Archstone v Tocci Bldg. Corp. of N.J., Inc.
2009 NY Slip Op 32673(U)
November 6, 2009
Supreme Court, Nassau County
Docket Number: 001018/2008
Judge: Ira B. Warshawsky
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[* 1]

ORIGINAL

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

ARCHSTONE f/k/a ARCHSTONE-SMITH OPERATING TRUST AND TISHMAN SPEYER ARCHSTONE-SMITH, L.P. f/k/a ASN ROOSEVELT CENTER, LLC,

Plaintiffs,

-against-

TOCCI BUILDING CORPORATION OF NEW JERSEY, INC., LIBERTY MUTUAL INSURANCE COMPANY, PERKINS EASTMAN ARCHITECTS, INC. and ELDORADO STONE, LLC,

Defendants.

Main Party Action

INDEX NO.: 001018/2008
MOTION DATE: 10/05/2009
MOTION SEQUENCE: 009

MOTION TO COMPEL PRODUCTION OF WESSLING REPORTS

TOCCI BUILDING CORPORATION OF NEW JERSEY, INC.,

Third Party Plaintiff,

-against-

ADJO CONTRACTING CORPORATION, AMERICAN ENGINEERING SERVICES, P.C., APRO CONSTRUCTION GROUP, ATLAS COMFORT SYSTEMS, USA, L.P., d/b/a ATLAS AIR CONDITIONING BUILDERS HARDWARD, CLEM'S ORNAMENTAL IRON WORKS, DAVINCI CONSTRUCTION OF NASSAU, INC. d/b/a DAVINCI CONSTRUCTION, FOUR SEASONS INSULATION CORP., HAVANA CONSTRUCTION CORP., HOUSTON STAFFORD ELECTRICAL CONTRACTORS, L.P., d/b/a HOUSTON STAFFORD ELECTRIC, KLEET LUMBER COMPANY, KNIGHT WATERPROOFING COMPANY, INC., MANNING PLUMBING AND HEATING CORP., METRO PAINTING, M.I. CONCRETE CORP., MID-ATLANTIC STONE, INC., PATTI ROOFING, LLC, SIDNEY B. BROWNE & SON, LLP, SIPALA LANDSCAPE SERVICES, INC., STAT FIRE SUPPRESSION, INC., SUPERSEAL MANUFACTURING CO., THREE B'S PLUMBING HEATING AND AIR CONDITIONING

Third-Party Action

[* 2]

CORP. and UNIVERSAL FOREST PRODUCTS,

Third Party Defendants.

FJR CONSTRUCTION, INC.,

Plaintiff,

-against-

ARCHSTONE-SMITH COMMUNITIES, LLC, TOCCI BUILDING CORPORATION OF NEW JERSEY, INC., et al.,

Defendants.

Joined Lien Action # 1

INDEX NO.: 005292/2007

DAVINCI CONSTRUCTION OF NASSAU, INC.,

Plaintiff,

-against-

ARCHSTONE-SMITH COMMUNITIES, LLC, TOCCI BUILDING CORPORATION OF NEW JERSEY, INC., et al.,

Defendants.

Joined Lien Action # 2

INDEX NO.: 006064/2007

TOCCI BUILDING CORPORATION OF NEW JERSEY, INC.,

Second Third-Party Plaintiff,

- against -

MG CONSULTING SERVICES, INC., RMS ENGINEERING and ROBINSON, MULLER & SCHIAVONE ENGINEERS, P.C.,

Second Third-Party Defendants.

Amended Second Third-Party Action

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The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed	1
Affirmation in Support of Motion to Compel by Mid-Atlantic Stone, Inc.	2
Affirmation in Support of Motion to Compel by Patti Roofing, LLC	3
Affirmation in Support of Motion to Compel by Stat Fire Suppression, Inc.	4
Affirmation in Support of Motion to Compel by Atlas Comfort Systems, USA, LP	5
Plaintiffs' Response in Opposition to Defendants Tocci Building Corporation of New Jersey, Inc. and Liberty Mutual Insurance Company's Motion to Compel	6
Reply Affirmation in Support of Motion to Compel of James Davies, Esq.	7

The defendant/third-party plaintiff, Tocci Building Corporation of New Jersey, has moved this court for an order pursuant to CPLR 3124, compelling plaintiff to produce all documents, communications and reports created by or relating to Stephen J. Wessling and/or Wessling Architects, Inc. (collectively Wessling) concerning Wessling's work at or investigation of conditions affecting the buildings located at 1299 Corporate Drive, Westbury, New York 11590.

