

**Commerce & Indus. Ins. Co. v  
Entertainment Servs., Inc.**

2009 NY Slip Op 30876(U)

April 13, 2009

Supreme Court, New York County

Docket Number: 113620/06

Judge: Debra A. James

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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY**

**PRESENT: DEBRA A. JAMES**  
*Justice*

**PART 59**

COMMERCE AND INDUSTRY INSURANCE COMPANY  
as assignee/subrogee of KIM SCHIMMEL,  
Plaintiff,

Index No.: 113620/06

Motion Date: 12/02/08

Motion Seq. No.: 04

- v -

ENTERTAINMENT SERVICES, INC., a division of  
RING POWER CORPORATION, RING POWER  
CORPORATION, HENRY LAUFER, MARSHA LAUFER,  
and BARBARA ESSES,  
Defendants.

Motion Cal. No.: OSC

The following papers, numbered 1 to 5 were read on this motion to vacate and for a commission.

Notice of Motion/Order to Show Cause -Affidavits - Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED	
1	
2 - 4	
5	

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

**Cross-Motion:**     Yes     No

Upon the foregoing papers,

**FILED**  
APR 20 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

The issue on this motion and cross-motion is whether this court has the power under CPLR 3101 to compel a workers' compensation carrier, acting as subrogee/assignee of an employee, to produce for discovery (examination before trial [EBT]) the injured employee who has received benefits where the employee no longer resides in the State. The court finds that it does have the power to compel the worker to appear for an EBT, but it does not have the power to sanction the carrier for the failure of the

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**Check if appropriate:**     DO NOT POST     REFERENCE

worker to respond to proper discovery requests absent fraud or collusion by the carrier.

CPLR 3101 (a) provides in pertinent part that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: (1) a party, or the officer, director, member, agent or employee of a party; (2) a person who possessed a cause of action or defense asserted in the action." As stated by Professor Siegel, assignors are within the ambit of the statute:

The assignor of the claim or the person or entity originally incurring the liability qualifies as a "party," and disclosure can therefore be had against that person without the additional burdens imposed by CPLR 3101(a)(3) or (4). This applies not merely to the immediate assignor or, as under prior law, to the original owner of the claim or defense. Under the statutory language in CPLR 3101(a)(2), it applies to the original owner and every mesne assignee (or assumer) along the way.

Under CPLR 3101(a)(1), the person under the control of a party by employment or agency qualifies as a "party" for disclosure purposes, and that person's omission to disclose upon due notice or order can result in the imposition of a civil sanction against the party under CPLR 3126. The theory is that since such person is under the control of the party, responsibility for making that person disclose can be imputed to the party. That is not true of the former owner of a claim or defense under CPLR 3101(a)(2). If the agreement of assignment or assumption imposes no obligation on the person who originally possessed the cause of action or defense to cooperate in a possible litigation, such person can default on the disclosure. The default apparently will not be visited on the ultimate party, who therefore cannot be punished under CPLR 3126 absent some clear showing of control by the party or collusion. A coercive threat to cooperate with disclosure can be supplied with a subpoena, disobedience of which may result in a contempt of court. CPLR 3106(b), 2308. A subpoena need not be served on a

person who qualifies under paragraph (1) as a present agent or employee, but it must be served on one who is within CPLR 3101(a)(2).

In sum, CPLR 3101(a)(2) permits disclosure to be had against the former owner of a claim or defense in the action without the need of satisfying the extra requirements of CPLR 3101(a)(3) or (4). The party seeking disclosure under these circumstances must serve a subpoena, however, and not simply a mere notice. See, e.g., CPLR 3106(b), 3120(1); Commentary C:3120:12.

Siegel, Practice Commentaries, McKinney's Cons Laws of NY, 7B, CPLR 3101:20.

A injured worker who receives benefits under the Workers' Compensation statute can be compelled to provide discovery in a suit by the carrier. See Commissioners of State Ins. Fund v Shirley Herman Co., 10 Misc2d 67, 68 (Sup Ct, Erie County, 1958 [Jasen, J.]) (court issued "an order for a physical examination of certain named individuals, whose claims for damages for personal injuries, medical and hospital expenses and loss of wages against the defendants herein have become subrogated by reason of the operation of the Workmen's Compensation Law of the State of New York"). However, Justice Jasen did not resolve the issue presented here which is whether the assignee/subrogee possesses sufficient control of a former employee such that in the event of the failure of the subrogor-employee to respond to discovery should be assessed against the insurer-subrogee. Id. at 69.

It has further been held that non-resident assignors can be ordered to appear for EBTs with the Court stating that

A nonresident plaintiff may be required to appear in this State for examination. There is no good reason for holding that a nonresident assignor of the plaintiff should not be required to appear here for examination. . . [A] plaintiff may be stayed for failure of his assignor to comply with an order for the latter's examination if the plaintiff has sufficient control over the assignor to secure his presence here in compliance with the order for his examination. The question of whether the instant plaintiff does possess such control of her assignor should not be determined at this time but upon a motion to stay the plaintiff in the event the assignor fails to appear here.

