

Hauc v Maryland Cas. Co.

2011 NY Slip Op 31746(U)

June 23, 2011

Sup Ct, NY County

Docket Number: 601753/08

Judge: Emily Jane Goodman

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

EMILY JANE GOODMAN

PRESENT:

PART 17

Index Number : 601753/2008

HAUC, FREDERICK

vs

MARYLAND CASUALTY

Sequence Number : 002

STRIKE A PLEADING

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 *is decided*

per attached

FILED

JUN 28 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/23/11

EMILY JANE GOODMAN ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

FILED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

JUN 28 2011

-----X
FREDERICK HAUC and FREDERICK HAUC
as assignee of the rights and obligations of
FRED GREENBERG,

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff,

-against-

Index No.: 601753/08

MARYLAND CASUALTY COMPANY and
ZURICH NORTH AMERICA,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C:

Plaintiff moves, pursuant to CPLR 3124 and 3126, to strike the defendants' answer or to compel disclosure. Defendants cross-move for a protective order, pursuant to CPLR 3103 (a), to prevent the disclosure of certain documents.

Background

The plaintiff in this case, Hauc, was also the plaintiff in a slip-and-fall personal injury case against non-party Fred Greenberg and two corporations, 20/20 Hotel Services (20/20) and Titan Resources, Inc. (Titan). Hauc's personal injury case against Greenberg, Titan and 20/20 was litigated in this court before the Honorable Justice Walter Tolub (the Underlying Action). It is undisputed that Greenberg was affiliated with both Titan and 20/20, and that he and Titan were insured by the defendants in this action, Maryland Casualty Company and Zurich North America (Maryland/Zurich or defendants) pursuant to an insurance policy or policies (the Policy).¹ Maryland/Zurich hired Bonner Kiernan Trebach and Crociata (the Bonner Firm) as defense

¹The Policy has not been provided to the court.

counsel for its insured in the Underlying Action.

By order dated March 17, 2006, Justice Tolub granted summary judgment, dismissing the Underlying Action as against Titan. Thereafter, defendants sent Greenberg a letter, dated May 17, 2006, disclaiming coverage. In defendants' May 17, 2006 letter, annexed as an exhibit to defendants' cross motion, defendants stated that 20/20, the remaining corporate defendant in the Underlying Action after the dismissal of Titan, was not covered because it was not added as a named insured under the Maryland policy until four months after Hauc suffered his personal injury accident occurred. The letter also states that defendants were withdrawing because Justice Tolub's decision indicated that the remaining claims in the Underlying Action against Greenberg were based solely on his capacity as owner of 20/20. Therefore, according to the May 17, 2006 letter, because 20/20 was not an insured when Hauc's accident occurred, Greenberg, as owner of 20/20, did not qualify as an insured for the potential liability.²

Thereafter, in the Underlying Action, Hauc and Greenberg entered into a consent judgment, dated March 2007, in the sum of \$2,000,000. In addition, Hauc asserts that Greenberg assigned any claims he had against his insurance companies, Maryland/Zurich, to Hauc.

In June 2008, Hauc commenced this action against the Maryland/Zurich. Hauc states that he brings this action pursuant to Insurance Law § 3420 (a) (2), as the judgment from the Underlying Action was entered and served upon defendants, Maryland/Zurich, but was not satisfied. New York Insurance Law § 3420 (a) (2) permits an injured party to sue the tortfeasor's insurer once the injured party has obtained a money judgment against the tortfeasor that remains

²The May 17, 2006 letter refers to a 2004 letter and states that that letter informed Greenberg that 20/20 was not an insured at the time of the Hauc accident and that Greenberg was only insured on the Policy in relation to his affiliation to Titan.

unsatisfied for at least 30 days after presentment to the insurer.

Hauc also bring this action as an assignee of Greenberg's rights under the Policy, and based on Maryland/Zurich's conduct in disclaiming in the Underlying Action. Hauc alleges that Greenberg assigned to him all of his rights in any potential bad faith, malpractice or other action against Maryland/Zurich.

In the first cause of action of Hauc's complaint here, brought pursuant to Insurance Law § 3420 (a) (2), Hauc alleges that defendants, Maryland/Zurich, failed to timely disclaim coverage to Greenberg, to give written notice of disclaimer to Hauc, an injured person, and have no valid coverage defense to the action. In the second cause of action, predicated on Greenberg's alleged assignment of claims, plaintiff alleges that Maryland/Zurich undertook Greenberg's defense without validly reserving their rights or disclaiming coverage under the Policy, and that defendants' May 17, 2006 disclaimer letter was untimely and did not comply with Insurance Law § 3420. Plaintiff further alleges that Maryland/Zurich managed the defense of the Underlying Action in bad faith, but, other than the alleged wrongful disclaimer, does not allege any facts concerning conduct by the defendants that was in bad faith.

