At an IAS Term, Part 38 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1st day of October, 2009

P R E S E N T:

HON. MARTIN M. SOLOMON,

Justice.

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OLD WILLIAMSBURG CANDLE CORP. INDIVIDUALLY AND AS ASSIGNEE OF THE CLAIM OF 141-143 ALABAMA, LLC AND LIBERTY LIGHTS, LLC,

Plaintiff,

Index No. 33791/04

- against -

SENECA INSURANCE COMPANY, INC.,

Defendant.

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The following papers numbered 1 to 8 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-4
Opposing Affidavits (Affirmations)	5, 6
Reply Affidavits (Affirmations)	7, 8
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant Seneca Insurance Company, Inc. (Seneca) renews its motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Old Williamsburg Candle Corp. individually and as assignee of the claim of 141-143 Alabama, LLC, and Liberty Lights, LLC's (plaintiff or OWC-Del) complaint. In a separate motion, Seneca moves, pursuant to CPLR 2308 (b) and 22 NYCRR 202.21(d), for an order

compelling plaintiff's counsel, Weg & Meyers, P.C., to fully comply with Seneca's subpoena duces tecum dated March 10, 2009.

Background Facts and Procedural History[1]

In or about 1995, Eugene Loevinger and Meir Ackerman incorporated Old Williamsburg Candle Corp. (OWC-NY), a New York-based company engaged in the business of manufacturing and selling of candle products. At all relevant times, OWC-NY's manufacturing and storage facilities were located at two buildings located at 141-143 Alabama Avenue (the Alabama building) and 300 Liberty Avenue (the Liberty building), Brooklyn, New York. These buildings were owned by 141-143 Alabama LLC (Alabama LLC) and 300 Liberty Lights, LLC (Liberty Lights) respectively.

In March 2001, CMS, Inc. (CMS), a wholesale insurance broker, submitted to Seneca an application for a commercial insurance policy which sought coverage for the contents, machinery and equipment, and stock (collectively, business personal property) located at the two buildings. Thereafter, Seneca issued a "Manufacturers Output Policy" covering the business personal property effective April 29, 2001 to April 29, 2002. The policy listed OWC-NY and Alabama as named insureds.[2]

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[1]The facts and procedural history were previously set forth in the court's decision and order dated November 23, 2007. In the interest of judicial economy, these same facts and procedural are set forth herein.

[2]Liberty Lights was not named as an insured under the policy or identified as the owner of the Liberty building. According to plaintiff, this was the result of a "clerical error."

In or about August 2001, OWC-Del was incorporated under the laws of the State of Delaware with Yaniv Mazor as Chief Financial Officer and Shalom Fisher as principal. On August 16, 2001, OWC-NY and OWC-Del entered into an Asset Purchase Agreement under which OWC-NY agreed to sell its assets to OWC-Del for a purchase price of $12,800,000.00.[3] On September 4, 2001, this agreement was modified to provide for transfer of title of OWC-NY's "inventory" to OWC-Del. On March 19, 2002, the parties entered into a "Closing Statement" which provided, in pertinent part:

> "(a) The Closing with respect to the sale and purchase of the Inventory shall have taken place as of September 4, 2001 and the Buyer shall have acquired all right, title and interest to the Inventory as of said date.
>
> "(b) The Closing of the sale and purchase of the Assets other than the Inventory shall take place on March 19, 2002 (hereinafter the "Closing").
>
> "(c) Effective September 4, 2001, the Buyer shall have retained the Seller to operate the Business on behalf of the Buyer and for the account of the Buyer and profits and losses incurred by the Business from September 4, 2001 Closing shall be the property and liability of the Buyer. The Buyer shall pay the Seller in remuneration for operating the Business the sum of $1,100,000 payable as follows ..."

On the same day as the closing, OWC-Del (as tenant) and Alabama LLC and Liberty Lights (as landlords) entered into a lease agreement with respect to the buildings. This

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[3] At the time of the agreement, OWC-Del was known as New Williamsburg Candle Corp. Shortly after the closing, OWC-NY changed its name to A&L Asset Management, Ltd. and New Williamsburg Candle Corp. (i.e., OWC-Del) changed its name to Old Williamsburg Candle Corp., the same name formerly held by OWC-NY.

agreement gave OWC-Del the option of purchasing the subject buildings. Also at the closing, Ackerman and Loevinger entered into employment agreements with OWC-Del whereby they agreed to work as employees of OWC-Del for a period of six months after the closing.