Plaintiffs are successors to the developer and owner of a residential development located at 1299 Corporate Drive in Westbury, New York. For the purposes of this motion, the development and plaintiff will be called "Archstone." Plaintiffs contend that this motion was brought to improperly obtain non-testifying expert opinions as part of a hoped for effort to critique testifying experts.

On or about January 17, 2008, plaintiffs commenced this action by filing a summons and complaint. Plaintiffs allege, *inter alia*, that due to improper design, defective materials and poor workmanship that the exterior facades at Westbury leak. Plaintiff seeks tens of millions of dollars in damages resulting from these leaks. As a result of the leaks, the facades of the buildings were removed and massive reconstruction occurred.

In May of 2007, Archstone hired Wessling to investigate and repair the facade for leaks. He rendered services that extended from approximately early May through early September, and pre-repaired reports during this period of time. In a document dated May 30, 2007, Wessling sets forth the work he intended to do on the building and his billing rates.

On March 18, 2008, Tocci served its answer to the summons and complaint, and along with that answer also served its first Notice for Discovery and Inspection. It requested, amongst other things:

> Documents concerning any communication, written or oral, by or between Plaintiffs and... any forensic building experts, including, without any limitation, any architects... concerning conditions at the Buildings and its Units after base construction was complete, including, but not limited to, all reports, drafts, photographs and/or video, relating in any way whatsoever, to alleged defects in construction... or water leaks.

Massive discovery has taken place in this case. The proverbial warehouse, now enclosed within discs, has been produced by both sides. We are not merely talking about a plaintiff and defendant, but three co-defendants and approximately, originally, 26 third-party defendants. It was clearly a case that called for "a clawback agreement", to handle inadvertent discovery of privileged information. None was entered into.

In a letter dated October 22, 2008, Archstone demanded that Tocci returned e-mails already produced in discovery that contained any of the findings of Wessling Architects. Prior to that date, Archstone contends it discussed the privilege issue before it even filed the complaint. Plaintiff claimed that the documents were privileged and that they were inadvertently produced. One month later, November 21, 2008, Tocci responded, objecting to plaintiff's description of Wessling's role in the process as a litigation consultant to the plaintiff, (which would allegedly make all communications with Wessling, and all reports produced by Wessling, privileged).

The instant motion to compel, was filed during the summer of this year, and was fully briefed and orally argued in October 2009.

Plaintiff has continued to persist in its request for the return of previously produced e-mails which referred to Wessling or his reports. They have argued generally that Mr. Wessling was hired as a litigation consultant and therefore anything that he produced, his work product, was privileged as well as any discussions with him by any Archstone personnel or Archstone's lawyers is also privileged. Tocci, on the other hand, argues that this material was not prepared solely for litigation purposes, and instead, was obtained and or prepared as part of the normal business routine and, therefore, does not meet the standards set forth by CPLR section 3101.

As previously noted, there was a massive production of e-mails in this case. It is from these e-mails that the movant is able to piece together what was happening in April and May of 2007 at Archstone's Westbury site. The Community Manager of Westbury had become concerned

about alleged leaks in the facade at Westbury; this concern was communicated to upper management and, therefore, by March 13, 2007, Archstone's Senior Regional Service Manager, William Tarinelli, decided to conduct an investigation of the causes of any leaks and directed the Westbury Community Manager not to perform additional waterproofing until after Mr. Tarinelli had spoken with the waterproofing contractor. By April 16, 2007, the Westbury manager had complained to Tarinelli and to Linda Early, Archstone Vice-President of Operations, regarding leaks in 15 of the 396 apartments at the Westbury development. They brought a waterproofing contractor onto the site, so that by the end of April, more specifically April 30, 2007, there were plans to erect scaffolding which would enable them to remove sections of the facade to analyze the problem underneath. Mr. Tarinelli reported his findings to senior Archstone personnel including James Dunlop, Archstone Senior Vice-President of Development, Linda Early, and Eve Michelle. Mr. Tarinelli reported:

> I have had the siding and stone removed off of a portion of Building 16 to try to determine the cause and have taken pictures. It could be both design and construction issues. I would like someone or everybody who can to take a look at what I have seen and see if we can agree on the cause and come up with a solution to fix the problem....

