

**Biancone & Wilinsky, LLP v Liberty Insurance Underwriters, Inc.**

2006 NY Slip Op 30325(U)

February 16, 2006

Supreme Court, New York County

Docket Number: 0600617/2005

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03  
Justice

\_\_\_\_\_  
Biancone & Wilinsky, LLP  
Plaintiff,  
-against-  
Liberty Insurance Underwriters, Inc.  
Defendant.  
\_\_\_\_\_

INDEX NO 600617/2005  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

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 |
|-----------------|
|                 |
|                 |
|                 |

Cross-Motion:  Yes  No

Upon the foregoing papers, it is  
**AND ORDERED** that this motion is decided in accordance with the  
accompanying **Decision and Order**.

*AND ORDERED Decision and Order of 2/16/06 is recalled, and vacated*  
*(Amended)*

*3/2/06*  
Dated: ~~February 16, 2006~~

*[Signature]*  
\_\_\_\_\_  
KARLA MOSKOWITZ  
J.S.C. *[Signature]*  
KARLA MOSKOWITZ

**FILED**  
MAR 02 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 3

-----x  
Biancone & Wilinsky, LLP

Index No. 600617/2005

Plaintiff,

-against-

Liberty Insurance Underwriters, Inc.

Decision and Order

Defendant.  
-----x

**FILED**  
MAR 02 2006  
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MOSKOWITZ, J:

This is a declaratory judgment action concerning whether Liberty Insurance Underwriters, Inc. ("Liberty") must provide insurance coverage under a professional liability policy it issued to plaintiff, the law firm of Biancone and Wilinsky, LLP (plaintiff or the insured). The insured has asked Liberty to provide a defense and indemnity for an underlying lawsuit alleging fraudulent transfer against the insured (the "receiver lawsuit").

BACKGROUND

The insured claims that in late 2003, Louis DeLucia, a receiver for certain former clients of Biancone and Wilinsky LLP (the Receiver), claimed that Biancone and Wilinsky LLP had received fees for professional services that were improper. The Receiver demanded restitution. (Complaint ¶ 9). The Receiver apparently claimed at a November 19, 2003 meeting that he intended to assert a malpractice claim against Biancone and Wilinsky LLP. At that point, the insured notified Liberty about the upcoming claim. (Complaint ¶ 20).

Before the Receiver initiated his lawsuit, apparently, Liberty had paid Biancone &

voluntarily for a deposition. As Kaloud resides in New Jersey, plaintiff necessarily had to obtain a commission from this court and commence an action in New Jersey. In the New Jersey action, defendant moved to quash plaintiff's subpoena to the extent it called for Kaloud to produce irrelevant or privileged documents.

According to Ms Kaloud, she "was the only person from Liberty who had personal knowledge of the matters." (Affidavit of Nancy Kaloud from the New Jersey proceeding, sworn to September 30, 2005, at ¶ 4, attached as Exhibit E to the affirmation of Kevin Cavaliere, dated November 15, 2005 ). She claims she retained copies "for the sole purpose of refreshing [her] memory in the event Liberty management had questions about any of the matters after [she] left." (*Id.*).

By order dated November 15, 2005, Justice Thomas W. Cavanagh Jr. of the Superior Court of New Jersey Law Division: Monmouth County referred "any issues pertaining to Nancy Kaloud's obligation to comply with the Subpoena Duces Tecum. . .to the Honorable Karla Moskowitz of the Supreme Court of the State of New York." "Any issues" included an *in camera* review of the documents in Nancy Kaloud's possession.

Concerned that this court lacked jurisdiction to decide this issue as Nancy Kaloud is a resident of Homdel, New Jersey, (and hence the need for the New Jersey proceeding in the first place) my court attorney requested the parties and Ms. Kaloud stipulate to this court's exercise of jurisdiction over Nancy Kaloud for the purposes of this action. On December 7, 2005, the court received a copy of that stipulation.

By way of supplemental affirmations on this motion, plaintiff seeks all documents that Ms Kaloud took with her upon termination of her employment, including the large loss report

(the Kaloud documents”). Plaintiff also seeks sanctions. Defendant has submitted the documents Kaloud took with her for *in camera* inspection.

#### Discussion

The court cannot take the various affirmations of Thomas Wilinsky, Esq. into consideration to the extent they seek to place facts before the court. An affirmation of an attorney who is a party to an action is of “no probative value.” (*Sassower v. Greenspan, Kanarek, Jaffee & Funk*, 121 AD2d 549 [2nd Dep’t 1986]). However the court has reviewed the Kaloud documents, the complaint, the Kaloud affidavit and the applicable law and makes the following determination:

#### I. Reargument

The court grants reargument and upon reargument adheres to its prior determination. In the context of this case, reserves are not discoverable. Plaintiff’s cases are irrelevant and outdated. The modern trend is to deny discovery of reserve information. (*See Lava Trading Inc. v. Hartford Fire Ins. Co.*, 2005 WL 66892 at \* 2 [SDNY January 11, 2005] [discovery of reserves denied because they “are normally created in anticipation of litigation. Indeed, that is the generally accepted rule”]; *Maiden Creek T.V. Appliance, Inc. v. General Casualty Ins. Co.*, 2005 WL 1712304 at \*1 [SDNY July 21, 2005] [recognizing the tenuous link between reserves and actual liability]).

