

Tower Ins. Co. of N.Y. v Headley

2009 NY Slip Op 31829(U)

August 11, 2009

Supreme Court, New York County

Docket Number: 102578/2008

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN

Justice

PART 7

Index Number : 102578/2008

TOWER INSURANCE

VS.

HEADLEY, GRANTLEY

SEQUENCE NUMBER : 002

COMPEL

INDEX NO. 102578/08

MOTION DATE 5/21/09

MOTION SEQ. NO. 002

MOTION CAL. NO. 12

The following papers, numbered 1 to 6 were read on this motion to compel; cross motion for sanctions

- Notice of Motion— Affirmation— Affirmation— Exhibits A-L
- Notice of Cross Motion—Affirmation—Exhibits 1-2
- Reply Affirmation In support of Defendants' motion;
- Affirmation in Opposition to Plaintiff's Cross Motion

FILED

AUG 17 2009

COUNTY CLERK'S OFFICE
NEW YORK

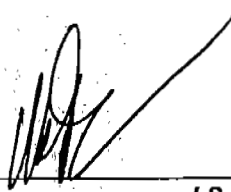
PAPERS NUMBERED

1-3
4-5
6-7

Cross-Motion: X Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

Dated: 8/17/09
New York, New York



J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X
TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

Index No. 102578/2008

- against -

GRANTLEY HEADLEY, JOLANDER HEADLEY, and
TERRY HAYDEN,

FILED

Decision and Order

Defendants.

AUG 17 2009

-----X
HON. MICHAEL D. STALLMAN, J.:

**COUNTY CLERK'S OFFICE
NEW YORK**

In this declaratory judgment action, plaintiff Tower Insurance Company seeks a declaration that it has no duty to defend and indemnify defendants Grantley Headley and Jolander Headley, in a personal injury action pending in Supreme Court, Kings County, Hayden v Headley, Index No. 36989/2007. According to plaintiff, defendants misrepresented that the premises was a two family residence, whereas it is allegedly a three family residence.

Defendants Grantley Headley and Jolander Headley (the Headleys) move for an order compelling plaintiff to produce the documents demanded in discovery, or in the alternative, to compel plaintiff to provide an appropriate privilege log; plaintiff cross-moves for sanctions against the Headleys (Motion Seq. No 002). The Headleys also move for an order to compel plaintiff to produce documents demanded pursuant to their Notice for Discovery and Inspection dated January 26, 2009, or in the alternative, for an order of preclusion (Motion Seq. No. 003). This decision addresses both motions and plaintiff's cross motion.

BACKGROUND

Counsel for the Headleys served plaintiff with a first set of interrogatories and various

discovery notices dated April 7, 2008. Mehran Affirm., Ex B. Plaintiff served a response to the Headleys' demands on August 28, 2008, which counsel claims was incomplete and insufficient. Id., Ex E. Counsel served plaintiff with another notice to produce on September 10, 2008, demanding, among other things, a complete copy of the first-party claim file, a complete copy of the underwriting file, and a detailed privilege log with respect to all documents (and portions of documents) withheld, on the basis of privilege, in plaintiff's August 28, 2008 response. Id., Ex F.

At a preliminary conference on October 30, 2008, plaintiff was directed "to provide (by November 30, 2008), supplemental privilege log & discovery responses for both redacted items & missing pages 13-58, 68-107, 119-135, 136-150, 162-165, 168-184, 187-212, 214-262, 285-460, 462-680, 746-756." Id., Ex H. On December 1, 2008, plaintiff served a response to the Headleys' demands. According to the Headleys, plaintiff produced a copy of their insurance policy and application for the policy when demanded to produce a copy of the underwriting file, and plaintiff submitted an amended privilege log in a narrative format. Id., Ex J.

The Headleys served plaintiff with a Notice for Discovery and Inspection dated January 26, 2009. Plaintiff's EBT was held on March 6, 2009, during which the Headley's counsel allegedly requested plaintiff to comply with the January 26, 2009 demand.

DISCUSSION

Motion Seq. No. 002

The Headleys move for an order compelling plaintiff to produce the request documents, or in the alternative, to compel plaintiff to provide an appropriate privilege log. Plaintiff opposes the motion, arguing that the Headleys subsequently amended their original notice to produce, and in the amended notice to produce, demanded non-privileged documents. Laurence Affirm., Ex 1. Plaintiff

claims that the “privileged documents” are correspondence between counsel for the Headleys in the underlying action and Tower. Plaintiff argues that, because it appointed defense counsel to represent them in the underlying action, the the Headleys can request to inspect any of the “privileged documents” from their counsel. Plaintiff cross-moves for sanctions against the Headleys.

