IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE CONDOMINIUMS AT STONEBRIDGE OWNERS' ASSOCIATION, INC.	)	**CASE NO. CV 11 771554**
	)	**JUDGE JOHN P. O'DONNELL**
Plaintiff,	)	
vs.	)	
THE K&D GROUP, INC., *et al.*	)	**JOURNAL ENTRY DENYING THE DEFENDANTS' MOTION FOR A PROTECTIVE ORDER**
Defendants	)	

John P. O'Donnell, J.:

Defendants The K&D Group, Inc., Stonebridge Building & Design, Inc., The Condominiums at Stonebridge, Ltd., and Stonebridge Towers, Ltd. filed on July 25, 2013, a motion for a protective order to "claw back" from plaintiff's counsel a letter produced in discovery. The plaintiff opposed the motion on July 29 and the defendants replied to that opposition on July 31. This entry follows.

STATEMENT OF THE CASE

The plaintiff filed this lawsuit on December 16, 2011. Four defendants were named: The K&D Group, Inc., Stonebridge Building & Design, Inc., The Condominiums at Stonebridge, Ltd., and Stonebridge Towers, Ltd. The defendants filed a joint answer on March 29, 2012. The complaint has since been amended, and third-party complaints asserted, but the causes of action in the original complaint against the four original defendants are repeated in the amended complaint and those claims only are scheduled for a trial on August 26, 2013.

The plaintiff – as its name implies – is the association for unit owners of a condominium complex at 2222 Detroit Avenue, Cleveland, known as Stonebridge. The condominiums were built beginning in about 2003. The four defendants are entities

"responsible for planning, designing, developing, building and warranting"[1] the project. The plaintiff claims that the faulty design and construction of the building has resulted in the infiltration of water that has damaged the entire structure. Moreover, the plaintiff alleges that the defendants fraudulently misrepresented and concealed the deficiencies. Finally, the plaintiffs claim that The K&D Group, Inc. and the individual developers breached fiduciary duties.

STATEMENT OF THE FACTS

Upon being sued the defendants tendered the lawsuit to their insurer, the Cincinnati Insurance Company, with a request for indemnity and a defense. Cincinnati provided a defense – while reserving its right to disclaim coverage – by retaining the Reminger law firm to represent K&D.[2]

Discovery then proceeded in this case and in a related arbitration where K&D and the is asserting claims against the sub-contractors who actually constructed the building. In the meantime, on February 26, 2013, Cincinnati filed a declaratory judgment action against the defendants and their owners. Cincinnati seeks a declaration that it does not owe its policyholders coverage for the damages claimed by the plaintiff, which is also a defendant in the declaratory judgment case. The other lawsuit is captioned *Cincinnati Insurance Company v. The K&D Group, Inc., et al.*, case number CV 13 802148, and has been consolidated with this case.

As part of its discovery in the declaratory judgment case, K&D propounded discovery requests to Cincinnati. Among other things, K&D sought the entirety of Cincinnati's claim

[1] Amended omplaint, ¶2. Although the four defendants are certainly separate entities with separate claims asserted against them, they are related entities and are represented by the same counsel. Hence, in this entry they will be referred to together as "K&D" or "the defendants." Where necessary, they will be distinguished from each other.
[2] Reminger has since been replaced by the Roetzel & Andress law firm.

files, including all correspondence and coverage opinions, and all communications between Cincinnati and "any attorney, including your in-house and outside counsel" concerning case number 771554. In response to that discovery, Cincinnati produced, among other documents, a March 13, 2013, five-page letter from K&D's corporate counsel Jeffrey J. Lauderdale to attorney John Farnan, Cincinnati's trial counsel in case number 802148.

In accordance with Rule 5(A) of the Ohio Rules of Civil Procedure the letter was served by Cincinnati not only to K&D, the party requesting it, but all other parties in case number 802148, including the condominium owners' association.

K&D then filed the motion for a protective order asking that the plaintiff return the letter and be prohibited from disclosing or using its contents.

LAW AND ANALYSIS

K&D argues that the letter should be returned because it is "an inadvertently produced, attorney-client privileged communication between defendants and their insurer."[3] The plaintiff opposes the motion on the basis that the letter is not privileged.

Civil Rule 26(B)(1) provides that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Anticipating that otherwise discoverable material will be withheld on a claim of privilege, Civil Rule 26(B)(6) requires a party claiming privilege to make that claim expressly supported by a privilege log. Cincinnati followed that procedure and produced a privilege log showing that many documents were withheld as privileged. The letter at issue was not one of them. Nevertheless, once K&D received the discovery it claimed a privilege for the letter and demanded its return in accordance with Civil Rule 26(B)(6)(b). That section provides as follows:

[3] Motion for protective order, page 1.

> If information is produced in discovery that is subject to a claim of privilege . . . the party making the claim may notify any party that received the information of the claim and the basis for it . . . A party may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim of privilege.

K&D followed that procedure here. K&D notified plaintiff's counsel on July 22 that the letter is privileged and was inadvertently produced and then filed the motion for a protective order. Additionally, K&D has filed, under seal, copies of the March 13 correspondence and a July 24 letter from plaintiff's counsel responding to the claims of privilege and inadvertent production.

