

**General Motors Acceptance Corp. v New York Cent.
Mut. Fire Ins. Co.**

2011 NY Slip Op 31942(U)

June 30, 2011

Sup Ct, NY County

Docket Number: 109668/2006

Judge: Joan M. Kenney

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

PRESENT: JOAN M. KENNEY
J.S.C. Justice

PART 8

General Motors Acceptance Corporation
and American Automobile Insurance Company,

INDEX NO. 109668/06

MOTION DATE 002

MOTION SEQ. NO. 10/14/11

MOTION CAL. NO. _____

- v -

New York Central Mutual Fire Insurance
Company,

The following papers, numbered 1 to 37 were read on this motion to Strike answer

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

- 26

27 - 36

37

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

FILED

JUL 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 30, 2011

JOAN M. KENNEY J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8**

-----X
General Motors Acceptance Corporation and American
Automobile Insurance Company,

Plaintiffs,

-against-

New York Central Mutual Fire Insurance Company,

Defendant.
-----X

DECISION AND ORDER
Index Number.:109668/2006
Motion Seq. No.: 002

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to strike defendant's answer.

FILED

Papers

Notice of Motion, Affidavits and Exhibits
Affirmation in Opposition & Exhibits
Reply Affirmation

JUL 14 2011

Numbered

1-25
26-33
34

NEW YORK
COUNTY CLERK'S OFFICE

In this action seeking damages for defendants' purported bad faith settlement negotiations, plaintiffs seek an Order, pursuant to CPLR 3216, striking defendant's answer for spoliation of evidence. Alternatively, plaintiffs seek an Order granting a negative presumption at trial as to what the missing evidence would have demonstrated.

FACTUAL AND PROCEDURAL BACKGROUND

Briefly, it is alleged in the complaint that defendant, New York Central Mutual Fire Insurance Company (NYCM) insured plaintiff, General Motors Acceptance Corporation (GMAC), under a primary insurance policy for claims brought by non-party, Julia Sette (Ms. Sette) against GMAC in a personal injury lawsuit entitled, *Julia Sette v. Lesly Appleby, Jamie Stevenson, Maria Clayton and GMAC Financial Services* [Civil Court, County of New York, Index #146 TSN 2001] (the underlying action).

Defendant NYCM's primary insurance policy provided GMAC with a \$300,000.00 primary

insurance coverage and plaintiff, American Automobile Insurance Company (AAIC) provided GMAC with insurance coverage in excess of the \$300,000.00 primary insurance coverage afforded to GMAC by NYCM. In sum, GMAC was an additional insured under defendant NYCM's insurance policy and AAIC was GMAC's excess insurance carrier.

The trial of the underlying action was bifurcated. On or about December 6, 2000, a jury found GMAC liable for damages and on or about April 10, 2003, a jury returned a verdict against GMAC in the amount of \$1,500,000.00.

It is plaintiffs' contention that during the time period between the liability verdict and the damages verdict in the underlying action, defendant, NYCM, refused to make any settlement offer or engage in settlement negotiations with the attorney for Ms. Sette despite plaintiffs' request that the underlying action be settled. Plaintiffs aver that NYCM had an opportunity to settle by payment of less than the amount of its primary insurance coverage; by payment of the full amount of its primary insurance coverage; and/or by payment of an amount higher than the amount of its primary insurance coverage, to which plaintiffs offered to contribute the excess above the NYCM policy amount if NYCM paid its full policy amounts.

Plaintiffs assert that defendant, NYCM, acted in bad faith and in violation of its duties and obligations to plaintiffs in failing to settle the underlying action. As a result of this bad faith negotiation on the part of defendant, plaintiffs claim they were "forced to pay \$1,200,000.00 to Ms. Sette" (see complaint paragraph 12). On or about July 12, 2006 plaintiffs commenced the within lawsuit against defendants seeking to recover the monies they paid Ms. Sette.

On or about October 4, 2007, plaintiffs served defendant with a Notice for Discovery and Inspection in this matter (the discovery demands). Specifically, paragraph one of the discovery

demands¹ states, in pertinent part, that defendant was to provide:

“Full and complete copy of [defendant, NYCM’s] claims file for the underlying matter of *Sette v Appleby and GMAC*, including, but not limited to, any and all emails relating to the claim, all computer log note entries, any and all committee/conference/roundtable notes or reports ... and all paper and electronic materials kept in relation to this action;”

Plaintiffs claim that defendant did not comply to said discovery demand and on November 15, 2007, Justice Kornreich issued a preliminary conference order which stated, in pertinent part, that the “[p]arties [are] to respond to outstanding discovery demand w/in 60 days” (the 1st Court Order).

On July 31, 2008, Justice Kornreich issued a compliance conference order stating that “defendant did not respond within 30 days of the April 30, 2008 order to plaintiffs’ D&I demand and no EBT’s [was] held as per [the] PC order of 11/15/07. Defendant’s response to plaintiffs’ D&I [is] incomplete. Defendant shall comply by affidavit stating it does not have possession, custody or control of records that it claims it cannot produce because they do not exist” (the 2nd Court Order).