On that same day, apparently after Mr. Tarinelli reported to Mr. Dunlop, Dunlop assigned Eve Michel, who is an architect and an Archstone Vice-President of Construction, and Michael Creighton, Archstone Westbury Project Manager, to assist Tarinelli in resolving the issue. Ms. Michel also contacted Archstone's Project Manager Chris Schuler and "drafted" him on to the "Westbury Leak Team."

On May 4, 2007, the team observed conditions at Westbury. Later in the day Creighton reported his observations to John Costello, the Archstone Vice-President of Construction responsible for the Westbury construction. In response to this report, Mr. Costello wrote back to Creighton and asked him if he should "discuss with Tony after you send him the results or prep him that it is coming?" Apparently Tony is a reference to Anthony Sandonato, Senior Vice-President of Tocci-NJ.

It appears that Mr. Wessling was contacted in early May, and the meeting was scheduled with him at the site for Friday, May 18, 2007. Invited to attend this meeting were two

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representatives from Tocci, Robert Tierney, Tocci's General Superintendent, and the aforementioned Anthony Sandonato. A representative of the window manufacturer, Super Seal Manufacturing Company, also attended the May 18 meeting. Prior to the meeting Ms. Michel had contacted Wessling and had told him that it was Archstone's intention to have Tocci "hold his design contract." This apparently meant that Tocci would be responsible for paying Mr. Wessling. (Somewhat inconsistent with Archstone's claim that Wessling was their litigation consultant in anticipation of litigation against Tocci.)

Within a week Wessling had e-mailed Michel as to certain design changes that he wanted to have made at the project. Specifically details for waterproofing along with top edge of the stone veneer without a cavity. These details were subsequently delivered to the employees of Tocci. On May 30, 2007, the Westbury manager asked Tarinelli for an update on the leak repairs. Tarinelli responded that there was not much to update: "they have done a lot of different tests to determine the problem and are waiting for the design drawings from the waterproofing consultant the next step is to repair another building and testing again to make sure we solve the problem and then repair all the remaining buildings."

Also on May 30, 2007, Wessling submitted an Architectural Proposal for leak review and recommended repair detail services. The proposal is for ordinary architectural services. In the proposal, Wessling estimates that its employees will spend 124 hours on review and repair of conditions at Westbury. Specifically, of the 124 hours in the proposal: thirty-two hours are budgeted to developing "recommended waterproofing repair details;" sixteen hours are budgeted to responding " to the clients phone calls and <u>e-mails from the contractor</u>;" and thirty hours are budgeted to "attend two meetings at Westbury, NY to <u>review our details & progress of the repairs</u>." (emphasis added). This statement of services to be rendered and the costs of the services does not mention speaking with a lawyer, a risk management officer at Archstone, or a claims professional at any insurer.

The next day Eve Michel forwarded Wessling's fee proposal along with a proposal of another waterproofing consultant. She concluded her e-mail noting that "Wessling Architects is working on the [Archstone] Waterbury project and has successfully completed services for us in a timely and effective manner. We propose entering into contract with Wessling Architects...."

(All e-mail references were included as exhibits as part of defendants' motion).

Defendants contend that a June 1, 2007 e-mail from Stephen Wessling to Eve Michel confirms that Wessling was hired to diagnose and correct the leaks at Westbury, and not as a litigation consultant. In response to Eve Michel's request as to how long it would take to complete his services, Stephen Wessling wrote "the length of time will depend on how fast the repairs can be completed." (See e-mail from Stephen Wessling dated June 1, 2007 and attached revised flashing details, copies of which were annexed as Exhibit 19). On or about June 4, 2007, Wessling was retained by Archstone. (See e-mail correspondence between Schuler, Tarinelli and Michel regarding execution of the Wessling contract, copies of which were annexed as Exhibit 20).

