

**Saca v Canas**

2009 NY Slip Op 30881(U)

April 6, 2009

Supreme Court, New York County

Docket Number: 117323/03

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 22

**Paul Wooten**  
J.S.C.

JOSE SACA a/k/a JOSE SACAABREGO and PATRICIA  
SACA,

Plaintiffs,

-against-

Index No.: 117323/03

RICARDO CANAS, PENSKE TRUCK LEASING CO.,  
LIMITED PARTNERSHIP, PENSKE TRUCK LEASING  
CORPORATION, VITAMIN SHOPPE INDUSTRIES INC.  
and ALBERT ERSKINE,

Defendants.

motion seq. no. 001  
CPL no. 78

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

WOOTEN, J.:

Defendants Ricardo Canas (Canas), Penske Truck Leasing Co., Limited Partnership, Penske Truck Leasing Corporation, and Vitamin Shoppe Industries Inc. (Vitamin Shoppe), move, pursuant to CPLR 3124, for an order compelling disclosure from plaintiffs, and pursuant to CPLR 2201, for a temporary stay of the trial pending the completion of disclosure. Defendant Albert Erskine (Erskine) cross-moves for the same relief and adopts the arguments of his co-defendants.

Plaintiffs Jose Saca a/k/a Jose Sacaabrego (Mr. Saca) and his wife, Patricia Saca, contend that they have satisfied all of the disclosure requests and argue that a stay is unnecessary.

The underlying action was commenced by the plaintiffs to recover damages for injuries Mr. Saca suffered as a result of a January 30, 2001 motor vehicle accident. Mr. Saca, a resident of New Jersey, was driving a vehicle owned by his employer, Domus Design Center, Inc., on the Long Island Expressway, when a vehicle to his front and driven by Erskine, lost control and struck the right guardrail. Mr. Saca's vehicle, which was driving behind Erskine, braked and

veered right to avoid Erskine's vehicle and spun around straddling the right shoulder of the highway. Thereafter, a vehicle operated by defendant Canas, owned by Penske Truck Leasing Co., Limited Partnership and Penske Truck Leasing Corporation, and leased by Vitamin Shoppe, collided with Mr. Saca's vehicle.

On October 22, 2003, plaintiffs filed this action in New York, alleging that both Erskine and Canas were reckless and negligent. Plaintiffs' complaint also named Penske Truck Leasing Co., Limited Partnership, Penske Truck Leasing Corp., and Vitamin Shoppe. Erskine carried the New York State minimum automobile liability coverage limits of \$25,000 with AIU Insurance Company, and Canas' vehicle was insured by a policy issued by Atlantic Mutual containing limits greater than \$1,000,000.

Plaintiffs also brought a claim in New Jersey for underinsured motorist benefits (UIM) against Zurich Insurance Company, the company who, through its subsidiary, Northern Insurance Company of New York (referred to herein as Zurich), insured the Domus vehicle that Mr. Saca was driving after it became apparent that Mr. Saca's personal injury claim would exceed Erskine's \$25,000 limit. The Zurich policy carried UIM limits of \$1,000,000. Defendants allege that it was not until the note of issue was filed in late 2007 that plaintiffs' counsel even advised them of the UIM claim in New Jersey.

In October of 2007, plaintiffs' counsel moved to compel Zurich to arbitrate the UIM claim. Zurich filed a cross motion to stay the UIM claim and the arbitration pending the resolution of plaintiffs' personal injury action in New York. Zurich was represented by the law firm of Melito & Adolfsen, P.C. Zurich argued that the Domus vehicle was not underinsured within the meaning of NJSA 17:28-1.1(e), because the limits of all bodily injury liability

insurance applicable had not yet been exhausted by payment of settlement or judgments.

Plaintiffs argued that the law in New Jersey, like New York, permits claimants to pursue UIM benefits as long as one or several potential tortfeasors are underinsured. The New Jersey Superior Court agreed with plaintiffs, and ordered Zurich to proceed to arbitration.

Counsel for the defendants contends that on, November 20, 2007, plaintiffs' counsel informed Judge Gammernan of the pendency of both claims and that the outcome of the UIM arbitration could render the New York action moot. Therefore, Judge Gammernan adjourned the trial until January 9, 2008.

The arbitration was tried before a three-member panel in New Jersey on December 19 and 24, 2007. The panel found that Erskine was 100% at fault for the accident and assessed plaintiffs' damages at \$2,000,000. On January 8, 2008, Zurich paid \$975,000 to plaintiffs. Plaintiffs' counsel avers that, pursuant to New Jersey law, Zurich also elected to pay plaintiff the \$25,000 limits of Erskine's policy, and that payment was made on March 19, 2008.

