11 A.D.3d 647
Supreme Court, Appellate Division,
Second Department, New York.

George E. BOMBARD, respondent,
v.
AMICA MUTUAL INSURANCE COMPANY, appellant.

Oct. 25, 2004.

Synopsis

Background: Insured sued insurer, seeking a judgment declaring that the insurer was obligated to defend and indemnify the insured in an underlying personal injury action. The Supreme Court, Nassau County, McCarty, J., granted the insured's motion to compel the insurer to respond to a notice for discovery and inspection insofar as it sought disclosure of certain documents, and the insurer appealed.

[Holding:] The Supreme Court, Appellate Division, held that material sought by insured was not protected by the statutory privilege for material prepared in anticipation of litigation.

Affirmed.

West Headnotes (3)

[1] Pretrial Procedure
Burden of Proof

Party asserting the statutory privilege for material prepared in anticipation of litigation bears the burden of demonstrating that the material it seeks to withhold is immune from discovery by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation. McKinney's CPLR 3101(d).

12 Cases that cite this headnote

[2] Pretrial Procedure
Insurance Policies and Related Documents

Payment or rejection of claims is a part of the regular business of an insurance company and, 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, and reports prepared by insurance investigators, adjusters, or attorneys before the decision is made to pay or reject a claim are not privileged and are discoverable, even when those reports are "mixed/multi-purpose" reports, motivated in part by the potential for litigation with the insured. McKinney's CPLR 3101(d).

6 Cases that cite this headnote

[3] Pretrial Procedure
Insurance Policies and Related Documents

Insurer failed to prove that a decision to deny coverage had been made by the date of a reservation of rights letter, but rather, it was not until the time of a disclaimer letter that there was a firm decision to reject the insured's claim, and thus, it was only at that later time that files of the insurer became privileged from discovery by the insured; accordingly, the insurer was properly directed to comply with the insured's request for the production of material previously prepared. McKinney's CPLR 3101(d).

3 Cases that cite this headnote

Attorneys and Law Firms

****86** Bee Ready Fishbein Hatter & Donovan, LLP, Mineola, N.Y. (Thomas J. Donovan of counsel), for appellant.

Purcell & Lyons, LLP, Huntington, N.Y. (Christopher J. Purcell of counsel), for respondent.

FRED T. SANTUCCI, J.P., THOMAS A. ADAMS, WILLIAM F. MASTRO, and ROBERT A. SPOLZINO, JJ.

Opinion

***647** In an action, inter alia, for a judgment declaring that the defendant is obligated to defend and indemnify the plaintiff in a ***648** personal injury action pending in the Supreme Court, Nassau County, under Index No. 17777/02, the defendant appeals, as limited by its brief, from so much of an order of the Supreme Court, Nassau County (McCarty, J.), dated April 19, 2004, as granted that Branch of the Plaintiff's Motion which was to compel the defendant to respond to the plaintiff's Notice for Discovery and Inspection insofar as it sought disclosure of documents prepared between December 31, 2002, and February 4, 2003.

ORDERED that the order is affirmed insofar as appealed from, with costs.

[1] The party asserting the privilege provided by CPLR 3101(d) bears the burden of demonstrating that the material it seeks to withhold is immune from discovery (*see Koump v. Smith,* 25 N.Y.2d 287, 294, 303 N.Y.S.2d 858, 250 N.E.2d 857) by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation (*see Chakmakjian v. NYRAC, Inc.,* 154 A.D.2d 644, 645, 546 N.Y.S.2d 650; *Crazytown Furniture v. Brooklyn Union Gas Co.,* 145 A.D.2d 402, 535 N.Y.S.2d 401). The Supreme Court correctly held that the defendant's conclusory assertions failed to satisfy this burden. In fact, on the limited record that was before the Supreme Court, it was apparent that the asserted privilege is inapplicable.

[2] "[T]he 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" (*Landmark Ins. Co. v. Beau Rivage Rest.,* 121 A.D.2d 98, 101, 509 N.Y.S.2d 819). Reports prepared by insurance investigators, adjusters, or attorneys before the decision is made to pay or reject a claim are thus not privileged and are discoverable (*see Landmark Ins. Co. v. Beau Rivage Rest., supra* at 101, 509 N.Y.S.2d 819; *see also Bertalo's Rest. v. Exchange Ins. Co.,* 240 A.D.2d 452, 454, 658 N.Y.S.2d 656; *Roman Catholic Church of Good Shepherd v. Tempco Sys.,* 202 A.D.2d 257, 258, 608 N.Y.S.2d 647; *Paramount Ins. Co. v. Eli Constr. Gen. Contr.,* 159 A.D.2d 447, 553 N.Y.S.2d 127), even when those reports are "mixed/multi-purpose" reports, motivated in part by the potential for litigation with the insured (*see Landmark Ins. Co. v. Beau Rivage Rest., supra* at 102, 509 N.Y.S.2d 819; *see also McKie v. Taylor,* 146 A.D.2d 921, 536 N.Y.S.2d 893).

[3] Here, the record belies the defendant's contention that the decision to deny coverage had been made by December 31, 2002, the date of the reservation of rights letter. The language of that letter, as well as the subsequent disclaimer letter, clearly ***649** established that the defendant's investigation of the incident and the facts related to the plaintiff's notice of the incident was ongoing and that it was not until the disclaimer letter, dated February 4, 2003, that there was a firm decision to reject the ****87** plaintiff's claim. Since it was only at that time that the files became privileged, the Supreme Court properly directed the defendant to comply with the plaintiff's request for the production of the material previously prepared.

All Citations

11 A.D.3d 647, 783 N.Y.S.2d 85, 2004 N.Y. Slip Op. 07651