Ayers v Allstate Ins. Co.

2010 NY Slip Op 30961(U)

March 10, 2010

Supreme Court, Nassau County

Docket Number: 11044/07

Judge: F. Dana Winslow

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

EDWARD AYERS,

Plaintiff,

-against-

ALLSTATE INSURANCE COMPANY,

Defendant.

MOTION SEQ. NO.:003, 004
MOTION DATE: 11/9/09

INDEX NO.: 11044/07

The following papers having been read on the motion (numbered 1-3):

Notice of Motion..1
Notice of Cross Motion..2
Affirmation in Support of Motion and
Opposition to Cross Motion..3

Motion pursuant CPLR 3124, 3126 by the defendant Allstate Insurance Company, for an order compelling the plaintiff to comply with its amended demand for a bill of particulars and its amended notice of discovery and inspection.

Cross motion pursuant to CPLR 3124, 3126 by the plaintiff Edward Ayers for an order compelling the defendant to comply with stated discovery demands and (2) for leave to file an amended, verified complaint.

The Court notes at the outset that there is no record of an attempt to resolve the instant discovery motion pursuant to local rules and the PC Order requiring contact with this Court and the appropriate DCM clerks part prior to submission of any motion. No further applications will be considered with out a showing that there was a prior attempt to resolve the matter between counsel and contact made with this part and the DCM clerks office.

The plaintiff Edward Ayers alleges, *inter alia*, that after he was involved in a car accident, the defendant Allstate Insurance Company ["Allstate"], improperly (1) failed to "total" out his accident-damaged, purportedly unrepairable truck upon adjusting his loss; and (2) then authorized repair work which was defective and valueless (A. Cmplt., ¶¶ 4-6).

The plaintiff's amended complaint further alleges that Allstate also "wrongfully, negligently and maliciously" declined to, among other things, reimburse the plaintiff for costs incurred as a result of the total loss of his vehicle – a sum amounting to $15,000.00 (A. Cmplt.,¶¶ 4-8, 10).

Notably, the within action was originally commenced by M.V.B. Collision, Inc ["MVB"], d/b/a Mid-Island Collision, Inc. ["Mid Island"], as Ayers' assignee – although the caption was later amended so as to remove Mid Island and add Edward Ayers as sole plaintiff – with Mid Island's original counsel remaining as attorney for Ayers (Bornes Aff., ¶¶ 2, 6; Bornes Aff., Exh., "A"[original Cmplt., ¶ 5]).

Thereafter, Allstate served an amended demand for a bill of particulars and an amended notice of discovery and inspection. By notices dated May 27, 2009 and October, 2009, the plaintiff filed responses to Allstate's amended demands together with stated objections alleging that many of items were over broad, lacking in relevance and/or were palpably improper (Pltff's Exhs., "C," "D").

It bears noting that Allstate's amended document demand – at least in the form produced here – contains two separate items denominated as item "4" and also omits items "8" and "9", jumping instead, from item "7" immediately to item "10".

Upon the instant notice, Allstate moves for relief compelling discovery and/or further responses to its amended demands.

The plaintiff opposes Allstate's application and cross moves for (1) leave to serve an amended complaint pursuant to CPLR 3025[b]; and (2) for an order compelling responses to his September 1, 2009 demand for discovery and

inspection (Pltff's Exh., "E").

Allstate's motion is **denied.** The plaintiff's cross motion is **granted** to the extent indicated below.

With respect to that branch of the plaintiff's motion which is for leave to amend, it is settled that leave "is to be freely granted, provided that the proposed amendment does not prejudice or surprise the defendant, is not patently devoid of merit, and is not palpably insufficient (*Tyson v. Tower Ins. Co., NY*, 68 AD3d 977 *see also, Cinao v. Reers*, ___AD3d___, 2010 WL 118212 [2nd Dept. 2010]; *Greco v. Christoffersen*, ___AD3d___, 2010 WL 437449 [2nd Dept. 2010]; *DeMato v. Mallin*, 68 AD3d 711; CPLR 3025[b]).