Tocci argues that all of the above as well as numerous other documents, confirm that Wessling was hired to design and oversee leak repairs at Archstone, and not as a litigation consultant. This is exemplified by the suggestion that even Michel had made to senior Archstone employees that the following memo be sent to the tenants to ease their anxiety:

1. "we are finalizing a plan."

2. "we have engaged services of an engineer to develop remedial details" and

3. "work will be phased over the next few months. In fact we have already started: by using Bldg 16 as a prototype, we have a better understanding of conditions and sources. Engineer has designed flashing flashing [sic] details that will be put in place within two weeks."

Obviously, the engineer they are discussing is Mr. Wessling.

Further inspections were conducted by Mr. Wessling in late June. They included making probes and inspecting the reinstallation of siding on certain buildings. By mid-July Mr. Wessling was apparently sufficiently through with his work to identify the causes of the leaks and to design appropriate repairs. In fact, according to Mr. Tarinelli, they were able at this time to prepare a proposed budget to make said repairs. Interestingly enough, Mr. Tarinelli advised in an e-mail dated July 12, 2007:

> We have hired a waterproofing consultant and his investigation has found the issues are of a design nature rather than a construction issue. The cost attached are

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a result of his recommendations on how to fix the water leaks in several estimates from contractors.

On July 27, 2007, Eve Michel reported that Wessling was preparing an Executive Summary, which would include recommendations, and that a full report would be available within two weeks.

Ms. Michel submitted an affidavit in support of plaintiffs' opposition to defendants' motion to compel. She stated Archstone had two goals at the time of Wessling's retention: (1) Archstone needed expert opinions as to the cause of the problem so as to assess its option against the responsible parties; and (2) Archstone needed to determine the nature of the damage and repair.

Ms. Michel's affidavit is clearly self-serving. That does not mean, however, that it should be rejected. However, there is nothing in the e-mails that precede the retention of Wessling or are exchanged within the Archstone corporate body, while Wessling was preparing the drafts of the Executive Summary and a Photo Report, that Wessling was or was to become a litigation consultant. Pursuant to Ms. Michel's facts, carefully sculpted to fit the plaintiffs' theory of law, we have material that would indicate, through defendants' eyes, that Wessling was a litigation consultant hired to help them prepare for litigation, as well as working to solve the problem of water infiltration.

She states she discussed the possibility of litigation with Wessling and the potential of his work product being used in a subsequent legal proceeding. He told her he was familiar with the format and content required for litigation reports. Ms. Michel concluded that she could "clearly state that the Wessling report was prepared in anticipation of litigation."

Plaintiff argues that Wessling, consistent with the two objectives stated in Ms. Michel's affidavit, prepared two distinct categories of documents that could theoretically come under the purview of Tocci's action: (1) repair details and related materials that it was anticipated would be utilized in pursuit of remediation or repair (collectively "Repair Details"); and (2) draft expert reports offering of opinions as to the cause of the leaks and the responsible parties (the "Wessling Reports"). It is those reports that are the subject of the motion.

At the court's request, the "draft" reports from Mr. Wessling were produced and

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forwarded to the court for in-camera review. These reports are as follows:

July 30, 2007 — Executive Summary
Draft Report for Water Leaks and Drainage

August 12, 2007 — Executive Summary
Draft Report of Architectural Drawings

August 28, 2007 — Photographic Report (only portions provided to the court as an example – it is very large)

September 4, 2007 — Executive Summary
Draft Report of Water Leaks and Drainage

September 9, 2007 Executive Summary
Draft Report Review of the Architectural Drawings

DISCUSSION

The statutory heart of our issue lies within CPLR § 3101:
§ 3101. Scope of disclosure.

(a) Generally. There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof,

. . . .

(b) Privileged matter. Upon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable.

(c) Attorney's work product. The work product of an attorney shall not be obtainable.

(d) Trial preparation.

