Gendell v 42 W. 17th St. Hous. Corp

2018 NY Slip Op 31313(U)

June 26, 2018

Supreme Court, New York County

Docket Number: 158100/2015

Judge: Carmen Victoria St. George

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 34

YFAT GENDELL and BRADLEY GENDELL,

Plaintiffs,

Index No.: 158100/2015
Motion Sequence No.: 005

- against -

DECISION/ORDER

42 W. 17TH STREET HOUSING CORP and
YITZHAK LORIA MANAGEMENT LLC,
Defendants.

ST. GEORGE, CARMEN VICTORIA, J.S.C.:

Plaintiffs Yfat Gendell and Bradley Gendell move pursuant to CPLR § 3124 for an order compelling the production of emails for which defendants 42 W. 17th St. Housing Corp. (hereinafter "The Board") and Yitzhak Loria Management LLC[1] (hereinafter "Loria") (collectively referred to as "Defendants") asserted the attorney-client privilege and that the material is protected from disclosure as prepared in anticipation of litigation. Alternatively, plaintiffs seek to compel defendants to produce the challenged emails to the Court for *in camera* review and a determination of whether they are privileged. Plaintiffs also move to compel the deposition testimony of non-party Omega Environmental Services, Inc. ("Omega"). Defendants cross-move pursuant to CPLR § 2304 to quash the subpoenas served on defendants' experts Omega and Merritt Engineering Consultants, PC[2] ("Merritt") and for a protective order pursuant to CPLR § 3103.

[1] Managing Agent for the Subject Premises.
[2] The Court notes that plaintiffs did not seek to compel the deposition of "Merritt" in their moving papers. However, plaintiffs address the enforceability of the Merritt subpoena in their opposition to defendant's cross-motion. When the parties appeared for oral argument on March 1, 2018, this Court inquired as to the deposition of Merritt. Plaintiffs' counsel contended that the subpoena of Merritt still stands and that it was their intention to move forward with the deposition of Merritt. Nevertheless, plaintiff acknowledged that if the Court granted defendants' cross motion then they would not be able to move forward with the deposition. If the Court denied defendants cross-motion, then plaintiffs planned to proceed with scheduling Merritt's deposition.

This action arises out of a dispute involving the proprietary lease entered into between plaintiffs and defendant 42 W. 17th Street Housing Corp. It is alleged that plaintiffs sustained various damages to the units that they lease, which are Apartments 12B and 12C, and said damages were due to defendant's negligence and breach of the proprietary lease.[3] Specifically, plaintiffs allege that water leaks into their units caused a significant mold issue within and around their apartments, which resulted in property damage and personal injury. Consequently, for their safety and at the direction of medical experts, plaintiffs and their children vacated the subject premises from February 2015 to April 2016. Additionally, for the same reasons plaintiffs were forced to release their tenant from a sublease for Unit 12C, allegedly causing plaintiffs a loss of at least $9,000 per month.

During discovery, defendants served their third supplemental response to plaintiff's first notice for discovery and inspection, dated July 11, 2017. In connection with same, defendants provided a privilege log reflecting fourteen individual email communications withheld from production for alleged privileged reasons. Now, plaintiffs assert that the emails withheld by defendants are not privileged and should be produced because they are communications sent to third-parties that do not contain any legal advice. Plaintiffs maintain that a majority of the withheld emails are not directed to an attorney but merely include an attorney as a copied recipient (Emails 1, 3, 4, and 9[4]) and/or are emails which pertain to non-legal and discoverable subject matter, such as submitting an insurance claim or addressing complaints raised by shareholders (Emails 1, 3, 4, 9, and 12). Plaintiffs rely on *Bertalo's Restaurant Inc. v Exchange Insurance Co.*, 240 AD2d 452 (2d Dept 1997) to support their position that the privilege may not be asserted in this case. In

[3] Plaintiffs allege three causes of action against The Board: breach of contract, tortious breach of implied warranty of habitability, and negligence. Plaintiffs allege one cause of action of negligence against Loria.
[4] These numbers correspond with defendants' privilege log served on plaintiffs (Defendants' Exhibit A in its cross-motion).

