

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2084CV2009

BOARD OF TRUSTEES OF
THE 488 DOT CONDOMINIUM TRUST

vs.

R&B INVESTMENTS, LLC, and others¹

**ORDER ON DEFENDANTS' MOTION TO COMPEL THE DARTMOUTH GROUP,
INC.'S COMPLIANCE WITH RULE 45 SUBPOENA**

The Board of Trustees of the DOT Condominium Trust (Board), the organization of unit owners of The 488 DOT Condominium (Condominium) filed a seven-count amended complaint seeking damages for defects in the design and construction of the Condominium.² Defendants served a Mass. R. Civ. P. 45 subpoena on non-party, The Dartmouth Group (Dartmouth), the Condominium's Property Manager. Pursuant to a Court order, Dartmouth produced a privilege log identifying documents withheld from production pursuant to the attorney-client privilege and / or the work-product doctrine.

Defendants have now filed the instant Motion to Compel (Motion) seeking an order requiring Dartmouth to produce the documents identified on the privilege log. Defendants argue that (i) the inclusion of Dartmouth on communications between the Board and its counsel constitutes a waiver of the attorney-client privilege, and (ii) communications with the Board's expert, Criterium Engineers (Criterium), are not

¹ Timothy J. Russell d/b/a Russell Design Associates, Thomas G. Broderick, Jr., Esq., Trinity Green Investments, LLC

² The Board also filed a claim for fraudulent transfer of the Condominium's commercial unit against R&B Investments and LLC and Trinity Green Investments, LLC.

protected pursuant to the work-product doctrine because (a) they were not prepared in anticipation of litigation or (b) Defendants have shown a substantial need and that the documents cannot otherwise be obtained.

I held a hearing on the Motion on December 21, 2021 and ordered Dartmouth to provide to me, under seal, copies of the documents withheld as privileged and or work product. I have reviewed those documents. After hearing and review, and for the reasons stated below, the Motion is **DENIED**.

DISCUSSION

The attorney-client privilege protects from disclosure confidential communications between a client and a professional legal advisor relating to the provision of legal advice. Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 303-04 (2009) (hereinafter Comcast Corp.), citing Suffolk Constr. Co. v. Division of Capital Asset Mgt., 449 Mass. 444, 448 (2007) (privilege protects “all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice”). Its purpose “is to enable clients to make full disclosure to legal counsel of all relevant facts . . . so that counsel may render fully informed legal advice.” Suffolk Constr., 449 Mass. at 449. The privilege is “highly valued” and “the social good derived from the proper performance of the functions of lawyers acting for their clients ... outweigh [s] the harm that may come from the suppression of the evidence.” Comcast Corp., 453 Mass. at 303-04.

Defendants argue first that the Board has waived any privilege by including Dartmouth on communications with counsel. I disagree. Although disclosing attorney-client communications to a third party can constitute waiver, there are exceptions to that rule. One exception is when the third party is a “necessary agent” of the attorney or of the client. Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 449 Mass. 609, 616 (2007) (privilege protects “statements made to or shared with necessary agents of the

attorney or the client, including experts consulted for the purpose of facilitating the rendition of such advice”).

I conclude that Dartmouth was acting as a necessary agent for the Board to facilitate the needed factual investigation of the conditions at the Condominium and the scope of necessary repairs for the purpose of obtaining legal advice regarding the legal claims that have been asserted in this case. Put otherwise, the Board needed Dartmouth to assist counsel to conduct the factual investigation necessary to obtain and implement counsel’s advice. The Board, like most organizations of condominium unit owners, is made up of volunteer unit owners. To properly advise the Board, its counsel needed to ascertain the defects in design or construction of the Condominium and the scope of any necessary repairs. The Board necessarily relied on its agent, Dartmouth, to facilitate – at counsel’s direction and request – that factual investigation for the purposes of obtaining legal advice. Dartmouth needed to be included in communications concerning the scope, timing, and logistics of the investigation and repairs necessary for the provision of legal advice. See Attorney Gen. v. Facebook, Inc., 487 Mass. 109, 121 (2021) (hereinafter Facebook) (“The privilege covers the flow of confidential communications in both directions -- from the attorney to the client and from the client to the attorney[.]”). Finally, the management agreement between the Board and Dartmouth³ expressly provides that the Board can ask Dartmouth to assist with litigation matters involving the Condominium, including, as necessary, consulting with the Condominium’s counsel.

Defendants also argue that the withheld documents do not concern legal advice but rather ordinary property management tasks and functions. That argument is understandable because counsel and Criterium’s investigation and cataloging of the alleged defects and needed repairs overlapped with Dartmouth’s regular

³ A copy of the agreement was provided to the Court after the hearing on the Motion.

responsibilities as property manager. However, the privilege protects the provision of factual information necessary for counsel to provide fully informed legal advice. Here, having reviewed the documents, I conclude the withheld documents, generally, either expressly address the litigation, constitute communication of facts necessary for the provision of legal advice, or consist of counsel's directions and requests for assistance in connection with that investigation, and thus are protected by the attorney-client privilege.

Defendants argue next that communications with Criterium are not protected from disclosure under the work-product doctrine. I again disagree. The Massachusetts Rules of Civil Procedure protect from disclosure documents "prepared in anticipation of litigation or for trial by or for another party or for that other party's representative (including his attorney, consultant, . . . or agent." Mass. R. Civ. P. 26(b)(3); see also McCarthy v. Slade Assocs., Inc., 463 Mass. 181, 194 (2012). "Importantly, '[t]he work product protection is broader than the attorney-client privilege in that it is not restricted solely to confidential communications between an attorney and client.'" See Facebook, 487 Mass. at 126-127, quoting Federal Trade Comm'n v. Boehringer Ingelheim Pharms., Inc., 778 F.3d 142, 149 (D.C. Cir. 2015), cert. denied, 577 U.S. 1102 (2016).

Here, Criterium was retained in 2018 in anticipation of litigation and to pursue claims against the Defendants. The issues relating to alleged common area defects had arisen and been raised with the Defendants by April 2018. Thus, communications between the Board, Dartmouth, Criterium and counsel related to the litigation and Criterium's role as an expert consultant and witness are protected by the work-product doctrine.⁴

⁴ The Board has produced communications between Dartmouth and Criterium unrelated to the litigation.

Finally, although fact work product is discoverable “upon a showing that the party seeking discovery has substantial need of the materials ... and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means,” Mass. R. Civ. P. 26 (b) (3), Defendants have not established a substantial need for the material. Information regarding the conditions at the Condominium from 2018 to the present are available from other sources, including from the company hired to perform renovation and repair work.

ORDER

For the foregoing reasons, the Motion to Compel The Dartmouth Group, Inc’s Compliance with Rule 45 Subpoena is **DENIED**.

January 21, 2022

/s/ Debra Squires-Lee

Debra A. Squires-Lee

Justice of the Superior Court

Attest: *Paul Kennedy*
Asst. Clerk