1. Experts. Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on

> its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.
>
> . . . .
>
> 2. Materials. Subject to the provisions of paragraph one of this subsection, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent) may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the 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.

CPLR § 3101(a) requires full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof. The statute has been liberally construed to require disclosure of any information or material reasonably related to the issues, which will assist in the preparation for trial. See Hoenig v. Westphal, 52 N.Y.2d 605, 439 N.Y.S.2d 831 (1981) (quoting Allen v. Crowell-Collier Pub. Co., 21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968) and holding that the provision has been construed so as to require any matter that will "assist preparation for trial by sharpening the issues and reducing delay and prolixity").

CPLR § 3124 states that "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response." Where a notice for disclosure is ignored, a party seeking disclosure can proceed under CPLR § 3124 for an order to compel disclosure, or move under § 3126 for the imposition of penalties for willful failure to disclose. See Goldner v. Lendor Structures, Inc., 29 A.D.2d 978, 979, 289 N.Y.S.2d 687 (2d Dept. 1968).

In this action, Archstone has refused to produce the Wessling Material despite Tocci-NJ's requests for such documents. Archstone relies on the claim that these documents are exempt from production under CPLR § 3101(d)(2) (materials "prepared in anticipation of litigation").

When discussing the "anticipation of litigation" exclusion, CPLR § 3101(d)(2), provides:

> materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

The defendants note this exception to the general rule is very limited. Indeed, courts limit the use of this exception to material prepared exclusively for litigation. Sigelakis v. Washington Group, LLC, 46 A.D.3d 800, 848 N.Y.S.2d 272 (2d Dept. 2007) (accident report prepared by employee was not material prepared in anticipation of litigation since it was not prepared solely in anticipation of litigation); see Mogollon v. South African Marine Corp., Inc., 88 A.D.2d 586, 449 N.Y.S.2d 791 (2d Dept. 1982) (report prepared by investigator employed by attorney was not material prepared in anticipation of litigation since it was not exclusively prepared for litigation); cf. Coastal Pollution Control Servs. v. Poughkeepsie Hous. Auth., 78 A.D.2d 847, 432 N.Y.S.2d 725 (2d Dept. 1980) ("subject report was prepared solely for litigation purposes" and was immune from disclosure) (emphasis added). Indeed, if any other purpose for the preparation of the material exists – e.g., the material was obtained and prepared as part of a normal business routine – the material does not fall within the scope of CPLR § 3101(d)(2) and would not be exempt from discovery. Sigelakis, 46 A.D.3d at 801; see Calkins v. Perry, 168 A.D.2d 999, 564 N.Y.S.2d 943 (4th Dept. 1990) (holding there must be full disclosure of accident reports prepared in the ordinary course of business that were motivated at least in part by a business concern other than preparation for litigation).

Defendants argue CPLR § 3101(d)(2) does not apply where, as here, the report was "prepared in the ordinary course of business or []'assembled to aid defendant in the operation of business.'" Christie's, Inc. v. Zirinsky, 17 Misc.3d 1123(A), 851 N.Y.S.2d 68 (N.Y. Sup. Ct. 2007) (quoting Spectrum Systems, Intl. Corp. v. Chemical Bank, 157 A.D.2d 444 (1st Dept. 1990), *rev'd on other grounds* 78 N.Y.2d 371 (1991). Mixed/multi-purpose reports that may be motivated in part by business and in part by litigation have been found to be discoverable. Bombard v. Amica Mutual Insurance Company, 11 A.D.3d 637, 783 N.Y.S.2d 85 (2d Dept.

2004).

Plaintiffs contend, through Ms. Michel, that the report was prepared in anticipation of "potential litigation." She does not contend that it was prepared for actual, anticipated or threatened litigation. They contend when we apply the immunity provisions of CPLR 3101(d)(2) to the actual documents at issue, the "status of each category of documents is very clear."

Plaintiffs choose to separate what they call "repair details and construction repair advice", which they have or are willing to produce, from the "Wessling Reports." Counsel argues that the Wessling proposal specifically carves out report writing as one element of Wessling's work. They argue that Wessling provided expert services separate and distinct from his role as a designer. (Plaintiffs' Opposition to Motion to Compel, p. 7, footnote 8).

