SHORT FORM ORDER

INDEX No. 09-38968

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 9-6-11
ADJ. DATE 9-27-11
Mot. Seq. # 004 - MotD
005 - MotD
006 - MotD
007 - MotD

AMERICAN AUTOMOBILE INSURANCE COMPANY a/s/o/ Greg and Deborah Wasser,

Plaintiff,

- against -

ASHTON CONSTRUCTION, INC., SAFEWAY ELECTRICAL CONTRACTORS, INC., ELM AIR CONDITIONING CORP., and E & M HARDWOOD FLOORING CORP.,

Defendants.

CANTER LAW FIRM, P.C.
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Ashton Construction, Inc. [#004], dated August 12, 2011, and supporting papers 1 -15; (2) Notice of Motion/Order to Show Cause by the defendant Elm Air Conditioning Corp. [#005], dated August 19, 2011, and supporting papers 29 - 32; (3) Notice of Motion/Order to Show Cause by the defendant E&M Hardwood Flooring Corp. [#006], dated August 30, 2011, and supporting papers 37 - 42; (4) Notice of Motion/Order to Show Cause by the defendant Safeway Electrical Contractors Inc.[#007], dated August 30, 2011, and supporting papers 45 - 48; (5) Affirmation in Opposition by the plaintiff, dated August 26, 2011, and supporting papers 16 - 25; (6) Affirmation in Opposition by the plaintiff, dated August 29, 2011, and supporting papers 33 - 34; (7) Affirmation in Opposition by the plaintiff, dated September 1, 2011, and supporting papers 43 - 44; (8) Reply Affirmation

by the defendant Ashton Construction, Inc., dated September2, 2011, and supporting papers 26 - 28; (9) Reply Affirmation by the defendant Elm Air Conditioning Corp., dated September 20, 2011, and supporting papers 35 - 36; (10) Other in camera submission by the plaintiff 49 -51 (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that this motion by the defendant Ashton Construction, Inc. for an order pursuant to CPLR 3126 compelling the plaintiff to disclose certain reports and materials, or in the alternative, precluding the plaintiff from presenting evidence and/or testimony at trial is granted to the extent that the plaintiff is directed to deliver to the movants the report of its cause and origin investigator dated March 6, 2007,and a list of all items said investigator moved within, or removed from, the home of the plaintiff's subrogor within 15 days of the service of a copy of this order with notice of entry, and is otherwise denied; and it is further

ORDERED that this motion (incorrectly designated as a cross motion) by the defendant Elm Air Conditioning Corp. for an order pursuant to CPLR 3126 compelling the plaintiff to disclose certain reports and materials, or in the alternative, precluding the plaintiff from presenting evidence and/or testimony at trial is granted to the extent that the plaintiff is directed to deliver to the movants the report of its cause and origin investigator dated March 6, 2007, and a list of all items said investigator moved within, or removed from, the home of the plaintiff's subrogor within 15 days of the service of a copy of this order with notice of entry, and is otherwise denied; and it is further

ORDERED that this motion (incorrectly designated as a cross motion) by the defendant E&M Hardwood Flooring Corp. for an order pursuant to CPLR 3126 compelling the plaintiff to disclose certain reports and materials, or in the alternative, precluding the plaintiff from presenting evidence and/or testimony at trial is granted to the extent that the plaintiff is directed to deliver to the movants the report of its cause and origin investigator dated March 6, 2007, and a list of all items said investigator moved within, or removed from, the home of the plaintiff's subrogor within 15 days of the service of a copy of this order with notice of entry, and is otherwise denied; and it is further

ORDERED that this unopposed motion (incorrectly designated as a cross motion) by the defendant Safeway Electrical Contractors, Inc. for an order pursuant to CPLR 3126 compelling the plaintiff to disclose certain reports and materials, or in the alternative, precluding the plaintiff from presenting evidence and/or testimony at trial is granted to the extent that the plaintiff is directed to deliver to the movants the report of its cause and origin investigator dated March 6, 2007, and a list of all items said investigator moved within, or removed from, the home of the plaintiff's subrogor within 15 days of the service of a copy of this order with notice of entry, and is otherwise denied.