On March 7, 2002, CMS submitted to Seneca an application to renew OWC-NY and Alabama's policy. The only change requested on the application was the addition of coverage for the Alabama building and the Liberty building. Thus, the application did not request that OWC-Del be substituted as a named insured for OWC-NY. Thereafter, Seneca renewed the insurance policy listing the same named insureds and containing the same terms and conditions as the old policy except for added coverage for the buildings for the period of April 29, 2002 to April 29, 2003.

On October 28, 2002, OWC-Del exercised its option in a lease agreement between the parties to purchase the Alabama building and Liberty building pursuant to a real estate purchase agreement. On November 14, 2002, OWC-Del assigned its rights and interests in the real estate purchase agreement to MBSF, a wholly owned subsidiary of OWC-Del.

On December 26, 2002, a large fire occurred and resulted in losses to the business personal property and to both buildings. According to plaintiff, rather than reduce the purchase price of the buildings or cancel the real estate purchase agreement between OWC-Del/MBSF and Alabama LLC and Liberty Lights, shortly after the fire,[4] Alabama LLC and

[4]Plaintiff claims that this assignment was made verbally immediately after the fire, and reduced to writing shortly thereafter. The written assignment submitted by plaintiff is undated.

Liberty Lights assigned any and all of the claim proceeds recoverable under the Seneca policy to OWC-Del.

On April 30, 2003, Seneca demanded sworn statements in proofs of loss for the losses caused by the fire. On May 6, 2003, OWC-Del submitted six proofs of loss signed by Shalom Fischer as president. These proofs of loss concerned both the business personal property and the buildings. In a letter dated May 19, 2003, Seneca indicated that it was rejecting the proofs of loss for payment pending the outcome of an ongoing investigation of the claims arising out of the fire. Thereafter, Seneca continued its investigation which included examinations under oath of Mr. Akerman and Mr. Loevinger.

By letter dated August 20, 2004, Seneca denied coverage for plaintiff's claim and rescinded the policy. The letter listed several reasons for Seneca's action in this regard. In particular, Seneca's letter stated that the March 2002 application for renewal of the policy contained fraudulent and material misrepresentations inasmuch as it failed to advise Seneca that the insured business personal property had been sold by the named insured OWC-NY to OWC-Del. According to the letter, had Seneca been aware of this information, it would have conducted further underwriting inquiries regarding the risks associated with the new owners and either declined to issue a policy to OWC-Del or substantially altered the level, type of coverage, and or premium assessed for the risk. The letter also advised plaintiff that the purported assignment by Alabama LLC and Liberty Lights of their rights under the policy

to OWC-Del was without effect. In particular, Seneca's letter noted that the policy right could not be assigned without Seneca's permission.

By summons and complaint dated October 19, 2004, plaintiff commenced the instant action against Seneca seeking payment under the policy both directly, and as Alabama LLC and Liberty Light's assignee for losses it sustained to the business personal property as well as damage to the buildings. The complaint also contained a cause of action seeking reformation of the underlying policy to reflect the intent of the parties to insure the assets of OWC-Del and Liberty Lights. On November 29, 2004, Seneca served an answer containing 27 affirmative defenses. Thereafter, the matter proceeded to the discovery phase.

In an order dated August 16, 2006, Hon. Howard Ruditzky of this court issued an order directing that the depositions of all party and non-party witnesses be completed by March 1, 2007, that the note of issue be filed on or before March 30, 2007, and that all dispositive motions be filed within 60 days of the filing of the note of issue. Thereafter, in several correspondences with Seneca, plaintiff sought to schedule depositions of Mel Funk, John Mkravocic, Frank Donohoue, and Ellen O'Connor. When these efforts were unsuccessful, plaintiffs filed an order to show cause seeking an order compelling Seneca to produce these witness for depositions. In an order dated February 27, 2007, Justice Ruditzky resolved the order to show cause by directing Seneca "to produce witnesses Mel Funk, John Mkravocic, Frank Donohoue, and Ellen O'Connor on or before May 1, 2007. Justice

Ruditzky's order further directed that the date for the filing of the note of issue be extended to September 11, 2007.

