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

PRESENT: HON. JUDITH J. GISCHE PART 10

Index Number : 604229/2005

DESAI, PANKAJ

VS

PROVIDENT MUTUAL LIFE

Sequence Number : 004

COMPEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED
AUG 04 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: AUG 02 2010

HON. JUDITH J. GISCHE J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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Pankaj T. Desai,

Plaintiff

-against-

Provident Mutual Life Insurance Company of Philadelphia, Nationwide Life Insurance Company of America, Inc., *successor in interest to* Provident Mutual Life Insurance Company of Philadelphia, Nationwide Financial Services, Inc., Life Insurance Company of Boston & New York, CNA Financial Corp., Continental Casualty Company, UNUM Life Insurance Company of America, First UNUM Life Insurance Company and Paul Revere Life Insurance Company,

Defendants.

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DECISION/ORDER
Index No.: 604229/2005
Seq. No.: 004

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	**Numbered**
Defs' CNA & CCC n/m (§§3025, 3212) w/CS affid (sep back), MHB affirm (sep back), exhs	1, 2, 3
Defs PMLICP, NWLICA et al x/m (§§3025, 3212) w/MJK affirm, GMT affid, exhs	4
Pltf's x/m (stay) w/PTD affid,	5
Defs' PMLICP, NWLICA et al reply to pltf's x/m w/MJK affirm	6

Upon the foregoing papers the court's decision is as follows:

GISCHE J.;

This is an action by plaintiff for breach of contract based upon claims that the defendants, all insurance companies, denied plaintiff benefits he was entitled to under several disability insurance policies. There have been prior orders by this court which extensively addressed the parties' disputes, in particular the court's decision denying defendants' motion and cross motion for summary judgment (Order, Gische J., 9/23/08).

The motion presently before the court, which is for an order imposing discovery sanctions on defendant CNA Financial Corp. and Continental Casualty Company ("CNA/Continental"), is partly based upon court's prior written order dated July 2, 2009 and the order made in court on the record July 16, 2009 which is set forth in the stenographic minutes of that day.

Argument

Plaintiff is a medical doctor who is no longer licensed to practice medicine. His medical license was revoked in June 2003, after the New York State Board for Medical Conduct completed its hearing. At the time he was served with charges, plaintiff had certain disability policies with the defendants. Plaintiff's license was revoked on October 9, 2002, when the medical board served him with charges. At that time plaintiff's disability insurance was also cancelled.

Before he was served with charges and before his policy was cancelled, plaintiff filed a disability claim with the defendants. In the disability claim form dated October 2, 2002, plaintiff stated that he was disabled as of September 2, 2002. In describing the nature of the disability, plaintiff described various vision problems which prevented him

from performing microsurgery competently.

After he filed the claim, he was examined by the defendants' doctor and his vision problems evaluated. On January 29, 2003, defendants disclaimed coverage stating that there was no medical evidence for the medical condition claimed. The disclaimer letter, however, states that "our decision has been based on a complete evaluation of the file as it has developed in your claim . . ." and that plaintiff could submit "any additional information of which we are not aware . . ." This offer is repeated in later correspondence from the defendants to plaintiff dated April 2, 2003.

In October 2005, plaintiff applied for Social Security Disability Income Benefits, providing a psychologist's statement that plaintiff suffered from depression, ADHD and anxiety and had been treating with him since September 2005.

On December 19, 2006, plaintiff provided defendants with a psychological report dated November 15, 2006 which was prepared by Paul H. Wender, M.D. ("Wender report"). The Wender report indicates that plaintiff has suffered from ADHD since childhood, and that he also suffers from Antisocial Personality Disorder and Schizotypal Personality Disorder. The Wender report describes the symptoms of these psychiatric and personality disorders, principal among them being "disorganization," "irresponsibility," "deceitfulness," "confusion," "paranoia," and "auras."