By affidavit dated August 6, 2008 from Diana Wildey (Ms. Wildey), who at the time was President of NYCM, Ms. Wildey stated that NYCM “does not have possession, custody or control of committee/conference/roundtable notes ... guidelines or protocols ... training manuals or protocols ... [or] outside attorney panel guidelines or protocols”

On or about April 15, 2009, plaintiffs served defendant with yet another Notice for Discovery and Inspection, seeking disclosure of the following pertinent items:

1. [t]ranscriptions of committee meeting audio recordings regarding the *Julia Sette v. Appleby et al.*, matter maintained by NYCM employee, David Vibbard;
2. Lotus Notes as testified to by NYCM witness, Beth Menuetz, maintained by claims personnel concerning the *Julie Sette v Appleby, et al.*, matter; and

¹It is noted that these discovery demands sought other disclosure relief which is not the subject of the within application.

3. All correspondence, between defendant, NYCM and Baxter & Smith (now known as Baxter, Smith & Shapiro) regarding the *Julia Sette v. Appleby, et al* case, up to the time of the commencement of this (GMAC, et ano v. NYCM) action; ...

On or about July 7, 2009, Ms. Wildey again provided an affidavit wherein she stated that NYCM does not have possession, custody or control of audio recordings of NYCM committee meetings held at which the underlying action was discussed.

There can be no dispute that months before this last affidavit from Ms. Wildey, a NYCM former employee, Beth Menuez, testified at her deposition on April, 7, 2009, that audio recordings and transcriptions of committee meetings regarding the underlying action, were made (see Menuez Deposition Transcript page 38, Exhibit "G" to the moving papers). Ms. Menuez also testified that she did not know what happened to these items after she left her employ with NYCM.

ARGUMENTS

Plaintiff argues that defendant's answer should be stricken as it is clear that defendant willfully failed to disclosed demanded documents. Alternatively, plaintiff maintains that a negative inference should be allowed at trial for plaintiff's non-compliance with disclosure due to spoliation of evidence.

Defendant argues that all disclosure is complete and they have complied with discovery demands.

DISCUSSION

CPLR 3126, provides for a range of options for a court to utilize in addressing a parties' refusal to comply with a discovery order, or wilful failure to disclose information the court finds ought to have been disclosed. Essentially, CPLR 3126 is an enforcement mechanism, giving the court power to impose penalties for failure to obey a court order (*Patricia Postel et al. v New York*

University Hospital, 262 AD2d 40 [1st Dept 1999]). It is noted, however, that striking the pleadings is a drastic measure and plaintiff has failed to demonstrate that defendants' non-compliance was willful, contumacious or due to bad faith (see *Shirley Jones v New York City Transit Authority, et al.*, 2002 NY App Div Lexis 3605 [1st Dept 2002]).

Neither of the two prior Court orders presented are specific enough with respect to the undisclosed "committee/conference/roundtable notes" and/or "[t]ranscriptions of committee meeting audio recordings." Rather, the 1st Court Order directs BOTH parties to comply with outstanding discovery demands, while the 2nd Court Order directs that defendant respond to plaintiffs' discovery and inspection demands - which defendant ultimately did when it provided affidavit(s) attesting that the demanded discovery was not in its "possession, custody or control." As such, the Court Orders presented cannot form a basis for striking defendant's pleadings at this juncture.

Nevertheless, plaintiff's motion raises some troubling facts regarding defendant's non-disclosure. All said, defendant cannot hide behind self serving affidavits to change deposition testimony which clearly set forth the undeniable assertion that transcripts regarding the pertinent committee meetings were made. Defendant's further attempts to claim that several data entries it provided is the actual disclosure sought by plaintiffs, is wholly without merit. Defendant has not claimed to search for any of the requested documents because its position has always been that none existed. Even after defendant's own employee testified to its existence, however, defendant has still refused (without any reasonable excuse for doing so) to make any efforts to locate the requested documents that their own witness claims existed. Such behavior may warrant granting plaintiff's alternative relief seeking a negative presumption as to the contents of the missing documents and a preclusion order against defendant. Accordingly, it is

ORDERED that plaintiff's motion to strike the answer, is denied; and it is further


ORDERED that defendant is hereby precluded from offering any evidence in opposition to the plaintiff's claim of liability UNLESS the following documents:

1. [t]ranscriptions of committee meeting audio recordings regarding the *Julia Sette v. Appleby et al.*, matter maintained by NYCM employee, David Vibbard;
2. Lotus Notes as testified to by NYCM witness, Beth Menez, maintained by claims personnel concerning the *Julie Sette v Appleby, et al.*, matter; and
3. All correspondence, between defendant, NYCM and Baxter & Smith (now known as Baxter, Smith & Shapiro) regarding the *Julia Sette v. Appleby, et al* case, up to the time of the commencement of this (*GMAC, et ano v. NYCM*) action

are received by plaintiff's counsel within 30 days from service of a copy of this order with notice of entry and an affirmation of compliance by defendant's counsel is filed with the Clerk of the Court and a copy thereof is served upon counsel for plaintiff; and it is further

ORDERED that failure to comply with this Order shall result in defendant's preclusion at trial as to those matters not disclosed as directed herein and an adverse inference at trial with respect to the missing documents which are the subject of the within motion application.

DATED: June 30, 2011

ENTER:


 Hon. Joan M. Kenney
 J.S.C.

FILED
JUL 14 2011
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