Bertalo's, the court concluded that reports and communications prepared by attorneys to aid the insurance company in the process of deciding whether to pay or reject claims are made "in the regular course of its business" and therefore are not privileged (*Bertalo's*, 240 AD2d at 454-455). Plaintiffs emphasize that defendants cannot shield documents and information involving routine business functions or commercial activities simply because defendants' in house attorney is copied on emails or is engaging with non-clients with respect to same. Plaintiffs claim that eleven out of the fourteen emails withheld are by and between defendants and its insurance broker, an independent adjuster, or its insurance company – and as such, Plaintiffs maintain that no attorney-client privilege exists between defendants and the aforementioned third parties.

Additionally, plaintiffs argue that defendants improperly designated and withheld documents under the guise of attorney-work product (Emails 5, 6, 7, 8, 13, and 14). Plaintiffs allege that notwithstanding their preparation by an attorney, those communications "were prepared in the ordinary course of business, therefore not created in anticipation of litigation" (plaintiffs' brief at 22), and as such are unprotected by the attorney-work product privilege. Finally, Plaintiffs also assert that the privilege log which was ultimately provided by the defendant's herein is impermissibly vague.

In opposition, defendants maintain that the emails are protected by the attorney-client privilege and were prepared in anticipation of litigation. Defendants note that they did not assert the attorney-work product protection in their privilege log. Defendant's state that Plaintiffs' assertions that the emails in question did not involve legal advice or were not of legal character are unsubstantiated. Defendants argue that, contrary to plaintiffs' contentions, Emails 1, 2, 3, 4, and 11 involved Thomas Kerrigan, who is The Board's attorney and therefore any advice conveyed by Mr. Kerrigan to The Board would have been as part of his role as an attorney to advise The

Board on legal matters. Defendants assert that the attorney-client privilege is not limited to communications directly between the client and counsel.

Further, defendants dismiss plaintiffs' assertions that said emails cannot be privileged because they involved routine or commercial business functions. They argue that plaintiffs have no support for this argument other than the conclusory allegations of counsel. Defendants maintain that *Bertalo's* and other cases plaintiffs cite to, are distinguishable from the instant case in that they involved situations where the attorneys were working for an insurance company and determining whether to pay or deny a claim, thus making it part of the claims file. Conversely, defendants contend the emails at issue here were sent by or to Mr. Kerrigan regarding claims being filed against or by The Board. Defendants further emphasize that this is not a situation where the attorneys involved were working for an insurance company regarding the payment of claims. Defendants further reject plaintiffs' contention that Mr. Kerrigan's participation in the submission of insurance claims was not legal in nature and instead contend that this case involved a claim that was potentially going to be (and in fact, has been) litigated, so there would be even more reason for The Board's lawyer to be involved.

Defendants maintain that emails 5, 6, 7, 8, 13, and 14 are privileged as material prepared in anticipation of litigation and therefore not discoverable. Defendants' counsel argues that there is evidence that defendants had good reason to expect litigation when these emails were generated beginning on March 23, 2015. In support, defendants point to a letter sent by plaintiffs' counsel to Mr. Kerrigan dated March 13, 2015, which referenced the dispute at issue, recommended that The Board notify its insurance carriers, and reserved the right to make any claims regarding this matter (defendants' exhibit D). Defendants state that, contrary to plaintiffs' interpretation of CPLR § 3101(d)(2), there is no requirement that documents withheld under the protection of documents

prepared in anticipation of litigation actually be prepared by an attorney. Further, defendants assert that plaintiffs have not shown that they have a substantial need for the emails nor have they demonstrated undue hardship to obtain the emails by other means.

On March 1, 2018, the Court heard oral argument on the instant motion and directed defendants to submit to the Court, for *in camera* review all fourteen emails being challenged.

