</sup> The First Department and other New York state courts have cited favorably to *Arkwright*. See *Deutsche Bank*, 43 AD3d at 64; *DH Holdings Corp. v Marconi Corp.*, 10 Misc3d 530, 532-33 (Sup Ct, NY County 2005). Other courts, with similar privilege doctrines, have also concluded that "at issue" waiver is not forfeited in estoppel cases notwithstanding the relevance of the privileged communications. See, e.g., *Chamberlain Group v Interlogix, Inc.*, 2002 WL 467153, at \*4 (ND Ill 2002).

the strategic decision not to produce this evidence, such decision might doom its case. Yet, that is for ORIC to decide, not United.

As for United's contention that ORIC is impermissibly making selective disclosure, "[using the attorney-client] privilege both as a sword and a shield, to waive when it enures to [its] advantage, and wield when it does not" [*Farrow v Allen*, 194 AD2d 40, 45 (1st Dept 1993)], such a determination cannot be made absent *in camera* review of the subject documents. ORIC maintains that it is not making misleading selective disclosure, and, in fact, the number of withheld documents pale in comparison to the thousands of disclosed documents. On the instant record, the court cannot determine if ORIC has made selective disclosure. Hence, United, if it so chooses, may request that such issue be referred to a Special Referee (or, if the parties prefer, a private Special Master). Such reference would be limited exclusively to whether selective disclosure has been made, which, for well established fairness concerns, could mandate full disclosure.<sup>3</sup> See *MBIA Ins. Corp. v Patriarch Partners VIII, LLC*, 2012 WL 2568972 (SDNY 2012). Accordingly, it is

ORDERED that the motion to compel by defendant United National Insurance Company is denied; and it is further

ORDERED that, if United elects to refer the selective disclosure issue to a Special Referee, it must move by order to show cause within 10 days of the entry of this order on the NYSCEF system; and it is further

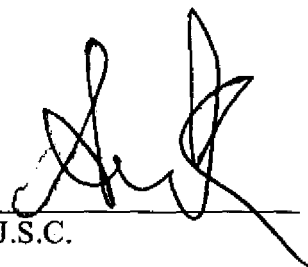
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<sup>3</sup> To be sure, United's argument that there is a fundamental unfairness to not being able to discover the full context the parties' state of mind in an estoppel claim is not lost on the court. Yet, the applicable case law holds otherwise.

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County,  
60 Centre Street, Room 228, New York, NY, for a status conference on January 21, 2013 at  
10:30 in the forenoon.

Dated: December 30, 2013

ENTER:

  
\_\_\_\_\_  
J.S.C.