On or about March 16, 2007, Seneca made a motion for summary judgment seeking dismissal of plaintiff's complaint. At the time the motion was made, depositions of Mr. Funk, Mkravocic, Donohoue, and Ms. O'Connor had yet to be conducted. However, Seneca's motion included affidavits by Ms. O'Connor and Mr. Funk. Thereafter, the motion was adjourned two times for the submission of plaintiff's opposition papers. On April 20, 2007, plaintiff filed an order to show cause seeking an order: staying Seneca's summary judgment motion pending the completion of discovery, denying Seneca's summary judgment motion with leave to renew after the completion of discovery, lifting the CPLR 3214 stay so as to allow the parties to conduct discovery, and compelling Seneca to produce the aforementioned witnesses for depositions. On or about May 18, 2007, plaintiff made a cross motion for an order reforming the Seneca policy: adding OWC-Del as a named insured in connection with the business personal property insured under the policy, adding Liberty Lights as a named insured with respect to the Liberty building, and dismissing numerous affirmative defenses alleged in Seneca's answer.

The Prior Decision and Order

In a decision and order dated November 23, 2007, the court denied Seneca's summary judgment motion without prejudice to renewal upon the completion of discovery. In so ruling, the court found that it was improper for Seneca to move for summary judgment

without first complying with Justice Ruditsky's outstanding discovery order. The court further noted that the outstanding discovery required in the order could impact upon Seneca's motion. Specifically, the possible reformation of the Seneca insurance policy so as to add OWC-Del as a named insured in connection with the business personal property was a major issue before the court. Further, a key issue in determining whether or not OWC-Del was entitled to reformation revolved around the question of whether Seneca would have continued to cover the risk associated with the business personal property had it been aware of the change in the named insured. Accordingly, inasmuch as Ms. O'Connor was responsible for Seneca's underwriting policies, her deposition testimony might have shed light on this issue.

The court also ruled that plaintiff was entitled to depose Mr. Funk inasmuch as he was responsible for conducting Seneca's investigation of the claims at issue in the case. In this regard, an issue before the court was whether or not Seneca's disclaimer of coverage was timely. Specifically, plaintiff argued that Seneca obtained information that would allow it to disclaim coverage as early as July 10, 2003, some 13 months prior to its actually disclaimer. However, Seneca maintained that it needed this time to conduct a thorough investigation. Consequently, the court concluded that Mr. Funk's deposition should be taken prior to a ruling on Seneca's summary judgment motion.

With respect to plaintiff's cross-motion, the court ruled that plaintiff was not entitled to summary judgment ordering that the Seneca policy be reformed to name OWC-Del as a

named insured in connection with the business personal property. Specifically, the court ruled that plaintiff failed to establish that Seneca would have continued to insure the business personal property had it been aware of the change in ownership of this property. The court further denied plaintiff's cross motion to the extent that it sought summary judgment on its coverage claim relating to the buildings. In this regard, plaintiff's claim was based upon the assignment of the named insureds (Alabama LLC and Liberty Lights)[5] rights under the Seneca policy to plaintiff. However, the court found that plaintiff had failed to demonstrate that this assignment took place prior to the May 6, 2003 closing on the sale of the buildings to plaintiff. This was significant inasmuch as it was undisputed that Alabama LLC and Liberty Lights were paid full price for the buildings notwithstanding the damages they sustained in the fire. Thus, if the assignment took place after the closing on the sale of the buildings, the assignors would have no rights to assign since they sustained no losses.

After the court issued its decision and order, the outstanding discovery was completed and plaintiff filed a note of issue. Thereafter, Seneca filed the instant motion to renew its motion for summary judgment.

The Business Personal Property

In support of its motion for summary judgment dismissing plaintiff's claims as relates to the business personal property, Seneca raises the same arguments that it previously raised in support of the prior motion. Specifically, Seneca notes that at the time of the fire, OWC-

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[5]Although Liberty Lights was not a named insured, the court ruled that the policy be reformed to include Liberty Lights as a named insured with respect to the Liberty building.

