

Matter of Hollander v XL Capital Ltd.

2008 NY Slip Op 32383(U)

August 21, 2008

Supreme Court, New York County

Docket Number: 0115309/2007

Judge: Louis B. York

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PRESENT: LOUIS B. YORK
J.S.C.

PART 2

Index Number : 115309/2007
HOLLANDER, GAIL
VS.
XL CAPITAL LTD.
SEQUENCE NUMBER : 002
VACATE STAY/ORDER/JUDGMENT

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

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

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1419).

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

Dated: 8/21/08

Ley

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
LOUIS B. YORK
J.S.C.

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X
In the Matter of the Application of
Gail Hollander for an Order to take
the Videotapes Deposition of Buchanan
Ingersoll and Rooney, Harry Slotnick,
Mendes and Mount and George C. Lock
in the State of New York in certain
action pending in the Superior Court
of the State of California for the
County of Los Angeles, entitled
GAIL HOLLANDER et al.,

Plaintiffs,

Index No.: 115309/07

-against-

DECISION AND ORDER

XL CAPITAL LTD., et al.,

Defendants.

-----X
YORK, J.

Motion sequence 001 and 002 are consolidated for
disposition.

FACTUAL BACKGROUND

Movants are non-party attorneys who seek to quash a subpoena
issued by plaintiffs through commissions by the State Court in
California in *Hollander v XL Capital Ltd et al.*, Cal Sup Ct No.
BC365455. In the alternative, movants seek a protective order
pursuant to CPLR 3102 (a). Movants also seek the imposition of
sanctions, alleging frivolous conduct on the part of plaintiffs
in attempting to seek this discovery.

The underlying California action involves an insurance claim

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1000)

filed by plaintiffs against the defendant insurer for the alleged loss in value to three of their paintings caused by damage in shipment. The total value of the alleged loss is \$181,745, the difference between the paintings appraised value and the net proceeds from their auction sale. Plaintiffs are also seeking punitive damages.

After exhaustive discovery in California, plaintiffs are now seeking discovery with respect to XL Capital Ltd.'s (defendant) policies and practices with respect to other claims, based on a theory of unfair practices in handling such matters.

The New York third parties from whom plaintiffs seek discovery are the attorneys who represented the insurer and the insured (the Wynns) involved in a claim filed in the New York courts against Lloyd's of London (Lloyd's).

Defendant is an underwriter with Lloyd's, as was the underwriter in the New York case. The New York case was settled for an undisclosed amount, but the alleged loss was \$54,000,000 for damage to a Pablo Picasso painting valued at \$139,000,000. Movants allege that there is no connection between the two actions, except for the fact that they are both insurance claims based on damage to artworks, and both underwriters are affiliates of Lloyd's.

In November, 2007, the California court issued commissions for the discovery to be taken of the New York third parties, and

subpoenas based on those commissions were duly served pursuant to an ex parte motion in this court. However, subsequent to the present motion to quash being filed, the California court held an oral argument with respect to plaintiffs' motion to compel discovery in the California court, and, on April 15, 2008, the California court denied plaintiffs' motion to seek the same discovery now sought from movants, but allowed plaintiffs to renew the request for depositions only of the Wynns upon a showing of relevance, which the court stated plaintiffs had failed to do up to that time.

Among the documents sought to be discovered are all of the writings, appraisals, claims, settlement agreement and the entire attorney files for the Wynns and the insurer in the New York case.

In opposition, plaintiffs have served and filed an affidavit of a California attorney, along with supporting documents. It is noted that the California lawyer moved to appear in the New York court *pro hoc vice*, but that motion was denied on May 20, 2008.

All of the instant arguments posited by both the third party movants and the plaintiffs were submitted prior to the California ruling noted above.

DISCUSSION

CPLR 3102 (e) provides that when there is a mandate or commission issued by a court in another state that requires

discovery from a New York witness, the witness "may be compelled to appear and testify in the same manner and by the same process as may be employed for the purpose of taking testimony in actions pending in this state."

However,

"[i]t is appropriate for the sister State court which has the underlying case, and is therefore in a better position to determine the appropriate scope of disclosure, to make the threshold determination as whether to permit the discovery. The New York court's role is necessarily more limited. In the event the sister State court declines to permit the disclosure, the New York court will not reach the issue or its determination will be bound by the principles of collateral estoppel [citation omitted]."

In the Matter of Welch, 183 Misc 2d 890-891 (Sup Ct, NY County 2000).