Counsel argues that the court should be examining the documents in question to determine if it was created in anticipation of litigation. See Sigeliakis, supra. Whether the author prepared other non-litigation tasks, they argue, is irrelevant to the analysis required by New York courts as to the document itself. See Betalo's Rest., Inc. v. Exch. Ins. Co., 240 A.D.2d 452, 658 N.Y.S.2d 656 (2d Dept. 1997).

Plaintiffs have completely twisted the case law to support its dual track theory of a litigation consultant wearing two hats; one to prepare an expert report and the other to prepare "repair details and construction repair advice."

In Betalo, supra, the court ruled that a report is not immune if litigation is not the sole motive. This, once again, does not support plaintiffs' creative dual track system, nor does the Spectrum case, Spectrum Systems. Int'l. Corp. v. Chemical Bank, 157 A.D.2d 444 (1st Dept. 1990), *reversed on other grounds*, 78 N.Y.2d 371 (1991), which stated that a memorandum must be prepared purely for purposes of litigation, to receive immunity from production, putting aside what the court considers plaintiff's incorrect view of the cited case law. Plaintiffs concluded that a person/entity "does not have to be retained solely for litigation purposes if the report was for litigation purposes." Archstone cites to their hiring of Williams Building Diagnostic ("WBD") in an expert capacity for litigation. Archstone also is using them as an architect of record for the ongoing repair and remediation work at the project. (Though not determinative, WBD was brought in by counsel; Wessling by the plaintiffs). Archstone proffers that if the court was to

follow Tocci's argument, Archstone waived any protection of WBD's expert materials because Archstone chose to have WBD also prepare repair details. These facts do not parallel those of Wessling and the court chooses not to encompass a ruling on WBD along with the motion to compel the Wessling reports.

There is nothing in the Wessling retainer docufment that indicates he had dual purposes. There is no affidavit from Mr. Wessling that he thought he was retained for dual purposes; beyond telling Archstone what was wrong and how to fix it.

During oral argument, the court inquired of plaintiffs' counsel if they believed that the intent of the party who ordered the report or investigation or inspection should control our issue. They believed it did. In other words, if Wessling was retained to investigate the leaks, find the source(s)/cause of the water infiltration and then bring about said repairs, and the plaintiff's intention to use his report to bring about litigation, even though he may never have known it, he would have become Archstone's litigation consultant and his reports protected by the privilege.

The court does not accept that theory nor does it believe it is supported by case law in this state. The court had read all draft reports submitted by Wessling to Archstone. There is nothing in those reports which would signal to the reader they were meant as a road map to litigation by the plaintiffs. At best, an educated reader could argue that he/she could use the report not only for repairing the project, but to plan early litigation decisions. Obviously that does not qualify them for immunity pursuant to CPLR 3101(d)(2).

No matter how many times plaintiffs' counsel says Wessling was and is their litigation consultant, that does not make it so. The e-mail history calls him their waterproofing consultant. They say Tocci will "hold his design contract" (no indication there was, or was to be, any other kind of contract).

The agreement of Wessling (dated May 30, 2007 on top and May 31, 2007 on bottom) is labeled "Architectural Proposal for: /Westbury, Long Island, N.Y., Roosevelt Center Apartment Complex/Leak Review and Recommended Repair Detail Services." There is nothing about this document which would lead anyone to believe Wessling was to be a litigation consultant.

The e-mail recommending the hiring of Wessling "to investigate leaks and to prepare recommendations for the repair of leaks at the Westbury Project" goes no further. Even the May

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30/31, 2007 Wessling proposal states, "Wessling Architects fee proposal is a cohesive whole and cannot be separated into pieces without a fee adjustment."

