

**Liberty Mut. Ins. Co. v Paragon Restoration Corp.**

2011 NY Slip Op 33769(U)

May 17, 2011

Sup Ct, NY County

Docket Number: 104028/10

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

LIBERTY MUTUAL INSURANCE COMPANY,  
Plaintiff,  
-against-

INDEX NO. 104028/10  
MOTION DATE 04-27-2011

PARAGON RESTORATION CORPORATION,  
GREAT AMERICAN E AND S INSURANCE  
COMPANY, GREAT AMERICAN INSURANCE  
COMPANY OF NEW YORK, TOURO CONTRACTING  
CORP., UTICA FIRST INSURANCE COMPANY,  
Defendants.

MOTION SEQ. NO. 001 & 002  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 8 were read on this motion to/for Preclude and Compel

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

**FILED**

PAPERS NUMBERED

1 - 2, 3 - 4

Answering Affidavits — Exhibits \_\_\_\_\_ cross motion

5, 6, 7

Replying Affidavits \_\_\_\_\_

**MAY 19 2011**

8

Cross-Motion:  Yes  No

NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that defendant Utica First Insurance Company's motion to preclude pursuant to CPLR §3126 or pursuant to CPLR §3124 and §3042[c] to compel the plaintiff to provide responses and supplemental responses to their June 10, 2010, combined demands, notice for discovery and inspection, and demand for a bill of particulars, is granted. The plaintiff's cross-motion pursuant to CPLR §3126 seeking to preclude Paragon Restoration Corporation, Great American E and S Insurance Company, Great American Insurance Company of New York and Touro Contracting Corp., for failure to provide responses to the combined demands dated October 13, 2010, or pursuant to CPLR §3124, to compel discovery responses, is granted.

Plaintiff, Liberty Mutual Insurance Company, brought this subrogation action seeking to recover for the defense and indemnification in a personal injury action brought by Donald Miller in the Supreme Court under index number 112861/07 [Cross-Mot. Exh. A]. The action brought by Donald Miller was transferred pursuant to CPLR §325[d] to the Civil Court of the City New York by Order of Hon. Joan Madden dated January 10, 2010 [Plaintiff's Reply Exh. B]. The case was transferred after Donald Miller's personal injury claims were settled and paid by defendant, Touro Contracting Corp., pursuant to a global settlement for approximately \$20,000.00, at that time the plaintiff sought \$21,874.64 in defense costs [Plaintiff's Reply Exh. E]. The remaining cross-claims for defense and indemnification in the Donald Miller action, are currently pending in the Civil Court of the City of New York under index number 300227TSN 2010.

Utica First Insurance Company, hereinafter referred to as "Utica First" served the plaintiff with its combined demands, notice for discovery and inspection and demand for a bill of particulars, dated June 10, 2010 [Mot. Exh. C], plaintiff served its response on February 16, 2011 [Cross-Mot. Exh. C]. Defendant Touro Contracting Corp., hereinafter referred to as "Touro" served a demand for discovery and inspection dated June 10, 2010, plaintiff served its response on February 16, 2011 [Cross-Mot. Exh. D]. Utica First and Touro both sought unredacted copies of the plaintiff's legal bills. Plaintiff's

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

responses to the Touro notice for discovery and inspection included copies of redacted legal bills. The redacted copies left out any description of the work performed. Plaintiffs attorneys by letter dated October 13, 2010, advised counsel for Utica First and Touro Contracting Corp. that they would only provide unredacted copies of the legal bills upon acknowledgment of the obligation to reimburse Liberty Mutual Insurance Company for reasonable defense costs in the underlying personal injury action commenced by Donald Miller [Mot. Exh. E]. Utica First provided responses to the plaintiff's demands on December 20, 2010 [Aff. Opp. to Cross-Mot. Exh. A]. Paragon Restoration Corporation, Great American E and S Insurance Company, Great American Insurance Company of New York and Touro Contracting Corp. have not responded to plaintiff's demands.

Pursuant to CPLR §3126, there must be a showing of a willful violation of a prior Order for discovery and that the failure to provide discovery was willful, contumacious or due to bad faith. This would include predicate failure to provide the discovery sought. (*Weissman v. 20 East 9<sup>th</sup> Street Corporation*, 48 A.D. 3d 242, 852 N.Y.S. 2d 67 [N.Y.A.D. 1<sup>st</sup> Dept., 2008]; *Siegman v. Rosen*, 270 A.D. 2d 14, 704 N.Y.S. 2d 40 [N.Y.A.D. 1<sup>st</sup> Dept. 2000]).

The motion and cross-motion do not have copies of prior discovery orders from this action annexed to them. The motion and cross-motion do not sufficiently establish that there have been predicate failures to provide discovery in this action. The relief sought in the motion and cross-motion, to preclude pursuant to CPLR §3126 is denied.

