

Grontas v Kent North Assoc. LLC

2014 NY Slip Op 30233(U)

January 25, 2014

Sup Ct, New York County

Docket Number: 603482/2009

Judge: Cynthia S. Kern

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KERN
Justice

PART 55

GRONTAS, PETER, ETAL.

INDEX NO. 603482/09

- v -
KENT NORTH ASSOCIATES, LLC,
ETAL.

MOTION DATE _____

MOTION SEQ. NO. 10

MOTION CAL. NO. _____

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

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

is decided in accordance with the annexed decision.

FILED

JAN 28 2014

NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
JAN 27 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: 1/25/14 _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
PETER GRONTAS and VALENTINA SCHEMBRI,

Plaintiffs,

Index No. 603482/2009

-against-

DECISION & ORDER

KENT NORTH ASSOCIATES LLC, et al.,

Defendants.
-----X

HON. CYNTHIA S. KERN, J.S.C.

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

Papers

FILED Numbered

Notice of Motion and Affidavits Annexed.....	JAN 28 2014	1
Affirmations in Opposition.....		2
Replying Affidavits.....	NEW YORK	3
Exhibits.....	COUNTY CLERKS OFFICE	4

Plaintiffs commenced the instant action seeking both equitable and monetary relief for alleged economic damages they sustained as a result of continued water infiltration into their apartment. Non-party the Board of Managers of the Schaefer Landing North Condominium (the "Board") now moves for an order to quash the subpoena served by plaintiffs to compel document production from Simpson, Gumpetz & Heger ("SGH"), who was retained as an expert by the Board in a related action entitled *The Board of Managers of the Schaefer Landing North Condominium v. Kent North Associates, et al.*, Index No. 12693/2010 (the "Supreme Kings Action"). For the reasons set forth below, the Board's motion is granted.

The relevant facts are as follows. On July 16, 2005, plaintiffs Peter Grontas and

Valentina Shembri purchased a unit in the newly constructed condominium building located at 440 Kent Avenue in the Williamsburg section of Brooklyn, New York (the "Building"). Shortly after plaintiffs moved into the unit, they experienced significant and persistent water intrusion and leaks in the living room of the unit during periods of heavy rain. The leaks and water infiltration created damp, wet and uninhabitable conditions and caused damage to plaintiffs' personal property. The issue was never resolved and after two years, on October 1, 2008, plaintiffs vacated the unit and moved to an apartment in Manhattan.

Plaintiffs initiated this action by the filing of a summons and complaint on or about November 16, 2009, asserting allegations of, among other things, design and construction defects, the most significant of which involve water infiltration against several defendants, including the Board. Thereafter, on or about May 21, 2010, the Board, on behalf of the Building's unit owners, commenced the Supreme Kings Action, which also involves claims of construction defects against several of the same defendants herein. As preparation for that case, SGH, an engineering firm, was retained as a consulting expert. On or about November 19, 2013, plaintiffs served a subpoena on SGH demanding the production of its expert file relating to its work for the Board in the Supreme Kings Action (the "Subpoena"). The Board brings the instant motion to quash the subpoena on the ground that the sought after documents are privileged.

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.” It is well settled that “[s]uch privilege extends to experts retained as consultants to assist in analyzing or preparing the case, ‘as an adjunct to the lawyer’s strategic thought processes, thus qualifying for complete exemption from disclosure.’” *Hudson Ins. Co. v. Oppenheim*, 72 A.D.3d 489, 490 (1st Dept 2010) (quoting *Santariga v. McCann*, 161 A.D.2d 320, 321 (1st Dept 1990)).

In the present case, the Board’s motion to quash the Subpoena is granted as it improperly seeks discovery of materials prepared in anticipation of litigation that is exempt from disclosure. As an initial matter, it is undisputed that the report sought by plaintiff from SGH was prepared in anticipation of litigation to assist the Board in preparing for the Supreme Kings Action. Additionally, plaintiffs have failed to demonstrate a substantial need for the report and an inability to obtain the substantial equivalent of the report by other means. Plaintiffs attempt to argue that they are unable to obtain the requested disclosure from any independent source. However, this contention is without merit as plaintiffs are free to hire their own expert to conduct an investigation of the Building and the fact that this may cost them time and expense is insufficient in and of itself to demonstrate an undue hardship in obtaining the information.

Additionally, to the extent plaintiffs argue that they are entitled to these documents under the fiduciary exception to attorney-client privilege as articulated in *Hoopes v. Carota*, 142 A.D.2d 906 (3d Dept 1988), such contention is without merit. Under the fiduciary exception, where a party involved in litigation is in a fiduciary relationship with another person, courts have permitted the other person, upon a showing of good cause, to pierce the attorney-client privilege

for communications between counsel and the fiduciary. *See Hoopes v. Carota*, 142 A.D.2d 906 (3d Dept 1988). In the instant action, as an initial matter, this exception is inapplicable as SGH's report is protected from disclosure as attorney work product and not attorney client privilege and plaintiffs have failed to present any authority extending the fiduciary exception to attorney work product immunity. Additionally, even assuming, *arguendo*, that such exception applies to attorney work product immunity, the exception is still inapplicable as plaintiffs cannot demonstrate "good cause" for the expert report. As the court stated above, plaintiffs are free to hire their own expert to investigate the Building and the fact that this may cost them extra time or money is insufficient to demonstrate good cause for SGH's report.

Accordingly, the Board's motion to quash the Subpoena is granted and it is hereby

ORDERED that SGH need not, and shall not, produce the material sought in the Subpoena. This constitutes the decision and order of the court.

Dated:

1/25/14

Enter: _____

OK

J.S.C.

FILED
JAN 28 2014
NEW YORK
COUNTY CLERK'S OFFICE