

DeMartino v Harleystown Worcester Ins. Co.
2009 NY Slip Op 32116(U)
September 9, 2009
Supreme Court, New York County
Docket Number: 113314/08
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

MARILYN SHAFER

PART 8

Index Number : 113314/2008

DE MARTINO, LOUISE

VS.

HARLEYSVILLE WORCESTER INSURANCE

SEQUENCE NUMBER : # 001

AMEND

Justice

INDEX NO. 113314-08

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied in accord*

with the amended memorandum

FILED

SEP 16 2009

COUNTY CLERK'S OFFICE

NEW YORK

[Signature]

MARILYN SHAFER

Dated: 9/9/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 8

-----x
LOUISE DEMARTINO,

Plaintiff,

Index No.: 113314/08

-against-

HARLEYSVILLE WORCESTER INSURANCE
COMPANY,

Defendant.

-----x
MARILYN SHAFER, J.:

FILED
SEP 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

BACKGROUND

Motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence number 001, plaintiff Louise Demartino moves, pursuant to CPLR 3025 (b), to amend her complaint to include consequential damages. In motion sequence number 002, plaintiff moves, pursuant to CPLR 3124, to compel the production of certain documents pursuant to a subpoena duces tecum.

The initial complaint, filed on October 1, 2008, alleges that defendant Harleysville Worcester Insurance Company both failed to respond to plaintiff's claims in a timely manner, and undervalued the loss sustained by plaintiff. Allegedly, a building owned by plaintiff, insured by defendant, suffered substantial damage caused by demolition, excavation and construction work performed by plaintiff's neighbor on the

property adjacent to plaintiff's building. The insurance policy issued by defendant includes provision for business interruption loss (section 5 [d]). Plaintiff now wishes to amend her complaint to include consequential damages resulting from her loss of business allegedly occasioned by defendant's delay in processing her claim.

In opposition to the motion for leave to amend, defendant argues the underlying merits of the basic claim, and only asserts that, in order to be allowed to amend the complaint, plaintiff must make an evidentiary showing that the claim can be supported, which defendant avers plaintiff cannot do.

In motion sequence number 002, plaintiff moves to compel the production of certain documents, pursuant to a subpoena duces tecum served on defendant on December 4, 2008, to which defendant has asserted certain privileges. The documents in question are categorized in the privilege log provided by defendant as follows: (1) e-mail correspondence from Cheryl McLaughlin of defendant company to its expert regarding the subject subpoena, dated December 15, 2008, alleged to be created in anticipation of litigation; (2) fax correspondence from defendant's counsel, dated October 6, 2008, to Henri Lang of J.S. Held, defendant's builder, characterized by defendant as correspondence to expert regarding building estimate, alleged to be exempt from discovery as attorney-client and work-product privilege; (3) the same

correspondence as (2) sent by e-mail; and (4) e-mail correspondence from Peggy Sabatini of J.S. Held to defense counsel, dated October 6, 2008, characterized by defendant as correspondence from expert to defense counsel regarding building estimate, alleged to be part of the attorney-client and work-product privilege. Plaintiff maintains that the documents in question were prepared as part of defendant's ordinary business, and, therefore, that the asserted privileges do not apply.

DISCUSSION

CPLR 3025 (b) states that

"[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

It is well settled that leave to amend should be freely given, absent prejudice or surprise to the opposing party.

Sheets v Liberty Alliance, LLC, 37 AD3d 170 (1st Dept 2007).

However, prior to allowing such amendment, the court must ensure that the amended allegation is not palpably insufficient nor totally devoid of merit. *Lynch v Lynch*, 47 AD3d 771 (2d Dept 2008).

Recent decisions of the Court of Appeals hold that a claim for consequential damages against an insurer may be asserted "so long as the damages were within the contemplation of the parties as the probable result of a breach at the time of or prior to

contracting [internal quotation marks and citation omitted].” *Panasia Estates, Inc. v Hudson Insurance Company*, 10 NY3d 200, 203 (2008). The fact that the parties contemplated that plaintiff would be insured for losses sustained by a delay in payment and repair to her premises is found in the policy’s business interruption clauses.

“The purpose served by business interruption coverage cannot be clearer—to insure that [plaintiff] had the financial support necessary to sustain [her] business operation in the event disaster occurred. The purpose of business interruption insurance is to indemnify the insured against losses arising from inability to continue normal business operation and functions due to the damage sustained as a result of the hazard insured against [internal quotation marks and citations omitted].”

Bi-Economy Market, Inc. v Harleystown Insurance Company of New York, 10 NY3d 187, 194 (2008).

Because the proposed amendment is not palpably insufficient or patently devoid of merit, as supported by the reasoning in the above-quoted Court of Appeals cases, and the motion for leave to amend was made less than one year after the action commenced, there is no evidence that granting plaintiff’s motion would prejudice or surprise defendant. *Barnes Coy Architects, P.C. v Shamoon*, 53 AD3d 466 (2d Dept 2008).

Consequently, based on the foregoing, plaintiff’s motion for leave to amend her complaint is granted.

The court must now address plaintiff’s motion to compel documents.

"[T]he CPLR establishes three categories of protected materials, ... supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101 [b]); attorney's work product, also absolutely immune (CPLR 3101 [c]); and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means (CPLR 3101 [d] [2])."

Spectrum Systems International Corp. v Chemical Bank, 78 NY2d 371, 376-377 (1991).

"Whether a particular document is or is not protected is necessarily a fact-specific determination, most often requiring in camera review [citation omitted]." *Id.* at 378.

Plaintiff has failed to meet the criteria necessary to obtain production of the document created by Cheryl McLaughlin of defendant company to its expert regarding the subject subpoena. This document, by its very nature, having been created because of the subpoena duces tecum, appears to have been created specifically in preparation for the instant litigation (*Bombard v Amica Mutual Insurance Company*, 11 AD3d 647 [2d Dept 2004]), and plaintiff has not proffered any argument that she has a substantial need for the information. Therefore, this portion of plaintiff's motion to compel is denied. See generally *People v Kozlowski*, 11 NY3d 223 (2008).

However, with respect to the other three requested documents, in order to render a competent decision, the court must make an in camera inspection of the items to determine

whether the asserted privileges apply. Defendant, in its opposition memorandum, has agreed to such in camera inspection. Therefore, this portion of plaintiff's motion to compel is held in abeyance, pending the court's examination of the subject correspondence.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendant shall serve an answer to the amended complaint within 20 days from the date of said service; and it is further

ORDERED that the portion of plaintiff's motion to compel production of the e-mail correspondence from Cheryl McLaughlin of defendant company to its expert regarding plaintiff's subpoena duces tecum, dated December 15, 2008, is denied; and it is further

ORDERED that the portion of plaintiff's motion to compel production of the other documents referenced in her motion is held in abeyance pending an in camera inspection of said documents by the court; and it is further

ORDERED that within 20 days from the date of this order plaintiff shall serve a copy of this order with notice of entry of this order on defendant; and it is further

ORDERED that within 20 days of service of notice of entry of this order defendant shall provide the Hon. Marilyn Shafer, at 80 Centre Street, room 276, copies of the above-referenced documents, in a sealed envelope, for the court's in camera inspection thereof.

Dated: 9/9/09

ENTER:

MARILYN SHAFER

Marilyn Shafer, J.S.C.

FILED
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NEW YORK