

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.

SUPERIOR COURT

(FILED: March 21, 2013)

CHRISTOPHER LAMENDOLA, SUSAN :
LAMENDOLA, THOMAS HOGAN, :
CYNTHIA PELOSO, KEITH AMELOTTE, :
and WENDY AMELOTTE :

v. :

C.A. No. KC-2011-0160

KATHLEEN RAPOSA, in her capacity as :
Finance Director for the Town of East :
Greenwich, THE EAST GREENWICH :
SCHOOL DEPARTMENT, STRATEGIC :
BUILDING SOLUTIONS, LLC, PAUL B. :
ALDINGER & ASSOCIATES, INC., :
GILBANE BUILDING COMPANY :
SPECIAL PROJECTS GROUP, INC., :
FLEET CONSTRUCTION COMPANY, :
and MANAFORT BROTHERS, INC. :

DECISION AND ORDER

RUBINE, J. This matter arises out of the construction of a new middle school on Cedar Street in the Town of East Greenwich, Rhode Island. Plaintiffs Christopher Lamendola, Susan Lamendola, Thomas Hogan, Cynthia Peloso, Keith Amelotte, and Wendy Amelotte (collectively “Plaintiffs”) allege that from November 16, 2009 through August 2011, Defendants Strategic Building Solutions, LLC (“Strategic”), Paul B. Aldinger & Associates, Inc., Gilbane Building Company Special Projects Group, Inc. (“Gilbane”), Fleet Construction Company, and Manafort Brothers, Inc. used vibratory rollers and tracked construction machinery adjacent to Plaintiffs’ property causing shaking, vibrations, and property damage to their homes. Plaintiffs filed requests to produce documents, prompting some of the Defendants to respond, asserting claims of privilege. The assertion of said privileges led the Plaintiffs to file motions with respect to that

discovery as follows: (1) strike the privilege objections of Defendants Kathleen Raposa and the East Greenwich School Department (hereinafter the “East Greenwich Defendants”) and compel them and the subpoenaed deponent, John Gowell, to produce documents that have been withheld under claim of privilege in response to the deposition notice and subpoena served on Mr. Gowell; (2) strike the privilege objections of the East Greenwich Defendants and compel them to produce documents that have been withheld on the grounds of privilege in response to the Plaintiffs’ third request for production of documents; (3) strike the privilege objections of the East Greenwich Defendants and compel them to produce documents that are part of Strategic’s project file that have been withheld under claim of privilege in response to Plaintiffs’ request for production of documents to Strategic; and (4) award Plaintiffs reasonable costs and attorneys’ fees in prosecuting these motions. The Court heard argument on the Plaintiffs’ motions on February 25, 2013, and this Decision constitutes the Court’s resolution of the pending discovery motions.

I

FACTS AND TRAVEL

The East Greenwich School Department (the “EGSD”) is the owner of the construction project known as the New East Greenwich Middle School (the “project”). The project is located adjacent to a residential street known as Sarah’s Trace. The Plaintiffs reside at various addresses on this street. Pursuant to its contract with the EGSD, Strategic is the owner’s representative and the project manager. Strategic provided comprehensive project management, which, during the construction phase of the project, included coordinating and reporting, schedule monitoring, financial monitoring and control, construction, supervision and control, technical review of change order requests, and closeout of contracted work. Gilbane was selected as the general

contractor for phases two and three, entitled “Construction and Demolition.” (Pls.’ Am. Compl. ¶ 20.)

Plaintiffs allege that from November 2009 through August 2011, while site work and construction were ongoing on the project, their properties adjacent to the project experienced severe vibrations—including shaking and rattling of windows, fixtures, and other personal property in their homes. Plaintiffs allege that during this period they began to see “fresh cracks” in various parts of their homes. (Pls.’ Am. Compl. ¶¶ 21, 23, 27, 37, 40, 41, 49, 52.)

On May 24, 2010, Strategic employees Jon Winikur and Ken Romeo appeared before the East Greenwich Town Council to report on the progress of the project. Mr. Winikur acknowledged the presence of cracks in the Lamendolas’ home. Strategic indicated that they were modifying the construction means and methods to reduce vibrations and the corresponding damage to the Plaintiffs’ homes. John Gowell, the East Greenwich Building Committee Chairman, told the East Greenwich Town Council and the Building Committee that he believed that Gilbane and their insurance carrier should address the situation. (Pls.’ Ex. 18.)