Discussion

Attorney-Client Privilege

Pursuant to CPLR § 3101 (a) and (b), materials protected by the attorney-client and work product privileges are immune from discovery (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 376-377 [1991]). Materials prepared in preparation for trial, on the other hand, are subject to a conditional privilege and may give way to disclosure only upon a showing of substantial need and an inability to obtain the substantial equivalent by other means (CPLR § 3101[d][2]; *Matter of New York City Asbestos Lit.*, 109 AD3d 7, 12-13 [1st Dept 2013]). It is therefore well settled that the attorney-client privilege shields confidential communications between an attorney and his or her client, during the course of a professional relationship for the purpose of facilitating the rendition of legal services (*Spectrum Sys. Int'l Corp. v Chemical Bank*, 78 NY2d 371, 377-378 [1991]; CPLR § 4503[a]). The privilege is limited to communications, not underlying facts (*Spectrum*, 78 NY2d at 377). The communication itself must be primarily or predominantly of legal character (*Id.* at 378). Importantly, to that end, "that nonprivileged information is included in an otherwise privileged lawyer's communication to its client—while influencing whether the document would be protected in whole or only in part—does not destroy the immunity" (*Id.*). Further, "[i]n transmitting legal advice and furnishing legal services it will often be necessary for a lawyer to refer to nonprivileged matter" (*Id.*; *see also Arkin Kaplan Rice*

LLP v Kaplan, 118 AD3d 492, 493 [1st Dept 2014] (finding that the privilege was not waived by an email because it "was a mere transmittal email" containing non-privileged communication). The party asserting the privilege has the burden of proving each element of the privilege and that it has not been waived (*Spectrum*, 78 NY2d at 377).

Third-Party Communications

Generally, communications disclosed to or made by a third-party are not privileged (*see People v Harris*, 57 NY2d 335, 343 [1982]; *People v Osorio*, 75 NY2d 80, 84 [1989]; *Eisic Trading Corp. v Somerset Marine, Inc.*, 212 AD2d 451, 451 [1st Dept 1995] ["Most of the documents at issue here were either disclosed to or authored by third parties, such as claims adjusters, or contained nonprivileged factual information, and cannot be considered attorney work-product since they were not prepared by attorneys employed as such"]). However, the Court of Appeals held that "[a]n exception exists for statements made by a client to the attorney's employees or in their presence because clients have a reasonable expectation that such statements will be used solely for their benefit and remain confidential" (*Osorio*, 75 NY2d at 84). Likewise, "communications made to counsel through a hired interpreter, or one serving as an agent of either attorney or client to facilitate communication generally will be privileged" (*Id.*). "[W]hether a particular document is or is not protected is necessarily a fact specific determination... most often requiring in camera review" (*Spectrum,* 78 NY2d at 378).

Materials prepared for litigation or in anticipation thereof

With respect to the qualified privilege of "materials prepared in anticipation of litigation," the party asserting the privilege must first demonstrate that the materials were prepared exclusively for litigation" (*Commerce & Indus. Ins. Co. v S.H. Laufer Vision World*, 225 AD2d 313, 314 [1st Dept 1996]; *see* CPLR § 3101 [d][2]). Materials prepared for more than one reason, and not

exclusively for litigation, may subject the materials to disclosure (*Commerce*, 225 AD2d at 314). If the party asserting the privilege has established that the materials were prepared exclusively for litigation, the party seeking discovery may obtain the disclosure "only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent by other means" (CPLR § 3101[d][2]). But, if the materials were created for mixed purposes (*Commerce*, 225 AD2d at 314, *citing Mavrikis v Brooklyn Union Gas Co.*, 196 AD2d 689 [1st Dept 1993]) then CPLR § 3101(d)(2) does not apply and the party seeking the disclosure is "under no obligation to justify disclosure of [the materials] with a showing of undue hardship" (*Commerce*, 225 AD2d at 314). Conclusory assertions contained in an attorney's affirmation, not based on personal knowledge, that the materials sought are not discoverable on the basis that they were prepared exclusively in anticipation of litigation are insufficient to establish the privilege (*Agovino v Taco Bell 5083*, 225 AD2d 569 [2d Dept 1996]).