NY rather than OWC-Del was the named insured under the Seneca policy which covered this property. Seneca also argues that there is no basis for reforming the policy so as to add OWC-Del as a named insured since there was no mutual mistake regarding the lack of coverage for OWC-Del under the policy. Rather, it is undisputed that Seneca was never asked to cover OWC-Del and therefore, the parties could not have intended that such coverage be afforded to OWC-Del. In addition, Seneca maintains that plaintiff is not entitled to any reformation of the policy to afford coverage to OWC-Del since only a party to the insurance contract has standing to seek reformation. Here, OWC-Del is a stranger to the insurance policy. In addition, Seneca argues that any reformation of the policy to afford coverage to OWC-Del would violate Insurance Law § 3435 prohibition against group policies since it would allow a single policy to cover OWC-Del as respects the business personal property and to entirely unrelated entities - namely Alabama LLC and Liberty Lights - as respects the buildings.

In opposition to this branch of Seneca's motion, plaintiff maintains that it is entitled to reform the policy so as to provide coverage to OWC-Del with respect to the business personal property. In particular, plaintiff argues that it was not a stranger to the policy inasmuch as it was the owner of the business personal property at the time the Seneca policy was renewed. Further, plaintiff notes that Seneca continuously accepted OWC-Del's premium checks after the transfer of the business personal property. Plaintiff also argues that Seneca has failed to establish that it would have discontinued coverage had it been informed

that ownership of the business personal property had been transferred from the named insured to OWC-Del. In this regard, plaintiff notes that the nature and location of the business personal property remained the same after OWC-Del purchased this property. Finally, plaintiff argues that there is no merit to Seneca's claim that coverage cannot be extended to OWC-Del since it would render an impermissible group policy under Insurance Law § 3435. Specifically, plaintiff maintains that the statute only applies to public entities and homogenous groups formed for purposes other than obtaining insurance. Accordingly to plaintiff, OWC-Del, Alabama LLC, and Liberty Lights do not fall within either of these categories.

In reply to plaintiff's opposition papers, Seneca notes that plaintiff fully concedes that OWC-Del is not a named insured under the policy with respect to the business personal property. Accordingly, plaintiff's only basis for obtaining coverage is through reformation of the insurance policy to list OWC-Del as a named insured. However, Seneca contends that OWC-Del lacks standing to reform the policy since it is not a party to the insurance contract. Further, Seneca reiterates its argument that reformation is inappropriate here since the lack of coverage for OWC-Del was not the result of any mutual mistake on the part of the parties. Indeed, it is undisputed that plaintiff never requested that Seneca provide it with coverage with respect to the business personal property. Seneca also maintains that, as the party seeking reformation, the burden of proof lies with plaintiff to demonstrate that it is entitled to reformation. Finally, Seneca argues that there is no merit to plaintiff claim that Seneca

continually accepted OWC-Del's premium checks for the policy. In this regard, Seneca points out that the premium payment checks were drawn on the account of the wholesale broker CMS, the same broker whose checks paid the premium prior to the sale of the business personal assets to OWC-Del.

It is well-settled that insurance "[c]overage extends only to named entities and/or individuals defined as insured parties under the relevant terms of the policy" (*Catholic Health Serv. of Long Is., Inc. v National Union Fire Ins. Co of Pittsburgh, P.A.*, 46 AD3d 590, 592 [2007], *citing Sanabria v American Home Assur. Co.*, 68 NY2d 866, 868 [1986]; *Seavey v James Kendrick Trucking*, 4 AD3d 119 [2004]; *Mitchel v County of Jefferson*, 217 AD2d 917; *National Gen. Ins. Co. v Hartford Acc. & Indem. Co.*, 196 AD2d 414, 415 [1993]) Here, Seneca has submitted uncontroverted evidence that OWC-Del was not a named insured under its policy with respect to the business personal property. Consequently, the burden shifts to plaintiff to raise a triable issue of fact with respect to its coverage if it is to avoid summary judgment.

In opposition to this branch of Seneca's motion, plaintiff does not dispute the fact that OWC-Del is not a named insured under the policy. Instead, plaintiff argues that the policy should be reformed so as to provide it with coverage for the losses to the business personal property. "A claim for reformation of a written agreement must be grounded upon either a mutual mistake or fraudulently induced unilateral mistake" (*Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 443 [2007]). Further, "[i]n the event

'that an innocent mistake occurred with respect to a named insured and it is evident that the parties intended to cover the risk, the error may be deemed mutual for purposes of reformation even though the insurer was not aware of the error'" (*Herron v Essex Ins. Co.*, 34 AD3d 913, 915 [2006], *quoting Cheperuk v Liberty Mut. Fire Ins. Co.*, 263 AD2d 748, 749 [1999]). However, because there is a heavy presumption that deliberately prepared and executed documents reflect the true intention of the parties, a party seeking reformation must demonstrate by clear and convincing evidence not only that a mistake or fraud exists, but what was really agreed upon between the parties (*New York First Ave. CVS, Inc. v Wellington Tower Assoc.*, 299 AD2d 205 [2002], *citing Chimart Assocs. v Paul*, 66 NY2d 570, 574 []).