This is an action to recover damages sustained by the plaintiff, as insurer and subrogee of Greg Wasser and Deborah Wasser, after it was obligated to pay its insureds' claims arising from a fire in the basement of their single-family home located at 60 Swans Neck Lane, Water Mill, New York. The fire,

which occurred on November 17, 2006, started shortly after the home was renovated by the defendants. The plaintiff alleges that the fire originated in the basement ceiling of the Wasser's home, above the HVAC system, due to an electrical fault and electrical arcing in non-metallic cables as a result of penetration by a nail and/or staple installed during the renovation. The defendant Ashton Construction, Inc. (Ashton) was the general contractor for the renovation. The defendant Elm Air Conditioning Corp. (Elm) was responsible for the installation of the HVAC system. The defendant E&M Hardwood Flooring Corp. (E&M) installed the flooring above the location were the nail or staple allegedly caused this fire. The defendant Safeway Electrical Contractors, Inc. (Safeway) completed the electrical work for the renovation.

It is undisputed that the plaintiff's claims adjuster retained Connell, Nolan Associates, Inc. (Connell), a fire cause and origin firm, to inspect the Wasser home on November 20, 2006. On or about November 21, 2006, the plaintiff retained Craig/is Ltd. (Craig) to represent its subrogation interests in this matter. By letters dated November 22, 2006 or November 27, 2006, depending on the individual defendant, Craig notified the defendants of their possible involvement in the matter, and their "opportunity to participate in the investigation of the loss." Thereafter, the parties conducted a joint inspection of the Wasser home on December 14, 2006. The defendants later became aware that the plaintiff's cause and origin expert had previously inspected the Wasser home, and each served a notice of discovery and inspection for discovery relative to that inspection.

The plaintiff has refused to exchange, among other things, Connell's report dated March 6, 2007, which includes its finding regarding its inspection on November 20, 2006. Ashton now moves for an order compelling the plaintiff to disclose all reports and materials prepared by Connell, all findings of Connell, and a list of all items that Connell moved at and/or removed from the Wasser residence, or in the alternative, precluding the plaintiff from presenting evidence and/or testimony at trial. The plaintiff asserts that the discovery sought is privileged and not discoverable because it was prepared after the decision to pay the Wasser's claim, after subrogation counsel was retained, and at the direction of plaintiff's subrogation counsel.

It is well settled that the party asserting the statutory privilege for material prepared in anticipation of litigation "bears the burden of demonstrating that the material it seeks to withhold is immune from discovery (citation omitted) 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" (***Bombard v Amica Mut. Ins. Co.***, 11 AD3d 647, 783 NYS2d 85 [2d Dept 2004]; *see also* ***Koump v Smith***, 25 NY2d 287, 303 NYS2d 858 [1969]; ***New York Mar. & Gen. Ins. Co. v. Sirius Am. Ins. Co.***, 83 AD3d 1019, 923 NYS2d 330 [2d Dept 2011]; ***Caruso v. Northeast Emergency Med. Assocs., P.C.***, 85 AD3d 1502, 926 NYS2d 702 [3d Dept 2011]). Generally, reports which an insurer utilizes in the process of deciding whether to pay or reject a claim are not privileged as they are deemed part of the regular business of an insurance company (***Rosario v. North Gen. Hosp.***, 40 AD3d 323, 835 NYS2d 181 [1st Dept 2007]; ***Landmark Ins. Co. v Beau Rivage Rest.***, 121 AD2d 98, 509 NYS2d 819 [2d Dept 1986]; ***Millen Indus. v American Mut. Liab. Ins. Co.***,37 AD2d 817, 324 NYS2d 930 [1st Dept 1971]). In addition, said reports are discoverable even if "mixed/multi-purpose" reports, used to determine coverage of the claim and motivated, in part, by the potential for litigation (***Bombard v Amica Mut. Ins. Co.***, *supra*).

In matters involving claims by its insured, the determining factor in deciding whether an expert's report was prepared in the regular course of business or exclusively for anticipated litigation is the date that the insurer made a firm decision to disclaim coverage, rather than the date the insurer has reason to investigate the legitimacy of the loss (***Landmark Ins. Co. v Beau Rivage Rest.***, *supra*). Likewise, in this action, the relevant date is the date that the plaintiff made the firm decision to litigate its subrogation claims herein. Nor is the date that the plaintiff retained a representative to investigate the possibility of seeking subrogation, by itself, sufficient to establish that it has made a firm decision to litigate the issue (***Landmark Ins. Co. v Beau Rivage Rest.***, *id.*).