Extension of the attorney-client privilege

Importantly, it is well settled that the attorney-client privilege can be extended to the client's employees or legal representatives under the agency doctrine (*Hudson Ins. Co. v M.J. Oppenheim,* 72 AD3d 489, 489-490 [1st Dept 2001] [applying privilege to documents generated by forensic accountant retained by defense counsel]; *Carone v Venator Group, Inc.,* 289 AD2d 185, 186 [1st Dept 2001] [attorney-client privilege covered defendant's in-house counsel]). Less settled, however, is whether the privilege reaches the client's insurance brokers. While neither defendants nor plaintiffs offer New York case law germane to the situation here, plaintiffs urge this Court to follow *Landmark Ins. Co. v Beau Rivage Rest.*, 121 AD2d 98, 101 [2d Dept 1986] ["The payment or rejection of claims is a part of the regular business of an insurance company.

Consequently, reports which aid it in the process of deciding which of the two indicated actions to pursue are made in the regular course of its business"]).

In general, courts have held that reports of insurance investigators or adjusters prepared during the processing of a claim to determine whether to accept or reject coverage are discoverable since they are prepared in the regular course of business, unless it is demonstrated that the reports are prepared solely in anticipation of litigation (*148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009]; *Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 191 [1st Dept 2009]). Indeed, "when statements are given to a liability insurer's claims department as part of an internal investigation or for internal business purposes, as well as for defense purposes, they are not immune from discovery as material prepared solely in anticipation of litigation" (*Sigelakis v Washington Group, LLC*, 46 AD3d 800, 800 [2d Dept 2007]; *see also Landmark,* 121 AD2d at 99).

Based on the Court's in camera review of the emails in question and the applicable law, this Court makes the following determinations:

The emails contained under the following tabs <u>must be disclosed</u>:

1. Tab A (Email 1)
2. Tab E (Email 5)
3. Tab F (Email 6)
4. Tab G (Email 7)
5. Tab H (Email 8)
6. Tab M (Email 13)
7. Tab N (Email 14)

The emails contained under the following tabs <u>are to be disclosed in accordance with the foregoing redactions:</u>

1. Tab C (Email 3) - defendants are to redact the second sentence in the March 18, 2015 12:19 PM communication as it is protected.
2. Tab D (Email 4) – defendants are to redact the following: the entire March 19, 2015 10:20 AM communication, the entire March 19, 2015 3:42 PM communication, the entire March 19, 2015 4:40 PM communication, and the second sentence in the March 18, 2015 12:19 PM communication, as they are protected.

The emails contained under the following tabs are <u>not to be disclosed</u>:

1. Tab B (Email 2)
2. Tab I (Email 9)
3. Tab J (Email 10)
4. Tab K (Email 11)
5. Tab L (Email 12)

<u>Omega Subpoena</u>

Plaintiffs set forth that on or about February 2, 2016, Omega Environmental Services inspected the subject premises and prepared a mold assessment ("Omega report") utilized by defendants to execute remediation.[5] Thereafter, on September 12, 2016, defendants retained the services of Maxons Restoration Services ("Maxons") to perform remediation work in Unit 12B. Between September 13, 2016 through September 16, 2016, Maxons performed the mold

[5] Article 32 of New York Labor Law requires, *inter alia*, that an independent mold assessment obtained in order to define the scope of the mold remediation work, and it prohibits the performance of both the mold assessment and remediation on the same property by the same individual.

remediation work in Unit 12B per the Omega report. Plaintiffs allege that while Maxons was in the process of remediating the mold in Unit 12B, Maxons observed additional mold and water damage throughout the walls and floors not documented in the Omega report. Plaintiffs state that Maxons was not given approval by defendants to continue to remediate the mold in Unit B beyond the scope of the Omega report. Further, plaintiffs state that it has been over a year since Maxons began the remediation process in Unit 12B, and defendants have failed to address the remainder of the mold therein thereby rendering Unit 12B still uninhabitable.

