

**TC Ravenswood, LLC v National Union Fire Ins. Co.
of Pittsburgh, PA**

2014 NY Slip Op 30235(U)

January 24, 2014

Sup Ct, New York County

Docket Number: 400759/2011

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE Justice

PART 12

Index Number : 400759/2011
TC RAVENSWOOD, LLC.
vs
NATIONAL UNION FIRE INSURANCE
Sequence Number : 016
ORDER OF PROTECTION

INDEX NO. 400759/2011
MOTION DATE
MOTION SEQ. NO. 016

The following papers, numbered 1 to , were read on this motion tofor
Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits No(s) 293-304
Answering Affidavits -- Exhibits No(s) 324-327
Replying Affidavits No(s) 330-340

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 1/24/14

BARBARA JAFFE J.S.C.
NON-FINAL DISPOSITION

- 1. CHECK ONE: CASE DISPOSED
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 : IAS PART 12

-----X
TC RAVENSWOOD, LLC,

Plaintiff,

-against-

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH PENNSYLVANIA
(a/k/a AIG, n/k/a Chartis), ASSOCIATED
ELECTRIC & GAS INSURANCE SERVICES
LIMITED, ACE INA INSURANCE, AND ARCH
INSURANCE COMPANY, and FACTORY
MUTUAL INSURANCE COMPANY,

Defendants.

-----X
NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH,
PENNSYLVANIA, ASSOCIATED ELECTRIC
& GAS INSURANCE SERVICES LIMITED,
ACE INA INSURANCE COMPANY, and ARCH
INSURANCE COMPANY,

Plaintiffs,

-against-

TRANSCANADA ENERGY USA, INC. and TC
RAVENSWOOD SERVICES CORP.,

Defendants.

-----X
BARBARA JAFFE, J.S.C.:

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Index No. 400759/2011

Motion seq. nos. 016, 017

DECISION AND ORDER

Index No. 650515/2010

Motion seq. no. 012

By notice of motion, plaintiff TC Ravenswood, LLC (Transcanada) moves pursuant to

CPLR 3103 for an order directing defendants National Union Fire Insurance Company of Pittsburgh, Pennsylvania, ACE INA Insurance, and Arch Insurance Company (collectively, the insurance companies) to return inadvertently produced documents and destroy all copies, striking questioning related to the documents from deposition transcripts, and prohibiting the use of the documents, the information contained therein, and related deposition questioning.

By notice of motion, Transcanada moves for the identical relief in the related action under Index number 650515/10.

By notice of motion, the insurance companies move for an order compelling the production and allowing the use of the documents at issue and directing that Transcanada's witnesses be instructed to answer questions at depositions regarding the documents. Transcanada opposes.

I. PRIVILEGE

The four documents at issue are, as pertinent here:

- (1) an email between Transcanada's in-house counsel and its former outside counsel, Andrews Kurth LLP, in which the attorneys discuss Transcanada's potential claim against the insurance companies and analyze a report issued by Siemens concerning its investigation of the cause of the incident at issue (Exh. 420);
- (2) the same email as above as contained within an independent document entitled "Unit 30 RCA Metallurgical Report - Reviewed by Jim D'Andrea," Transcanada's in-house counsel (Exh. 137);
- (3) an email between a Transcanada representative and its in-house counsel, entitled "AKO Legal Analysis," containing the representative's summary and description of written legal analysis provided to Transcanada by its current outside counsel, Anderson Kill & Olick P.C. (AKO) (Exh. 422); and
- (4) a chart prepared by Transcanada summarizing the analyses, legal advice, and legal strategies proposed by various law firms which Transcanada interviewed for the purpose of obtaining legal advice and representation regarding its claim here; the questionnaire which Transcanada sent to the firms include such questions addressed to the firms' impression of Transcanada's claim, recommendation for strategy, and legal opinions on certain issues such as the venue of the action (Exh.

271).

