

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos: 02-4404/05/06/07/08/09/10/11/47

ELISABETH SHARP

v.

GOVERNMENT OF THE VIRGIN ISLANDS;
ROY MARTIN, TAX ASSESSOR

Government of the Virgin Islands and Roy Martin

Appellants

CYRIL V FRANCOIS ASSOCIATES

v.

GOVERNMENT OF THE VIRGIN ISLANDS;
ROY MARTIN, TAX ASSESSOR

Government of the Virgin Islands and Roy Martin

Appellants in No. 02-4405

SUGAR BAY CLUB AND RESORT CORP.

v.

GOVERNMENT OF THE VIRGIN ISLANDS;
ROY MARTIN, TAX ASSESSOR

Government of the Virgin Islands and Roy Martin

Appellants in 02-4406

ROBERT SCHMIDT; KIM HOLDSWORTH;
ROBERT SCHMIDT DEVELOPMENT CORP;
DORI P. DERR

v.

GOVERNMENT OF THE VIRGIN ISLANDS;
ROY MARTIN, TAX ASSESSOR

Government of the Virgin Islands and Roy Martin

Appellants in 02-4407

LINDON CORP; GORDON L. COFFELT;
SORAYA DIASE COFFELT; ONE STOP, INC.

v.

GOVERNMENT OF THE VIRGIN ISLANDS;
ROY MARTIN, TAX ASSESSOR; BOARD
OF TAX REVIEW

Government of the Virgin Islands and Roy Martin,

Appellants in 02-4408

BERNE CORPORATION; B&B CORPORATION;
TWENTY-ONE QUEEN QUARTER, INC.

v.

GOVERNMENT OF THE VIRGIN ISLANDS; ROY MARTIN,
IN HIS OFFICIAL CAPACITY AS TAX ASSESSOR;
VIRGIN ISLANDS BOARD OF TAX REVIEW

Government of the Virgin Islands and Roy Martin

Appellants in 02-4409

SHELL SEEKERS, INC; CHARLES W. CONSOLVO;
LINDA B. CONSOLVO; SNEGLE GADE, A LIMITED
PARTNERSHIP; YVETTE B. TRUST LEDERBERG;
ARTHUR B. CHOATE; STACY LOVELAND; STEWART
LOVELAND

v.

VIRGIN ISLANDS TAX REVIEW BOARD; GOVERNMENT
OF THE VIRGIN ISLANDS; ROY MARTIN, IN HIS
OFFICIAL CAPACITY AS TAX ASSESSOR

Government of the Virgin Islands and Roy Martin

Appellants in 02-4410

MILLER PROPERTIES, INC.

v.

GOVERNMENT OF THE VIRGIN ISLANDS;
ROY MARTIN, TAX ASSESSOR

Government of the Virgin Islands and Roy Martin

Appellants in 02-4411

BLUEBEARD'S CASTLE, INC.; CASTLE
ACQUISITIONS, INC.

v.

GOVERNMENT OF THE VIRGIN ISLANDS; ROY
MARTIN, IN HIS OFFICIAL CAPACITY AS
TAX ASSESSOR

Government of the Virgin Islands and Roy Martin

Appellants in 02-4447

Appeal from the District Court of the Virgin Islands
(D.C. Civil Action Nos. 01-cv-00228, 01-cv-00196, 01-cv-00181,
02-cv-00057, 00-cv-00141, 01-cv-00197, 01-cv-00151, 01-cv-00155)
District Judge: Honorable Thomas K. Moore

Submitted Under Third Circuit LAR 34.1(a)
on May 1, 2003

Before: ROTH, MCKEE and COWEN Circuit Judges

Opinion filed August 29, 2003

OPINION

ROTH, Circuit Judge:

This is an appeal from a November 19, 2002 order by the United States District Court of the Virgin Islands. The Government of the Virgin Islands and the Virgin Islands Tax Assessor (Government) were sued by the Appellees (Commercial Property Owners), who contested the method utilized by the Government to assess their property.

The Commercial Property Owners sought to discover copies of documents prepared by Kenneth Voss, a government contractor. The Government objected, claiming that the documents were prepared in anticipation of litigation. Pursuant to *Federal Rules of Civil Procedure* Rule 26(b)(3), the appellants sought to protect the documents from discovery. They requested that the District Court examine the documents *in camera*. At the conclusion of the *in camera* hearing, the District Court ordered the Government to turn over the documents to the Commercial Property Owners. The Government filed a

motion to stay the production of the documents pending appeal. On January 9, 2003, the District Court denied the stay and the Government produced the documents to counsel for the Commercial Property Owners.