Conversely, if the sister state permits discovery, by means of issuing a commission,

"[t]he court's inquiry with respect to objections raised by persons required to testify pursuant to CPLR 3102 (e) is limited to determining (1) whether the witnesses' fundamental rights are preserved; (2) whether the scope of inquiry falls within the issues of the pending out-of-State action; (3) whether the examination is fair The courts 'will not prejudge the materiality or the competency of the evidence in a cause pending in another jurisdiction and will afford the widest possible latitude in the conduct of such examinations' [citation omitted]."

Matter of Ayliffe & Companies, 166 AD2d 223, 224 (1st Dept 1990).

In the instant case, although the California court initially issued the commissions, that court subsequently denied plaintiffs' discovery request for the records of the New York

attorneys who represented the owners and the insurer in the earlier New York. The California court stated:

"I'm going to deny these requests at this time.

...

"You are going to have to make a stronger showing based on something other than hearsay to get into the XL files on the Wynn claim.

...

"I'm denying the request to get into the Wynn file at this time because I can't - I'm not convinced that based on the representations that it leads to admissible evidence.

...

"You are going to have to bring in some first-hand information that's going to convince me to delve into these files. I'm not convinced at this time ... And I'm not saying I'd grant these at a later time either. Don't get the impression that I'm inviting you to renew the motion because I'm going to let you into these files. So far, I'm not.

...

"These requests are denied at this time."

Tr. p. 31-33, Cal Sup Ct, No. BC365455, April 15, 2008.

Once the sister state has declined to permit the discovery, the New York court will be bound by that determination under the principles of collateral estoppel, provided that there is "an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling [internal quotation marks and citation omitted]." See *Gilberg v Barbieri*, 53 NY2d 285, 291 (1981).

In the instant matter, plaintiffs were afforded a full opportunity to contest the issue of the materiality of the discovery relating to the Wynns' lawsuit, and their argument did

not prevail in California. It is not the function of the courts of New York to act as an appellate tribunal for decisions rendered by courts of competent jurisdiction in a sister state. *See generally In the Matter of Kerr*, 16 Misc 3d 1028 (Sup Ct, NY County 2007). Therefore, since California has determined that the discovery sought is not appropriate to the underlying litigation, this court will not second-guess that decision.

Even if this court did not feel bound by the oral decision of the California tribunal, the court still retains the authority under CPLR 3103 (a) to quash subpoenas issued pursuant to CPLR 3102 (e) due to an independent determination that the material sought is not necessary or privileged. *See In the Matter of Kirkland & Ellis v Chadbourne & Park, L.L.P.*, 176 Misc 2d 73 (Sup Ct, NY County 1998) (files of a New York law firm prepared for litigation not discoverable).

Plaintiffs have requested, among other things: 1. all writings regarding the Wynn claim; 2. all writings regarding offers of settlement; 3. the entire original Wynn claim file; 4. the settlement agreement; 5. all records of telephone calls between the Wynns and any representatives of the insurer; 6. The entire file of Mendes, attorneys for the insurers; and 7. the entire file of Buchanan, attorneys for the Wynns. The material requested of the third party attorneys is not only excessive and over broad (*Pucik v Cornell University*, 4 AD3d 686 [3d Dept

2004]; *Editel, New York v Liberty Studios, Inc.*, 162 AD2d 345 [1st Dept 1990]), but has been determined by the court hearing the underlying matter not to be relevant. Additionally, much of the material is protected from discovery as being subject to the attorney-client privilege (CPLR 4503) or part of the attorney's work product. *Spectrum Systems International Corp. v Chemical Bank*, 78 NY2d 371 (1991); see generally *Bombardier Capital Inc. v Schoengold Sporn Laitman & Lometti, P.C.*, 46 AD3d 323 (1st Dept 2007).

Movants have also requested the court to impose sanctions against plaintiffs for seeking this discovery, based on allegations of harassment and frivolous litigation.

The Code of Professional responsibility (22 NYCRR 1200.03 [a] [1]) mandates that professional conduct be within the bounds of the law and requires that an attorney not take an action that would serve merely to harass or maliciously injure another. However, if the claim has some legal basis, the attorney's action cannot be considered frivolous or merely intended to harass.

In the instant case, in order to obtain discovery of third parties resident in New York, plaintiffs were required to obtain commissions from the California court. The rationale for desiring such discovery is a theory of unfair practices, and the California court only denied such discovery after the instant subpoenas and motions were served. Under these circumstances,

the court exercises its discretion in declining to order sanctions. 22 NYCRR § 130-1.1.

Based on the foregoing, the court grants movants' motion to quash.

CONCLUSION

It is hereby

ORDERED and ADJUDGED that movants' motion to quash the discovery subpoenas issued by plaintiffs in the California action *Hollander v XL Capital Ltd.* is granted; and it is further

ORDERED and ADJUDGED that movants' motion to impose sanctions is denied.

Dated: 8/21/08

ENTER:



Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

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