Further, "[m]ere lateness is not a barrier to the amendment," since "[i]t must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (*Edenwald Contr. Co. v. City of New York*, 60 NY2d 957, 959 [1983]; *Spitzer v. Schussel*, 48 AD3d 233, 234; *Matter of Rouson*, 32 AD3d 956, 958 *see, Matter of Barabash*, 31 NY2d 76, 81-82 [1972]; *Skrodelis v. Norbergs*, 272 AD2d 316).

The decision whether to grant leave to amend a pleading rests within the Supreme Court's broad discretion, and "the exercise of that discretion will not be lightly disturbed" (*Chirinkin*, 60 AD3d 901, 902; *Ingrami v. Rovner*, 45 AD3d 806, 808 *see also, Frumento v. On Rite Co., Inc.*, 66 AD3d 828, 829).

Here, the proposed amendment merely addresses and then corrects a factual error relative to the date on which the accident occurred and does not otherwise alter the underlying theory of the action or add any significantly new or additional facts (*see, Cinao v. Reers, supra*). Since Allstate has not demonstrated that it would be prejudiced by virtue of the amendment, the Court exercises its discretion in favor of granting the plaintiff's motion (*Rosicki, Rosicki and Associates, P.C. v. Cochems*, 59 AD3d 512, 514; *Arcuri v. Ramos*, 7 AD3d 741, 742).

That branch of Allstate's motion which is to, *inter alia*, compel further responses to its amended demand for a bill of particulars, is **denied**.

It is settled that the purpose of a bill of particulars is to "provide a general statement of the acts or omissions relied upon," so as to "amplify pleadings, limit proof, and prevent surprise at trial" (*Toth v. Bloshinsky*, 39 AD3d 848, 850; *Moran v. Hurst*, 32 AD3d 909; *Kaplan v. Rosiello*, 16 AD3d 626, 627; *176-178 Ashburton Ave. Corp. v. New York Property Ins. Underwriting Ass'n*, 125 AD2d 653; *Cirelli v. Victory Mem. Hosp.*, 45 AD2d 856, 857 *see*, CPLR 3043[a][3]). Significantly, "[u]nlike the disclosure devices authorized in CPLR article 31, a bill of particulars is of limited scope and may not be used to obtain evidentiary material" (*Ginsberg v. Ginsberg,* 104 AD2d 482, 484; *Philipp Bros. Export Corp. v. Acero Peruano S. A.*, 88 AD2d 529 *see*, *Toth v. Bloshinsky, supra; see also, Arroyo v. Fourteen Estusia Corp.*, 194 AD2d 309; *Posh Pillows, Ltd. v. Hawes*, 138 AD2d 472, 474; *Jericho Water Dist. v. S. Zara & Sons Contracting Co., Inc.*, 116 AD2d 622, 624; *Katz 737 Corp. v. Schulman*, ___ Misc3d ___, 2008 WL 1745146 at 6 [New York City Civil Court 2008]).

Here, while the plaintiff's amended complaint contains only 10 paragraphs, Allstate's amended bill of particulars is comprised of 35 separately paragraphed, single-spaced demands, most of which propound a multiplicity of intricately detailed follow-up inquiries and questions (*cf., Fulton County Nat. Bank and Trust Co. v. Bollam,* 114 AD2d 655; *Nazario v. Fromchuck*, 90 AD2d 483, 484).

The requests demand detailed evidentiary and factual material relating to every aspect and component of the plaintiff's action, *i.e.,* information of an evidentiary nature including, *inter alia*, the names of potential witnesses, details of documents, demands that documents be identified, dates, times and specific details pertaining to a wide spectrum of events and occurrences (*Bardi v. Mosher*, 197 AD2d 797, 798; *Philipp Bros. Export Corp. v. Acero Peruano S. A., supra; Simpson Elec. Corp. v. Leucadia, Inc.,* 130 AD2d 738; *Nazario v. Fromchuck, supra see, 176-178 Ashburton Ave. Corp. v. New York Property Ins. Underwriting Ass'n, supra*, 125 AD2d 653).

