

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

RCPR ACQUISITION HOLDINGS LLC, )  
Plaintiff )  
v. ) Case No. 457043 V  
ZURICH AMERICAN INSURANCE COMPANY )  
Defendant )

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**MEMORANDUM OPINION AND ORDER**

Before the Court is that part of Plaintiff’s Motion to Compel Production of Claim Handling Information (DE 226)(“Plaintiff’s Motion”) that pertains to 25 documents (now marked as Exhibits 1–25) that Defendant withheld as allegedly containing privileged attorney-client communications (“the disputed documents”). The Court has considered Plaintiff’s Motion, Defendant Zurich American Insurance Company’s Response to Plaintiff’s Motion to Compel Production of Claim Handling Information (DE 242)(“Zurich’s Opposition”), and Plaintiff’s Reply in Further Support of Motion to Compel Discovery of Claim Handling Information (DE 253), together with the exhibits, arguments of counsel on November 22, 2019, and supplemental letters. At Defendant’s request, the Court has also reviewed the disputed documents *in camera*. For the reasons set forth below, the Court will GRANT Plaintiff’s Motion as it pertains to Exhibits 1 – 25.

Plaintiff (“RCPR”) is the owner of the Ritz Carlton San Juan hotel and casino in San Juan, Puerto Rico. Defendant (“Zurich”) is Plaintiff’s insurer. Plaintiff filed its three-count complaint herein on November 1, 2018 following Defendant’s alleged failure to satisfy its contractual obligation to indemnify Plaintiff for property damage, business interruption, and other losses sustained by Plaintiff as a result of Hurricane Maria in September, 2017. With the

complaint, Plaintiff seeks declaratory relief and damages. A jury trial is scheduled for March 20, 2020 through April 17, 2020.

In response to Plaintiff's First Set of Requests for Production of Documents ("RFP"), specifically RFP Nos. 3 and 4, Defendant withheld the disputed documents and provided a privilege log showing the nature of the documents (emails and attachments), when they were created (July, 2018 through September, 2018), the sender, and the recipients. For each disputed document, Defendant asserted it was privileged because it was "[c]orrespondence between counsel and client representation for purpose of provision of legal advice."

Here, Plaintiff claims that Defendant has not shown that privilege applies, and that even if it does, any privilege was waived when the emails and attachments were exchanged with David Buck, an outside adjuster who is neither Zurich's employee nor otherwise represented by Zurich's counsel. Zurich counters that the disputed documents contain "... communication between Zurich's counsel and [Mr. Buck] about the adjustment of the claim that occurred in anticipation of litigation."<sup>1</sup> Because Mr. Buck is Zurich's agent, Zurich now says, his presence on the email threads does not, in and of itself, waive Zurich's privilege.

In Maryland, attorney-client privilege "... is a rule of evidence that prevents the disclosure of a confidential communication made by a client to his attorney for the purpose of obtaining legal advice." *E.I. Du Pont de Nemours & Co. v. Forma-Pack, Inc.* 351 Md. 396, 414 (1998). The privilege is defined as follows:

'(1) Where legal advice of [any] kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection [may] be waived.'

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<sup>1</sup> See Zurich's Opposition at p. 5.

*Id.* at 415 (omitting citations). The privilege only applies to communications not intended for disclosure to third persons, and to communications whose primary purpose is to solicit legal, as opposed to, business advice. *Id.* at 416-417. See also, e.g., *Charter Oak Fire Ins. Co. v. Am. Capital, Ltd.*, No. DKC-09-0100, 2013 WL 6844359 (D. Md. Dec. 24, 2013)(where “in-house and outside counsel performed traditional claims handling, rather than legal, functions[,]” communications were not protected). Finally, “the party seeking the protection of the privilege bears the burden of establishing its existence.” *E.I. Du Pont de Nemours & Co. v. Forma-Pack, Inc.*, *supra*, at 415 (omitting citations).

Having reviewed the disputed documents in light of the above standards, the Court is not persuaded that attorney-client privilege protects any of them. Even if Mr. Buck’s presence on the email chains does not vitiate any privilege that might exist, an issue the Court does not reach, Zurich has failed to demonstrate that the communications at issue are privileged.