On May 24, 2010, Jean Ann Guliano, the Chairperson of the East Greenwich School Committee, issued a directive to Jon Winikur to begin using hand rollers instead of vibratory rollers immediately. Plaintiffs allege that Mr. Gowell pressured Ms. Guliano to reconsider her recommendation. Subsequently, Ms. Guliano wrote to Mr. Lamendola and advised him that the East Greenwich School Committee was now in a “holding pattern” with respect to the switching of the vibratory rollers to hand rollers. Ms. Guliano indicated that the East Greenwich School Committee was awaiting a “cost estimate” on the proposed adjustment to hand rollers that was eventually provided in March 2011. Plaintiffs allege that vibratory roller use continued until August 2011. (Pls.’ Am. Compl. ¶ 52.)

Plaintiffs filed suit on February 8, 2011 and propounded written discovery and deposition notices to all Defendants, including the East Greenwich Defendants, Strategic, and John Gowell. The document requests seek communications between and among the members of the East Greenwich Town Council, the East Greenwich School Committee, the East Greenwich Building Committee, and other named Defendants to this action relating to the Plaintiffs' allegations in their First Amended Complaint. The East Greenwich Defendants allege that certain documents—primarily emails—that are otherwise responsive to the discovery requests are privileged and withheld from production for that reason. In response to the privilege objections, Plaintiffs filed the aforementioned discovery motions.

II

ANALYSIS

The following claims of privilege have been advanced with respect to the requested production: (1) attorney-client privilege; (2) work-product doctrine; (3) deliberative process privilege; (4) joint defense or common-interest rule. The Court will address each of these classes of privilege seriatim.

A

1.

Attorney-Client Privilege

It is well established that “communications by a client to his attorney for the purpose of seeking professional advice, as well as the responses made by the attorney to such inquiries, are privileged communications not subject to disclosure.” State v. Grayhurst, 852 A.2d 491, 512 (R.I. 2004) (quoting Mortgage Guarantee & Title Co. v. Cunha, 745 A.2d 156, 158-59 (R.I.

2000)). Our Supreme Court, quoting with approval the analysis of the United States Court of Appeals for the Fifth Circuit, has stated that the following elements must be established in order to invoke the attorney-client privilege:

(1) the asserted holder of the privilege is or sought to become a client;

(2) the person to whom the communication was made (a) is [a] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;

(3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and

(4) the privilege has been (a) claimed and (b) not waived by the client.

State v. von Bulow, 475 A.2d 995, 1004 (R.I. 1984) (quoting United States v. Kelly, 569 F.2d 928, 938 (5th Cir. 1978), cert. denied, 439 U.S. 829 (1978)). The burden of establishing these elements is on the party advancing the privilege. Rosati v. Kuzman, 660 A.2d 263, 265 (R.I. 1995) (citing von Bulow, 475 A.2d at 1005)).

2.

Work-Product Doctrine

Rhode Island Superior Court Rules of Civil Procedure 26(b)(3), entitled “Trial Preparation,” refers to the contours of the work-product doctrine:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivisions (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent) only

upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

There are two distinct types of work-product. The first, "opinion" work-product, "refers to a document or other written material containing the mental impressions of an attorney or his or her legal theories." Henderson v. Newport County Regional Young Men's Christian Ass'n, 966 A.2d 1242, 1247 (R.I. 2009) (citing Crowe Countryside Realty Associates, Co., LLC v. Novare Engineers, Inc., 891 A.2d 838, 840 (R.I. 2006)). Opinion work-product receives the highest level of protection. Id. "Such opinion work product qualifies for absolute immunity from discovery and under no circumstances may another party obtain, through discovery [], an attorney's recorded thoughts and theories." Id.

The second type of work-product, called "factual" work-product, applies to materials prepared in anticipation of litigation. Id. at 1248. "This category covers a wider spectrum than opinion work product and encompasses any material gathered in anticipation of litigation. It is not necessary for the attorney to have prepared the materials or the documents for them to constitute work product." Id. Rather, "a document prepared by a party's representative or agent constitutes factual work product as long as the document was prepared in anticipation of litigation." Id. (citing Cabral v. Arruda, 556 A.2d 47, 49 (R.I. 1989)).

3.