In the third cause of action, plaintiff alleges that Greenberg relied on defendants' good faith, as they controlled his defense in the Underlying Action, and was prejudiced by their delay in disclaiming coverage, and that defendants acted in bad faith in handling Greenberg's defense by placing their interests above that of Greenberg. Plaintiff also asserts that defendant's management and defense of Greenberg's claim violated General Business Law § 349.

Maryland/Zurich denies the allegations of the complaint. Defendants also assert affirmative defenses that include: (1) that 20/20 was not an insured under the Policy and that

coverage for Greenberg cannot be created by estoppel; and (2) that the amount of the consent judgment in the Underlying Action is unreasonable and excessive.

On September 29, 2008, plaintiff served a notice of inspection and discovery upon defendants (Plaintiff's Notice), seeking a complete copy of Maryland/Zurich's claim file pertaining to the Underlying Action (Demand No. 2) and all documents pertaining to Greenberg's claim for coverage in the Underlying Action, including e-mails, examiners' notes and internal correspondence (Demand No. 4) (Pl. Mov. Aff., Exh. E). In response to Plaintiff's Notice, defendants served an untimely document objecting to the demands as irrelevant, vague, overly broad and unduly burdensome, and as seeking materials protected by attorney-client privilege, or work product doctrine or prepared in anticipation of litigation. Specific to Demand No. 4, defendants asserted that the claim file notes were irrelevant to this litigation which, they stated, concerns contract interpretation. Defendants noted that they would provide a privilege log under separate cover.

On May 7, 2009, a discovery conference was held at which defendants were ordered to provide responses to Plaintiff's Notice within 30 days. In addition, plaintiff was ordered to respond to defendants' request for interrogatories within 30 days of defendants' response.

Defendants served a supplemental response on August 28, 2009. In this response, defendants provided approximately 39 pages of dated computer notes. On that same date, defendants served a privilege log (the Privilege Log). According to the Privilege Log, based on attorney-client privilege, defendants did not provide three items that are at issue here. The first, is a nine-page letter from Ignatius John Melito, Esq. to Jon Connor of Zurich, dated May 2, 2006, regarding "Hauc's claims for coverage" (Item No. 6). The second is a two-page letter, dated

April 20, 2006, from Jon Connor to Ignatius John Melito, regarding “analysis of Hauc’s claims for coverage” (Item No. 16) (Pl. Mov. Aff., Exh. I, at 2-3). The third is a claim note entry, dated May 17, 2006, of Jon Connor of Zurich, regarding “coverage counsel recommendations for Hauc claim” (Item No. 19) (*id.*). For convenience, the court will refer to these three items as the Privilege Log Items.

At a November 5, 2009 discovery conference, defendants were ordered to respond, within 30 days, to plaintiff’s request for claim file correspondence. Plaintiff had, only on the day prior to the conference, November 4, 2009, sent defendants a letter stating that numerous pages of the computer claim log were missing, that it was not in chronological order and that the claims file correspondence that predated the defendants’ May 17, 2006 disclaimer letter was not privileged. At the November 5, 2009 conference, plaintiff was also ordered to respond to defendants’ request for interrogatories within 30 days, as they had also previously been ordered to do approximately six months before. Motion practice, brought by plaintiff to compel, was resolved with a discovery conference order dated November 5, 2009.

On January 14, 2010, defendants were again ordered to respond to plaintiff’s request for the claim file correspondence within 30 days. In addition, defendants were, for the first time, ordered to respond to plaintiff’s November 4, 2009 letter. Plaintiff was again ordered to respond to defendants’ request for interrogatories. Defendants responded, by letter dated May 4, 2010, that they would not provide a further discovery response to plaintiff’s demands except upon court order. Defendants also declined to collate and organize Maryland/Zurich’s notes and asserted that correspondence between Maryland/Zurich and counsel retained to represent Greenberg in the Underlying Action was not subject to disclosure.

On May 5, 2010, as they had also previously done, the parties brought their dispute concerning the alleged missing pages of the computer claim log and the document privilege claims to the attention of this court at a discovery conference. Counsel were informed that the resolution of these issues, which required briefing and a review of case law not readily done in a crowded courtroom setting, would not be entertained at a discovery conference. This motion ensued.