The following issues are raised on appeal: Did the District Court abuse its discretion when it ordered the Government to produce the documents or, more specifically, were the documents prepared in anticipation of litigation. If the documents were prepared in anticipation of litigation, did the Commercial Property Owners demonstrate that obtaining the substantial equivalent by other means would expose them to an undue hardship

We have jurisdiction pursuant to 28 *U.S.C.* § 1291. Discovery orders are reviewed for abuse of discretion. *See Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir. 2000). A court abuses its discretion if the reasoning is clearly erroneous or contrary to law. *See Id.* at 139. A finding is “clearly erroneous when the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.” *In re Life USA Holding, Inc.*, 242 F.3d 136, 143 (3d Cir. 2001) (citing *United States v. Igbonwa*, 120 F.3d 437, 440 (3d Cir. 1997)).

The work product doctrine was first announced in *Hickman v. Taylor*, 329 U.S. 495 (1947). After *Hickman*, Congress codified the Court’s holding in Federal Rules of Civil Procedure Rule 26(b)(3). *See In re Grand Jury Subpeona Duces Tecum*, 112 F.3d 910, 924 (8th Cir. 1997). In determining whether a document or other tangible item is

protected work product, courts consider the nature of the document and the factual circumstances of the particular case. *Martin v. Bally's Park Place Hotel and Casino*, 983 F.2d 1252, 1260 (3d Cir. 1993) (citing *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979)). After considering those factors, the court must determine whether the document can be fairly identified as prepared in anticipation of litigation. *Id.* Litigation need not be imminent . . . as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation.” *United States v. Rockwell*, 897 F.2d 1255, 1266 (3d Cir. 1990) (citing *United States v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982)). The party claiming work product immunity has the burden of proving that the materials were in fact prepared in anticipation of litigation. *Holmes*, 213 F.3d at 138. Work product prepared in the ordinary course of business is not protected from discovery. *Id.*

Based on the fact that Kenneth Voss's contracts and the appraisals themselves did not support the Government's assertion that the appraisals were protected by the work product doctrine, the District Court ordered the Government to turn over the appraisals. It is clear from our review of the record that the appraisals were not prepared in anticipation of litigation.

Voss's contract clearly states that he was hired to facilitate compliance with the mandate of the District Court, pursuant to the *Berne Settlement*. Voss was to update the appraisal manual, create income valuation methods, and develop continuing education for

personnel. While working for the Tax Assessor's Office, Voss's primary purpose was to aid the office in complying with *Berne* and re-valuing all commercial properties. The re-valuation of commercial properties necessarily encompassed appraising the properties regardless of pending or future appeals. Accordingly, we do not find that the District Court abused its discretion when it found that the language of Voss's contracts did not support the Government's claim that the appraisals deserved work product protection.

Though Voss's renewed contract did include the added purpose of preparing appraisals for individual properties under appeal, this does not establish that the appraisals were created with the primary purpose of preparing for anticipated litigation. In limiting work product to materials prepared in anticipation of litigation, the drafters of Rule 26 excluded "materials assembled in the ordinary course of business, or pursuant to public requirements . . . for other non-litigation purposes." *Fed. R. Civ. P.* 26(b)(3) advisory committee note. An examination of 33 V.I.C. §§ 2402, 2403, 2404 illustrates that the appraisals were done in the ordinary course of business of the Tax Assessor's Office, pursuant to public requirements for non-litigation purposes. Virgin Island law states that the Tax Assessor must "value and assess all commercial property" annually. 33 V.I.C. § 2402 (b). Therefore, the appraisals would have been prepared regardless of whether the particular property was the subject of pending litigation. Furthermore, the Tax Assessor is required to consider certain factors when assessing property. 33 V.I.C. § 2404. When preparing the appraisals, Voss considered all of the factors that the Tax

Assessor is required to consider when performing his annual duty of assessing commercial property. Voss also followed the statutorily mandated method for preparing assessments. *See* 33 V.I.C. § 2403. Thus, the appraisals were created in the ordinary course of business of the Tax Assessor's Office, pursuant to public requirements for non-litigation purposes. Accordingly, the appraisals do not deserve protection under the work product doctrine.

For the reasons set forth above, we conclude that the District Court did not abuse its discretion. Accordingly, we will affirm the order of the District Court.

TO THE CLERK:

Please file the foregoing Opinion.

By the Court,

/s/ Judge Jane R. Roth

Circuit Judge