While reserves may sometimes be discoverable in certain instances where plaintiff had accused the insurer of bad faith, the bad faith claim here is tenuous considering that the complaint for which plaintiff asked Liberty to provide a defense does not appear to contain a

claim within coverage.

II. Renewal

Plaintiff cites as its basis for renewal that plaintiff's prior application via letters was not a full record and that it was improper for this court to make a decision without a motion. The court takes note that the prior application involved four multi-paged, single-spaced letters from plaintiff, five such letters from defendant and an *in camera* inspection of over 100 pages of documents. If the plaintiff did not want the court to rule upon these submissions, it certainly should have said so. Renewal is not a basis for a second bite at the apple. However, at the risk of inciting a later motion to renew, the court will consider the newly discovered fact that defendant's former employee Kaloud left her employ with several documents including the large loss report as a basis for renewal.

To protect a document on the ground that it was prepared in anticipation of litigation a party must have prepared that document solely for use in litigation (*JP Foodservice Distributors Inc. v. Sorrento Inc.*, 305 AD2d 266 [1st Dep't 2003]).

Here, defendant admits that Ms Kaloud kept copies of the report to refresh her memory in the event Liberty Management had questions of her. As Kaloud herself swore in an affidavit in the New Jersey proceeding, "I kept copies of certain documents simply to refresh my memory about the claims to which they related in the event Liberty ever called with questions concerning those matters. . .my employment with Liberty ended amicably and I wanted to be in a position to give it prompt assistance if needed." (Kaloud Aff. ¶ 6). ~~It is undisputed that Kaloud is not a lawyer.~~ It would appear from this statement that defendant did not prepare the document solely in anticipation of litigation as Kaloud intended to use it to aid Liberty's management. ~~A Kaloud~~

*Karla Moskowitz*  
JSE

~~was not a lawyer, assistance to Liberty management must have been in a business capacity.~~

WARRA MOSKOWITZ  
JSC

Thus, it would appear from defendants' own statements that defendant did not prepare the large loss report solely for litigation purposes. Therefore, it is discoverable.

Even if Liberty had prepared the large loss report solely for litigation purposes, Liberty does not appear to have taken any pains to protect the information plaintiff seeks. Indeed, defendant did not even realize Ms. Kaloud had the document until plaintiff subpoenaed her. Under these circumstances, the large loss report is no longer entitled to protection.

In addition, defendant's own submission belies its contention that the large loss report is irrelevant. If the report were irrelevant, Kaloud would not need it to refresh her recollection. Also, the court cannot say at this juncture that the large loss report could not lead to relevant evidence in this case.

The court has reviewed the other documents that Kaloud took with her that the New Jersey court thought should be reviewed *in camera* and rules that plaintiff is not entitled to them because they are irrelevant. Documents 1-15 contain Kaloud's personal employment information and therefore are obviously irrelevant. Documents 15-50 involve drafts of documents in opposition to plaintiff's motion to disqualify defendant's counsel upon which this court already ruled. Hence those documents are not relevant to any issues pending in this lawsuit. Plaintiff is therefore not entitled to these documents either.

Because of this decision, the court declines to address plaintiff's argument that defendant has placed the large loss report at issue in this litigation. Nevertheless, that argument appears to rehash arguments this court already rejected during plaintiff's prior motion to disqualify defendant's counsel.

### III. Sanctions

The request for sanctions is denied. As much as plaintiff would like to believe, there is no indication in the record that defendant purposefully kept from the court or anyone else that copies of the documents were in the hands of a former employee. The court warns plaintiff not to engage in the kind of hyperbole that has characterized its submissions and dealings with the court throughout this litigation. Nor will the court tolerate half truths with respect to the facts *or the law* in this or any other case. Further, in this case, the court will not accept letters or hold informal telephone conferences, but will hold all conferences in the courtroom with a court reporter and only respond to formal motion practice.

Accordingly,

IT IS ORDERED THAT that that part of plaintiff's motion for reargument is granted and upon reargument the court adheres to its original determination; and it is further

ORDERED THAT that part of plaintiff's motion seeking renewal based upon the newly discovered fact that defendant's former employee took privileged documents with her when she left defendant's employ is granted to the extent that defendant shall produce the document the parties refer to as the "large loss report"; and it is further

ORDERED THAT defendant has ten days from the date of this order with notice of entry to produce that document; and it is further

ORDERED THAT the court denies the remainder of plaintiff's motion to the extent plaintiff seeks other documents from non-party Nancy Kaloud or defendant Liberty; and it is further

ORDERED THAT that part of plaintiff's motion for sanctions is denied; and it is further  
ORDERED THAT the parties are to appear for a conference on before a court reporter on  
March 2, 2006 at 10 am in the courtroom, room 248, 60 Centre Street.

Dated: February 16, 2006

*[Handwritten signature]*  
\_\_\_\_\_

J.S.C.

*Recalled + Vacated +  
Amended and Re-signed  
March 2, 2006*

*[Handwritten signature]*  
**KARLA MOSKOWITZ**  
*[Handwritten initials]*

**FILED**  
MAR 02 2006  
NEW YORK  
COUNTY CLERK'S OFFICE