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

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THE GLAZIER GROUP, INC., PENNY PORT, LLC and DELTA DALLAS ALPHA CORP.,

Plaintiffs,

-against-

DECISION AND ORDER

Index No.: 159101/2014

NOVA CASUALTY COMPANY and HUB INTERNATIONAL NORTHEAST LIMITED,

Defendants.

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MELISSA A. CRANE, J.

Plaintiffs The Glazier Group, Inc. and Delta Dallas Alpha Corp. ("Plaintiffs") commenced this action for breach of contract seeking indemnification under an insurance policy they allegedly thought defendant Nova Casualty Company ("Nova") had issued to cover loss of business income and business personal property. Plaintiffs' restaurant, Bridgewaters, sustained damage on October 29, 2012, during Superstorm Sandy. Nova declined to indemnify plaintiffs on the basis that the damage was from a flood and plaintiffs' policy lacked flood insurance coverage. Plaintiffs also sued their long-time insurance broker, HUB International Northeast Limited ("HUB"), for its failure to obtain the flood insurance coverage plaintiffs had allegedly instructed it to obtain.

On September 30, 2014, shortly after plaintiffs commenced this action, HUB's General Counsel, Ivy Fischer ("Fischer"), emailed plaintiffs several documents, claiming they proved HUB was not at fault and asking the plaintiffs to "strongly consider dropping the claim against Hub before we incur any legal fees" (Champion Aff., 6/6/2017 Exh. H, Motion Seq. 001). Among these documents was an email dated February 7, 2012 from a

HUB account executive, M'Lynda Kopacka ("Kopacka") purporting to confirm that plaintiffs had declined flood coverage for the relevant period. Plaintiffs discovered that they had not received this email and had instead received another email with a different message from Kopacka on exactly the same date and time, down to the second. On October 10, 2014, Plaintiffs met with and informed Fischer that they had never received the email in question and believed it had been falsified. Then, on November 21, 2016, plaintiff deposed Kopacka. At her deposition, Kopacka gave conflicting testimony about the email. In the middle of the deposition, HUB's counsel requested a break and left the room with her. Upon her return, Kopacka changed her initial testimony claiming Fischer relayed to her the findings of an "IT person" at HUB that "[t]he email didn't go through" (Kopacka Dep. 172:12-173:21). Finally, on July 5, 2017, HUB admitted to plaintiffs that it had completed an internal investigation regarding whether the email in question was authentic, had determined it was "not authentic," and that Kopacka had "been terminated as a consequence" (Nicolazzo Aff., Ex. I.).

Plaintiffs moved by order to show cause for a forensic examination, related discovery, sanctions and to amend their pleading to incorporate the forged email evidence (Motion Seq. 001). HUB opposed and moved for a protective order and to "reargue/renew" a prior discovery order (Motion Seq. 002).[1] Plaintiffs then cross-moved for an order to compel HUB to produce all documents related to its investigation of the forged email, all documents related to Kopacka's termination, and to compel HUB to produce Kopacka for a second deposition.

This court held oral argument on these motions on August 14, 2017 and, from the bench, granted plaintiff's motion to amend the complaint to add causes of action for:

[1] This sort of order was not one that is subject to renewal or reargument.

breach of fiduciary duty, fraud and violation of the judiciary law (see tr. pg 19). The parties and the court then worked out many of the discovery issues, including those related to plaintiff's request for a forensic examination and related discovery. However, the court reserved decision on whether or not: (1) non-testifying consulting expert or other privilege protects certain information related to HUB's investigation into the fraudulent email; (2) HUB waived its right to assert privilege; (3) the crime fraud exception applies; and (4) the court should sanction HUB under 22 NYCRR § 130-1.1. This decision now addresses those issues.

DISCUSSION

CPLR 3101 (a) requires that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." These words are "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." (*Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406 [1968]; *see also*, *Anonymous v. High School for Environmental Studies*, 32 A.D.3d 353, 358 [1st Dept 2006] ("New York has long favored open and far-reaching pretrial discovery")). Pretrial disclosure extends not only to proof that is admissible, but also to matters that may lead to the disclosure of admissible proof (*Matter of New York County DES Litig.*, 171 A.D.2d 119, 123 [1st Dept 1991]).

Here, plaintiffs seek discovery, pursuant to the liberal interpretation of CPLR 3101 (a), into the "who, what, when and how" of the forged email. Claiming privilege, HUB has not provided details regarding its investigation into Kopacka's fraud, including how it proceeded, who it contacted, what forensic analysis it used, and what facts it uncovered other than that the email was not authentic. For the most part, HUB labels

information from the investigation as privileged because general counsel, Fischer, sought advice from a non-testifying consultant to determine whether, in part, this case was defensible and what exactly happened with respect to the forged e-mail. Plaintiffs promote several theories by which they claim they are entitled to this privileged information.

The crime fraud exception is inapplicable. In order to fall within the crime fraud exception, the privileged communication must be in furtherance of a fraud or crime applies (*see Nowlin v. People of State of New York*, 1 A.D.3d 172 [2003] [crime-fraud exception applied where record demonstrated a factual basis to show probable cause concerning the commission of a fraud or crime and that the communications were in furtherance of that fraud or crime]; *see also Matter of New York City Asbestos Litig.*, 109 A.D.3d 7 [2013] (crime-fraud exception to the attorney-client privilege applied where there was a sufficient factual basis to find that the communications could have furthered a fraud), here, the investigation did not further the fraud that Kopacka committed. Rather, the investigation was in response to it. After the investigation, HUB came clean to plaintiffs that the document was entirely forged. Thus, the investigation and related communications did not further the fraud. Any other result would discourage corporate investigations into their own misconduct.