Defendants allege that plaintiffs' attorney and Zurich negotiated an agreement by which Zurich, either as a subrogee or an assignee, would pursue plaintiffs' claims in this action against Erskine and Canas, the alleged tortfeasors.

On January 9, 2008, the parties appeared before Judge Gammernan for jury selection. At the proceeding, plaintiffs' attorney informed the court that the law firm who represented Zurich in the UIM arbitration, Melito & Adolfsen P.C., would be conducting the trial, to which defendants objected, claiming a potential conflict of interest. Defendants also requested the disclosure of the agreement between plaintiffs' attorney of record and Zurich and/or plaintiffs' trial counsel, including their fee and expense sharing terms. Judge Gammernan removed this

action from the trial calendar and remanded it back to this Part for further discovery. On January 14, 2008, defendants served plaintiffs with a disclosure demand and thereafter filed these motions to compel.

Defendants contend that there exists fundamental questions as to what type of agreement exists between plaintiffs' attorney of record, Charles M. Hammer, Esq., the law firm of Melito & Adolfsen, P.C. and Zurich. They argue that Zurich's payment of money to plaintiffs may require dismissal of the action based on G.O.L. § 13-101, which proscribes the assignment of personal injury claims. Defendants further raise the specter of a secret illegal "Mary Carter agreement," at the same time arguing that the payment to plaintiffs by Zurich might statutorily reduce the claim of the plaintiffs against the defendants under G.O.L. § 15-108.

If this action is, on the other hand, now a subrogation action, defendants argue that Zurich would be required to commence its own action against the defendants and any action must be commenced within three years of the occurrence if based on a payment relating to a personal injury. Whatever the arrangement that is in place, defendants contend that Zurich is now the real party in interest and the caption of the case is inappropriate and severely misleading to the jury. Thus, defendants argue that the discovery they seek is relevant and necessary to answer preliminary questions about whether this action should be dismissed or re-styled or re-captioned; whether defendants are entitled to amend their answer to assert a defense of set-off under G.O.L. § 15-108; and whether there are any ethical or professional issues raised by the agreement and the relationship.

Plaintiffs maintain that they have not transferred all right, title, or interest in their tort claims against the defendants or given up the right to all proceeds in this case, but rather, in

accord with the UIM endorsement to Zurich's insurance policy, plaintiffs agreed to share the proceeds of any recovery with Zurich. The defendants' allegations of fraud and collusion are devoid of merit, plaintiffs argue, because the applicable Zurich insurance policy provides that Zurich has the right to recoup its payment to the plaintiffs from any tortfeasor, but that the plaintiffs also have the right to obtain a recovery above the UIM payout if they can prove negligence against the defendants.

Section 202.21 (d) of the Uniform Rules of the Supreme Court provides in pertinent part that "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings."

Plaintiffs did not respond to the defendants' discovery demands until May 16, 2008 after this motion to compel was made. In response to demand no. 4, which had requested position statements and submissions including exhibits made at the UIM arbitration, plaintiffs objected on the ground of relevance, attorney-client privilege, and attorney work product. In opposition to the motion, plaintiffs' counsel contends that he withheld "certain expert reports and redacted other materials specific to damages information exchanged in the [UIM] arbitration" (Lewbel Affirm., ¶ 3), contending that these materials were prejudicial to the plaintiffs' damage claim in this litigation, that expert disclosure rules in New Jersey are more expansive than those in New York, and thus their production would be beyond the scope of what is required by the CPLR, and finally, that "expert materials, relevant solely on damages, are not at issue on this motion practice" (*id.*).

“[T]he burden of proving that an item should not be produced during discovery is placed upon the party seeking to avoid such discovery.” *New York State Elect. & Gas Corp. v Lexington Ins. Co.*, 160 AD2d 261, 262 (1st Dept 1990); *see also Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 (1991) (holding that the burden of establishing that the documents sought are covered by a certain privilege rests on the party asserting the privilege). Here, plaintiffs fail to meet their burden of explaining how the attorney-client privilege or attorney work product doctrine applies to documents exchanged in a non-confidential arbitration, or how the production of these materials is prejudicial, as opposed to merely damaging, to their case. Nor do plaintiffs cite to any authority to support their argument that New York has less expansive expert disclosure rules than New Jersey. And while the issue of damages is not the issue on this motion, it is certainly a major issue in this case, and having failed to disclose the pendency of the UIM arbitration until late 2007, after the note of issue was filed, plaintiffs may not object to production on the grounds of relevance. Plaintiffs are ordered to produce the materials withheld within 15 days of the date of this order.