Exhibits 1-12 span July 18-24, 2018, a time period that pre-dates the November 1, 2018 start of this case by more than three months. Exhibits 1-2 are emails that start on July 18, 2018 and pertain to a “high-level claim comparison”<sup>2</sup> prepared by Zurich’s outside consultant, DBI Construction Consultants, and forwarded by Zurich’s internal adjuster, Mr. Wilkie, to Mr. Brewer, Zurich’s outside counsel, other employees of Zurich, and Mr. Buck. Exhibits 3-12 start on July 20, 2018 and pertain to a letter Mr. Wilkie intended to send to Nikolay Holtze, Owner’s Representative, at the Ritz Carlton San Juan, explaining Zurich’s position on coverage of water mitigation work performed at Ritz Carlton San Juan by Interstate Restoration. After seeking “fact-checking” from Mr. Buck, and “polish” from Mr. Brewer, Mr. Wilkie approved the letter.

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<sup>2</sup> The Court could not locate a “high-level claim comparison” among the documents received for *in camera* review.

In these emails and attachments is nothing that corroborates Zurich's otherwise unverified claims<sup>3</sup> that these documents contain communications ". . . for purpose of provision of legal advice" or "in anticipation of litigation." To start, the preparation of Mr. Wilkie's letter to Mr. Holtze appears to be an ordinary step in the claims handling process. By seeking Mr. Buck's and Mr. Brewer's input, Mr. Wilkie appears to be involving them in the claims handling process, not communicating for the purpose of seeking legal advice. Certainly, Mr. Buck thought his emails with Mr. Wilkie pertained to Mr. Buck's adjustment work.<sup>4</sup> Zurich has provided no verified evidence that suggests otherwise.

Moreover, while an insurer might reasonably anticipate litigation prior to receiving notice of an actual suit, Zurich has provided no information regarding when it denied Plaintiff's claim regarding Interstate (a natural point at which Zurich might have anticipated suit), or what happened between July 24, 2018 and November 1, 2018 to move the entire matter from claims handling to litigation. If anything, the Holtze letter suggests that as of July 24, 2018, Zurich had not denied Plaintiff's claim regarding Interstate, wanted more information, and intended to advise Plaintiff of its settlement figure no later than August 17, 2018, all steps suggesting that litigation was not then anticipated.

Exhibits 13-25 are emails and one attachment spanning August 7, 2018 to September 26, 2018 between Mr. Brewer to Mr. Buck (and eventually Ms. Landeck of Zurich) wherein Mr. Brewer wants Mr. Buck's claim diary so that Mr. Brewer can prepare for an Examination Under Oath and respond to the Puerto Rico Department of Insurance. The attachment is Mr. Buck's

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<sup>3</sup> With its Opposition, Zurich provided Exhibits A through H. None pertained to the instant claim of privilege.

<sup>4</sup> See Deposition of David Buck, attached as Exhibit D to Plaintiff's Motion, at pages 367-368.

adjuster activity notes from 2017. These items are not privileged because Mr. Buck is not seeking legal advice. Mr. Brewer appears merely to be gathering information for disclosure to a third party. Again, Zurich has not shown otherwise.

On balance, Zurich has not shown that Exhibits 1-25 are protected by attorney-client privilege or provided any other reason why they should not be produced to Plaintiff.

Accordingly, Plaintiff's Motion will be granted and Zurich will be ordered to produce the above documents to Plaintiff within five days of the docketing of this Order.

### **ORDER**

Wherefore, for the foregoing reasons, it is this 9<sup>th</sup> day of December, 2019, by the Circuit Court for Montgomery County, Maryland, hereby

ORDERED, that to the extent that it seeks to compel production of Exhibits 1-25, Plaintiff's Motion at DE 226 is GRANTED; and it is further

ORDERED, that Defendant shall produce Exhibit Nos. 1-25 to Plaintiff within five days of the docketing of this Order; and it is further

ORDERED, that the parties' supplemental letters regarding Plaintiff's Motion shall be filed in the court file.

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ANNE K. ALBRIGHT  
Judge  
Circuit Court for Montgomery County,  
Maryland

