

United States Court of Appeals
For the Eleventh Circuit

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No. 04-11181 - CC

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

District Court Docket No.
8: 03-00112-MC-T-27-EAJ

Aug 19, 2004

THOMAS K. KAHN
CLERK

POTOMAC ELECTRIC POWER COMPANY,

Plaintiff-Appellee,
ENERGY INSURANCE MUTUAL, LTD.,

Interested Party-Appellee,

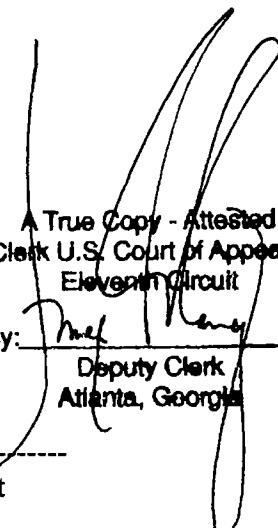
versus

SUPPORT TERMINAL SERVICES, INC.,

Defendant-Appellant,

SUPPORT TERMINALS OPERATING PARTNERSHIP, LP,

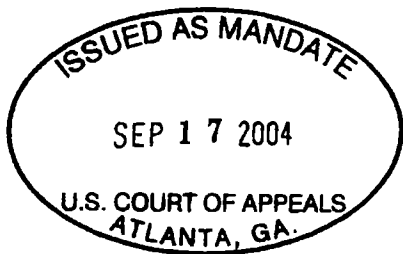
Movant-Appellant,

A True Copy - Attested
Clerk U.S. Court of Appeals,
Eleventh Circuit
By: 
Deputy Clerk
Atlanta, Georgia

Appeal from the United States District Court
for the Middle District of Florida

J U D G M E N T

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.



Entered: August 19, 2004
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

FILED

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11181
Non-Argument Calendar

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 19 2004
THOMAS K. KAHN
CLERK

D. C. Docket No. 03-00112-MC-T-27-EAJ

POTOMAC ELECTRIC POWER COMPANY,

Plaintiff-Appellee,

ENERGY INSURANCE MUTUAL, LTD.,

Interested Party-Appellee,

versus

SUPPORT TERMINAL SERVICES, INC.,

Defendant-Appellant,

SUPPORT TERMINALS OPERATING PARTNERSHIP, LP,

Movant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(AUGUST 19, 2004)

Before BLACK, PRYOR and COX, Circuit Judges.

PER CURIAM:

Support Terminal Services, Inc. (“ST Services”) appeals the district court’s final order denying its motion to compel Energy Insurance Mutual, Ltd. (“EIM”) to comply with a document subpoena. We vacate and remand.

I. BACKGROUND & PROCEDURAL HISTORY

Potomac Electric Power Company (“Pepco”) owned an oil pipeline in Maryland. ST Services operated the pipeline for Pepco. There was an oil spill from the pipeline, which caused millions of dollars worth of damage to the environment around the pipeline. As owner of the pipeline, Pepco was financially responsible for this damage. Pepco has sought and is now seeking to recoup that loss from several sources.

Pepco sought to recoup the damages from its insurance companies. EIM is Pepco’s excess insurance carrier: under EIM’s contract with Pepco, it will pay for reasonable and necessary oil-spill-cleanup costs over the limits of Pepco’s principal insurance policy. Pepco made a claim on its EIM policy, and EIM, following its normal claims-handling procedure, referred the claim to its counsel, Baker & McKenzie, for Baker & McKenzie to adjust the claim. Baker & McKenzie retained the services of Roux Associates to review the Pepco claim. Roux compiled,

organized, and analyzed the hundreds of invoices generated in Pepco's clean-up of the spill; interviewed Pepco's managers and accountants; and obtained and reviewed diagrams and aerial photographs of the clean-up site. In the process, it generated many documents containing its findings. It ultimately compiled a report which it provided to Baker & McKenzie. Baker & McKenzie used the Roux report to adjust the Pepco claim. EIM conducted no independent review of the Pepco claim, and, based on Baker & McKenzie's conclusions, paid substantial portion of Pepco's claim.

Pepco is also seeking to recoup the cleanup costs from ST Services, pursuant to ST Services's agreement to indemnify Pepco for reasonable and necessary clean-up costs caused by ST Services's management of the pipeline. To this end, Pepco is prosecuting a civil action in the United States District Court for the District of Maryland, *Potomac Elec. Power Co. v. Support Terminal Servs., Inc.*, Civil Action PJM-02-4076. EIM is not a party to the Maryland case.