Here, plaintiff does not allege that the failure to list it as the named insured under the policy was caused by fraudulently induced mistake. Moreover, it is undisputed that OWC-Del never notified Seneca that it purchased the business personal property from OWC-NY and wished to be a named insured. Thus, there was no mutual mistake whereby OWC-Del's name was left out of the policy notwithstanding the parties agreement that it be listed as a named insured. Plaintiff has also failed demonstrate by clear and convincing evidence that Seneca intended to cover the risk associated with loss of the business personal property so as to allow the court to deem the error to be mutual for purposes of reformation. In fact, there is no evidence before the court that Seneca intended to insure the business personal property irrespective of whether the actual owner of the property was a named insured.

Finally, there is no basis for any finding that, because it possessed an insurable interest in the business personal property at the time of the fire, OWC-Del was an intended beneficiary under the insurance contract. As Seneca points out, the Appellate Division, Second Department has ruled that a party which is not named in the insurance policy lacks standing to assert such a claim notwithstanding the fact that it owned the subject property (*Bronxville Prop. v Friedlander Gp.*, 307 AD2d 245 [2003]).

Accordingly, upon reargument, that branch of Seneca's motion which seeks summary judgment dismissing plaintiff's claim against it as respects the business personal property is granted.

The Buildings

Seneca also moves to reargue that branch of its prior motion which seeks summary judgment dismissing plaintiff's claim as respects coverage for losses sustained to the buildings. In so moving, Seneca reiterates its prior argument that Alabama LLC and Liberty Lights assigned their rights under the insurance contact to plaintiff after the closing on the sale of the buildings. Accordingly, since it is undisputed that Alabama LLC and Liberty Lights were paid full price for the buildings at the time of the closing (*i.e.*, without taking into account the reduced value of the structures due to the fire), Seneca reasons that they had no rights to assign vis a vis the insurance policy since they sustained no losses as a result of the fire. Seneca further maintains that evidence uncovered after the issuance of the prior decision and order conclusively proves that the assignment took place after the closing.

Specifically, Seneca points to a February 10, 2004 cover sheet from a fax sent by OWC-Del's attorney William H. Parash of Weg and Myers P.C., to OWC-NY's attorney, Jake Steiner, Esq. The cover sheet states:

> "I have made the changes requested in your January 30th fax. Please print three sets of the assignment and have your clients execute same and return to this office. If this can be done immediately and returned to me, Mr. Fisher is in town on Tuesday and can execute them at that time. I will then return two originals to you.
> Regards,
> Bill Parash"

Seneca also points out that the February 10, 2004 date on the cover sheet coincides with the "2/10/2004" facsimile transmission date on the copy of the assignment agreement produced by plaintiff in this lawsuit. Thus, according to Seneca, this cover sheet conclusively establishes that the assignment was executed more than nine months after the May 6, 2003 closing at which the buildings were sold for full, pre-fire price.

Seneca further argues that the assignment is invalid for additional reasons. Specifically, Seneca avers that the policy requires that proof of loss be submitted by a named insured. Here, the proofs of loss were submitted by a principle of OWC-Del, Shalom Fischer. In addition, Seneca argues that the policy requires that Seneca provide written consent prior to any assignment of rights or duties under the policy. Here, Seneca never provided such consent. Finally, Seneca claims that even if the assignment took place prior to the May 6, 2003 closing, the assignment would be invalid since it took place before the proofs of loss were filed. In this regard, citing the case of *Yaccarino v St. Paul Fire &*

Marine Ins. Co. (150 AD2d 771 [1989]), Seneca maintains that an assignment given without the insurers consent is valid only after the insured has sustained a loss and has submitted a proof of loss. Here, the named insured never submitted a proof of loss.

