

United Nations Fed. Credit Union v Arch Ins. Co.

2010 NY Slip Op 32274(U)

August 20, 2010

Sup Ct, NY County

Docket Number: 116188/08

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. EILEEN A. RAKOWER

PART 15

Index Number : 116188/2008
UNITED NATIONS FEDERAL
vs.
ARCH INSURANCE
SEQUENCE NUMBER : 002
COMPEL DISCLOSURE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1
2
3

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
AUG 24 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/20/10


HON. EILEEN A. RAKOWER

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 15

-----X
UNITED NATIONS FEDERAL CREDIT UNION and
TISHMAN CONSTRUCTION CORPORATION OF
NEW YORK,

Index No.
116188/08

Plaintiffs,

**DECISION
and ORDER**

- against -

Mot. Seq.

ARCH INSURANCE COMPANY and PETROCELLI
ELECTRIC CORPORATION,

FILED
AUG 24 2010

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. EILEEN A. RAKOWER

Plaintiffs United Nations Federal Credit Union ("UNFCU") and Tishman Construction Corporation of New York ("Tishman") (collectively "Plaintiffs") bring this action seeking a judgment declaring that they are entitled to additional insured status under the insurance policy issued by Arch Insurance Company ("Arch") to Petrocelli Electric Corporation, Inc. ("Petrocelli") for the policy period including October 31, 2006, and including location of work performed by Petrocelli at 24-01 44th Road, in Long Island City, New York ("the construction site"). Plaintiffs claim that additional insured coverage was triggered based upon the pleadings in the matter titled *DelRosario v. United Nations Federal Credit Union et al.*, Index No. 303940/08, in Supreme Court, Bronx County ("DelRosario action" or "underlying action").

In the underlying action, plaintiff Sandy DelRosario alleges that, on October 31, 2006, in the course of performing construction work at the above premises, he was caused to fall from a ladder as a result of a defective condition at the work site. DelRosario brought the underlying action against UNFCU, Tishman, and Petrocelli, as property owner, general contractor, and an electrical subcontractor, respectively, alleging each of them to be liable for his injuries. UNFCU and Tishman subsequently added Eurotech Construction Corporation ("Eurotech"), DelRosario's employer, as a third-party defendant seeking indemnification.

UNFCU and Tishman tendered their defense to Petrocelli, claiming entitlement to additional insured status. After Petrocelli denied the tender, Plaintiffs commenced this action.

Presently before the court is a motion by Arch and Petrocelli (collectively "Defendants") for an order, pursuant to CPLR §3124, compelling Plaintiffs to produce discovery responsive to portions of Defendants' March 15, 2010 demand for discovery and inspection ("D&I"); and for a properly verified response to Defendants' interrogatories. Defendants state that the discovery sought is germane to the critical issue of whether the alleged conditions arouse out of Petrocelli's "work," such that additional insured coverage is triggered. Specifically, with respect to Defendants' D&I, Defendants seek an order compelling documents responsive to request #2 (which Plaintiffs responded to in part), and requests # 4-17 (which Plaintiffs objected to outright as "overbroad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, harassing, and not relevant to a declaratory judgment insurance coverage action where the issues are whether the Plaintiffs herein are insured under the Defendant Arch's policy for Defendant Petrocelli's work."). Defendants' requests are as follows:

2. Copies of any and all contract specifications entered into with Petrocelli Electric in connection with the construction site... that were in full force and effect on October 31, 2006
4. Copies of all daily, weekly and monthly construction logs and/or reports that were prepared by Plaintiffs in connection with the work performed at the construction site...
5. Identify all employees employed by the Plaintiffs that were on site at the construction site...
6. For any employees identified in response to item 5 herein, identify the title/position of each employee. If any such employees are no longer employed, provide the last known address of any employee no longer in the employ of Plaintiffs.
7. Identify the Project Superintendents, if any, employed by the Plaintiffs in connection with the construction site... for the period of 6 months prior to and including October 31, 2006. If any such

employees are no longer employed, provide the last known address of any employee no longer in the employ of Plaintiffs.

