

**Certain Underwriters at Lloyd' s London v North  
Shore Signature Homes, Inc.**

2011 NY Slip Op 31503(U)

May 24, 2011

Sup Ct, Nassau County

Docket Number: 007877/09

Judge: Steven M. Jaeger

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**SUPREME COURT OF THE STATE OF NEW YORK  
NASSAU COUNTY**

Present:

**Hon. Steven M. Jaeger  
Acting Supreme Court Justice**

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**CERTAIN UNDERWRITERS AT LLOYD'S LONDON,  
SUBSCRIBING TO POLICY NUMBER APH 0100472  
A/S/O TAL AND AHARON PHILIPSON,**

Plaintiffs,

**-against-**

**NORTH SHORE SIGNATURE HOMES, INC., and  
RICHARD WISCHHUSEN,**

Defendants.

**DECISION - ORDER**

**Index No:  
007877/09**

**Motion Sequence  
Nos. 5 and 6**

**ACTION NO. 1**

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**STATE FARM INSURANCE COMPANY, as Subrogee of  
MARILYN M. SALIERNO,**

Plaintiff,

**-against-**

**NORTH SHORE SIGNATURE HOMES, INC., and  
RICHARD WISCHHUSEN,**

Defendants.

**Index No. 4638/10**

**ACTION NO. 2**

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The following papers were read on these motions:

- Notice of Motion, Affirmation of Good Faith, Affirmation in Support, Exhibits X
- Notice of Motion, Affirmation in Support, Exhibits X
- Affirmation in Opposition, Exhibits X
- Reply Affirmation, Exhibits X
- Reply Affirmation, Exhibits X

In this action to recover damages for negligence and breach of contract arising out of a fire which occurred on February 29, 2008, at the residence of Tal and Aharon Philipson ("the Philipsons"), the subrogees of plaintiff Certain Underwriters at Lloyd's, London ("Lloyd's"), defendant North Shore Signature Homes, Inc ("NSSHI") seeks an Order, pursuant to CPLR 3124: (1) compelling the production of the entire unredacted file of Lloyd's Subscribing Policy No. APH 0100472 A/S/O Tal and Aharon Philipson in Action No. 1, including the coverage file and underwriting file regarding Claim No. PR 026371 in relation to the February 29, 2008 fire; (2) compelling Lloyd's to respond to NSSHI's discovery demands; or (3) in the alternative, compelling an *in camera* inspection and review of redacted portions of Lloyd's claim file regarding Policy No. APH 0100472 and Claim No. PR 026371. Defendant Richard Wischhusen ("Wischhusen") also moves for an Order (1) pursuant to CPLR 2308 compelling East Coast Claims, Inc. ("East Coast"), and Raphael & Associates ("Raphael"), Lloyd's local adjusters, to comply with his subpoena duces tecum; and (2) pursuant to CPLR 3124, compelling Lloyd's to comply fully with his discovery demands or, in the alternative, compelling Lloyd's to produce documents for *in camera* inspection.

On February 29, 2008, NSSHI and Wischhusen were contractors performing renovations to the premises of the Philipsons located at 44 Colony Lane in Manhasset when a fire broke out at the property, which was insured by Lloyd's. Action No. 1 was commenced by Lloyd's against NSSHI seeking damages for negligence in, *inter alia*, handling fireplace ash and embers, as a result of which Lloyd's, pursuant to its policy of insurance, was required to pay in excess of \$300,000 to its insureds for the repair and/or replacement of real and personal property. In Action No. 2, plaintiff State Farm

insured the premises which were immediately adjacent to the Philipsons' property and which were damaged in the fire. State Farm commenced an action as subrogee of Marilyn Salierno, the neighbor and its insured against the same defendants and, by Order dated October 12, 2010, (McCarty, III, J), the actions were directed to be joined for the purposes of discovery and trial.

Central to the defendant's request is the contention that they need disclosure to mount a potential defense of voluntary payment by Lloyd's as a bar to subrogation. The Lloyd's claim file, including all inspection and investigation reports and related documents, the subject of this motion, were originally requested in NSSHI's Combined Demands dated May 28, 2009 and in a letter dated June 20, 2010 to Lloyd's's counsel. In a Preliminary Conference ("PC") Stipulation and Order dated June 24, 2010, Lloyd's undertook to " provide the loss evaluation reports and photos in the underwriting file."

Lloyd's counsel, by letter dated June 24, 2010, provided numerous redacted documents in response to the discovery demands of NHSSI and Wischhusen. Both defendants contend that the responses are inadequate since they were not provided with Lloyd's claim or underwriting file, as well as and the subpoenaed documents from East Coast and Raphael. Since then, at various conferences and through several pieces of correspondence, the parties have been discussing whether there has been full disclosure and whether more disclosure is required with the plaintiff claiming privilege or inadmissibility on several grounds.

Lloyd's contends, in response to the motion, that East Coast and Raphael were hired by it and so, by extension, the attorney-client privilege applies to their reports as well. Additionally, Lloyd's anticipates, it states, that the defendants will submit a

summary judgment motion on the ground that the policy did not afford coverage to the Philipsons and that such a motion would, of necessity, be decided by this Court. Since the coverage communications, the redacted reports and the emails between Lloyd's and its local adjusters would be reviewed by the Court, such review, it argues, could prejudice its interest in this case.

