

Matter of Indian Harbor Ins. Co. v Trimis
2007 NY Slip Op 32397(U)
July 26, 2007
Supreme Court, New York County
Docket Number: 0107475/2007
Judge: Marcy L. Kahn
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Check if appropriate: DO NOT POST REFERENCE

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

PRESENT: Hon. Nancy Lang
Justice

PART 50K

Indian Harbor

INDEX NO. 107475/07

- v -

George Trimis

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for pre-action disclosure

- Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
- Answering Affidavits — Exhibits _____
- Replying Affidavits _____

PAPERS NUMBERED
<u> 1 </u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion **FILED**

AUG 03 2007

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION**

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

Dated: Pt. SK JUL 26 2007

[Signature]
HON. NANCY LANG J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 50K

-----X

In the Matter of the Application of :

INDIAN HARBOR INSURANCE COMPANY :
as subrogee of ZOZO Restaurant,

Petitioner, :

-against-

GEORGE TRIMIS, :

Respondent :

-----X

MARCY L. KAHN, J.:

DECISION AND
ORDER ON MOTION
PURSUANT TO
CPLR §3102(c)

Index No. 107475/07

By order to show cause issued May 30, 2007, petitioner Indian Harbor Insurance Company ("petitioner" or "Indian Harbor") seeks an order pursuant to Section 3102(c) of the Civil Practice Law and Rules ("CPLR") directing pre-action disclosure. Petitioner seeks the right to subpoena the respondent, George Trimis ("respondent" or "Trimis"), for deposition of oral testimony for the purpose of identifying the plumbing contractor who installed the valves which caused water damage to petitioner's subrogee, ZOZO Restaurant ("ZOZO"). An affidavit of service was sworn on June 1, 2007 and was filed on June 8, 2007. Respondent has failed to appear in this proceeding, and the application is granted on default.

I. BACKGROUND

Petitioner insured ZOZO for the risk of water intrusion at its catering hall located at 43-35 Ditmars Avenue, Astoria, New

York. (See Pet. Exh. A). ZOZO hired a contractor, respondent George Trimis, owner of T/Enterprises, Inc., to install urinals in the catering hall, which included the urinal from which the October 2, 2005 water intrusion originated. (Affirm. of Michael S. Leavy, Esq., dated May 22, 2007, In Support of Order to Show Cause ["Pet. Affirm."], at ¶5). Robert Junge, Indian Harbor's general adjuster who settled ZOZO's insurance claim, discovered that a flushometer valve angle stop appertinent to a urinal failed, causing the water intrusion. (Affidavit of Robert Junge, Adjuster with U.S. Adjustment Corp., sworn May 11, 2007 In Support of Order to Show Cause ["Junge Aff."], ¶4). The valve was installed under a contract with the respondent's company. (Junge Aff., ¶4; see Pet. Affirm., Pet. Exh. B).

Indian Harbor alleges that respondent has refused either to identify his own liability insurer for the time period when the water damage occurred or to provide the name of his plumbing subcontractor. (Pet. Affirm. ¶7, Pet. Exh. C). Petitioner claims it intends to sue the contractor and subcontractor, once identified, as ZOZO's subrogee, to recover for the amount it paid to ZOZO fin settlement of its insurance claim. (Pet. Affirm. ¶8). In order to identify the subcontractor and continue with its plan to commence suit, Indian Harbor has sought an order permitting it to subpoena and depose Trimis. As noted, respondent has failed to appear in this proceeding.

II. APPLICABLE LAW

Section §3102(c) of the Civil Practice Law and Rules provides, in relevant part:

Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration may be obtained, but only by court order.

In order to obtain pre-action disclosure, the petitioner must demonstrate both "a meritorious cause of action and that the information sought is material and necessary to the actionable wrong." (Matter of Uddin v. New York City Transit Auth., 27 AD3d 265 [1st Dept. 2006]; Holzman v. Manhattan & Bronx Surface Transit Operating Auth., 271 AD2d 346, 347 [1st Dept. 2000]; Bliss v. Jaffin, 176 AD2d 108 [1st Dept. 1991]).