On March 21, 2017, plaintiffs served Omega with a subpoena directing it to produce documents in connection with its inspection of the Subject Premises by April 11, 2017 and to appear to give testimony in connection with the same on May 16, 2017. Plaintiffs contend that on March 23, 2017, defendants' counsel informed counsel for the plaintiffs that Omega would not be appearing for a deposition or producing documents as Omega was defendants' consultant and anticipated expert. In response, plaintiffs' counsel advised that if defendants took issue with the subpoena served upon Omega, that the proper avenue to address same would be through a motion to quash. On May 11, 2017, counsel for the plaintiffs sought to confirm with defense counsel that Omega would be appearing for its scheduled deposition on May 16, 2017. Defense counsel reiterated that Omega was defendants' expert and therefore not subject to the subpoena. Neither counsel for defendants nor a representative Omega appeared for the deposition on May 16, 2017. Thereafter, on June 6, 2017, defendants served their CPLR § 3101(d) response designating Omega as defendants' expert.

Plaintiffs argue that defendants must be compelled to produce Omega as a fact witness pursuant to the valid subpoena served upon it. Plaintiffs assert that if defendants had an issue with the subpoena, defendants should have moved to quash the subpoena prior to the return date.

Instead, plaintiffs contend that defendants attempted to shield Omega by designating them as an expert months after Omega was served with a subpoena. Regardless, plaintiffs maintain that the purpose of the subpoena is not to question Omega as defendants' consultant or expert, but rather as a fact witness who made observations inside plaintiffs' units and whose reports were the basis for remediation work performed in plaintiffs' units.

Defendants cross-move pursuant to CPLR § 2304 to quash the subpoenas served on Omega and Merritt and for a protective order that prevents plaintiffs from seeking any discovery or taking the depositions of Omega and Merritt as they are defendants' experts in this matter. Defendants assert plaintiffs are not entitled to depose defendants' expert witnesses or obtain documents from them without a showing of special circumstances and obtaining leave of the court pursuant to CPLR § 3101(d)(1)(iii). Defendants maintain that these subpoenas were issued to these entities despite the fact that the plaintiffs were well aware that both Merritt and Omega were retained by defendants' counsel to serve as experts in this matter. Defendants submit multiple email correspondences from September and December 2015 in an effort to prove that plaintiffs were or should have been aware that Omega and Merritt were serving as defendants' consultants. Likewise, defendants' counsel contacted plaintiffs' counsel on March 23, 2017 (two days after the subpoena was issued) to advise that Merritt and Omega were defendants' experts in this matter and would not be appearing for depositions, as the subpoenas were facially insufficient. Defendants note that no further communication with plaintiffs' counsel occurred on this issue until mid-May 2017, when a substantially similar conversation was held to the one in March 2017. Defendants contend that in light of plaintiffs' requests, defendants formally designated Omega and Merritt as its experts via a CPLR § 3101(d) expert witness exchange. Even if the depositions will only focus on the factual knowledge of Omega, defendants state, that does not cure the facial deficiency of the

subpoena citing *ESSA Realty Corp. v J. Thomas Realty Corp.*, 2010 NY Misc. Lexis 2789 (Sup Ct 2011). In *ESSA Realty*, the court was confronted with a similar argument and ruled that that there was no First Department precedent that permitted the deposition of an expert for purely factual reasons without a showing of "special circumstances" (*Id.*). Therefore, defendants argue, the subpoenas should be quashed as plaintiffs have not demonstrated special circumstances warranting the depositions of defendants' experts.