Plaintiff contends he timely filed his disability claim, before his medical license was revoked complying with the requirements of his policy. Part 5 of the insurance policy agreement [no. 03-A-1940] provides that "written notice [of a claim] must be given to us within 30 days after any loss covered by the Policy. If notice cannot be

given within that time, it must be given as soon as reasonably possible. The notice will be sufficient if it identifies the Insured and the Policy. It must be sent to Us at Our Home Office, CNA Plaza, Chicago, Illinois 60685 or given to Our agent."

Plaintiff also claims that he provided defendants with timely written proof of loss. Part 5 of the policy requires that "Written proof of loss must be given to Us within 90 days after the date of such loss. If it is not reasonably possible, the claim is not affected if the proof is given as soon as reasonably possible."

Thus plaintiff alleges that the Wender report was not in support of a new claim, but to amplify and further support the October 2002 claim that was timely made but denied. Furthermore, plaintiff alleges that because defendants did not investigate the bona fides of the written proof of loss in the Wender report, they have not only breached the terms of their agreement with him (i.e. the policy) and the failure to investigate is a waiver of any rights the defendants may have to deny his October 2002 claim. In correspondence dated January 25, 2007, Eva Canaan, Esq., an attorney with Sedgwick Detert, confirmed receipt of the report and inquired whether it was for a new claim. Plaintiff's counsel wrote back that it was written proof of loss of the October 2002 claim. Subsequently, in written correspondence dated March 29, 2007, Canaan rejected the additional proof of loss as untimely.

Plaintiff has deposed the person who handled his claim and sent him the disclaimer letter in October 2002 ("Maxwell"). He also deposed the disability claims examiner who also worked on his claim ("Sauerhoff"). In November 2009, after this action was commenced, and pursuant to court ordered discovery, plaintiff deposed the

in house counsel for CNA/Continental who is employed by Hartford Financial, defendants' parent company. The attorney who appeared for that deposition was Brien Horan, Esq.

During Horan's examination before trial, Sedgwick Detert (and at one point Horan himself) invoked the attorney /client privilege repeatedly. Plaintiff argues that defendants' decision to have Horan "cherry pick" his answer is a waiver of the attorney client privilege, if it applies although plaintiff argues it does not apply because Horan was not providing legal advice to the defendants, but processing his claim.

CNA/Continental argues that all its communications with Horan are absolutely immune from discovery because Horan is their in-house counsel and he was providing legal advice. Furthermore, defendants deny the plaintiff needs to know any more information because he already knows they did not investigate the matters in the Wender Report. Defendants disagree with plaintiff, that they waived any rights under the policy and argue that waiver cannot be used to create coverage where there is none in the first place.

After Horan was deposed, defendants provided plaintiff with an amplified log of documents that they claim are protected from disclosure under CPLR 3101 [c] and/or [d] because they are privileged and/or attorney work product and/or prepared specifically for this litigation. The documents identified in the log are for the period 1/12/07 - 4/5/07. They were authored and/or exchanged by Horan and Sedgwick Detert et al, the attorneys for defendants in this case.

Discussion

CPLR § 3101(a) provides for the "full disclosure of all matter material and necessary in the prosecution or defense of an action." Under this standard, disclosure is required "of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (Allen v. Crowell-Begin Collier Publ. Co., 21 N.Y.2d 403, 406 [1968]).

There are, however, three categories of matters protected from disclosure. They are privileged matters which are absolutely immune from discovery (CPLR 3101[b]); attorney's work product, also absolutely immune; and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means (CPLR 3101[d][2]; Spectrum Systems Intern. Corp. v. Chemical Bank, 78 N.Y.2d 371 [1991]). Since defendants claim the materials demanded by plaintiff are protected, they have the burden of establishing the immunity of that information from discovery (Volpicelli v. Westchester, 102 AD2d 853 [2nd Dept 1984]).

