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

PRESENT: **SHIRLEY WERNER KORNREICH** PART 54
Justice J.S.C.

DIAMOND STATE INS. CO.

-v-

UTICA FIRST INS. CO.

INDEX NO. 104910/05

MOTION DATE 10/22/08

MOTION SEQ. NO. 002

MOTION CAL. NO. ____

The following papers, numbered 1 to 5 were read on this motion to/for quash subpoena & x-motion to strike, etc.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-4
Replying Affidavits	5

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 1/9/09

HON. SHIRLEY WERNER KORNREICH J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☒ REFERENCE

SUPREME COURT OF THE STATE OF YORK
COUNTY OF NEW YORK

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DIAMOND STATE INSURANCE CO.,

Plaintiff,

-against-

UTICA FIRST INSURANCE COMPANY,

Defendant.

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DECISION and ORDER

Index No.: 104910/2005

KORNREICH, SHIRLEY WERNER, J.

In this action for bad faith refusal to settle within the limits of its policy, defendant Utica First Insurance Company (Utica) moves to quash two subpoenas served upon two law firms that represented Utica in another lawsuit involving the roofing exclusion at issue in this case. Plaintiff Diamond State Insurance Co. (Diamond State) cross-moves to strike Utica's answer, or, alternatively, to compel a further deposition of Utica's claim manager, Jeffrey Mountz, production of further Utica claim files, and production of documents listed on a privilege log as withheld.

Motion to Quash

The motion to quash is granted in the absence of proof that the subpoenas were served on the non-party witnesses in the same manner as a summons. CPLR 3106(b) and 2303(a).

Cross-Motion to Strike or Compel

The issue before the court has previously been addressed by the Appellate Division, First Department, in a decision dated February 1, 2007, which reversed this court's decision and order, entered on July 25, 2006. *Diamond State Ins. Co. v. Utica First Ins. Co.*, 37 A.D.3d 160 (1st Dep't 2007) (AD Order). The Appellate Division disagreed with this court's decision, which

held, in part, that Utica did not have to produce claim files with respect to other insureds involving the interpretation of the roofing exclusion on the ground that it would be unduly burdensome to sift through all of its claim files. The facts are set forth in the previous determinations, with which familiarity is assumed, and will be repeated only as necessary to this determination.

The AD Order provided that Utica must produce documents concerning its interpretation of the roofing exclusion which post-dated its October 10, 2002 disclaimer and predated the expiration of the settlement period on February 20, 2005 (Window Period). In its decision, the Appellate Division noted that the attorney-client and work product privileges do not apply in an action predicated on bad faith.

Two disclosure conferences before this court took place after the appeal. On March 13, 2008, Utica was ordered to provide the documents within ten days (March Order). At a June 26, 2008, conference, in which Utica's counsel said that there were no responsive documents, Utica was directed to provide within ten days an affidavit detailing its efforts to search and the lack of responsive documents.

Jeffrey Mountz, Utica's claim manager, provided the affidavit, sworn to on July 24, 2008, which did not comply with the AD Order, or this court's March Order, in that it limited the files to be searched. Mr. Mountz's affidavit stated that there were 6,000 claims made against Utica policies with the prefix ART, which are the only policies with a roofing exclusion, and that Utica's database could not identify which of the 6,000 ART policy claims involved interpretation of the roofing exclusion. He further admitted that he had reviewed only the 184 claim files that had resulted in litigation, had found three documents involving roofing operations, all of which

post-dated the commencement of this action, and had found *"no coverage letters interpreting the roofing exclusion that were created prior to the commencement of this action."* (emphasis supplied) The AD Order did not say that Utica was required to produce only documents that could be searched with its database. Utica's decision to forego review of the 6,000 files by hand was in direct violation of the AD Order, which reversed the determination that production would be unduly burdensome, and the subsequent March Order.

In addition, the record of this motion establishes that there were documents not produced by Utica that were responsive and which Mr. Mountz swore in his affidavit did not exist. On June 2, 2004, Mr. Mountz received an e-mail from Utica's counsel regarding another insured, S&S Budget Contractors, in a case involving the claimant Moses Garcia. This document, authored during the Window Period, specifically discusses whether the exclusion would be applicable where Mr. Garcia claimed that he was removing snow from a roof when he fell. The Garcia claim came to light when Diamond State's attorneys discovered a reported appellate decision ruling that, despite the roofing exclusion, Utica had to defend Garcia's claim against S&S Budget Contractors. *Garcia v. Utica First Ins. Co.*, 7 A.D.3d 665 (2nd Dep't 2004). (*Garcia*). The *Garcia* ruling itself, which was issued during the Window Period, should have been disclosed as responsive to Diamond State's request for production, as it had requested judicial interpretations of the exclusion. Although Mr. Mountz's disclaimer letter in *Garcia* did pre-date the Window Period, his affidavit in this case inaccurately stated that he found *"no coverage letters interpreting the roofing exclusion that were created prior to the commencement of this action."* In fact, it was Mr. Mountz who authored the disclaimer letter in *Garcia* on September 20, 2001, prior to commencement of this action. Diamond State's counsel also has