In preparing its defense in the Maryland case, ST Services sought to discover the amount that EIM paid to Pepco, and the basis for that amount, because ST Services maintains that it, like EIM, is only required to indemnify Pepco for reasonable and necessary clean-up costs. Pepco produced several documents to ST Services, including an incomplete copy of the Roux report, as well as about 100 pages

of letters between EIM, Baker & McKenzie, and Roux. But ST Services wanted more.

ST Services filed this action, an action ancillary to the Maryland suit, in the Middle District of Florida (where EIM is headquartered) to enforce a subpoena seeking from EIM documents relating to the Pepco claim. The initial document in this case was ST Services's motion to compel compliance with the subpoena. EIM produced to ST Services hundreds of pages of documents which EIM maintains are not privileged. But EIM refused to produce others, on the grounds of the attorney-client and other privileges. EIM then filed with the court a log of all the documents it was refusing to produce; the log went document-by-document stating the particular privilege being asserted and why.

In addition to the privilege log, the record also contains two pieces of evidence: one, the affidavit of Lisa S. Brogan, a Baker & McKenzie lawyer, which simply affirms the contents of EIM's response to ST Services's motion; the other, the deposition of EIM's CEO, David Hadler. The response which Attorney Brogan swore to stated that the documents which EIM was refusing to produce contained legal advice and strategy given by Baker & McKenzie to EIM. CEO Hadler, however, testified that the Roux documents "dealt with purely factual issues," as

Roux's job was simply to "amass[] . . . the facts of the costs submitted" with the Pepco claim. (R. at 5, Ex.2 at 69, 77.)

ST Services proposed that the district court order EIM to produce the documents, so that the court could review *in camera* the documents to determine whether they were indeed privileged.

Without examining the documents, a magistrate judge denied ST Services's motion to compel, concluding in part that the documents were privileged, based on the log and the evidence in the record. ST Services timely objected to the magistrate judge's ruling. The district court affirmed, concluding, based on the log and the uncontroverted evidence, that the documents were protected by the attorney-client privilege because they contained the legal advice and litigation strategy opinions of EIM's lawyers. ST Services appeals.

II. ISSUE ON APPEAL

Whether the district court abused its discretion in denying ST Services's motion to compel EIM to comply with ST Services's document subpoena, to the extent that the subpoena sought documents generated by Roux during Roux's investigation of the Pepco claim, based on the court's conclusion that these documents were protected by the attorney-client privilege.

III. STANDARD OF REVIEW

Denial of a motion to compel is a discovery decision which we review for abuse of discretion. *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1315 (11th Cir. 1999).

IV. CONTENTIONS OF THE PARTIES

ST Services contends that the district court abused its discretion in denying its motion to compel EIM to comply with the document subpoena, as the subpoena related to the Roux investigation documents. It maintains that these documents were not privileged because they were created as a part of EIM's ordinary insurance-claims-adjusting business, and not in the course of seeking legal advice or strategy.

EIM contends that the district court properly denied the motion based on privilege, even as it related to the Roux documents, because Baker & McKenzie retained Roux to provide expert advice needed in Baker & McKenzie's legal, rather than business, advice to EIM.

V. DISCUSSION

As the party invoking the attorney-client privilege, EIM bore the burden of proving the privilege. *Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003). EIM was entitled to have the Roux documents shielded by the attorney-client privilege only if they were generated in the course of Baker & McKenzie's providing EIM an

opinion of law, legal services, or assistance in some legal proceedings. *Ray v. Cutter Labs.*, 746 F. Supp. 86, 87 (M.D. Fla. 1990) (citing *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950)). The privilege does not apply if the documents were generated in the course of EIM's seeking ordinary business advice from Baker & McKenzie. *Ray*, 746 F. Supp. at 87.