As the insurance companies submit no specific opposition as to whether the third document (exh. 422) is privileged, they are deemed to have waived any argument as to it. As the other three documents contain legal analysis by Transcanada's attorneys as to the merits of its legal claim against the insurance companies, including the attorney's legal opinion or impression of the Siemens report, the documents are privileged as attorney-client communications and/or attorney work-product. (See *Spectrum Sys. Intern. Corp. v Chem. Bank*, 78 NY2d 371 [1991] [report protected by attorney-client privilege as it set forth law firm's assessment regarding possible legal claim and its size and weaknesses, thereby conveying lawyer's assessment of client's legal position]; *Roswell Park Cancer Inst. Corp. v Sodexo Am., LLC*, 68 AD3d 1720 [4th Dept 2009] [documents created as part of in-house counsel's fact-gathering process and investigation that formed basis for counsel's legal advice and legal services]; *Brooklyn Union Gas Co. v Am. Home Assur. Co.*, 23 AD3d 190 [1st Dept 2005] [attorney work product applies to documents prepared by attorney acting as such and product of lawyer's learning and professional skills, such as those reflecting attorney's legal research, analysis, conclusions, legal theory or strategy]; *New York Times Newspaper Div. of New York Times Co. v Lehrer McGovern Bovis, Inc.*, 300 AD2d 169 [1st Dept 2002] [report prepared by defendant's employee at request of counsel protected by attorney-client privilege as it contained information and analysis regarding plaintiff's claims, including opinions and conclusions of defendant's employees as to possible causes of problem at issue]; compare *Ford v Rector*, 111 AD3d 572 [1st Dept 2013] [neither attorney-client nor work product privilege applied to documents containing no legal analysis or legal opinions, nor indicating that attorney had conducted legal research or analysis or rendered

legal opinion about client's legal position]).

The insurance companies have not met their burden of establishing that the crime-fraud exception applies here. (*See eg In re New York City Asbestos Litig.*, 109 AD3d 7 [1st Dept 2013] [party seeking to invoke exception must demonstrate that there is factual basis for showing of probable cause to believe that fraud or crime has been committed and that communications in question were in furtherance of fraud or crime]).

II. INADVERTENT PRODUCTION

The April 2013 affirmations of D'Andrea, Transcanada's in-house counsel during the relevant time period (NYSCEF 294), and Diana Shafter Gliedman, Esq., its current counsel (NYSCEF 295), sufficiently demonstrate that Transcanada intended to maintain the confidentiality of the four documents at issue, that their production was inadvertent, that it took reasonable steps to prevent the disclosure and promptly took reasonable steps to rectify the error upon discovering it during questioning of witnesses at depositions, and that the Insurance Companies will not be unduly prejudiced if a protective order against use of the documents is issued. (*See Oakwood Realty Corp. v HRH Constr. Corp.*, 51 AD3d 747 [2d Dept 2008]; *Campbell v Aerospace Prods. Intern.*, 37 AD3d 1156 [4th Dept 2007]; *Long Is. Lighting Co. v Allianz Underwriters Ins.Co.*, 301 AD2d 23 [1st Dept 2002] [plaintiff's attorneys' affirmations attested that plaintiff had always regarding report as privileged attorney-client communication, had used screening process in preparing document production, and that production of report among hundreds of thousands of other documents had been inadvertent error]; *Jacob v Duane Reade, Inc.*, 2012 WL 651536 [SD NY 2012] [disclosure of privileged document does not operate as waiver if disclosure was inadvertent, privilege holder took reasonable steps to prevent

disclosure, and also promptly took reasonable steps to rectify error]).

The insurance companies' claim of prejudice has no merit, as it is undisputed that it received a copy of the Siemens report, and as it has not established how Transcanada's attorney's impressions of the report or its litigation tactics in determining which law firm to hire are relevant to the claim at issue.

III. CONCLUSION

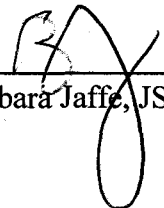
Accordingly, it is hereby

ORDERED, that plaintiff TC Ravenswood, LLC's motion for a protective order is granted, and (1) defendants National Union Fire Insurance Company of Pittsburgh, Pennsylvania, ACE INA Insurance, and Arch Insurance Company are directed to return the documents at issue to plaintiff within five days of entry of this order and destroy all copies; (2) any questioning during depositions related to the documents is stricken; and (3) defendants are enjoined from using the documents, the information contained in them, and the related deposition testimony; it is further

ORDERED, that defendants' motion to compel related to these documents is denied in its entirety; and it is further

ORDERED, that at the parties' next appearance in Part 12, they must retrieve any submitted papers which contain confidential and/or privileged information.

ENTER:



Barbara Jaffe, JSC

DATED: January 24, 2014
New York, New York