

Kildaze v Countrywide Insurance Company
2003 NY Slip Op 30167(U)
July 18, 2003
Supreme Court, New York County
Docket Number: 0107372/2002
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. HON MARTIN SHULMAN, J.S.Q.
Justice

PART 1

ANAIT KILDAZE and
GEORGE KILDAZE

INDEX NO. 107372/02

MOTION DATE _____

COUNTRY-WIDE INSURANCE COMPANY,
et al.

MOTION SEQ. NO. 001

MOTION CAL. NO. SCANNED

AUG 08 2003

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1</u>
<u>2</u>

Cross-Motion: Yes No

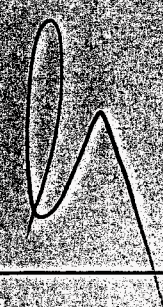
Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE

DATED: _____ J.S.C.

Dated: July 18, 2003



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
ANAIT KILDAZE and GEORGE KILDAZE,

Index No.: 107372/02

Plaintiffs,

- against -

DECISION and ORDER

COUNTRY-WIDE INSURANCE COMPANY,
INFINITY TRUCKING, INC.,
D.L.M. TRUCKING COW. and
JOHN DOES 1-5.

Defendants.

-----X
HON. MARTIN SHULMAN, J.S.C.:

Plaintiffs Anait Kildaze and George Kildaze (collectively “plaintiffs”) move for an order: (1) compelling non-party Progressive Insurance Company (“Progressive”) to produce various documents relating to an October 29, 1999 accident involving a vehicle owned by defendant D.L.M. Trucking (“D.L.M.”) and a vehicle occupied by Anait Kildaze and Jose Vasquez (“Vasquez”); and (2) compelling defendant Country-Wide Insurance Company (“Country-Wide”) to serve responses to plaintiffs’ Interrogatories (Interrogatories annexed as Exh. 4 to Motion). County-Wide opposes that branch of plaintiffs’ motion which seeks discovery from Progressive and asserts that the branch of plaintiffs’ motion which seeks to compel responses to plaintiffs’ Interrogatories has been rendered moot as such responses have been served (Country-Wide’s Responses to Plaintiffs’ Interrogatories annexed as Exh. A to Torto Aff.). Progressive and defendants Infinity Trucking, Inc. (“Infinity”) and D.L.M. have not submitted any opposition to plaintiffs’ motion.’

‘Plaintiffs’ affidavits of service for the instant motion disclose that plaintiffs served Progressive by serving its authorized agent and purportedly served Country-Wide, Infinity, D.L.M. and John Does 1-5 by serving copies of the motion papers on Thomas Torto, Esq. Mr. Torto in his Aff. in Opposition submitted on behalf of Country-Wide states, *inter alia*, that

In the underlying action, plaintiffs assert that on or about December 11, 2001 a judgment in the amount of \$248,404.50, was entered in favor of plaintiffs and against John Koratzanis and D.L.M. Apparently, the judgment remains unsatisfied and plaintiffs allege that more than thirty (30) days have elapsed since the service of the judgment, with notice of entry upon D.L.M. and its purported insurer, Country-Wide. Accordingly, plaintiffs seek, *inter alia*, a judgment against Country-Wide pursuant to Insurance Law § 3420. Country-Wide has denied coverage, *inter alia*, based on inadequate notice. Plaintiffs seek discovery from Progressive relating generally to the notice given to Country-Wide concerning the accident and specifically request: “(a) the last known address of Kathy Lowe and Edward Burke, who apparently were involved in communications with Country-Wide . . . concerning this accident; (b) computer records documenting communications with Country-Wide; (c) litigation papers; and (d) records of various communications in which Country-Wide . . . denied the existence of a policy.” (Motion at ¶ 5). Plaintiffs assert that Progressive obtained knowledge of the accident and issues relating to Country-Wide’s notice of the accident, *inter alia*, as a result of a claim for uninsured motorist benefits made by Vasquez against Progressive. This led to Progressive filing a Petition to Stay Uninsured Motorist Arbitration captioned In the Matter of the Arbitration between Progressive Insurance Company against Jose Vasquez and D.L.M. Trucking Corp., John Koratzanis, Anait Kildaze and Country-Wide Insurance Company, n.o.r., Sup. Ct., N.Y. Co. Index No.: 112685/01.

