SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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JOSEPH VELTRE and DENISE SALA VELTRE,

Plaintiffs,

-against-

RAINBOW CONVENIENCE STORE, INC., EUREKA REALTY CORP., and PEC, LLC,

Defendants.

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Index No. 158486/14

Motion seq. no. 005

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

For plaintiffs:	**For defendant Rainbow:**	**For defendant Eureka:**
Irving Gertel, Esq.	Antonio Marano, Esq.	Marsha J. Quinche, Esq.
Kagan and Gertel, Esqs.	Patterson & Sciarrino, LLP	Hannum Feretic *et al.*
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By notice of motion, defendant Eureka Realty Corp. moves pursuant to CPLR 2221(d) for an order granting it leave to reargue my decision and order dated October 19, 2015. Plaintiffs oppose.

By notice of cross motion, defendant Rainbow Convenience Store, Inc., moves pursuant to CPLR 2221(d) for an order granting it leave to reargue the same decision. Plaintiffs oppose.

In the October 2015 decision and order resolving plaintiffs' motion to compel defendants to provide bills of particulars related to their affirmative defenses and a copy of their insurance claims files from the date of plaintiffs' accident to the date the suit was commenced, I found, as pertinent here that:

(1) Rainbow had not addressed the portion of plaintiffs' motion related to its insurance claims file; and

(2) although Eureka had alleged that its file was immune from discovery as it

> consisted of materials prepared in anticipation of trial, it had failed to submit evidence of the date on which insurance coverage was denied and had thus failed to meet its burden of showing that the file was privileged.

(NYSCEF 153). Both Rainbow and Eureka were thus directed to provide plaintiffs with a copy of their insurance files within 20 days of the date of the order. (*Id.*).

In moving for leave to reargue, Eureka claims that plaintiffs originally requested only copies of written statements about the accident given to its insurance carrier's claims department, not the entire file, and that it provided the statements in its possession after the October 2015 order. It also argues for the first time that because there has been no denial of coverage as opposed to a denial of liability, I misapprehended the law in failing to find that the file is privileged, and observes that in the instant personal injury action, the claim files are privileged, whereas in the context of an insurance coverage dispute, claim files are not discoverable. (NYSCEF 142).

Plaintiffs contend that Eureka failed to meet its burden of showing that the file is privileged, and failed to offer a supporting affidavit or statement based on personal knowledge from Eureka's insurance carrier establishing that the materials contained therein were prepared in anticipation of litigation. (Affirmation of Irving Gertel, Esq., dated Dec. 1, 2015).

In reply, Eureka maintains that plaintiffs failed to meet their burden of demonstrating their entitlement to the file pursuant to CPLR 3101(d)(2), and that its provision of the witness statements to plaintiffs is sufficient. (NYSCEF 162).

Eureka misinterprets the law in contending that plaintiffs bear the burden of establishing privilege. Rather, the party opposing discovery bears the burden of proving that a document is privileged as material prepared solely in anticipation of litigation. (*Ligoure v City of New York*,

128 AD3d 1027 [2d Dept 2015]; *see eg, MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 93 AD3d 574 [1st Dept 2012] [plaintiff met burden of establishing that documents were primarily prepared in anticipated of litigation and were thus privileged]).

Here, Eureka's counsel's affirmation concerning the applicability of the privilege is insufficient to meet its burden. (*See Ligoure*, 128 AD3d at 1027 [attorney's affirmation with conclusory assertions that documents are privileged as made in anticipation of litigation, without more, insufficient to sustain burden of establishing privilege]; *New York Schools Ins. Reciprocal v Milburn Sales Co., Inc.*, 105 AD3d 716 [2d Dept 2013] [same]; *Agovino v Taco Bell 5083*, 225 AD2d 569 [2d Dept 1996] [attorney's affirmation about privilege applying to insurance reports insufficient]).

Eureka also offers no legal authority for its proposition that insurance claim files are privileged in the context of personal injury actions. (*See eg, Donohue v Fokas*, 112 AD3d 665 [2d Dept 2013] [in negligence action filed by firefighter for personal injuries sustained on insured property, insurer bore burden of showing that insurance claims file was privileged as material prepared in anticipation of litigation]; *Sigelakis v Washington Group, LLC*, 46 AD3d 800 [2d Dept 2007] [in personal injury action, court properly granted plaintiff's motion to compel disclosure of statement given to defendant's insurance carrier]; *Agovino*, 225 AD2d at 569 [in action for personal injuries, defendants failed to show that interviews and reports prepared by defendants' insurance carrier were privileged]).

Eureka's new claim that it did not deny coverage is raised improperly for the first time on its motion to reargue. In any event, even if true, it must nonetheless prove that the materials were prepared following the coverage decision in order for the privilege to apply. (*See Donohue*, 112

AD3d at 666-667 [as insurer failed to specify when decision was made whether or not to disclaim coverage, it did not establish that insurance documents were immune]; *Bombard v Amica Mut. Ins. Co.*, 11 AD3d 647 [2d Dept 2004] [reports made by insurers before decision is made to pay or reject claim are not privileged and are discoverable]).

Rainbow's cross motion improperly seeks relief against a nonmoving party (CPLR 2215; *Sheehan v Marshall*, 9 AD3d 403 [2d Dept 2004] [cross motion improper vehicle for seeking affirmative relief from nonmoving party]), and it offers no explanation for failing to oppose the motion the first time, and now only raises the same arguments made by Eureka regarding privilege.

Accordingly, it is hereby

ORDERED, that defendant Rainbow Convenience Store, Inc.'s motion for leave to reargue is denied; and it is further

ORDERED, that defendant Eureka Realty Corp.'s cross motion for leave to reargue is denied.

ENTER:

Barbara Jaffe, JSC

DATED: March 25, 2016
New York, New York