These excessively detailed demands materially exceed "mere amplification

of the pleadings (*e.g., Erbesh v. Schwartz*, 21 AD3d 532; *Medaris v. Vosburgh*, 93 AD2d 882, 883; *Nazario v. Fromchuck, supra*, 90 AD2d 483; *Katz 737 Corp. v. Schulman, supra*).

To the extent that some of the demands singly – and excised of their copiously detail – might be reasonable in scope (*Latture v. Smith,* 304 AD2d 534), 536; *Bardi v. Mosher, supra*, 197 AD2d at 798), it is settled that Courts are not obligated to prune notices containing improperly framed items (*see, Nazario v. Fromchuck, supra,* 90 AD2d 483 *see generally, Taji Communications, Inc. v. Bronxville Towers Apartments Corp.*, 48 AD3d 551, 552; *Bell v. Cobble Hill Health Center, Inc.,* 22 AD3d 620, 621).

With respect to Allstate's document demands, Allstate claims entitlement to the plaintiff's retainer agreement and the assignment agreement executed by Mid Island (items "10", "11"). The Court agrees that these materials need not be produced.

Although the scope of discovery is "far-reaching" (*Allen v Crowell-Collier Pub. Co., supra*; *Bustos v. Lenox Hill Hosp.*, 29 AD3d 424), "unlimited disclosure is not required" (*Smith v. Moore*, 31 AD3d 628 *see, Tower Ins. Co. of New York v. Murello*, 68 AD3d 977; *Auerbach v. Klein*, 30 AD3d 451), particularly where the demands made attach undue attention to collateral matters (*Blittner v. Berg and Dorf*, 138 AD2d 439, 440-441), or where they are overly broad, unduly burdensome, or lacking in specificity (*see, M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.,* 62 NY2d 75, 79 [1984]; *Merkos L'Inyonei Chinuch, Inc. v. Sharf,* 59 AD3d 408; *Gilman & Ciocia, Inc. v. Walsh*, 45 AD3d 531; *Vyas v. Campbell*, 4 AD3d 417, 418 *see also*, *Holness v. Chrysler Corp.*, 220 AD2d 720, 721).

The Court possesses broad discretion to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice, and also "to determine what is 'material and necessary' as that phrase is used in CPLR 3101(a)" (*Auerbach v. Klein, supra; Bell v. Cobble Hill Health Center, Inc., supra*, 22

AD3d 620, 622 *see, Andon v. 302-304 Mott St. Assocs.*, 94 NY2d 740, 746 [2000]; *Pacheco v. New York City Housing Authority*, 48 AD3d 534).

Allstate claims that the underlying action is one of many arising out of an-ongoing and highly contentious insurance dispute between it and Mid Island (*e.g.*, *M.V.B. Collision, Inc. v. Allstate Ins. Co.*, ___F.Supp2d___, 2007 WL 2288046 [E.D.N.Y. 2007]) – and that the now inoperative assignment may have violated New York's so-called Champerty statutes since Mid Island is allegedly funding various actions commenced by some of Allstate's insureds (*see,* Judiciary Law, §§ 488, 489 *see generally*, *Trust For the Certificate Holders of Merrill Lynch Morag. Investors, Inc. v. Love Funding,* 13 NY3d 190, 199-200 [2009]; *Bluebird Partners v. First Fid. Bank*, 94 NY2d 726, 734 [2000]). Mid Island, however, is no longer a party to the matter and is not prosecuting an action pursuant to an assignment which falls within the ambit of Judiciary Law §§ 488, 489 (*cf., M.V.B. Collision Inc. v. Allstate Ins. Co.*, *supra,* 25 Misc.3d 168, 169).