In Matter of Gleich v. Kissinger, 111 AD2d 130 (1st Dept. 1985), the Appellate Division, First Department adopted the criteria for granting pre-action discovery which had been earlier announced by the Appellate Division, Third Department:

The factors to be considered in determining an application for preaction disclosure were well summarized by the Appellate division, Third Department in Emmrich v. Technology for Information Mgt. (91 AD2d 777) as follows: "Disclosure to aid in bringing an action, under CPLR 3102 (subd [c]), is granted only where the party seeking the disclosure has shown in his affidavits facts which 'fairly indicate he has some cause of action against the adverse party' and, further, that the information he seeks is 'material and necessary' to that actionable wrong (Stewart v. Socony Vacuum Oil Co., 3 AD2d 582, 583). Preacton disclosure is not allowed to determine whether facts supporting a cause of action exist (Matter of Manufacturers & Traders Trust Co. v. Bonner, 84 AD2d 678; L-Tron Corp. v. Davco Systems, 60 AD2d 25, 29), and mere conclusory statements of suspicion and conjecture are insufficient to

allow one 'a judicial franchise to penetrate into another party's affairs, either by examination or inspection, to find out whether he ought to sue or ought not to sue' (*Stewart v. Socony Vacuum Oil Co.*, supra., p 583; see, also, 3A Weinstein-Korn-Miller, NY Civ Prac, par 3102.14)."

(*Matter of Gleich v. Kissinger*, supra, 111 AD2d at 131-132).

In order to prevail on a Section 3102(c) claim for pre-action discovery, as a threshold requirement, the petitioner must show the existence of a prima facie cause of action.

(*Toal v. Staten Island Univ. Hosp.*, 300 AD2d 592 [2nd Dept. 2002]; *Stewart v. New York City Transit Auth.*, 112 AD2d 939 at 940 [2nd Dept. 1985]). Therefore, pre-action disclosure is unavailable to ascertain whether facts supporting a cause of action exist. (*Matter of Uddin v. New York Transit Authority*, supra, 27 AD3d at 265; *Liberty Imports, Inc. v. Bourquet*, 146 AD2d 535, 536 [1st Dept. 1989] [pre-action disclosure "is not permissible as a fishing expedition to ascertain whether a cause of action exists"]).

A court has "wide discretion in determining what is material and necessary" in terms of the disclosure to be made under §3102(c). (*Stanco v. Steinberg*, 254 AD2d 363 [2nd Dept. 1998]). Furthermore, the court must consider the evidence presented in the light "most favorable to the petitioner," who is entitled to "every favorable inference which can reasonably be drawn." (*Ero v. Graystone Materials, Inc.*, 252 AD2d 812 at 814 [3rd Dept. 1998]).

III. DISCUSSION

Here, petitioner seeks pre-action disclosure to depose respondent general contractor in order to identify both its liability insurance carrier and the plumbing subcontractor responsible for installation of the device which caused water intrusion and damage to petitioner's premises. (Pet. Affrim, at ¶3). Pursuant to ZOZO's contract with respondent, the subcontractor installed a flushometer valve angle stop appertinent to a urinal. The valve stop failed, causing the water intrusion, resulting in damage to petitioner's restaurant. (Junge Aff., ¶4).

Indian Harbor claims it intends to sue the contractor and plumbing subcontractor to recover its payments made to ZOZO as a result of the failed urinal valve. It has thus fairly demonstrated both that it has a meritorious cause of action against the contractor and subcontractor for breach of contract and negligence, and that the information it seeks to discover through its pre-action discovery, i.e., the identity of the plumbing subcontractor and its liability insurer, is both material and necessary in order to frame the complaint. Petitioner is not attempting to determine whether a cause of action exists; it is merely seeking essential information to enable it to bring suit. Accordingly, petitioner is entitled to obtain this information through pre-action discovery.

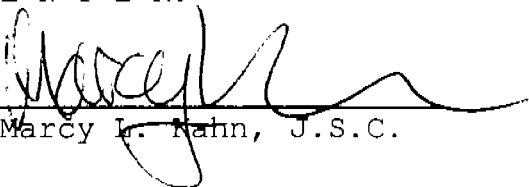
(Alexander v. Spanierman Gallery, LLC, 33 AD3d 411 [1st Dept. 2006]; Wien & Malkin LLP v. Wichman, 255 AD2d 244 [1st Dept. 1998]; Matter of Stump v. 209 East 56th St. Corp., 212 AD2d 410 [1st Dept. 1995]; Houlihan-Parnes, Realtors v. Cantor, Fitzgerald & Co., 58 AD2d 629 [2nd Dept. 1977]).

IV. CONCLUSION

For all the foregoing reasons, petitioner's application for pre-action discovery pursuant to CPLR §3102(c) is granted. The respondent must make himself available for deposition at a time and place to be fixed by petitioner on not less than ten (10) days notice, or at such other time and place as is mutually agreed by the parties.

The foregoing constitutes the decision and order of this court.

ENTER:


Marcy L. Kahn, J.S.C.

DATED: New York, New York
July 26, 2007

FILED
AUG 03 2007
NEW YORK
COUNTY CLERK'S OFFICE