In opposition to this branch of Seneca's motion, plaintiff contends that the assignment of Alabama LLC and Liberty Lights' claims under the policy took place shortly after the fire and before the closing on the sale of the building. In support of this argument, plaintiff points to the previously submitted affidavits by Shalom Fischer and Yaniv Mazor, both of which indicate that the assignment took place "immediately after the fire" and was reduced to writing shortly thereafter. In addition, plaintiff argues that the "2/10/2004" facsimile date stamp on the assignment agreement indicates nothing more than the fact that the agreement was faxed to some unidentified party on that date. Plaintiff maintains that at best, this evidence implies that the assignment was merely reduced to writing at some point after the closing.

Plaintiff also argues that there is no merit to Seneca's claim that the assignment was precluded by a "non-assignment" clause in the policy. In particular, plaintiff maintains that such clauses are only valid with respect to assignments that take place before a loss has occurred. Here, it is undisputed that the assignment was made after the fire. Further, plaintiff argues that there is nothing in the policy or relevant case law that would require the named insured to file proofs of loss before it assigned its building claims to OWC-Del.

In reply to plaintiff's opposition, Seneca notes that plaintiff has completely ignored the fax cover sheet which indicates that the assignment was not executed until February 10, 2004. In addition, Seneca again argues that the assignment is only valid if it takes place after the insured has sustained a loss and submitted a proof of the loss. Here, no named insured filed a proof of loss. Thus, Seneca maintains a condition precedent to recover under the policy was not satisfied.

Turning first to the issue of when the assignment took place, there is evidence which would allow the trier of fact to conclude that the rights under the insurance contract were not assigned to OWC-Del until after the May 6, 2003 closing on the sale of the buildings. Specifically, the fact that the assignment agreement is not dated and that the closing statement fails to mention the assignment at all casts doubt upon plaintiff's claim that the assignment pre-dated the closing. Furthermore, the fax cover sheet presented by Seneca indicates that the written assignment agreement was not executed until February 2004, months after the named insureds were paid full value for the buildings at the closing. However, as noted above, plaintiff has presented evidence in the form of Mr. Fischer and Mr. Mazor's sworn affidavits which indicates that the assignment took place immediately after the December 26, 2002 fire and was reduced to writing "shortly thereafter." Given this conflicting evidence regarding when the assignment took place, it cannot be said, as a matter of law, that the assignment took place after the closing.

With respect to Seneca's remaining arguments, the fact that Seneca did not consent to the assignment of the policy rights to OWC-Del does not preclude coverage inasmuch as the assignment took place after the fire (*see Globecon Gp. LLC. v Hartford Fire Ins. Co.*, 434 F3d 165, 170 [2006]). Finally, the court finds no merit to Seneca's argument that the named insured must file a proof of loss before assigning its claim under the insurance policy in order for the assignment to be valid. The *Yaccarino* case cited by Seneca in support of this contention merely stands for the proposition that a tenant cannot file a proof of loss on behalf of an owner inasmuch as the tenant and owner have different insurable interests (*Yaccarino*, 150 AD2d 772-773).

Accordingly, that branch of Seneca's motion which seeks summary judgment dismissing plaintiff's claim as respects coverage for losses sustained to the buildings is denied.

Seneca's Motion to Compel

In a separate motion, Seneca moves pursuant to CPLR 2308 (b) and 22 NYCRR 202.21(d) for an order compelling plaintiff and/or plaintiff's counsel to fully comply with Seneca's subpoena duces tecum dated March 10, 2009. In particular, Seneca seeks a copy of a January 30, 2004 correspondence which was faxed by non-party Jacob Steiner, Esq. to plaintiff's counsel William Parash of Weg & Myers, P.C.

By way of background, on May 27, 2008, Seneca served a notice for inspection and discovery upon plaintiff seeking "[a]ll documents including but not limited to the deposition