The Court finds unavailing plaintiff’s argument that the Headleys’ motion should be denied because the Headleys amended their original discovery demand so as to seek only non-privileged information. Headleys are challenging the adequacy of the plaintiff’s privilege log provided in response to the preliminary conference order.

The Court has reviewed plaintiff’s Amended Privilege Log, which is written in a narrative format. *See Mehran Affirm., Ex J.* In paragraphs 1 and 3, plaintiff purported to assert, as privileged, documents that are “immaterial to this litigation.” Immateriality is not an evidentiary privilege that permits plaintiff to redact documents or to withhold documents. There is no explanation as to why the documents referred in paragraph 1 are immaterial. Therefore, the Court directs plaintiff to produce, in unredacted form, the documents referred in paragraph 1.

Plaintiff asserts that the redacted entries in the documents referred in paragraph 3 are immaterial as well, because they pertain to reserve information, citing Karta Indus. v Ins. Co. of State of Pennsylvania (258 AD2d 375). To determine whether the redacted information pertains to reserve information and is therefore immaterial, the Court directs plaintiff to produce those pages referred in paragraph 3 to the Court within 35 days for an in camera inspection.

The narrative format of the Amended Privilege not adequate with respect to the documents referenced in paragraph 2, for which plaintiff asserted “attorney/client communication.” As the Headleys indicate, CPLR 3122 (b) requires the party asserting privilege to provide, as to each

document: “(1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify th document for a subpoena duces tecum,” unless divulgence such information would itself cause disclosure of allegedly privileged information.

Plaintiff’s narrative response in paragraph 2 did not set out the information required under CPLR 3122 (b). Neither did plaintiff claim that divulging such information would itself disclose allegedly privileged information. Given the assertion of attorney-client privilege, plaintiff should have indicated the name of the author of the document and the recipients of the document, so that it can be determined that the document involved a communication with an attorney for the purpose of securing legal information. [cite]. A privilege log in a table format would be the proper response, as follows:

Date	Page No.	Doc Type	Description	Author	Recipient(s)	Privilege Claimed

Therefore, plaintiff is directed to provide the Headleys with a privilege log for all documents referred in paragraph 2 of its Amended Privilege Log within 35 days.

Plaintiff’s argument that the Headleys already have access to the “privileged documents” is not a valid argument in opposition to their motion. In asserting attorney-client privilege, plaintiff led the Headleys to believe that the documents concerned communications between plaintiff and its own counsel “for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship,” and “primarily or predominantly of a legal character.” Spectrum Systems Intl. Corp. v. Chemical Bank, 78 NY2d 371, 378 (1991). At this point, the Headleys are entitled to a privilege log to determine whether plaintiff validly asserted a privilege with respect to

the documents. If, as plaintiff argue, the Headleys had the right to obtain all “privileged documents” from their assigned counsel, then plaintiff is conceding that there was no valid attorney-client privilege asserted. Thus, in lieu of providing a privilege log, plaintiff may provide the Headleys with all the documents referred in paragraph 2 of the Amended Privilege Log.

Paragraphs 5, 6, and 7 of the Amended Privilege Log are adequate. These paragraphs indicated the basis for redacting portions of documents produced to the Headleys, redacted on the basis of material prepared in anticipation of litigation and attorney-client privilege. Because the remainder of these documents were produced to the Headleys, the Headleys should be able to glean from the unredacted portions document the information that would have been otherwise provided in the privilege log described above.

The Headleys also claim that plaintiff has not supplied the missing pages as directed in the October 30, 2008 preliminary conference order. The Court has reviewed plaintiff’s response (see Mehran Affirm., Ex E), and plaintiff’s further response dated December 1, 2008 (see id., Ex J) and has matched the missing pages with those pages listed on the Amended Privilege Log (ibid). The Court finds that some of the pages which the Headleys claim were missing were in fact, among the response or plaintiff’s further response, though not arranged sequentially, and that the no privilege was asserted with respect to the following allegedly missing pages: 30, 69-75, 143-150, 188-211, 215, 251-257, 259-260, 329-348, and 351-363. Plaintiff did not specifically address the Headleys’ contention that these missing pages were later produced.¹ Accordingly, the Court directs plaintiff

¹ Many pages of the copies of plaintiff’s further response dated December 1, 2008 were not numbered, or the bates-stamped number was partially cut-off. It is unclear whether plaintiff produced these documents to the Headleys’ counsel in this form, or whether the Headleys’ counsel did not reproduce the documents clearly in submitting them as exhibits to their motion.

to produced these pages within 35 days.

Plaintiff's cross motion for sanctions against the Headleys is denied. As discussed above, the Headleys' motion raised valid discovery issues with respect to the adequacy of plaintiff's responses to the preliminary conference order.