Defendants argue that plaintiffs have failed to comply with discovery demand no. 8 which requests the disclosure of any subrogation agreements, and request the terms of the actual relationship between plaintiffs and Zurich as well as plaintiffs and its trial counsel. Although a document entitled “Release and Trust Agreement” dated March 6, 2008 between plaintiffs and Zurich has been provided, defendants maintain that plaintiffs failed to fully comply with this demand or provide sufficient information to determine whether this is a viable suit or not, because the agreement does not reveal the terms and the actual relationship amongst the plaintiffs and their two sets of attorneys and how they intend to share any potential proceeds or share or

split the costs of prosecuting this action.

Therefore, as the relationship of the parties remains unclear, if there are any memorandums of understanding, letters, e-mails, or other documents further outlining or explaining the “arrangement” entered into between plaintiffs and Zurich to share the proceeds, if any, received in this action and/or split the costs of prosecution of this action, the documents must be disclosed within 15 days. If no such documents exist, both Mr. Hammer and Mr. Lewbel shall provide an affidavit to that effect. *See Mahoney v Turner Constr. Co.*, \_\_ AD3d \_\_, 872 NYS2d 433, 436-437 (1st Dept 2009) (holding that an agreement of settlement should be disclosed where there is a concern of collusion between the settling parties).

Defendants also move to compel disclosure of the date and amount of all payments received by plaintiffs from Zurich in the arbitration proceeding, however copies of two of the payments are attached as exhibit J to Steven I. Lewbel’s affirmations in opposition. Therefore, this request is moot.

Defendants Canas, Penske and Vitamin Shoppe’s reply raises several arguments beyond what the underlying motion papers present. The reply argues that plaintiffs’ counsel intentionally mislead the New Jersey court that the New York action did not exist, that plaintiffs’ counsel used this litigation to extort money from defendants’ insurance carrier and that plaintiffs’ counsel intentionally failed to disclose the existence of the UIM proceeding until the eve of the trial. The reply further maintains that the case should be dismissed or the caption should be amended to reflect that Zurich is the subrogee.

A reply affirmation cannot be utilized to introduce new arguments in support of the motion or present new grounds for the motion. *See Dannasch v Bifulco*, 184 AD2d 415, 417 (1st

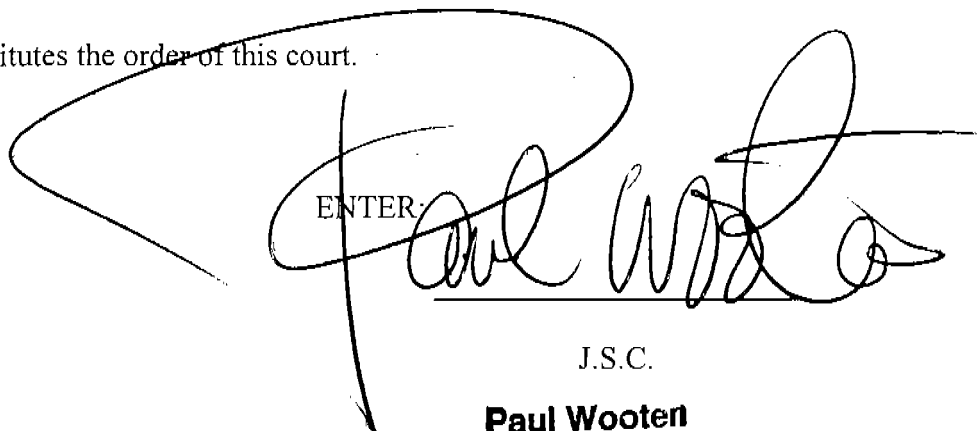
Dept 1992). Therefore, defendants' reply papers are deficient to the extent that they present new arguments.

All claims for relief raised in defendants' reply papers are more properly addressed at a pre-trial conference with the court, with all counsel present. A conference will be held on April 14, 2009 at 9:30 a.m., at which time any further stay of the action will be discussed.

Furthermore, it is ordered that plaintiffs shall provide the disclosure addressed in this decision.

The foregoing constitutes the order of this court.

Dated: April 6, 2009

ENTER 

J.S.C.  
**Paul Wooten**  
 J.S.C.

Final Disposition

Non-Final Disposition

**FILED**  
 APR 20 2009  
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