Deliberative Process Privilege

While the work-product doctrine protects “mental processes of the attorney,” deliberative process covers “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Department of Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 8 (2001) (internal citations omitted). “The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news.” Id. “Its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government.” Id. at 8-9 (internal quotation marks and citations omitted).

4.

“Joint Defense” or “Common-Interest” Rule

It is well settled that the disclosure of otherwise confidential communications to a third party generally will result in a waiver of the attorney-client privilege. See von Bulow, 475 A.2d at 1005. While the Rhode Island Supreme Court has not considered the applicability of the so-called “joint defense” or “common interest” theories, federal courts have more thoroughly examined these exceptions to the aforementioned waiver rule.

The common-interest doctrine is typically understood to apply “[w]hen two or more clients consult or retain an attorney on particular matters of common interest.” Cavallaro v. U.S., 284 F.3d 236, 249 (1st Cir. 2002) (citations omitted). In such a situation, “the communications between each of them and the attorney are privileged against third parties.” Id. Similarly, the “privilege applies to communications made by the client or the client’s lawyer to a lawyer

representing another in a matter of common interest.” Id. (internal quotation marks and citations omitted).

Federal courts consider the applicability of the privilege by examining the actual or potential relationship of the parties. Royal Surplus Lines Ins. v. Sofamor Danek Group, 190 F.R.D. 463, 472 (W.D. Tenn. 1999) (citing Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964)). “The weight of authority also favors considering the actual or potential identity of interest which the parties share rather than limiting the privilege to communications occurring only after litigation commences.” Id. (citing SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 513 (D. Conn. 1976)). “The privilege protects the free flow of information for the purpose of receiving legal advice, either in contemplation of litigation, or in attempting to avoid it.” Id. However, the common defense must be foreseeable. Id. at 472-73 (citing Medcom Holding Co. v. Baxter Travenol Lab., 689 F. Supp. 841, 845 (N.D. Ill. 1988) (noting “the privilege arises out of a need for a common defense; as opposed merely to a common problem.”)). “As a result, one relying on the joint defense privilege must establish that (a) there was existing litigation or a strong possibility of future litigation; and (b) the materials were provided for the purpose of mounting a common defense against it.” Id. at 473.

5.

Privilege Logs

Rhode Island Superior Court Rules of Civil Procedure 26(b)(5) states in pertinent part:

[w]hen a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. (emphasis added).

A party who withholds information that is “otherwise discoverable” by claiming that it is privileged or subject to protection as trial preparation material is required under Rule 26(b)(5) to make this claim expressly and to describe “the nature” of the documents not produced or disclosed in a manner that will enable other parties and the Court to assess the applicability of the privilege or protection that is claimed. D’Amario v. State, 686 A.2d 82, 86 n.11 (R.I. 1996). The objecting party must be specific enough in its objection to support its privilege and to provide a means to assess the claim, and consider the elements of the asserted privilege. If a responding party fails to adequately state the reason for an objection, he or she may be held to have waived the objections, including those based on privilege. Donegan v. Jackson, No. NC 2002-0625, 2005 WL 628501, at *5 (R.I. Super. Ct. Mar. 4, 2005) (citing 8A Wright and Miller, Federal Practice and Procedure §§ 2016.1, 2213 (1994)). While courts assessing the adequacy of a privilege log “should avoid hair-trigger findings of waiver, the party relying on the privilege needs to provide significant backup information.” Id.

Addressing the same issue in the federal courts, the United States District Court for the District of Rhode Island has stated that “[a]lthough the federal rules do not specifically address the subject, the ‘universally accepted means’ of claiming that requested documents are privileged is the production of a privilege log.” Corvello v. New England Gas Co., Inc., 243 F.R.D. 28, 33 (D.R.I. 2007) (quoting In re Grand Jury Subpoena, 274 F.3d 563, 576 (1st Cir. 2001)). “Like any other means of claiming that requested documents are privileged, ‘[t]he privilege log should: identify each document and the individuals who are parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure.’” Id. (quoting United States v. Constr. Prods. Research, Inc., 73 F.3d 464, 473 (2nd Cir. 1996)). “The privilege log must include a detailed description of the documents to be

protected with precise reasons given for the particular objection to discovery.” Id. (quoting Nat’l Union Fire Ins. Co. of Pittsburgh, P.A. v. Midland Bancor, Inc., 159 F.R.D. 562, 567 (D. Kan. 1994)) (internal quotation marks omitted).