Discussion

Of course, a party is entitled to full disclosure of matter material and necessary in the prosecution of an action (*Diamond State Ins. Co. v Utica First Ins. Co.*, 37 AD3d 160, 161 [1st Dept 2007]), regardless of burden of proof (*Anonymous v High School for Envtl. Studies*, 32 AD3d 353, 358 [1st Dept 2006] [“It is beyond cavil that New York has long favored open and far-reaching pretrial discovery (citation and quotation marks omitted)”]). “The words ‘material and necessary’ as used in the statute are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial” (*Anonymous*, 32 AD3d at 358). “The word ‘evidence’ [in CPLR 3101] has not been construed in a restrictive sense but rather to mean evidence required in preparation for trial” (*Baxter v Orans*, 63 AD2d 875, 875 [1st Dept 1978]).

“The burden of showing that the disclosure sought is improper is upon the party seeking the protective order, the [defendants] herein” (*Roman Catholic Church of Good Shepherd v Tempco Sys.*, 202 AD2d 257, 258 [1st Dept 1994]). A court is generally precluded from inquiring into the propriety of discovery requests, where a party has failed to timely object to production (*Anonymous*, 32 AD3d at 358-59). However, production in response to demands that

are palpably improper will not be compelled despite a party's failure to timely object (*Lea v New York City Transit Authority*, 57 AD3d 269, 269 [1st Dept 2008]). A party's production of materials that are privileged as attorney-client communications or constitute attorney work product, or as materials prepared for litigation also will not be compelled despite a party's failure to timely object (*see D'Alessio v Nabisco, Inc.*, 123 AD2d 816, 816 [2d Dept 1986]; *Lazan v Bellin*, 95 AD2d 751, 751 [1st Dept 1983]). The burden of establishing that the documents sought are covered by a certain privilege rests on the party asserting the privilege and the protection claimed must be narrowly construed (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]; *see Bombard v Amica Mut. Ins. Co.*, 11 AD3d 647, 648 [2d Dept 2004] [citation omitted] [“The party asserting the privilege provided by CPLR 3101 (d) bears the burden of demonstrating that the material it seeks to withhold is immune from discovery by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation”]).

Plaintiff complains about the manner in which the defendants' computer claim log was produced and seeks relief based on what it deems to be missing pages from it. “Whenever a person is required pursuant to such notice or order to produce documents for inspection, that person shall produce them as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request” (CPLR 3122 [c]).

Plaintiff argues that pages of notes from the computer claim log have not been produced, including entries from May 17, 2005 through May 16, 2006, during which time the Underlying Action was being actively litigated. However, defendants' counsel asserts that defendants have produced what they have. Defendants' cover letter for its production states that the documents

are in response to Demand No. 4, and thus, the production was organized to correspond to the categories in the Plaintiff's Demand (CPLR 3122 [c]). Plaintiff has not yet conducted the deposition of defendants and the court has no basis on which to determine that defendants' counsel's representation is not accurate or truthful. In order to determine that the documents have been willfully withheld, it is necessary to demonstrate that these documents are in defendants' possession. Plaintiff complains that, in light of the "missing pages" (Pl. Reply Aff., at 9), defendant's failure to provide a sworn affidavit that they have provided copies of everything they have demonstrates defendants' willful non-production. However, plaintiff has not briefed the issue of whether or not he is entitled to a client affidavit in these circumstances, and the court declines to do so. Plaintiff is correct that a litigant may not ignore court orders with impunity (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]) and, as he also not complied with several discovery orders, would be wise to heed his own advice. Determinative here, however, is that plaintiff has not demonstrated that the responses defendants have provided did not meaningfully address plaintiff's requests (*id.*), that defendants actually possess the document(s) that plaintiff seeks, or that defendants were previously ordered by the court to provide a good faith search affidavit.

The parties' second discovery dispute concerns documents and communications between defendants and the Bonner Firm. As previously mentioned, Maryland/Zurich hired the Bonner Firm as defense counsel for its insured in the Underlying Action. Thus, the Bonner Firm represented Greenberg in the Underlying Action. In cases where an insured party asserts a bad faith claim against his or her insurance company, and seeks disclosure of the communications and work product of counsel that defended that insured in the underlying action, the First

Department has determined that attorney-client and attorney work product privileges do not prevent disclosure to the insured (*Woodson v American Tr. Ins. Co.*, 280 AD2d 328 [1st Dept 2001] [attorney's client is the insured and therefore the privilege belongs to the insured rather than the insurer]; *Zurich Ins. Co. v State Farm Mut. Auto. Ins. Co.*, 137 AD2d 401, 402 [1st Dept 1988]; see also *Colbert v Home Indem. Co.*, 24 AD2d 1080 [4th Dept 1965], *affg* 45 Misc 2d 1093 [Sup Ct, Monroe County 1965]).

