

De Martino v Harleystville Worcester Ins. Co.

2010 NY Slip Op 30178(U)

January 21, 2010

Supreme Court, New York County

Docket Number: 113314/08

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C.

PART 8

Justice

Index Number : 113314/2008
DE MARTINO, LOUISE
vs.
HARLEYSVILLE WORCESTER INS
SEQUENCE NUMBER : 003
COMPEL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED
1-28
29-49, 50
51

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

Answering Affidavits — Exhibits + memo & law in opp

Replying Affidavits memo & law

After applications to clarify Motion Sgs 1 and 2 decisions + order

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED

JAN 27 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: January 21, 2010

Joan M. Kenney
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED

JAN 27 2010

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

LOUISE DEMARTINO,

Plaintiff

-against-

HARLEYSVILLE WORCESTER INSURANCE
COMPANY,

Defendant.

NEW YORK INDEX No. : 113314/08
COUNTY CLERK'S OFFICE
DECISION & ORDER

-----x

JOAN M. KENNEY, J.:

Motion sequence numbers 001, 002, and 003 are consolidated for disposition.

Motion sequence numbers 001 and 002 were subject of an earlier decision of this court, dated September 9, 2009, in which the court granted plaintiff's motion for leave to amend the complaint (motion sequence number 001), but held in abeyance a portion of plaintiff's motion to compel production of certain documents pending an in camera inspection of those documents by the court (motion sequence number 002). Plaintiff now seeks a clarification as to whether the court's determination that the complaint could be amended included plaintiff's request to amend to seek attorney's fees and costs. Additionally, plaintiff has provided the documents for the court's in camera inspection so that the court may now complete its decision with respect to the motion to compel production of certain documents.

In motion sequence 003, defendant Harleysville Worcester Insurance Company moves, pursuant to New York Insurance Law (Ins L)

§ 3404, to compel an appraisal of the amount of plaintiff Louise DeMartino's loss.

The underlying facts of this case have been discussed in detail in the court's previous decision, and need not be reiterated here.

DISCUSSION

With respect to plaintiff's request for clarification of the court's decision to allow her to amend the complaint, the complaint may be amended to include consequential damages for attorney's fees and costs.

As stated in the court's decision of September 9, 2009, defendant only opposed the motion for leave to amend by asserting that plaintiff must make an evidentiary showing that the claim can be supported, which, defendant maintained, she could not do.

In *Panasia Estates, Inc. v Hudson Insurance Company* (10 NY3d 200 [2008]), in deciding whether an insured may seek consequential damages arising from the insurer's delays in investigation and determination of a claim, the court said that "consequential damages resulting from a breach of the covenant of good faith and fair dealing may be asserted in an insurance contract context" *Id.* at 203. Defendant only argued against inclusion of consequential damages because it asserted that plaintiff could not support the claim. In the instant matter, there are conflicting facts as to the manner in which the claim was handled, so that it

cannot be determined at this juncture whether or not any alleged delays were reasonable under the circumstances, or which party caused such delays. However, the allegations are sufficient to place the matter before the trier of fact.

The decision of this court dated September 9, 2009, ordered that the complaint be amended in the proposed form annexed to the moving papers, which included the consequential damages plaintiff seeks. The discussion in that decision was directed only to plaintiff's claim for loss of business, because that was all that was argued by the parties in their papers at that time.

With respect to motion sequence number 002, the court has examined the documents in question in camera, and has determined that they must be produced to plaintiff.

The three documents consist of a fax correspondence from defendant's counsel, dated October 6, 2008, to defendant's builder, a corporation separate and distinct from defendant, regarding building estimates, the same correspondence sent by e-mail, and a response from the builder to defendant's counsel regarding the same estimates.

"CPLR 3101 (a) provides that [there] shall be a full disclosure of all evidence material and necessary in the prosecution or defense of an action and this provision is accorded a liberal interpretation in favor of disclosure. When a party claims that particular records or documents are exempt or immune from disclosure, the burden is on the party asserting such immunity... . [Defendant] failed to satisfy [its] burden of showing such immunity [internal quotation marks and citations omitted]."

Central Buffalo Project Corporation v Rainbow Salads, Inc., 140 AD2d 943, 944 (4th Dept 1988).

In the case at bar, defendant claims that the three documents are immune from disclosure based on the attorney-client and work-product privileges.

"The attorney-client privilege does not apply because the letter was not a communication between a lawyer and client made during the course of a professional relationship for the purposes of facilitating the rendition of legal advice or services. The exemption for attorney work product does not apply because the letter was not prepared by counsel acting as such and does not otherwise uniquely reflect a lawyer's learning and professional skills [citations omitted]."