In some instances, courts may be required to conduct an in camera inspection to resolve a privilege dispute. See id. at 34. “However, in camera inspection is unnecessary where the party claiming privilege has failed to make a prima facie showing that the documents in question are privileged by submitting a privilege log that adequately describes the documents and the basis for the claimed privilege.” Id. A deficient privilege log precludes an adverse party from raising an informed objection. Therefore, an in camera review is not warranted where a party has not met its initial obligation to justify the withholding of documents through a detailed privilege log. See id.; Diamond State Ins. Co. v. Rebel Oil Co., Inc., 157 F.R.D. 691, 700 (D. Nev. 1994).

B

1.

Plaintiffs’ Third Request for Production to the East Greenwich Defendants

Plaintiffs move to strike the privilege objections and to compel the East Greenwich Defendants to produce documents in response to the Plaintiffs’ third request for production of documents and for reasonable costs and attorneys’ fees in prosecuting the motion. The East Greenwich Defendants filed an initial response with no objections and four supplemental responses with documents, multiple privilege objections and amendments to their privilege logs, in response to the Plaintiffs’ third request for production of documents. The East Greenwich Defendants assert the “attorney-client and/or work product” or “deliberative process” privilege with respect to communications involving members of the EGSD and East Greenwich School Committee. Where recipients are not members of the EGSD or the East Greenwich School

Committee, the privilege log entry also states that the communications were made to “common interest parties concerning [P]laintiffs’ claims.”

After reviewing the East Greenwich Defendants’ privilege logs with respect to the Plaintiffs’ third request for production of documents, this Court finds that the privilege logs are deficient as they do not state with sufficient particularity the names, identities, and relationships of and between the senders and/or recipients of the email communications, the subject matter of the email communications, or the grounds for the particular privilege asserted. Specifically, simply listing an individual’s email address—without any explanation as to the individual’s identity or affiliation—is insufficient, and places the Court in an untenable position of speculating about the status of persons who are the parties to a communication. Further, subject lines stating simply “re: Lamendola” are deficient and do nothing to enable the parties, or this Court, to assess the applicability of any privilege or protection that is claimed. The privilege logs also fail to adequately state which party(s) is asserting the privilege. In the absence of a comprehensive privilege log, this Court is unable to determine the applicability of the Defendants’ objections. Therefore, this Court grants Plaintiffs’ Motion to Compel Production and strikes the East Greenwich Defendants’ objections unless and until they supplement their privilege log with more comprehensive responses. This Court orders that any supplemental privilege log be provided to both the Court and requesting counsel. The Court will only then determine the applicability of any claimed privilege. The Court will abstain at this time from ruling on Plaintiffs’ request for attorneys’ fees, pending the determination of the adequacy of the revised privilege logs.

2.

Plaintiffs' Interrogatories and Document Requests to Strategic

On October 18, 2012, Strategic served answers to Plaintiffs' interrogatories and a response to Plaintiffs' request for production of documents. See Pls.' Exs. 10, 11. Thereafter, in response to Plaintiffs' document request, Strategic made its entire project file available for inspection. Before the inspection of Strategic's entire project file took place, counsel for Strategic advised Plaintiffs' counsel that Strategic was directed by the East Greenwich Defendants to withhold certain documents on the basis of privilege asserted by the East Greenwich Defendants. Apparently, Strategic's counsel made it clear that Strategic did not withhold any documents on the grounds of a privilege that it was asserting, i.e., that its assertion of the privilege was made only at the request of the East Greenwich Defendants. See Pls.' Exs. 12, 13, 14. On November 16, 2012, the East Greenwich Defendants served Plaintiffs' counsel with a document entitled "Privilege Log II, [Strategic Documents]." This log asserts the attorney-client and/or work-product privileges with respect to fifty-four separate email chains between January 27, 2010 and December 6, 2010. See Pls.' Ex. 15.