Despite that 20/20 is not mentioned in the complaint, defendants argue that the lone issue in this litigation is whether defendants correctly and properly withdrew coverage to Greenberg and 20/20,³ that plaintiff is only entitled to discovery relevant to the bad faith claim, and that the claim is meritless. Defendants further argue that the Bonner Firm discovery is not relevant because the issue in this case is whether defendants had the right to withdraw their coverage to Greenberg under the terms of the Policy. Defendants maintain that Greenberg and 20/20 do not qualify as insureds under the Policy, and that Hauc may not, through this action, attempt to use discovery as a vehicle to determine whether or not Greenberg had other claims against defendants.⁴ Defendants' relevance argument is unpersuasive where they did not timely object to the disclosure in the original demand (*Anonymous*, 32 AD3d 353, *supra*), and have not timely met discovery deadlines in court orders. Additionally, the Court cannot say that the Bonner Firm

³Defendants characterize plaintiff's complaint as alleging that Maryland improperly withdrew its defense of Greenberg and 20/20 in the Underlying Action and argue that plaintiff's allegations solely pertain to defendants' decision to limit their defense to Greenberg and 20/20 and not Greenberg and Titan. However, neither the complaint nor the plaintiff's papers mention 20/20.

⁴Plaintiff states that Greenberg assigned *all* of the claims he might have against defendants. For purposes of this motion, however, the only claims at issue are those included in, or fairly stated by, the complaint.

discovery will not lead to relevant evidence.

Defendants also argue that plaintiff is not entitled to the Bonner Firm's communications because plaintiff has no concrete evidence that the Bonner Firm had any involvement in the coverage determination. Defendants state that they retained separate counsel, Melito & Adolfsen (M&A), to analyze the coverage issue (Lewbel Reply Aff., at 6). M&A is counsel for plaintiff in this action. Defendant offer that plaintiffs may inquire at a deposition as to whether the Bonner Firm had any involvement in the coverage analysis or the decision to withdraw coverage of Greenberg and 20/20 in the Hauc Action.

Discovery is about obtaining information and evidence, and it is defendants that must demonstrate "that the disclosure sought is improper" (*Roman Catholic Church of Good Shepherd*, 202 AD2d at 258). By arguing that plaintiff must provide "concrete evidence" of the Bonner Firm's involvement in defendants' coverage determination in order to obtain disclosure, defendants attempt to improperly shift the burden to plaintiff to show that the disclosure sought is proper, and exists. If, as defendants appear to contend, they have no documents responsive to plaintiff's demand concerning the Bonner Firm, then it follows that they will not have any documents to produce. However, defendants are not entitled to a protective order on the ground that plaintiff lacks evidence to support his discovery request.

Defendants argue that Hauc is not entitled to disclosure of the Bonner Firm correspondence because defendants are contesting damages, that is, the \$2 million consent judgment entered into by Hauc and Greenberg in the Underlying Action. Defendants maintain that their claim file contains correspondence exchanged between the Bonner Firm and defendant Maryland during the pendency of the Underlying Action that includes evaluation and comment

on Hauc's damages, and that production of the Bonner Firm's communications will compromise defendants' ability to contest damages.

"In the tort case in which the defendant is represented and defended by an attorney retained by the defendant's liability insurer, the insurer's whole file of the case qualifies as litigation material and is conditionally immune" (Siegel, NY Prac § 348 [Materials prepared for litigation]; *Grotallio v Soft Drink Leasing Corp.*, 97 AD2d 383 [1st Dept 1983] ["The contents of an insurer's claim file which have been prepared for litigation against its insured are immune from disclosure (*Kandel v Tocher*, 22 AD2d 513 [1st Dept 1965]) . . ."]). This rule applies only in the action in which the insurer has represented the insured (Siegel, NY Prac § 348), and does not apply when the insurer is representing itself against its insured. In the Underlying Action, Greenberg's entire file would have been conditionally immune from disclosure to Hauc, as the two were adversaries therein. In this case, however, Hauc's action is brought not only for his own alleged claim, pursuant to Insurance Law § 3420 (a) (2), but for Greenberg's claim or claims against defendants. There is no dispute that Greenberg was defendants' insured and would be entitled to materials from his former attorneys, the Bonner Firm, and would be entitled to materials in his claims file in a legal action against the defendants.⁵ Here, Hauc steps into Greenberg's shoes, and thus may also obtain these materials. While defendants argue that the Bonner Firm was not Greenberg's counsel at the time that the consent judgment was entered, they also do not demonstrate, or even assert, that any damages evaluation done by the Bonner