The follow up e-mails from Ms. Michel to Wessling of May 31, 2007 asks:

> Stephen:
> A couple of questions on your proposal:
>
> 1. During your review of the architectural drawings and the "as built" conditions, we would ask that you help us determine if the leaks are caused as a result of inadequate detailing or incorrect installation.
>
> 2. Will you need to make any probes or perform testing as part of this investigation? Are such tests/probes included in your current scope of services. We recognize that we would supply labor force as needed.
>
> 3. As part of your recommended repairs, will you be supplying an "order of magnitude" cost?
>
> 4. Approximately how long will it take to complete these services and when would you be ready to commence?
>
> Thank you.
>
> Eve Michel

Wessling replied (June 1, 2007):

> Eve:
>
> Answers:
>
> Attached please find flashing around the vents.
>
> 1. Yes I will give you my opinion as to the cause of the leaks.
> 2. Once we fully understand where the leak sources are then test cuts will probably be needed, but what Chris has done to date makes one major source of the leaks very clear.
> 3. We can provide cost but it is not in our fee, should we add a fee for working with a contractor?
> 4. The length of time will depend on how fast the repairs can be completed, but in the initial study should not take more than one month. We are exceptionally busy but we will fit it in. Looking over the facade leaks it appears they are on all elevations and all levels, am I correct? Are most of the leaks on levels one

and two?

Steve

It is clear that the only indicia of Wessling providing his opinion is in the e-mail response of June 1, 2007 to question number 1 asked by Ms. Michel.

This, in the court's opinion, is part of the business-related function of hiring Wessling as the waterproofing consultant. His agreeing to give his opinion as to the cause of the leaks does not create a dual track retention for which immunity would protect what has become known as the Wessling Reports.

Ms. Michel's affidavit, reflecting her conversations with Wessling as to the possibility of litigation and "the potential for his work product being used in a subsequent litigation", does not provide an immunity umbrella over these reports, the "Wessling Reports."

The fact that Mr. Wessling told Ms. Michel (hearsay – no affidavit from Wessling) "that he frequently prepared reports for the purposes of litigation and was familiar with the format and content required for litigation" adds nothing to plaintiff's claim of immunity; nor to Ms. Michel's contention that his familiarity with "litigation oriented reports" contributed to his hiring. In their own words, Archstone hired Wessling because of his work on another project. Ms. Michel's affidavits smacks of revisionist history.

Plaintiffs' counsel argues:

> Ms. Michel's testimony clearly illustrates that Archstone directed Wessling to create the Wessling Reports in anticipation of litigation and that the Wessling Reports were handled in a manner consistent with the treatment of confidential litigation reports.

There is absolutely nothing that has been presented to the court to support this statement.

As to the reports themselves, plaintiffs argue that they were not "used in any way, for the purpose of implementing a repair or any other activity that could theoretically be construed as an operational task." They played "no role in repairing or operating the project and were not in fact used that way."

Plaintiff further argues Tocci has failed to demonstrate a substantial need to override the conditional immunity plaintiffs claim is granted to the Wessling Reports. Burden of proof —

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Once party claiming immunity or conditional immunity from disclosure makes the required showing that the documents were prepared solely for litigation, the party seeking disclosure (Tocci) has the burden to establish that it would suffer undue hardship if its motion is denied. Straus v. Ambinder, 61 A.D.3d 672, 878 N.Y.S.2d 70 (2d Dept. 2009); Harold v. First Baptist Church, 254 A.D.2d 746, 677 N.Y.S.2d 859 (4th Dept. 1998).

Plaintiffs argue that the Wessling Reports are based upon a small sampling of buildings whose walls had been opened in the summer of 2007. Since that time, all the walls of all the buildings have been opened. All parties have been given the opportunity to be present and have opened the walls. The point being that there can be no information available in the reports that would not be available to Tocci and other defendants. Tocci had made no such argument.

Wessling's conclusions can only be preliminary, based upon the samples taken up until the time he rendered his report. Since then nearly twenty times that amount of information has been "uncovered." Thus, Tocci seeks discovery, so argues plaintiffs, "of the preliminary opinions of a non-testifying expert that were based on limited information in a presumed attempt to confuse the fact-finder in this case."

All this may be true, but while the CPLR protects the reports of a non-testifying expert, it does not protect those reports made as part of the plaintiffs' business in diagnosing and repairing the water infiltration problems suffered by the project. (If the Wessling Reports are inconsistent with WBD or any other expert's reports, then it would be up to the parties to explain the differences).