Plimpton v Massachusetts Mutual Life Insurance Company, 50 AD3d 532, 533 (1st Dept 2008).

"The subject documents should be disclosed since they are material and necessary, and either contain matter beyond an attorney's private thoughts in describing specific occurrences personally known to the attorney, or do not contain any indication that they served to give internal direction to facilitate performance of the legal services entailed in [the] representation [internal quotation marks and citation omitted]."

Gamiel v Sullivan & Liapakis, P.C., 289 AD2d 88, 88 (1st Dept 2001);
Getman v Petro, 266 AD2d 688 (3d Dept 1999).

Therefore, based on the foregoing, the court orders defendant to disclose the subject documents to plaintiff.

Lastly, the court now addresses defendant's motion to compel an appraisal.

Pursuant to Ins L § 3404 (e), which covers all New York Standard Fire Policies, as well as the policy at bar,

"[i]n case the insured and this Company fail to agree as to the actual cash value or the amount of loss, then, on written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand."

The subject policy contains an appraisal provision which provides that either side may make a written demand for appraisal. Opp Ex. A.

In the instant matter, the occurrence giving rise to the policy provisions occurred on June 20, 2006. Notice of the loss was timely made, and the parties continued to argue about the value of the loss. On May 2, 2008, defendant wrote to plaintiff, disputing the value of the loss, and stating: "Absent such agreement as to the amount of loss, we have already directed your attention to the appraisal provisions contained within the insuring agreement." Motion Ex. N. However, it was not until May 29, 2009, more than nine months after institution of the present lawsuit, that defendant's counsel wrote to plaintiff stating: "we have been instructed by our client to inform you that [defendant] demands that the amount of loss be submitted to appraisal, pursuant to the contractual obligations contained within the insuring agreement." Motion Ex. AA.

Each side contends that all delays were caused by the other, and the specifics need not be presented here, the interpretation of the cause of any delay being within the province of the trier of fact. However, either party

"has the right to require an appraisal when there is a disagreement as to the amount of loss. That right ... must be exercised within a reasonable period, depending upon the facts of the particular case. Neither party can so use the right as to take undue advantage of the other, but both must act in good faith. It is not a weapon of attack, but of defense, and a party who intends to use it must give reasonable notice of such intention, for its omission to do so will be evidence of waiver, more or less conclusive according to the circumstances. The insurer, for instance, knowing that the insured desires a prompt appraisal or an adjustment, so that the property may not suffer further injury before it is sold, cannot postpone its demand for an appraisal ... [internal citations omitted]."

Chainless Cycle Manufacturing Company v The Security Insurance Company of New Haven, Connecticut, 169 NY 304, 310 (1901).

In the case at bar, the court agrees with plaintiff that the first written demand for an appraisal, as mandated by the provisions of the policy, was not made until May 29, 2009, several years after the occurrence and more than nine months after the initiation of the lawsuit. Defendant's letter of May 2, 2008, only references the appraisal provision of the policy, which is non-obligatory and is only triggered by a written demand. The May 2, 2008, letter does not indicate that, at that time, defendant is demanding an appraisal; the letter merely implies that it may demand an appraisal if the parties cannot reach agreement.

Defendant's instant motion was made only after the lawsuit was filed and some discovery had taken place. The plaintiff in this action is a 79-year old woman whose only source of income, allegedly, is revenue from the subject building. At this point,

halting these proceedings for an appraisal would unduly delay a determination of the matter, and, therefore, is denied. Accordingly, it is

ORDERED that plaintiff's motion to compel production of documents (motion sequence number 002) is granted and defendant Harleysville Worcester Insurance Company is directed to turn over to plaintiff, within 20 days of notice of entry of this order, the following documents:

(1) 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;

(2) the same correspondence as (1) sent by e-mail; and

(3) 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;

and it is further

ORDERED that plaintiff Louise DeMartino's motion for leave to amend her complaint (motion sequence number 001) is granted in the proposed form annexed to her moving papers, pursuant to the previous order of this court dated September 9, 2009; and it is further

ORDERED that defendant's motion to compel appraisal (motion sequence number 003) is denied; and it is further

ORDERED, that the parties appear for a compliance conference on February 18, 2010 at 9:30 a.m. in Room 304 at 71 Thomas Street.

Dated: January 21, 2010

ENTER:



Joan M. Kenney, J.S.C.

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JAN 27 2010
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