⁵Defendants cite to *Kandel* (22 AD2d 513, *supra*) for the proposition that in a tort action, parties adverse to the insured are not entitled to receive materials created by the liability insurer in handling claims made against the insured, but Greenberg was not an "adverse party" in the Underlying Action, he was the insured.

Firm during the pendency of the Hauc claim was performed after the Bonner Firm was no longer Greenberg's counsel. Moreover, evaluating the extent of potential liability of the insured, which would necessarily include assessment of damages, is within the ordinary course of business of an insurance company, and therefore is not privileged (*Westhampton Adult Home v National Union Fire Ins. Co. of Pittsburgh Pa.*, 105 AD2d 627, 628 [1st Dept 1984]). In light of the foregoing, defendants are ordered to turn over the withheld documents responsive to plaintiff's demand, regardless of whether or not these documents concern communications with or from the Bonner Firm.⁶

Plaintiff seeks copies of the three Privilege Log Items. Defendants maintain that these items are correspondence between counsel of record in this action, M&A, and defendants, and provide coverage opinion with analyses of defendants' rights and obligations to Greenberg, Titan and 20/20 after the court granted summary judgment to Titan in the Underlying Action. Defendants maintain that this is not a situation where counsel performed investigation for the insurer on the accident at issue, but that the letters are pure attorney-client communications by M&A, as counsel for defendants, concerning this litigation, demanded by plaintiff as an attempt to invade attorney-client and work product privileges. Plaintiff counters that these documents were made while defendants were defending Greenberg in the Underlying Action, and were made within defendants' regular course of business in making a determination as to whether or not to disclaim coverage to their insured.

In the context of determining whether privilege applies, the court is, of course, not bound by parties' characterizations or label of the nature of the contents of a document (*Spectrum Sys.*,

⁶The exception to this order concerns the Privilege Log Items, discussed separately below.

78 NY2d at 381). In addition, the First Department has noted that the better practice is for a trial court to conduct an in camera inspection of documents when determining whether protection from disclosure is warranted (*id.*). The court will not make any determination as to the nature of the Privilege Log Items and whether or not they are protected, or whether they contain investigatory materials or communications that would be in the insurer's regular course of business, without reviewing the documents.

Therefore, defendants are directed to submit copies of the Privilege Log Items to this court, within 30 days after service of this order after entry, for in camera inspection. With this submission, M&A should also provide a copy of its retainer agreement with defendants and a cover letter specifying that the Privilege Log Items and the retainer are being provided to the court pursuant to this Decision and Order. Plaintiff should be provided a copy of the cover letter only. After review, the court will make a determination as to the nature of these documents and whether they are subject to disclosure in this case. Either plaintiff or defendant may move to renew this portion of the motion after the defendants' submission of the documents to the court.

Finally, while defendants have missed some discovery deadlines, as has plaintiff, they have also produced documents, other than those for which they claim privilege. This record, however, does not reveal occasion for recourse to the harsh remedy of striking a pleading.

Conclusion

Accordingly, it is

ORDERED that plaintiff's motion to compel is granted to the extent that defendants are to supplement their January 28, 2009 discovery response to include copies of any correspondence or other documents between or among defendants and the law firm of Bonner Kiernan Trebach


and Crociata concerning the action captioned *Frederic Hauc v Titan Resources, Inc.*, Index No. 121501/03 [Supreme Court, NY County]) within 30 days of service of this order with notice of entry by plaintiff, and the motion is otherwise denied without prejudice; and it is further

ORDERED that defendants' motion to protect is granted to the extent that defendants are to submit to the court for in camera inspection the documents referenced in numbers 6, 16 and 19 of defendants' privilege log dated August 28, 2009 within 30 days after service of this order with notice of entry by plaintiff, and is otherwise denied without prejudice in accordance with the directives in the decision above.

Dated: June 23, 2011

This Constitutes the Decision and Order of the Court.

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED

JUN 28 2011

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