transcripts, exhibits, contracts, assignments, e-mails, agreements, sales documents, correspondence, memos, reports, appraisals, quotes, receipts, and notes" of Sheldon Rudoff, Esq. of the firm Labaton Sucharow, LLP, and of Jacob Steiner, Esq. of the firm of Rick, Steiner, Fell & Benowitz, LLP.[6] On May 27, 2008, Seneca also served a deposition judicial subpoena duces tecum upon the non-party, Mr. Steiner. Ultimately, Seneca deposed Mr. Steiner and obtained various documents. In this regard, on January 8, 2009, Mr. Steiner's office provided Seneca with a copy of the aforementioned February 10, 2004 cover sheet sent by Mr. Parash to Mr. Steiner which made reference to a "January 30th fax." Accordingly, Seneca immediately contacted Mr. Steiner's office and requested that it provided Seneca with a copy of this January 30th fax. On January 30, 2009, plaintiff filed a note of issue. Thereafter, Mr. Steiner's office notified Seneca that it had conducted a search but was unable to locate the January 30th fax. Accordingly, in a letter dated February 20, 2009 sent to plaintiff's counsel, Seneca requested that it be provided with copy of the January 30th fax However, plaintiff's counsel failed to respond to this letter. On March 10, 2009, Seneca served a subpoena duces tecum upon plaintiff's counsel demanding the January 30th fax correspondence. However, plaintiff's counsel rejected and returned the subpoena on the basis that the note of issue had been filed and discovery was complete.

Seneca now moves for an order compelling plaintiff to comply with the subpoena and produce a copy of the January 30th fax correspondence. In support of its motion, Seneca

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[6]Mr. Steiner represented OWC-NY with respect to the sale of its business assets to OWC-Del. Mr. Rudoff represented OWC-Del in these transactions.

argues that the correspondence is critically important inasmuch as it may allow it to conclusively establish OWC-Del was not assigned the claims under the insurance policy until after it closed on the sale of the buildings. Seneca further argues that it is not precluded from seeking this discovery after the filing of the note of issue because nothing within the CPLR prohibits serving a subpoena duces tecum post-note of issue and, in any event, plaintiff should have produced this document in response to May 27, 2008 discovery demand. In the alternative, Seneca maintains that it is entitled to this post-note of issue discovery pursuant to 22 NYCRR 202.21(d) since unanticipated circumstances developed subsequent to the note of issue being filed which necessitated this discovery. Specifically, Seneca points out that it was not advised that Mr. Steiner lacked possession this document until after plaintiff filed the note of issue.

In opposition to Seneca's motion, plaintiff submits an affirmation by Mr. Parash in which he states that an associate from Weg and Myers has reviewed the firm's files and has not been able to locate a copy of the purported January 30th fax correspondence. Plaintiff further argues that the purported document is not relevant since it could not disprove plaintiff's claim that the claim was assigned orally immediately after the fire. Finally, plaintiff maintains that absent extraordinary circumstances which are not present here, a party may not seek discovery after the note of issue is filed. Instead, plaintiff maintains that Seneca should have moved to strike the note of issue within 20 days of its filing. Having

failed to do so, plaintiff argues that Seneca waived any right it had to obtain the subject discovery.

As an initial matter, the court finds that the subject January 30th fax correspondence may be relevant to these proceedings inasmuch as it may shed light on the question of when OWC-Del was assigned the claim rights under the policy. Further, the fact Seneca did not serve its subpoena upon plaintiff's attorney until after the note of issue was filed does not preclude Seneca from seeking this document. In this regard, Seneca did not learn of the existence of the January 30th correspondence until January 8, 2009, shortly before the note of issue was filed. In addition, Seneca did not learn that Mr. Steiner lacked possession of this document until after the note of issue was filed. Given these unanticipated circumstances, Seneca was entitled to seek production of this document after the note of issue was filed. However, Mr. Parash has indicated in his affirmation in opposition that his law firm has searched for but has been unable to locate a copy of this document. Obviously, it would be an exercise in futility for this court to direct plaintiff's attorneys to produce the subject document given the fact that Mr. Parash has already represented (under penalty of perjury) that Weg and Myers does not possess said document. Accordingly, Seneca's motion to compel is denied as moot. However, this denial is without prejudice to Seneca's seeking spoliation sanctions should it so choose.[7]

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[7]To the extent that Seneca seeks sanctions against Weg and Myers in the form motion costs, Seneca's motion is denied.

Summary

In summary, the court rules as follows: That branch of Seneca's motion which, upon reargument, seeks summary judgment dismissing plaintiff's claim against it as respects the business personal property is granted. That branch of Seneca's motion which, upon reargument, seeks summary judgment dismissing plaintiff's claim against it as respects the losses to the buildings is denied. Seneca's separate motion to compel production of the January 30th fax correspondence is denied as moot.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

Hon. Martin M. Solomon S.C.J.