Archstone argues that even if the court directs the production of the Wessling Reports, said production is an ultimately futile act. The reports are opinion, not fact, and Archstone cannot be forced to call Wessling as their expert witness and Wessling apparently will not testify for defendants.

Essentially, the report cannot come into evidence, its author will not testify (so we are told), and the statements made by Wessling do not create an admission on the part of the client. Vozdik v. Frederich, 536 N.Y.S.2d 599, 600 (3d Dept. 1989).

Archstone contends in summary:

1. Wessling prepared materials for a non-litigation purpose (details and related documents for repair).

2. Wessling also prepared reports in anticipation of litigation (separate and apart from non-litigation material).

3. That New York law protects the reports prepared in anticipation of litigation. CPLR 3101(d)(2).

4. Tocci cannot show it would suffer undue hardship if its motion to compel was denied.

Defendants in summary counter:

1. The materials prepared by Wessling were not prepared solely for the purposes of litigation, but rather in the regular course of business. The basis for the conclusion of plaintiffs is the self-serving statement of Ms. Eve Michel which is weakened by failing to include an affidavit from Wessling.

2. The Wessling Reports did not contain any "confidential" or "privileged" markings or notations on their covers.

3. The e-mail strings amongst Archstone personnel never reflects any indication that the Wessling Reports were prepared in anticipation of litigation.

Even more telling is the fact that on July 11, 2007, Archstone created a spreadsheet entitled "Westbury Remedial Repairs/Upgrades." It provided that "major facade repairs" are to be performed "based upon Wessling Reports" (from Karla Rodriguez to Chris Schuler and attaching a spreadsheet).

On July 27, 2007, Ms. Michel stated Archstone would have a "complete understanding of the problem" in two weeks after Wessling submits his report. If this report was meant to be in "anticipation of litigation" then it obvously was serving a dual purpose and was not solely in preparation or in anticipation of litigation. See Crow-Crimmins-Wolf and Munier v. Westchester County, 123 A.D.2d 813 (2d Dept. 1986).

In an e-mail of July 31, 2007, Eve Michel wrote to Archstone personnel (Smith, Early, Tarinelli, Lewis, Hughes and Schuler). She commented on the Wessling Report and what inferences she drew from it and what it meant to Archstone. Her comments were as an architect and befit her position as Vice-President of the corporation. The report was being used to plan

repairs and the replacement of materials. Once again, if the report was used in the future, in anticipation of litigation, it was also being sued to plan remediation and reconstruction.

The photographic report, according to Wessling, was being used to "document[ing] the multiple facade problems" (August 14, 2007) (to Eve Michel and Christ Schuler).

In an e-mail of August 16, 2007, Chris Schuler attached Wessling's Executive Summary and Roosevelt Common Drawing Review and wrote to Christopher Hughes (Atlanta) and Eve Michel that he would provide "a cliff note version of the pictures in a binder that tells the story of the problems at Westbury." He also noted:

> FYI: – I met with Warren Cressey from LCG (General Contractor from Atlanta) on Wednesday at Westbury. He too, will be forwarding a short summary of his recommendations and views regarding our problem.

This is further indication that the Wessling Reports were being used or the contemplated use was for business purposes of Archstone as of the time they were created.

The court finds the Wessling Reports were prepared in the ordinary course of business, and were assembled to aid Archstone in repair of the project and remediation of water infiltration. The argument that these reports are to be treated separate and apart from Wessling's "repair details and construction repair advice" is rejected by the court. At best, the Wessling Reports might be described as mixed multi-purpose reports that may have been initially motivated by business purposes and in part in anticipation of litigation. See Spectrum Systems Int'l. Corp. v. Chemical Bank, 157 A.D.2d 444 (1st Dept. 1990, reversed on other grounds 78 N.Y.2d 371 (1991).

The motion to compel production of the Wessling Reports is granted along with all documents and communications related thereto. The Wessling Reports, as previously set forth, are to be produced to Tocci and all other defendants and third-party defendants in the same format as earlier productions. The cover letter e-mails that accompanied said reports are also to be produced, if they were not part of earlier productions.

Dated: November 6, 2009

J.S.C.

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