At the outset, the court rejects plaintiff's argument that defendants waived any attorney client privilege by allowing Horan to answer some of the questions posed to him at his deposition. Not only did the court order Horan to be deposed, not all communications between an attorney and client are privileged (Carone v. Venator Group, Inc., 289 A.D.2d 185 [1st Dept 2001]). A blanket invocation of the privilege would have been improper and defendants were required to invoke it question by question (*see*, Art Board Inc. v. Worldwide Business Exchange, 134 Misc2d 350 [N.Y.

Civ Ct 1986]). Therefore, his answering some, but not all, of the questions asked of him is not a waiver of the privilege, if any.

Next, the court also rejects plaintiff's argument that Horan is not working as a lawyer for the defendants, but as a non-lawyer. This claim is without any support in the record developed at during the court of Horan's EBT. Horan testified that he is employed as defendants' in house counsel. Although he is presently the director of litigation, he has always worked on litigation matters, either directing the defense or prosecution in the matters assigned to him. He has, at times, interacted with defendants' trial counsel in this case (i.e. the firm of Sedgwick Detert et al). Viewing Horan's role in this case and judging by his sworn testimony, Horan has been consulted and provided services as an attorney, not as a non-attorney.

As a general rule, documents prepared in an insurer's ordinary course of business in investigating whether to accept or reject a claim are discoverable (McClier Corp. v. U.S. Rebar, Inc., 66 A.D.3d 416 [1st Dept 2009]). However, documents in an insurer's claim file that were prepared for litigation against its insured are immune from disclosure (McClier Corp. v. U.S. Rebar, Inc., supra).

Plaintiff sent the Wender report directly to Sedgwick Detert, not the defendants. The policy, however, allows for the additional proof of loss to be sent to the insurer or "its agent." As the attorneys for the insurer, the law firm was defendants' agent. The insurance company did not prepare a formal response rejecting the Wender report, rather it was the law firm that rejected the report as untimely after corresponding with Horan. Horan testified at his deposition that he did not investigate the Wender report or

even know much about it. However, the report was rejected only after the law firm and Horan exchanged certain correspondence or reports. Those reports are on the privilege log.

Without seeing the documents, the court cannot determine whether the reports are privileged. Horan was prevented from answering any questions about how the additional proof of loss was handled by the defendants, if at all. The other witnesses that defendants produced for depositions were unfamiliar with the Wender report and the report was rejected following the exchange of correspondence among the attorneys. Thus, while Sedgwick Detert and Horan each represent no investigation was made, plaintiff has a right to know why the additional proof was rejected by the insurer. The court will require that defendants provide the materials identified in the privilege log for an *in camera* inspection within Ten (10) Days hereof. The documents shall be delivered to 60 Centre Street, Room 232 with a copy of this decision and order.

Until the court examines those documents, it cannot decide whether Horan properly invoked the attorney client privilege in connection with how the Wender report was processed. Therefore, that branch of defendants' cross motion for a protective order and plaintiff's motion in chief for an order to compel, is held in abeyance and may be renewed after the court decides whether the documents in the log are privileged.

The other questions marked for a ruling appearing on pages 94 through 99 of the index to Horan's EBT either call for a legal conclusion or interpretation of the insurance policy at issue. Those objections are sustained and defendants' motion for a protective order as to those questions is granted.

Sanctions

The court may impose financial sanctions or costs for frivolous conduct in civil litigation (Part 130, §130-1.1 [a]). Conduct is "frivolous" when it completely is without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law or it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another (22 NYCRR §130-1.1 [c] [1], [2]). Defendants' cross motion for discovery sanctions is denied; the movant has not made the requisite showing.

Plaintiff's motion for CPLR 3126 is denied. There is not basis for the imposition of discovery sanctions at this time.

Conclusion

Plaintiff's motion to compel discovery is granted in the manner and to the extent provided. It is otherwise denied. The motion for discovery sanctions is denied.

Defendants' cross motion for a protective order is granted to the extent provided. The cross motion for Part 130 sanctions is denied.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
August 2, 2010

So Ordered:

Hon. Judith J. Gische, J.S.C.