Manley v Stuart Silver Co., 203 Misc 218, 219 (Sup Ct, App Term, 1<sup>st</sup> Dept, 1952) (citations omitted, emphasis added); but see Shahmoon v Shahmoon, 11 Misc2d 775, 776 (Sup Ct, Westchester County, 1956) ("a notice for a pretrial examination of a plaintiff's assignor, as a witness, is unauthorized where said witness is a nonresident of this State and the notice requires the plaintiff to produce the witness for examination in this State").

This court has issued three separate orders (November 29, 2007; February 14, 2008; September 16, 2008) requiring plaintiff to produce Kim Schimmel for an EBT within the state. Pursuant to arguments presented before the court issued its September 16, 2008, discovery Order, it is believed that Kim Schimmel is a quadriplegic now residing in Arizona. Plaintiff now seeks to vacate this court's directive to produce Kim Schimmel for deposition in New York and direct the issuance of a commission to have the EBT take place in Arizona. Defendants oppose the motion

and defendant Ring Power Corporation cross-moves to sanction the plaintiff by striking the complaint for its failure to produce Kim Schimmel for deposition.

The court shall grant the relief the plaintiff seeks and shall deny the cross-motion to impose discovery sanctions. Defendants have failed to demonstrate that plaintiff has any control over Kim Schimmel, the assignor/subrogor. The relationship between a Workers' Compensation carrier and an injured worker is purely the creature of statute, not contract. Therefore the assignment of workers' compensation claims does not create a contractual relationship wherein the carrier can condition the issuance of a policy or the provision of benefits upon the agreement of an insured worker to participate in the prosecution or defense of an action. In fact, the compensation carrier has no subrogation rights unless and until "such injured employee . . . has failed to commence action against such other within the time limited therefor by subdivision one, [and] such failure shall operate as an assignment of the cause of action against such other to the . . . insurance carrier liable for the payment of such compensation." Workers' Compensation Law §29 (2); 227 (2).

In the absence of any showing of control, a Workers' Compensation carrier cannot be compelled to produce for discovery a formerly-employed injured worker, its statutory

assignor/subrogor. See Holloway v Cha Cha Laundry, Inc., 97 AD2d 385, 386 (1<sup>st</sup> Dept 1983) (a party cannot be compelled to produce as a nonparty witness a former employee who is no longer under its control).

The Court has laid out the procedure to be followed in situations such a that presented here stating

[W]henever possible and except where expressly interdicted, the general procedure to be employed when a nonparty witness is sought to be deposed on oral questions is to secure a stipulation or, in the alternative, to serve a subpoena on the nonparty witness, pursuant to CPLR 3106 (subd [b]), and to serve notice of the intended examination on each party to the action, pursuant to CPLR 3107. It should be emphasized that when a deposition is sought to be taken, on notice, of a person who at the time of taking the deposition is not a party or an officer, director, member or employee of a party, service of a subpoena on such a witness located within this State is a necessary prerequisite. . . . Since the service of a subpoena outside of this State will be ineffective to compel such a witness to appear at an examination, CPLR 3108 makes available, upon application to the court, the commission and the letter rogatory as devices to secure disclosure. In addition to providing for commissions and letters rogatory as discovery devices, CPLR 3108 also allows for deposition upon written questions which are served on an out-of-State witness without a court order, pursuant to the self-executing procedures set forth in CPLR 3109.

Wiseman v American Motors Sales Corp., 103 AD2d 230, 233 -236 (2d Dept 1984) (citations omitted). There being no dispute among the parties as to the materiality and relevancy of Kim Schimmel's testimony, the court shall grant plaintiff's application for an Open Commission to seek to obtain the necessary discovery.

Accordingly, it is

ORDERED that plaintiff's motion to vacate this court's prior directives that plaintiff produce its assignor Kim Schimmel for deposition within the State is GRANTED and those directives in the court's prior Orders are VACATED; and it is further

ORDERED that the cross-motion of Ring Power Corporation for sanctions against plaintiff is DENIED; and it is further

ORDERED that plaintiff's motion for an Open Commission pursuant to CPLR 3108 is GRANTED and plaintiff shall submit to IAS Part 59, Courtroom 1254, 111 Centre Street, a Commission in a form similar to that annexed to the moving papers, for the testimony and other such discovery sought from Kim Schimmel within 30 days of this Order; and it is further

ORDERED that the parties are directed to attend a status conference on July 14, 2009, at 2:30 P.M., in IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: April 13, 2009

ENTER:

**FILED**

APR 20 2009

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NEW YORK**

Debra A. James  
HON. DEBRA A. JAMES J.S.C.