presented two other supreme court decisions in which Utica litigated the roofing exclusion: *American Protection Ins. Co. v. Buckley*, (Sup. Ct. Suffolk Co. 6/13/06), Index No.28723/04 (*American*), and *Delphi Restoration Corp. v. Sunshine Restoration Corp.* (Sup. Ct. Queens Co. 1/13/06), Index No. 12062/05 (*Delphi*). In *Delphi*, Utica's disclaimer fell within the Window Period. The *American Restoration* decision does not contain dates from which this court can determine whether any documents during the Window Period interpreted the roofing exclusion. Finally, the log prepared by Utica contains a pleading, dated January 24, 2005, within the Window Period, that incorrectly was withheld as "beyond the relevant time period."

In response to the cross-motion, Utica has argued that it produced the entire *Garcia* file predating the end of the Window Period, and is willing to produce all documents from *Delphi* and *American*, excluding those that post-date February 2005. The court notes that under the AD Order, Utica is entitled to documents up to February 20, 2005. In addition, Utica argues that the *Garcia* documents that it failed to produce did not involve "interpretation" of the roofing exclusion or fell outside the Window Period. This court disagrees.

Utica contends that the motion to strike must be denied because Diamond State did not present an affirmation of good faith, pursuant to NYCRR 202.7(a)(2). A good faith affirmation was not required because it would have been futile to confer. *See*, *Qian v. Dugan*, 256 A.D.2d 782 (1st Dep't 1998)(futile where plaintiff made no attempt to correct defects in expert disclosure despite having been made aware of them); *Casrrasquillo v. Netsloh Realty Corp.*, (1st Dep't 2001)(futile in light of frequency with which both sides resorted to judicial intervention over three years). Utica would not have consented to strike its answer and, in addition, Utica continues to defend Mr. Mountz's decision not to review all of the claim files that the AD Order

and the March Order required him to search.

Utica also urges that its answer should not be stricken because its conduct was not willful and contumacious. Utica's Memorandum of Law, dated October 22, 2008, submitted in response to the cross-motion, offers as proof that "last month," which would have been September 2008, it voluntarily agreed to produce portions of the *Garcia* file, that Diamond State has received considerable disclosure, that Mr. Mountz made a good faith search and that Mr. Mountz appeared for a deposition. In addition, Utica argues that it "voluntarily exceeded" the AD Order and the March Order.

Again, this court disagrees. The record reflects that Utica willfully and contumaciously flouted the AD Order and March Order by failing to inspect the 6,000 claim files that may have involved the roofing exclusion. The AD Order and March Order did not limit the files to be searched to claims that had been litigated. Moreover, Utica did not turn over the June 2, 2004 e-mail to Mr. Mountz from counsel in *Garcia*, even though it clearly discussed the interpretation of the roofing exclusion, or the appellate decision in *Garcia*. These failures are particularly egregious because not only was Mr. Mountz involved in *Garcia*, but Utica does not deny that the firm of Marshall, Conway, Wright & Bradley, which is representing it in this case, represented one of the defendants in *Garcia*. *See*, Affirmation of Steven G. Fauth, dated October 20, 2008, ¶*18*, p. 9. The fact that Utica turned over the *Garcia* file in September 2008, after Mr. Mountz was questioned at his deposition by Diamond State's attorneys about *Garcia*, did not undo its prior flouting of two court orders.

It is unnecessary to decide the remainder of the cross-motion seeking to compel disclosure in light of the decision to strike Utica's answer. Accordingly it is

ORDERED that the motion to quash is granted; and it is further

ORDERED that Diamond State's cross-motion to strike the answer of Utica First Insurance Co. is granted, its answer is hereby stricken and the remainder of the cross-motion is denied as moot; and it is further

ORDERED that an assessment of damages against defendant Utica First Insurance Co. is directed and the issue of the amount of damages that Diamond State Insurance Company is entitled to recover is referred to a Special Referee to hear and report with recommendations or, if the parties consent, to hear and determine that issue; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing.

Dated: January 9, 2008 ENTER:

J.S.C.