It bears noting that this Court's Law Secretary, by letter dated March 30, 2011, had previously advised all motions were adjourned to April 12, 2011 for a compliance conference and had directed Lloyd's to appear on that date "with copies of all documents being sought by Defendants that have not been exchanged and all copies of the original un-redacted portions of the documents that were exchanged with redactions for an in-camera inspection by the Court." In the same letter, the Court further "recognize[d] that Plaintiff objects to the in-camera inspection based upon possible summary judgment motions that may be made by the defendant. The Court find this argument to be without merit. Should Defendants make such motions in the future, and Plaintiff believes that the Court has been prejudiced by reviewing the sought after documents (of course, that's assuming that the Court decides that Defendants are not entitled to these documents) the issue can be dealt with at that time."

Plaintiff Lloyd's further contends that the defendants erroneously rely on the voluntary payment principle as a potential bar to the recovery and hence as a basis for the disclosure. It states that the voluntary payment doctrine does not bar a subrogation against an active tortfeasor. In *Broadway Houston Mack Dev., LLC., v Kohl et al.*, 71 AD3d 937, the Second Department observed, citing *Gerseta Corp., v Equitable Trust Co of NY*, 241 NY 418, 426, that the equitable doctrine of subrogation is applicable to

cases where one party is compelled to pay the debt of a third person to protect his own rights or to save his own property. While the doctrine cannot be invoked to recover voluntary payments, a party can demonstrate that its payment was not voluntary by showing either a contractual obligation or the need to protect its legal or economic interests (*id*; see, also, *Hamlet at Willow Creek Dev. Co. LLC., et al v Northeast Land Dev. Corp. et al*, 64 AD3d 85). At this juncture of the litigation, there have been no factual determinations as to the relationships of the parties or of responsibility for the losses suffered. There are, however, questions of fact and law that remain unanswered. Without a review of the demanded documents, these cannot be resolved nor can the litigation proceed.

Finally, Lloyd's argument based on the potential for a summary judgment motion is without merit. It is axiomatic that a movant for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by submitting evidentiary proof *in admissible form* which demonstrates that absence of any material issues of fact requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562; *Winegrad v New York University Medical Center*, 64 NY 2d 851, 853). Once such showing is made, the opponent of the summary judgment motion must demonstrate *by admissible evidence* that factual issues exist requiring a trial of the action (*Zuckerman, supra*; *Winegrad, supra*).

Any documentary proof which forms the basis of a decision either to grant or to deny summary must, first and foremost, be admissible. The notion, therefore, that this Court will be unable, if it happens to review inadmissible documents, to disabuse itself

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of their contents reflects little confidence in a Court which conducts such review as a matter of daily routine, more often than not when deciding on issues of admissibility during a trial. Of course, plaintiff is free to take whatever action it deems appropriate if that situation arises in the future.

By stipulation dated April 12, 2011, simultaneous with the submission of the instant motions, counsel for plaintiff submitted four (4) sets of documents to the Court for in camera review. It was agreed that plaintiff would produce those documents required pursuant to the terms of this Order.

The Court finds that, based upon the papers submitted, plaintiff has produced all other requested documents, including the claims files of East Coast Claims, Inc. and Raphael Associates. The Court notes that it has not considered nor ruled on the motion seeking to enforce compliance with the subpoenas served upon East Coast Claims, Inc. and Raphael Associates since the motion papers do not indicate they were served with the Notice of Motion.

Plaintiff's claims of privilege (work product and/or proprietary information) concerning six pages from reports sent by East Coast Claims and Raphael Associates to Lloyd's do not preclude disclosure. See, *Royal Indemnity Co. v. Salomon Smith Barney, Inc.*, 4 Misc3d 1006(A). Therefore, plaintiff shall produce unredacted copies of documents Bates stamped P0025, 0147, 0182, 0183, 0201, and 0756.

Plaintiff's claim of attorney-client privilege concerning two opinion letters dated July 3, 2008 and September 5, 2008 must be upheld. The Court has reviewed the documents, which are clearly legal opinions regarding coverage. *All Waste Systems, Inc. v. Gulf Ins. Co.*, 295 AD2d 379. Plaintiff shall not produce these documents.

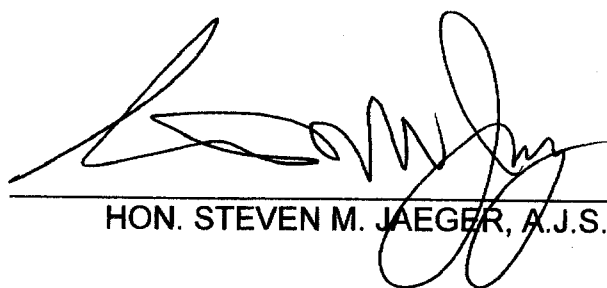
The third set of documents reviewed by the Court are various e-mails, notes, and other documents. Plaintiff claims these are communications among Lloyd's, its agents, and counsel concerning coverage and are privileged as work product, attorney-client, and confidential information. Upon review, plaintiff shall produce unredacted copies of the pages with Bates numbers P0184, 0738, 0763, 804, 806, and 812. *Royal Indemnity Co. v. Salomon Smith Barney*, 4 Misc3d 1006(A). All other documents in that set shall not be produced given the attorney-client privilege.

The final set of documents consists of "duplicates and invoices". To the extent that the documents contained therein have been voluntarily turned over or will be produced pursuant to this Order, plaintiffs shall provide unredacted copies of documents Bates numbered P0202, 0236, 0237, 0238, 0263, 0278, 0279, 0280, 0305, 716, 718, 731, 757, 758, 777, and 800.

Plaintiff shall not provide copies of the invoices marked as P824-836 as they are subject to the attorney-client privilege.

This Decision shall constitute the Order of the Court.

Dated: Mineola, New York  
May 24, 2011



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HON. STEVEN M. JAEGER, A.J.S.C.

**ENTERED**

MAY 26 2011

NASSAU COUNTY  
COUNTY CLERK'S OFFICE