8. Identify the Project Managers, if any, employed by the Plaintiffs in connection with the construction site... for the period of 6 months prior to and including October 31, 2006. If any such employees are no longer employed, provide the last known address of any employee no longer in the employ of Plaintiffs.
9. Identify the Project Foremen, if any, employed by the Plaintiffs in connection with the construction site... for the period of 6 months prior to and including October 31, 2006. If any such employees are no longer employed, provide the last known address of any employee no longer in the employ of Plaintiffs.
10. Copies of any daily, weekly and monthly work related meeting minutes prepared by Plaintiffs in connection with the work performed at the construction site... for the period of six months prior to and including October 31, 2006.
11. Copies of any daily, weekly and monthly safety meeting and tool box meeting minutes prepared by or submitted to Plaintiffs in connection with the demotion work performed at the site for the period of three months to and including the date of loss.
12. Copies of any and all Site Safety Plans and Manuals that were in full force and effect at the construction site... for the period of 6 months prior to and including October 31, 2006.
13. Provide duplicate original copies of any and all progress photographs taken at the site, more particularly of the accident scene as identified by counsel for Sandy DelRosario, plaintiff in his Bill of Particulars [in the underlying action] for the period of six months prior to and including October 31, 2006.
14. Provide copies of all accident and incident report[s] relative to Sandy DelRosario's alleged accident.

15. Provide copies of all sign in sheets for workers at the construction site on October 31, 2006.
16. For all individuals identified on sign-in-sheets in "15" above, identify the individual by job title and employer.
17. Copies of all daily, weekly and monthly construction logs and/or reports that were furnished to Plaintiff's [employer] Eurotech Construction in connection with the work performed at the construction site... for the period of six months prior to and including October 31, 2006.

Defendants submit an affirmation in support of their motion, as well as an affirmation attesting to their good faith efforts to procure the requested discovery without judicial intervention.

Plaintiffs submit an affirmation in opposition to Defendants' motion. Plaintiffs contend that "[a]ll of Defendants' demands have been responded to, and defendants are seeking documents that are not in counsel's control." Counsel for Plaintiffs states that he is not counsel for Plaintiffs in the *DelRosario* action, and that this court, per Justice Walter B. Tolub, previously denied Defendants' requests on the grounds that they were available to Defendants in the underlying action.

Defendants submit a reply affirmation.

CPLR §3101(a) generally provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and that "[t]he test is one of usefulness and reason" (*Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]). However, a party is not required to respond to discovery demands which are "palpably improper." A demand is palpably improper if it seeks information which is irrelevant or confidential, or is overbroad and unduly burdensome (*Gilman & Ciocia, Inc. v. Walsh*, 2007 NY Slip Op 8410, *1 [2nd Dept. 2007]).

Here, the court finds that Defendants are entitled to any documents which are responsive to items 4, 10, 11, 12, 13, 14, 15, and 17 of Defendants' March 15, 2010 D&I which are in Plaintiffs' possession, custody or control (to the extent that these items have not been produced to Defendants in the underlying action). These items are relevant to the issue of whether or not the plaintiff in the *DelRosario* action was injured in the course of performing Petrocelli's work, thus triggering additional insured coverage for Plaintiffs. Defendants' other requests, however, are denied. Request number "2" calls for the production of documents which should be in Petrocelli's own custody. The remaining requests do not call for the production of "documents or any things" in the possession of Plaintiffs (*see* CPLR §3120), but rather seek that Plaintiffs identify individuals and/or their job titles.

Finally, with respect to Defendants' interrogatories, Plaintiffs raise no opposition to the portion of Defendants' motion seeking a verified response. Accordingly, and pursuant to CPLR §3133(b), Defendants are entitled to a verified response. In addition, Plaintiffs shall respond to Defendants' interrogatory #10 as to whether Plaintiffs or anyone on Plaintiffs' behalf conducted an investigation into the alleged incident, subject to any assertions of privilege.

Wherefore it is hereby

ORDERED that Plaintiffs produce any and all documents responsive to requests numbered 4, 10, 11, 12, 13, 14, 15, and 17 Defendant's March 15, 2010 D&I to the extent not yet provided by Plaintiffs in this action or the *DelRosario* action within 30 days of receipt of a copy of this order with notice of entry thereof; and it is further

ORDERED that, if Plaintiffs do not have responsive documents pertaining to the above requests, Plaintiffs are to provide an affidavit from a knowledgeable source attesting to the search conducted for said documents within 30 days of receipt of a copy of this order with notice of entry thereof; and it is further

ORDERED that Plaintiffs shall serve a verified response to Defendants' interrogatories within 30 days of receipt of a copy of this order with notice of entry thereof.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: August 20, 2010



EILEEN A. RAKOWER, J.S.C.

FILED
AUG 24 2010
NEW YORK
COUNTY CLERK'S OFFICE