Motion Seq. No. 003

The Headleys seek to compel plaintiff to provide "complete" responses to their Notice for Discovery and Inspection dated January 6, 2009, which demanded six different categories of documents. In response to items 3 and 4, plaintiff stated that "A further response will be provided when and if any further documentation is discovered."

As the Headleys indicate, when the response to a discovery request is, in effect, that there are no responsive documents within the party's custody, possession or control, that party should specify the means and methods used to conduct a search for the records demanded. See Jackson v City of New York, 185 AD2d 768 (1st Dept 1992) ("the affidavit presented by the City made no showing as to where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, or whether a search had been conducted in every location where the records were likely to be found"). Accordingly, the Court directs plaintiff to provide, within 35 days, an affidavit from someone with personal knowledge of the search conducted for items 3 and 4 of the Headley's discovery demand, who shall specify the means and methods used to conduct a search for the records demanded.

In response to item 5, which sought "all applications for insurance on behalf of the Headleys from 1/05-9/12/07," plaintiff directed them to its prior August 28, 2008 documentation production, including page 162. However, page 162 was among the pages that were allegedly missing from the

August 28, 2008 production, and which plaintiff was directed to provide in the preliminary conference order dated October 30, 2008. Thus, plaintiff's response is not adequate. Therefore, plaintiff is directed to produce, within 35 days, the documents demanded, including the missing page 162.

As to item 6, which sought opinion letters rendered by attorney Max Gershweir, plaintiff asserted attorney-client privilege, because Gershweir is plaintiff's in-house counsel. The Headleys contend that the privilege does not apply because the opinion letters are documents prepared as part of the regular course of business of the insurance company, which are not privileged, citing Bertalo's Restaurant v. Exchange Insurance, 240 AD2d 452 (2d Dept 1997). To determine whether the privilege was validly asserted, the Court must review the documents in camera. Therefore, plaintiff is directed to provide the Court with the opinion letters demanded in item 6 of the Headleys' demand within 35 days.

As to item 1 of the Headleys' discovery demand, the Court finds that plaintiff's response was adequate. Plaintiff provided documents responsive to item 1 of the demand. Although the Headleys fault plaintiff to comment on the existence, or lack thereof, of documents other than those produced, the demand did not ask for plaintiff to provide such a comment. It is presumed that a party's production of documents responsive to a demand consists of all responsive documents that the producing party was able to locate within that party's custody, possession or control at the time of the response, unless otherwise stated. Plaintiff need not say, essentially, "These are all the documents we could find." The Court reminds the parties that they are under a continuing obligation to supplement their prior responses pursuant to CPLR 3101 (h).

The Headleys have not explained why they believe plaintiff's response to item 2 of their

demand is inadequate, except to say that it was the subject of a prior motion. Therefore, their motion is denied as to item 2.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion compelling plaintiff to produce documents demanded by defendants Grantley Headley and Jolander Headley, or in the alternative, to compel plaintiff to provide an appropriate privilege log (Motion Seq. No. 002), is granted to the extent that plaintiff must produce to the Headleys, within 35 days:

- 1) all documents referred in paragraph 1 of the Amended Privilege Log on the basis that they are immaterial to the litigation, and
- 2) a privilege log in the format discussed in this decision for documents referenced in paragraph 2 of plaintiff's Amended Privilege Log, or in lieu of a privilege log, production of unredacted copies of those documents; and
- 3) bates stamped pages 30, 69-75, 143-150, 188-211, 215, 251-257, 259-260, 329-348, 351-363 of plaintiff's response dated August 28, 2008; and it is further

ORDERED that plaintiff's cross motion for sanctions is denied; and it is further

ORDERED that the motion compelling plaintiff to produce documents demanded by defendants Grantley Headley and Jolander Headley, or in the alternative, for an order of preclusion is granted to the extent that plaintiff must produce, within 35 days:

- 1) an affidavit from someone with personal knowledge of the search conducted for items 3 and 4 of the Headley's discovery demand dated January 26, 2009, who shall specify the means and methods used to conduct a search for the records demanded; and

2) the documents demanded in item 5 of the Headley's January 26, 2009 demand, including the missing page 162; and it is further

ORDERED that, within 35 days, plaintiff must produce to the Court for an in camera inspection:

1) unredacted documents referred in paragraph 3 of plaintiff's Amended Privilege Log, redacted on the basis that immaterial information pertaining to reserve information; and

2) opinion letters rendered by attorney Max Gershwcir.

Copies to counsel.

Dated: 8/11/09
New York, New York

ENTER:



J.S.C.

FILED
AUG 17 2009
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