After reviewing the second privilege log, this Court finds that the privilege log is deficient as it does not state with sufficient particularity the names, identities, and relationships of and between the senders and/or recipients of the email communications, the subject matter of the email communications, or the grounds for the particular privilege asserted. As with the first log, this log fails to identify specifically the names and identities of the senders and recipients of the allegedly privileged email communications. Subject lines stating simply "RE: forum for Cole Abutters" do not aid the Court in determining the applicability of the asserted privilege(s). Again, these responses are insufficient for this Court to conduct a meaningful review of the

applicability of Defendants' objections or the privileges asserted. Absent a clear understanding of the privilege asserted as to each document withheld, this Court need not and will not conduct an in camera inspection. Therefore, this Court grants Plaintiffs' motion to compel the East Greenwich Defendants to produce documents that are part of Strategic's project file that have been withheld under claim of privilege asserted by the East Greenwich Defendants in response to Plaintiffs' Request for Production of Documents to Strategic unless and until they supplement their privilege log with more comprehensive responses. This Court orders that any supplemental privilege log be produced to both the Court and requesting counsel.

3.

Notice of Deposition and Subpoena *Duces Tecum* Served on John Gowell, Chairman of the East Greenwich Building Committee

On November 30, 2012, Plaintiffs served a notice of deposition and subpoena *duces tecum* on John Gowell, the Chairman of the East Greenwich Building Committee, while the project was being designed and constructed. See Pls.' Ex. 16. On December 20, 2012, Attorney Michael DeSisto, counsel for the East Greenwich Defendants and now Mr. Gowell, responded to the subpoena *duces tecum* served on Mr. Gowell. The response consisted of a number of documents and a privilege log containing forty-one documents consisting of multiple pages that are allegedly subject to attorney-client privilege, work-product doctrine, and/or deliberative process privilege.

After reviewing the third privilege log, this Court again finds that this privilege log is deficient as it does not state with sufficient particularity the names, identities, and relationships of and between the senders and/or recipients, the substance of the e-mail communications, the subject matter of the email communications, or the grounds for the particular privilege asserted.

As with the first and second privilege logs, this log fails to identify specifically the names and identities of the senders and recipients of the allegedly privileged email communications. Subject lines stating simply “RE: Home Inspections” are deficient. These responses are insufficient for this Court to conduct a meaningful review of the applicability of Defendants’ objections. Therefore, this Court conditionally grants Plaintiffs’ motion to compel the East Greenwich Defendants to produce documents that have been withheld on the grounds of privilege in response to the deposition notice and subpoena served on Mr. Gowell unless and until they supplement their privilege log with more comprehensive responses. Detailed supplements to the deficient privilege logs shall comply with this Decision and the mandates of Rule 26(b)(5) and be filed on or before forty-five days from the date of this Decision. Failure to comply adequately will result in a final order compelling the requested documents, upon further motion from the Plaintiffs, and hearing before the Court. The Court will abstain at this time from ruling on Plaintiffs’ request for attorneys’ fees, pending the determination of the adequacy of the revised privilege logs. This Court orders that any supplemental privilege log be produced to both the Court and requesting counsel.

ORDER

For the foregoing reasons, this Court conditionally grants Plaintiffs' motions to compel and strike Defendants' objections unless and until Defendants supplement their privilege logs with more complete responses. Detailed supplements to the deficient privilege logs consistent with this Decision and the mandates of Rule 26(b)(5) shall be filed on or before forty-five days from the date of this Decision. Failure to comply adequately will result in a final order compelling the requested documents, upon further motion from the Plaintiffs, and hearing before the Court. This Decision is rendered without prejudice to the Plaintiffs' right to renew their motions to compel production of documents, the Defendants' right to invoke claims of privilege consonant with this Decision, or either Plaintiffs' or Defendants' right to seek an in camera review after they have complied with the terms of this Decision. The Court will abstain at this time from ruling on Plaintiffs' request for attorneys' fees, pending the determination of the adequacy of the revised privilege logs.

ENTER:

PER ORDER:

JUSTICE

CLERK

Dated: _____



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: Christopher Lamendola, et al. v Kathleen Raposa, et al.

CASE NO: KC-2011-0160

COURT: Kent County Superior Court

DATE DECISION FILED: March 21, 2013

JUSTICE/MAGISTRATE: Rubine, J.

ATTORNEYS:

For Plaintiff: David E. Maglio, Esq.

For Defendant: Paul S. Callaghan, Esq.
Michael A. DeSisto, Esq.
Matthew Thomas Oliverio, Esq.
Brian C. Newberry, Esq.
Lynn M. Squillace, Esq.
Kristin A. Grant, Esq.
Lisa M. DeMari, Esq.
John Anthony Donovan, III, Esq.
Tyson C. Roy, Esq.