The plaintiff's claims adjuster, Joseph Dougherty(Dougherty), was deposed on March 3, 2011. He testified that he retained Connell as the cause and origin expert on this claim, and that he arranged to meet Connell at the Wasser home on November 20, 2006. After the inspection, the Connell representative indicated that the fire started in the basement soffit, and that "he suspected that wiring was the cause of the fire, but beyond that he did not know." Dougherty stated that he believes American Fire, a company hired by the plaintiff to do emergency clean up, was present at the Wasser home on the date of his inspection. He did not remove any wires or material from the home that day, and he was not aware of anyone else doing so. Dougherty further testified that he did not recall seeing a report from Connell after the inspection, that any loss over $100,000 is reported to the subrogation unit, that the subrogation unit decides if a cause and origin report is required, and that, in this instance, Craig would arrange for any additional experts. Craig was the independent subrogation vendor hired to investigate potential subrogation claims.

In opposition to the motion, the plaintiff submits an affirmation from its attorney which states that "[t]he report was not prepared (and Connell was not requested to prepare the report) until well after the initial investigation on November 20, 2006 regarding whether the fire was caused by arson, ... or due to the potential fault of some other person, party or entity." In addition, counsel for the plaintiff submits a copy of the Connell report, dated March 6, 2007, and a copy of the round table report created by Dougherty dated December 12, 2006, for *in camera* review by the Court. Initially, the Court notes that the Connell report indicates on its face that it has been "[r]equested by: Mr. Joseph Dougherty." The report goes on to state: "[p]ursuant to your instructions, on November 20, 2006, examination was made of the premises ... [t]he purpose of this examination was to determine the point of origin and cause of [the] fire, which occurred ... " In addition, the report notes that Connell's examination was conducted in the presence of "Timothy Ashton, General Contractor for the renovation, and the Principal of Ashton Construction ...," a clear indication that the report was not made exclusively in anticipation of litigation.

After a review of the record, and after *in camera* review of the subject report, the Court finds that the plaintiff has failed to establish the said report was "prepared exclusively in anticipation of litigation" (***Bombard v Amica Mut. Ins. Co.***, *supra*). This is true notwithstanding the possibility that the report was not set down in writing until well after Connell's inspection, and after the plaintiff's decision to pay the insureds' claims. Accordingly, Ashton's motion to compel is granted to the extent that the plaintiff is directed to deliver to Ashton the report of its cause and origin investigator dated March 6, 2007, and a list of all items said investigator moved within, or removed from the Wasser home.

Elm now moves for an order compelling the plaintiff to disclose all reports and materials prepared by Connell, all findings of Connell, and a list of all items that Connell moved at and/or removed from the Wasser residence, or in the alternative, precluding the plaintiff from presenting evidence and/or testimony at trial. The motion is essentially the same as the Ashton motion herein, and the plaintiff's opposition is a reassertion of its opposition to the Ashton motion. Accordingly, for the reasons set forth hereinabove, Elm's motion is granted to the extent that the plaintiff is directed to deliver to Elm the report of its cause and origin investigator dated March 6, 2007, and a list of all items said investigator moved within, or removed from the Wasser home.

E&M now moves for an order compelling the plaintiff to disclose all reports and materials prepared by Connell, all findings of Connell, and a list of all items that Connell moved at and/or removed from the Wasser residence, or in the alternative, precluding the plaintiff from presenting evidence and/or testimony at trial. The motion is essentially the same as the Ashton motion herein, and the plaintiff's opposition is a reassertion of its opposition to the Ashton motion. Accordingly, for the reasons set forth hereinabove, E&M's motion is granted to the extent that the plaintiff is directed to deliver to E&M the report of its cause and origin investigator dated March 6, 2007, and a list of all items said investigator moved within, or removed from the Wasser home.

Safeway now moves for an order compelling the plaintiff to disclose all reports and materials prepared by Connell, all findings of Connell, and a list of all items that Connell moved at and/or removed from the Wasser residence, or in the alternative, precluding the plaintiff from presenting evidence and/or testimony at trial. The motion is essentially the same as the Ashton motion herein, and the motion appears to be unopposed. However, the Court has considered the plaintiff's opposition as set forth in the Ashton motion. Accordingly, for the reasons set forth hereinabove, Safeway's motion is granted to the extent that the plaintiff is directed to deliver to Safeway the report of its cause and origin investigator dated March 6, 2007, and a list of all items said investigator moved within, or removed from the Wasser home.

The Court directs that the defendant Ashton Construction, Inc. or, if necessary another movant, serve the plaintiff with a copy of this order with notice of entry, and that the plaintiff serve upon the four movants the disclosure ordered herein within 15 days of said service.

Dated: 11/23/11

Peter H. Mayer
PETER H. MAYER, J.S.C.