In support of this motion, plaintiffs have submitted an attorney’s affirmation of good-faith attesting to efforts to resolve these discovery disputes without court intervention and a copy of a letter sent by plaintiffs’ counsel to Progressive seeking the aforementioned items.

he is “. . .the attorney for defendant Country-Wide in the above-captioned action”(Opp. Aff. at ¶ 1) and does not address the issue of service on the other defendants .

Country-Wide asserts that the plaintiffs' motion to compel Progressive to produce the requested material must be denied because: (1) plaintiffs' motion is premature since they have not served either a notice of deposition or a *subpoena duces tecum* on Progressive (Torto Aff. at ¶ 3); (2) the plaintiffs have failed to demonstrate that they have previously attempted to get the information they now seek from Progressive directly from Country-Wide and that such information was unavailable (Torto Aff. at ¶ 4); and (3) the plaintiffs are seeking discovery from Progressive, a non-party, before seeking discovery from the parties themselves (Torto Aff. At ¶ 5).

CPLR 3120 (b) directs that when a party seeks to compel the production of documents from a non-party in the absence of that non-party's deposition, a motion must be made on notice to all parties. In this action, plaintiffs do not seek, as of yet, to depose any of Progressive's current employees and are merely seeking documentary evidence. There is no requirement that plaintiffs must serve either a notice of deposition or a *subpoena duces tecum* on Progressive.'

Country-Wide also relies on Schwarz v. Schwarz, 227 A.D. 2d 611 (2nd Dept., 1996), Tsachalis v. City of Mount Vernon, 262 A.D.2d 399 (2nd Dept., 1999), Dioguardi v. St. John's Riverside Hosp., 144 A.D.2d 333 (2nd Dept., 1988) and In the Matter of Validation Review Associates, Inc. 237 A.D.2d 614 (2nd Dept., 1997) to support their contentions. Country-Wide's reliance is misplaced.

In Schwarz, the Appellate Division, Second Department reversed the lower court's order directing the defendant's counsel to comply with a subpoena and submit to a deposition by

'An amendment to the CPLR, effective September 3, 2003, *inter alia*, allows for the inspection of non-party documents and materials upon the issuance of a *subpoena duces tecum* and eliminates the requirement of CPLR 3120 (b) that in the absence of a non-party deposition, a party **must** obtain a court order prior to conducting such discovery. (2002 N.Y. Laws 575). According to the Sponsor's Memorandum the changes are ". . . designed to simplify methods for obtaining discovery of documents, particularly routine business records, from non-party witnesses and procuring their admission into evidence."

plaintiffs counsel. The Appellate Court noted that the plaintiff had “. . .failed to establish the requisite special circumstance to justify her demand for nonparty disclosure regarding the source of an appeal bond held in escrow by defendant’s counsel, since she failed to demonstrate that the information sought was otherwise unobtainable (*see, Dioguardi v. St. John ’sRiverside Hosp.*, 144 A.D.2d 333) and the deposition testimony of the defendant suggests that this information was either already obtained or is obtainable from the defendant himself.” Significantly, the non-party defense counsel actively opposed plaintiffs attempt to take counsel’s testimony, whereas in the instant matter non-party Progressive has failed to offer any opposition at all.

In Tsachalis, the Appellate Court upheld that part of the Supreme Court’s order which denied the plaintiffs motion to quash a subpoena to compel the production of the entire file from the non-party Westchester County District Attorney (“DA”) relating to plaintiff’s arrest and trial. In that matter the DA brought the motion to quash and argued that the plaintiff had failed to demonstrate the material sought was unavailable from other sources.