Moreover, while fee arrangements and/or attorney retainers "are not privileged in the usual case" and are discoverable – if relevant (*Priest v. Hennessy,* 51 NY2d 62, 69-70 [1980]; *In re Nassau County Grand Jury Subpoena Duces Tecum Dated June 24, 2003*, 4 NY3d 665, 678-679), the record belies the assertion that the retainer agreement is material, relevant and necessary to the prosecution and/or defense of the action (*see generally, Smith v. Moore*, *supra*, 31 AD3d at 629; *Casanova v. Huntington Union Free School Dist.,* 29 AD3d 723; *Costa v. Hadjigavriel,* 6 AD3d 636, 637).

At bar, the issues actually framed by the parties' pleadings do not raise any questions relating to the plaintiff's retainer arrangement with his attorney. Nor has Allstate interposed – among its 14 separate, affirmative defenses – any pleaded claims alleging the existence of an illegal assignment and/or an improper fee agreement which are prohibited by the Champerty statutes.

Notably, it is generally "incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of

relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Beckles v. Kingsbrook Jewish Medical Center*, 36 AD3d 733; *Costa v. Hadjigavriel*, *supra*, 6 AD3d 636; *Vyas v. Campbell*, *supra*, 4 AD3d at 418; *Crazytown Furniture, Inc. v. Brooklyn Union Gas Co.*, 150 AD2d 420, 421).

With respect to the remaining document demands at issue, Allstate asserts, *inter alia*, that it has requested but claims it has not received (or received incomplete) documentation in connection with its demands for, *inter alia*: (1) complaints or other documents authored by Ayers and/or MVB to the DMV or the Insurance Department and any responses received therefrom, relating to repairs performed on the subject vehicle or Allstate's adjustment of the claim; (2) rental bills and "the basis" for plaintiff's rental claim; (3) any repair bills issued by the first shop ("Pace Automotive") that made repairs to the vehicle and copies "of payment" the plaintiff may have made to Pace or Mid-Island; (4) proof and/or documents pertaining to an accident occurred on May 2, 2007, as alleged in complaint; and (5) copies of any appraisals performed by Mid-Island or others, and any bills therefor or oral agreements to make such payment (Bornes Aff., ¶ 8[a]-[h]).

As to proof that an accident occurred on May 2, 2007, the plaintiff has since corrected the erroneously alleged May, 2007 date and substituted therefor, the allegation that the accident occurred in August of 2007 (Bornes Aff., ¶ 8[d]). Moreover, counsel advises no payments have been made by the plaintiff to Mid Island – although counsel asserts that a debt has in fact been incurred for which a bill (already produced) has been issued but which to date remains unpaid (Goldstein Aff., ¶¶ 18-20). Further, and according to counsel, rental bills have been supplied and annexed to plaintiff's recent bill of particulars and that copies of the appraisals were produced in discovery response served in May of 2007 (Bornes Aff., ¶ 8[g], [h]).

The plaintiff's counsel has further averred that: (1) no complaints have been

made to the DMV or to the Insurance Department; (2) no bills have been received by the plaintiff from Pace Auto body; (3) no payment has been made by the plaintiff to Pace or to Mid Island at this juncture; and (4) that no correspondence exists between Pace and the plaintiff (Goldstein Aff., ¶¶ 17-18)(Bornes Aff., ¶ 8[c], [e], [f], [I]).

While Allstate's counsel disputes the plaintiff's assertion that there were no DMV complaints made (Goldstein Aff.,¶ 17), she does not elaborate on her claim so as to explain to the Court the factual basis of her contentions (Bornes Reply Aff., ¶ 10).

However, while the plaintiff has effectively advised that various documents do not exist – and although a party cannot be compelled to produce evidence that it does not possess (*see, Gottfried v. Maizel,* 68 AD3d 1060; *Tolz v. Valente,* 39 AD3d 737, 738; *McGroarty v. Long Island College Hosp.*, 37 AD3d 431) – it is also settled that "[a] failure to provide the information in his possession will * * * preclude him from later offering proof regarding that information at trial" (*Sagiv v. Gamache*, 26 AD3d 368; *Bivona v. Trump Mar. Casino Hotel Resort*, 11 AD3d 574; *Kontos v Koakos Syllogos "Ippocrates", Inc.*, 11 AD3d 661).