Moreover, HUB has not waived the attorney-client privilege, because it has not placed the subject matter of counsel's advice in issue. Nor has it made selective disclosure of this advice. The portions of the investigation and the report's findings that could constitute attorney work product are the impressions, directions, etc., of counsel. HUB has not waived the attorney-client privilege for any impressions and directions because it has not affirmatively used them (compare *Drizin v Sprint Corp.*, 3 A.D.3d 388, 389 [1st

Dept, 2004]) (plaintiffs affirmative use of selected, purportedly representative, tape recordings and transcripts of the investigators calls to defendants "knock-off" numbers waived work product privilege with respect to records of investigator in contemplation of litigation).

Plaintiffs request HUB to produce Fischer for deposition because they allege she is percipient witness, something that HUB has put into relief by relying on her affirmation in opposition to plaintiffs' motion. Plaintiffs also allege that Fischer knew, as early as November 2016, that no one sent the forged email. Plaintiffs rely on Kopacka's deposition testimony that Fischer had informed her the email did not "go through." (Kopacka Dep. 173:21). In support, plaintiffs point out that HUB has offered no explanation as to how Fischer knew this and that nobody else can explain it but her. However, Fischer affirmed under oath that others at HUB provided the forged email to her and that she has no independent knowledge about the email and other documents she forwarded to plaintiffs. The attorney-client privilege covers any non-factual information that she has about the forged email and the subsequent investigation.

Nor do plaintiffs have substantial need for the privileged material. Only communications with and observations of an attorney enjoy protection. Privilege does not extend to facts (*Stanwick v. A.R.A. Services, Inc.*, 124 A.D.2d 1041, 1041 [4th Dept 1986] (citing *Upjohn Co. v. United States*, 449 U.S. 383, 395–396). Plaintiffs will be able to explore the relevant facts as part of the additional discovery the court ordered on August 14, 2017. In addition to continuing the deposition of Robert Fiorito and subpoenaing Kopacka for second deposition, the two HUB account executives directly responsible for the procurement, servicing and renewal of plaintiffs' annual insurance policies, plaintiffs have also noticed the deposition of a HUB IT person. Therefore, the

court denies plaintiffs' motion seeking Fischer's deposition as other means exist to obtain the information (*Matter of Cavallo*, 20 Misc.3d 219) (relying on the three-prong test the Eighth Circuit Court of Appeals created in *Shelton v American Motors Corp.* (805 F2d 1323 [8th Cir 1986]): "to depose opposing counsel a party must establish that (1) no other means exist to obtain the information than to depose opposing counsel, (2) the information sought is relevant and nonprivileged, and (3) the information is crucial to the preparation of the case").

Finally, a court may impose sanctions against an attorney or a party for frivolous conduct. This is conduct that is completely without merit, undertaken primarily to delay or prolong the litigation or harass or maliciously injure another, or asserts material factual statements that are false (22 NYCRR § 130-1.1 [c]). Plaintiffs allege that HUB has engaged in frivolous conduct and seek an award of costs and attorneys' fees plaintiffs spent on their own forensic expert to determine the truth about the fraudulent email (conducted before defendant's own investigation), taking the deposition of Kopacka, preparing their discovery request for the forged email, preparing the amended complaint, and filing and litigating the order to show cause. Plaintiffs essentially argue that HUB engaged in frivolous conduct because of: (1) the forged document, (2) defendant's reliance upon that document when asking plaintiffs to abandon their claims, (3) the proffering of a false testimony from Kopacka, (4) its failure to notifypPlaintiffs or the Court when it became aware the email "didn't go through," and (5) its procedural actions with respect to this motion, including the late revelation that the email is "not authentic."

Here, plaintiffs have amended their complaint to assert fraud based upon the false email. Consequently, the sanctions plaintiffs seek are now part and parcel of their fraud damages. Moreover, it would be more accurate to assess any sanction after completion of

discovery into the investigation of the forged email and surrounding facts. The completion of the additional discovery will allow the court and plaintiffs to determine whether nor not HUB acted in good faith based on the actions and statements of HUB's then employee, Kopacka. It may be that HUB had no reason to know that Kopacka forged the email. Even though it took HUB over two and a half years to complete its investigation, counsel has offered to provide an explanation.

Accordingly,

IT IS ORDERED that the court denies that part of plaintiffs' motion seeking privileged documents concerning HUB's investigation; and it is further

ORDERED that HUB is directed to complete production of all non-privileged material concerning the investigation, along with a privilege log for any documents HUB withholds on the basis of privilege, within 30 days of the date of this decision and order with notice of entry; and it is further

ORDERED that the court denies plaintiffs' motion to depose HUB's general counsel; and it is further

ORDERED that the court denies plaintiffs' motion for sanctions under 22 NYCRR § 130-1.1, without prejudice.

Dated: January 12, 2018
New York, New York

ENTER:

Melissa A. Crane, J.S.C.