In In the Matter of Validation Review Associates, the Appellate Court upheld the quashing of subpoenas on a non-party witness where the subpoenas were “. . .facially invalid and unenforceable because they did not contain, or were not accompanied by, a notice setting forth the reason why disclosure was sought.”

In Dioguardi, the Appellate Division, Second Department found that whether or not -‘special circumstances’ warranting non-party disclosure exist is “. . .a question committed to the sound discretion of the court to which the application for discovery is made” and may be shown by “. . .establishing that the information sought to be discovered cannot be obtained from other sources.” The Appellate Court upheld the lower court’s decision denying defendants’ request to depose one of several treating physicians where such request was based on a claim “manifestly

without foundation” that the physician has instructed the plaintiff to lie and the court “decline[d] to hold that a defendant in a personal injury action may, as of right, depose any and all physicians who are shown to have treated the injuries claimed by the plaintiff.”

In the instant matter, Progressive has not objected to the plaintiffs’ demands for information regarding what notice of the accident, if any, was provided to Country-Wide. It is Country-Wide that objects premised, *inter alia*, on its contention that the plaintiffs have yet to demonstrate that information regarding notice to Country-Wide is unavailable from the parties themselves. Plaintiffs’ Complaint (annexed as Exh. 1 to Motion) contains the following allegation: “[d]efendant Country-Wide Insurance Company was notified properly of the accident.” (Complaint at ¶ 16). Significantly, Country-Wide’s Verified Answer (annexed as Exh.2 to Motion) states: “[Country-Wide] [d]enies each and every allegation contained in paragraphs “16” and “17” of the complaint” (Verified Answer at ¶ 6), and Country-Wide failed to respond to plaintiffs interrogatories despite service of same and a follow-up letter sent to Country-Wide’s Counsel (annexed as Exh. 5 to motion) until after Country-Wide was served with the instant motion. Determining the issue of notice to Country-Wide is of paramount importance in resolving this action.

As the Appellate Division, First Department noted in Rios v. Donovan, 21 A.D.2d 409 (1st Dept., 1964), “[t]he purpose of disclosure . . . is to advance the function of a trial, to ascertain truth and to accelerate the disposition of suits.” CPLR § 3101 (a) mandates that “[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof by . . . (4) any other person [non-party], upon notice stating the circumstance or reasons such disclosure is sought or required.” “This provision has been liberally construed to give effect to the strong public policy favoring full disclosure to adequately appear for

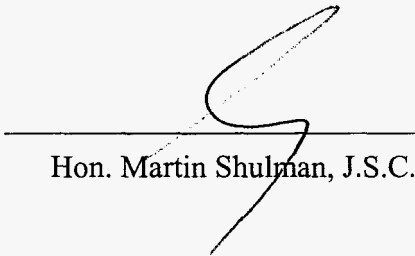
trial.” New York State Electric and Gas Corp. v. Lexington Insurance Co., 160 A.D.2d 261 (1st Dept., 1990). Plaintiffs have adequately demonstrated their need for disclosure from Progressive.

Accordingly, it is hereby ordered that Progressive shall produce the last known addresses of former Progressive employees Kathy Lowe and Edward Burke and make available for inspection and examination any documentation and/or records relating to what notice, if any, was provided to Country-Wide regarding the October 29, 1999, accident involving the vehicle owned by D.L.M. and the vehicle occupied by Anait Kildaze and Jose Vasquez. The cost of reproduction and transportation incident thereto shall be borne by plaintiffs. To the extent that plaintiffs’ motion seeks Progressive’s “entire files and other materials, and all papers in al lawsuits ” arising from the accident and the Petition to Stay Uninsured Motorist Arbitration sought by Jose Vasquez , that request is denied as being overly broad, vague and potentially violative of the attorney-client privilege.

That branch of plaintiffs’ motion which seeks to compel Country-Wide to respond to plaintiffs’ interrogatories has been rendered moot.

The foregoing constitutes the Decision and Order of this Court. Courtesy copies have been sent to counsel for all parties.

Dated: New York, New York
July 18,2003



Hon. Martin Shulman, J.S.C.