As to the remaining discovery items, item "12" is palpably improper since it broadly requests – without meaningful qualification at this pre-trial juncture – "each and every document" which the plaintiff intends to rely on at trial (*e.g., Benzenberg v. Telecom Plus of Upstate New York, Inc.*, 119 AD2d 717 *cf.*, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3101:41, at 89). Item "2" simply demands the names an addresses of "any person" having knowledge of the condition of the vehicle "at any time relevant to this action" – a demand which makes no reference to documentary materials (*cf.*, CPLR 3120[1]), and which the Court similarly regards as lacking in specificity and overly broad in its scope and import.

Lastly, that branch of the plaintiff's cross motion which is to compel further

responses to its one-item demand for discovery and inspection dated September 1, 2009 is **denied** (Plttf's Exh., "E", "F"), *i.e.*, its broadly framed demand that Allstate produce "all" records, books, business records and reports maintained by Allstate pertaining to Lange Technical Services, Ltd, which relate to the subject claim (*see, Watson v. Espoused*, 231 AD2d 512, 515-516).

Significantly, Allstate contends – and the plaintiff does not dispute – that (1) plaintiff's current counsel, Steven F. Goldstein, also represents Mid Island in a currently pending, federal action commenced by Mid-Island against Allstate (*see, M.V.B. Collision, Inc. v. Allstate Ins. Co., supra*, 2007 WL 2288046 [E.D.N.Y. 2007]); (2) that Goldstein has already received various Lange reports from Allstate in that Federal matter – albeit subject to a confidentiality agreement imposed therein (not attached here); and (3) that Goldstein, as confirmed by correspondence in the record, has received Allstate's permission to use those reports in the within action.

Under these circumstances, and absent further explanatory detail not supplied here by the plaintiff, the Court declines to compel further production of the above-referenced documents.

To the extent that there are any additional discovery issues which remain, the parties shall appear before the undersigned at a conference during which those matters will be considered.

The Court has considered the parties' remaining contentions and concludes that none warrants an award of relief except to the extent granted above.

Accordingly, it is,

ORDERED the motion pursuant CPLR 3124, 3126 by the defendant Allstate Insurance Company, for an order compelling the plaintiff to comply with its amended demand for a bill of particulars and an amended notice of discovery and inspection is **denied,** and it is further,

ORDERED the cross motion pursuant to CPLR 3124, 3126 by the plaintiff Edward Ayers is **granted** to the extent that the second amended complaint in the

form attached to the plaintiff's cross motion, shall be deemed served, and the plaintiff's cross motion is otherwise **denied**, and it is further,

ORDERED that the defendant's time to serve its answer shall be enlarged until 20 days after service upon them of a copy of this decision and order, and it is further,

ORDERED the matter shall be set down for a conference before the undersigned on **April 28, 2010, at 11:00 am**, during which the Court shall consider, *inter alia*, any outstanding issues or disputes relating to the conduct of discovery between the parties.

This Constitutes the Order of the Court.

Dated: March 10, 2010

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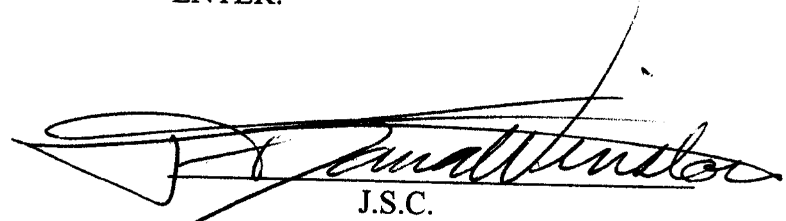

J.S.C.

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