Furthermore, defendants claim that they are entitled to a protective order to prevent any further discovery from Omega and Merritt. Defendants reiterate that plaintiffs have continued to demand documents from these entities and depositions of their representatives despite having been advised of the improper nature of their demands. Defendants assert that the continued efforts by plaintiffs to obtain this discovery will prejudice defendants and will unnecessarily increase the cost of this litigations. For these reasons, defendants request a protective order from this Court as against any efforts to obtain discovery from defendants' experts outside what is permitted under CPLR § 3101(d)(1)(i).

In opposition to defendants' cross-motion, plaintiffs reject defendants' position that the subpoena served upon Omega is void because plaintiffs "should have known" that Omega would have eventually been designated as defendants' expert because they inspected plaintiffs units in December 2015. Likewise, plaintiffs dismiss defendants attempts to paint plaintiffs as bad faith litigants who "subpoenaed defendants' expert." Instead, plaintiffs emphasize that they subpoenaed Omega as a fact witness three months before defendants designated Omega as an expert and only after it became evident that defendants actively instructed Maxons not to remediate the mold outside the scope of Omega's report. Plaintiffs contend that Omega's factual observations of Unit 12B are highly relevant to plaintiffs' claims and that they are entitled to question Omega as the

entity that authored the mold assessment report relied upon by defendants' in partially remediating plaintiffs' home. Specifically, plaintiffs contend that they should be permitted to question Omega as to why its assessment did not take into consideration all of the mold present in Unit 12B – a question that plaintiffs claim can only be answered by Omega.

Furthermore, plaintiffs assert that defendants' reliance on CPLR § 3101 (d)(1)(iii) in that plaintiffs must establish "special circumstances" in order to depose defendant's expert is without merit. Plaintiffs maintain that the Omega subpoena is not subject to the "special circumstances" requirement set forth under CPLR § 3101 (d)(1)(iii) because Omega was subpoenaed as a fact witness months prior to defendants' expert designation. Notwithstanding this, plaintiffs insist that they can meet a theoretical burden under CPLR § 3101(d)(1)(iii) should this Court deem it necessary.

Plaintiffs argue that special circumstances exist necessitating Omega's testimony. First, they point out that the physical circumstances in Unit 12B when Omega initially inspected the premises on or about December 2015 are lost and destroyed. Specifically, the conditions in Unit 12B which Omega relied upon in drafting its February 2016 mold assessment report are no longer in existence because defendants executed remediation work in 12B pursuant to Omega's report. Plaintiffs further claim that Omega is the only witness who can testify as to what it observed, tested, and was instructed to do in connection with its inspection of Unit 12B.

With respect to Merritt, plaintiffs' opposition papers state that the same arguments apply to the Merritt subpoena in that they were properly subpoenaed, only to be designated as defendants' experts months after the fact. Defendants served the Merritt report with their bill of particulars on March 6, 2017. Plaintiffs set forth that the Merritt report provides Merritt's observations made in the sprinkler tank/pressure tank room located on the roof directly above plaintiffs' units. Further,

plaintiffs allege that observations contained in the Merritt report revealed that "there is an opening in the terra cotta block partition wall situated above plaintiffs' units and an opening in the floor that allows water to infiltrate into plaintiffs' apartments below" (plaintiffs' brief in opp at 27). In light of the conditions Merritt observed in the sprinkler tank room, plaintiffs served Merritt with a subpoena to produce documents and provide testimony on June 8, 2017 as a non-party fact witness. Thereafter, on June 6, 2017, defendants' counsel directed Merritt not to appear for the deposition and designated Merritt as defendants' expert in in their CPLR § 3101(d) response.

This court is troubled by the cavalier positions taken by both sides in this litigation thus far, and suggests both sides be guided and govern themselves by the code of civility expected of them particularly by this Court. On the one hand, there appears to be communications between defendants' counsel and plaintiffs' counsel in which defendants indicate their intention to name Omega and Merritt as experts in their case prior to the issuance of the subpoenas, therefore alerting plaintiffs to this ultimate issue of contention herein. On the other hand, Omega and Merritt were not designated as experts pursuant to CPLR § 3101(d) at the time the subpoenas were served nor did defendants move to quash the subpoena prior to the return date notwithstanding its proposed intention to use Omega and Merritt as their respective mold and engineering experts in this litigation.