Thus, where an insurance company "farmed out" its investigation and claims handling to a law firm, the court in *First Aviation Servs., Inc. v. Gulf Ins. Co.*, 205 F.R.D. 65, 69 (D. Conn. 2001), compelled the insurance company to produce claims documents requested by an opponent, over the insurance company's claim of the attorney-client privilege. The court held that "[s]uch a practice cannot become a mechanism for avoiding disclosure of documents through an assertion of privilege," that "[a]n insurance company may not insulate itself from discovery by hiring an attorney to conduct ordinary claims investigations." *Id.* (citation and internal quotation marks omitted). The court's reasoning was two-fold. First, the attorney was acting merely as a claims investigator, which was the ordinary business of the insurance company. And second, under Connecticut's law of attorney-client privilege, a client's request to his attorney to obtain factual information is not privileged; nor is a communication from attorney to client solely regarding a matter of fact privileged, unless the communication is inextricably linked to the giving of

legal advice. *Id.* (citations omitted). *See also Mission Nat'l Ins. Co. v. Lilly*, 112 F.R.D. 160, 163-65 (D. Minn. 1986) (holding that documents generated by law firm employed by insurer to act as a claims adjuster were not automatically covered by the work-product privilege: only those portions of the documents reflecting mental processes and opinions of counsel which truly bore on anticipated, choate litigation were privileged and would be redacted and protected in discovery).

Here, the record is in conflict over the purpose of the Roux documents. EIM's CEO testified that in EIM's normal business practice, it referred all insurance claims to Baker & McKenzie, that EIM conducted no independent review of the Pepco claim, and that Baker & McKenzie hired Roux to examine the facts of Pepco's clean-up costs. This is a necessary part of adjusting an insurance claim. But, Attorney Brogan swore that the Roux documents were created to enable Baker & McKenzie to give EIM legal advice.

Likewise, the record is in conflict over the contents of the Roux documents. Brogan affirmed what the privilege log filed by EIM asserted: that the documents contain legal advice and strategy. CEO Hadler testified, however, that the Roux documents "dealt with purely factual issues." (R. at 5, Ex.2 at 69.) The papers in the record back up Hadler's view, stating that Roux reviewed Pepco's invoices,

interviewed Pepco's managers and accountants to reconcile inconsistencies in the invoices, and reviewed aerial photographs and diagrams of the clean-up site.

Because the evidence regarding the nature of the Roux documents was in conflict, the district court erred in concluding, without viewing the documents, that the Roux documents were protected by the attorney-client privilege.¹

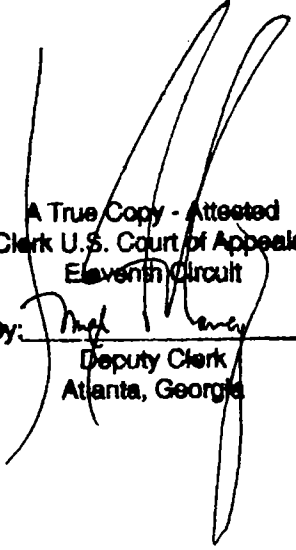
VI. CONCLUSION

Because the district court's ruling was based on an erroneously-drawn conclusion, the court abused its discretion in denying the motion to compel. Thus, we vacate the court's order denying the motion, and remand this case for further proceedings consistent with this opinion.

¹On appeal, EIM contends that we could affirm the district court's decision based on the work-product privilege. This privilege applies only if the documents "reveal an attorney's mental impressions and legal theories and were prepared by the attorney in contemplation of litigation." *Nadler v. United States Dept. of Justice*, 955 F.2d 1479, 1491-92 (11th Cir. 1992) (citations omitted), *abrogated on other grounds by United States Dept. of Justice v. Landano*, 508 U.S. 165, 113 S. Ct. 2014 (1993). We cannot conclude that the Roux documents are protected by the work-product privilege, for two reasons. First, the record is not clear that the Roux documents were prepared in anticipation of litigation: EIM referred all insurance claims to Baker & McKenzie, including the Pepco claim, and Baker & McKenzie merely delegated the factual review portion of adjusting the claim to Roux. While there was some dispute between Pepco and EIM over coverage, EIM points to no evidence that this was the build-up to a lawsuit, rather than a normal, insured-insurer negotiation. *Cf. Westhemeco Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 708-09 (S.D.N.Y. 1979) (concluding that report prepared, after insured asked insurance company to reconsider its initial denial, by surveyor retained by law firm representing insurance company was not protected by the work-product privilege because it was not prepared in anticipation of litigation, but merely in the course of the insurance company's investigating a claim prior to payment, which is the normal business of an insurance company). Second, in light of the conflicting evidence in the record, and without reviewing the documents, we cannot determine whether they reveal Baker & McKenzie's mental impressions and legal theories.

VACATED AND REMANDED.

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Eleventh Circuit

By:  _____
Deputy Clerk
Atlanta, Georgia