The first question to decide is whether the letter is privileged. If it is not then the question of whether it should be clawed back is moot.

In Ohio, the attorney-client privilege is governed both by statute, namely Ohio Revised Code section 2317.02(A), which provides a testimonial privilege, and by common law, which broadly protects against any dissemination of information obtained in the confidential attorney-client relationship. *State ex rel. Lanham v. DeWine*, 135 Ohio St.3d 191, 2013-Ohio-199, ¶26. Where legal advice of any kind is sought from a professional legal adviser in the adviser's capacity as such, then the communications relating to that purpose, made in confidence by the client, are, at the client's instance, permanently protected from disclosure by the client or the legal adviser, unless the protection is waived. *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, ¶ 21.

The discovery request was made by K&D in a lawsuit where it is a defendant and Cincinnati is the plaintiff. In that lawsuit, K&D's interests and Cincinnati's are clearly not aligned: Cincinnati claims it should not have to pay for K&D's defense in this case or for any damages that might be awarded against K&D here. The letter that K&D claims as privileged is

a letter from its counsel to plaintiff Cincinnati's trial counsel. The letter is adversarial: K&D demands that Cincinnati do more to provide a defense in this case. In support of the demand, K&D's counsel describes some deficiencies that he perceives in the defense provided to date.

There is nothing about the letter that supports a claim that it is a communication made to an attorney by a client or which contains an attorney's advice to a client. It is simply not a communication from K&D to its attorney. And to the extent it reveals, by inference, Lauderdale's advice to K&G – to push Cincinnati to provide extra resources for a defense – then any privilege can be deemed, also by inference, to be waived by virtue of being voluntarily revealed to Cincinnati's counsel.

But K&D argues that the letter is a "communication between an insured and a defending insurer"[4] covered by the attorney-client privilege. In support, K&D cites to *Lectrolarm Custom Systems, Inc. v. Pelco Sales, Inc.*, 212 F.R.D. 567 (E.D. Cal. 2002) for the proposition that communications made to a third party to advance a common interest do not waive the privilege as to another party who does not share that interest.

That case involved a patent infringement and unfair competition lawsuit by Lectrolarm against Pelco. Pelco's insurance carrier, Fireman's Fund, provided for a defense under a reservation of rights. During discovery, Lectrolarm requested documents from Pelco that included any communications Pelco had with Fireman's Fund and separately subpoenaed essentially the same documents from Fireman's Fund, which was not a party to the lawsuit. Pelco objected to the discovery and Lectrolarm filed a motion to compel. Meanwhile, Fireman's Fund moved for a protective order from the subpoena.

The court first noted that communications between private counsel and an insurer providing a defense under a reservation of rights "are not privileged per se" even where

[4] Mtn. for protective order, p. 5.

confidential client communications were disclosed to the insurer. *Lectrolarm*, supra, 572. However, because of their common interest in defending against Lectrolarm's claims, the court found that "disclosure of privileged information by Pelco to Fireman's Fund does not waive the attorney-client privilege." *Lectrolarm*, supra, 572. The court explained that the attorney-client privilege is not waived when a confidential communication is disclosed to a third party who has a common interest with the disclosing party. "The existence of a common defense allows the parties and counsel allied in that defense to disclose privileged information to each other without destroying the privileged nature of those communications." *Id.* The court went on to describe the common defense doctrine in greater detail:

> This "common defense doctrine" also referred to as the "joint defense privilege" expands the application of the privileges to circumstances in which parties are represented by separate counsel but engage in a common legal enterprise. (Citation omitted.) The doctrine only protects communications when they are part of an ongoing and joint effort to set up a common defense strategy.

Finally, the court made it clear that only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected.

But the situation here bears no resemblance to the situation in *Lectrolarm*. The significant difference is that K&D and Cincinnati are opposing parties in a lawsuit and it was K&D that sought production of the category of communications that includes the letter at issue.[5] There is no way to apply the common defense doctrine because there was no "common legal enterprise" K&D sought to advance. Even if K&D and Cincinnati can be said to have the common interest of preventing or minimizing the plaintiff's recovery in this case, the letter was not sent to advance that purpose. It was sent to persuade Cincinnati to devote more resources to K&D's defense. It can also be inferred that it was sent to support K&D's claim that

[5] K&D's motion should have been filed in case number 802148 because it arises from a claim that privileged information was inadvertently produced in discovery in that case.

Cincinnati breached its coverage contract by inadequately providing for a defense. But it was not sent to share strategy on how to defend against the condominium owners' associations claims. At most, Lauderdale shares his view on what he perceived as trial counsel's strategy. In short, the common defense doctrine does not operate to make the letter an attorney-client privileged communication.

CONCLUSION

The March 13, 2013, letter is not an attorney-client privileged communication. Because of that it cannot be clawed back, or its use restricted, under Civil Rule 26(B)(6)(b) and the defendant's motion for a protective order on that basis is denied.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

SERVICE

A copy of this journal entry was sent by email, this _____ day of August, 2013, to the following, with a request that K&D's counsel forward it by email to counsel for all other counsel of record in this case and case number 802148:

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Judge John P. O'Donnell