While this Court is now fully familiar with the tortured relationship between plaintiffs' and defendants' in this case having reviewed the emails and respective papers of the parties, it is unclear when the line of simple courtesies normally enjoyed and commonly extended between professional legal adversaries was crossed. After careful consideration of the positions of the respective parties and the relevant law, this Court finds that (1) both Omega and Merritt were intended to be expert witnesses in their fields of expertise called upon to provide trial testimony /

evidence concerning defendant's positions at trial, and (2) Plaintiff has failed to demonstrate a showing of special circumstances pursuant to CPLR § 3101(d)(1)(iii) sufficient to afford them the opportunity to depose these witnesses prior to trial.

In New York, depositions of a party's expert witness are ordinarily not permitted in the absence of "special circumstances" (*Fekete v GA Ins. Co. of New York*, 279 AD2d 300 [1st Dept 2001]; *King Electronics of Graham Ave., Inc. v American Nat. Fire Inc. Co.*, 232 AD2d 273 [1st Dept 1996]). Such circumstances exist where physical evidence is "lost or destroyed or where some other unique factual situation exists" (*Beauchamp v Riverbay Corp.*, 156 AD2d 172 [1st Dept 1989]). Where, as here, the report of the non-party expert clearly indicates the nature of the expert's proposed testimony, no special circumstances are present [*see Melendez v Roman Catholic Archdiocese of New York*, 277 AD2d 64 [1st Dept 2000]; *Weinberger v Lensclean, Inc.*, 198 AD2d 58 [1st Dept 1993]; *see also King Electronics of Graham Ave. Inc. v American Nat. Fire Ins. Co.*, 232 AD2d 273 [1st Dept 1996]). In *Melendez*, the Court held "further disclosure is denied especially since plaintiff's psychologist report has provided defendant with a clear idea of what the nature of her testimony will be, including her opinion as to the extent of plaintiff's psychological damages and diagnosis" (*Melendez*, 227 AD2d at 64).

The history of the interactions by the parties through email correspondence and the documentary evidence submitted in this case evidences a clear intention that the environmental agents Omega and consequently the remediation crew Merritt, were hired in anticipation of litigation and with the expectation to be presented as trial expert witnesses on behalf of the defendants. In fact, it was disingenuous for Plaintiffs counsel to state otherwise as was done on the record before this Court on March 1, 2018. *See Motion TR 3/11/2018 at 13,* where Ms. Basis states in relevant part, "in this case Omega came in in the ordinary course of work, not in the context of

litigation." This statement was made notwithstanding counsels receipt of the Omega February 2, 2016 report wherein the first page indicates that the Project Overview / Scope of Work noted that it was prepared "on behalf of the defendant's legal counsel...[where] Omega Environmental Services performed a mold inspection, including air and surface testing in Apt. 12B and 12C on 12/17/2015...[and] the purpose of the inspection was to assess current conditions in the units." Although failing to support a special circumstances determination in this case, Plaintiffs still has the ability, should they wish to, to fully examine these witnesses at trial.

Accordingly, it is hereby

ORDERED that the branch of plaintiffs' motion to compel the production of emails is granted in part; and it is further

ORDERED that defendants shall produce the documents as provided in this order within 10 days of service of this order with notice of entry; and it is further

ORDERED that defendants' cross-motion to quash is granted; and it is further

ORDERED that defendants' motion for a protective order with respect to the subpoenas served upon Omega and Merritt is granted.

This constitutes the Decision and Order of the court.

Dated: 6/26/2018

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.
HON. CARMEN VICTORIA ST. GEORGE
J.S.C.