Pursuant to CPLR §3124, the Court may compel compliance upon failure of a party to provide discovery. It is within the Court's discretion to determine whether the materials sought are "material and necessary" as legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (*Roman Catholic Church of the Good Shepard v. Tempco Systems*, 202 A.D. 2d 257, 608 N.Y.S. 2d 647 [N.Y.A.D. 1<sup>st</sup> Dept. 1994]; *148 Magnolia, LLC v. Merrimack Mutual Fire Insurance Company*, 62 A.D. 2d 486, 878 N.Y.S. 2d 727 [N.Y.A.D. 1<sup>st</sup> Dept., 2009]). The test concerning discovery is one of "usefulness and reason" and as such should lead to disclosure of admissible proof. Parties to an action are entitled to reasonable discovery of any relevant facts to the action (*Allen v. Crowell-Collier Publ.Co.*, 21 N.Y. 2d 403, 288 N.Y.S. 2d 449, 235 N.E. 2d 430 [1968]; *Spectrum Systems International Corporation v. Chemical Bank*, 78 N.Y. 3d 371, 581 N.E. 2d 1055, 575 N.Y.S. 2d 809 [1991]). Pursuant to CPLR §3042[c], a party may make a motion to compel responses to its demand for a bill of particulars, and seek sanctions if the failure to provide responses is willful.

An indemnity action for the costs of defending and settling a lawsuit will not automatically imply a waiver of the attorney client privilege. The waiver of attorney-client privilege occurs when a party affirmatively places the subject matter of its own privileged communications at issue in the litigation, so that the adversary would be deprived of vital information needed to determine the validity of the claim or the defense. The burden is on the defendant to demonstrate any prejudice resulting from failure to breach the attorney client privilege, and that the information needed could not be obtained through other sources. The need to determine the reasonableness of the amount spent on legal fees in the defense of, and settlement of an action, does not place at issue, "...attorneys' work product, or their private mental impressions, conclusions, opinions or legal theories..." Privileged material should not be used to establish the reasonableness of the defense and resulting settlement of the action. Non-privileged documents can include, unredacted time records and invoices, documents filed in court and resulting decisions (*Deutsche Bank Trust Company of Americas v. Tri-links*

Investment Trust, 43 A.D. 3d 56, 837 N.Y.S. 2d 15 [N.Y.A.D. 1<sup>st</sup> Dept., 2007]; Credit Suisse First Boston v. Utrecht-America Finance Corp., 27 A.D. 3d 253, 811 N.Y.S. 2d 32 [N.Y.A. D. 1<sup>st</sup> Dept., 2006]).

Utica First's Combined Demands seek discovery related to the underlying negligence action, and are not relevant to this action, the plaintiff shall not be compelled to provide supplemental responses to these demands.

The plaintiff has not provided Utica First with a bill of particulars, or discovery related to the causes of action asserted in this action. The redacted legal bills or invoices submitted by plaintiff only in response to Touro Contracting Corp.'s discovery demands [Cross-Mot. Exh. D], do not distinguish the time spent in legal representation in the underlying action commenced by Donald Miller from the time spent on other unrelated actions. The defendants have met their burden of proof that the privilege should be breached as to identifying whether the services were rendered in defense of the negligence action. The plaintiff has placed its privilege at issue, and has not sufficiently established that all of the information on the legal bills or invoices from the Donald Miller action are privileged in this subrogation action. Plaintiff will provide Utica First with copies of the tender letters in plaintiff's possession, concerning claimed entitlement to defense and indemnity from Utica First. Plaintiff will not be compelled to provide responses to Items 17, 20-23 of Utica First's notice for discovery and inspection, there is an insufficient basis provided in the motion papers for a finding that plaintiff's evaluations, claim file and underwriting file are relevant and not privileged in this action.

Utica First has not sufficiently established that the failure to provide a bill of particulars was willful. Utica First's Demand for a Bill of Particulars is relevant to this action and the plaintiff will be compelled to provide a response.

The plaintiff claims that Paragon Restoration Corporation, Great American E and S Insurance Company, Great American Insurance Company of New York and Touro Contracting Corp, hereinafter referred to as "the co-defendants," have not provided any responses to the combined demands dated October 13, 2010. Utica First provided responses to plaintiff's combined demands dated December 20, 2010. The plaintiff's Notice for Discovery and Inspection, item 1, seeks, "Copies of all contracts, subcontracts, entered between any party and/or entity regarding work performed at the subject premises in effect on June 8, 2010," this may be relevant. The remaining items in plaintiff's Notice for Discovery and Inspection seek discovery related to the underlying action for personal injury, they are not irrelevant to this action. The Demand for Witness Disclosure and Notice for Discovery of Party Statement also seek discovery related to the personal injury action and are irrelevant. The Notice to Take Deposition Upon Oral Examination seeks discovery that is irrelevant in this subrogation action seeking to recover for the defense and indemnification. The co-defendants will provide responses to its Demand for Insurance Information, as copies of insurance agreements, excess and umbrella insurance agreements and policies are relevant to this action.

Accordingly, It is ORDERED that defendant, Utica First Insurance Company's motion pursuant to CPLR §3126 to preclude or pursuant to CPLR §3124 and §3042[c] to compel the plaintiff to provide responses and supplemental responses to their June 10, 2010, combined demands, notice for discovery and inspection, and demand for a bill of particulars, is granted; to the extent that: the plaintiff shall provide a response to Utica First Insurance Company's Demand for a Bill of Particulars, and supplemental responses to the Notice for Discovery and Inspection but only as to Items 1 through 16, 18 and 19, within thirty days from service of a copy of this Order with Notice of Entry, or be

precluded from offering evidence in support of the allegations in the complaint. Responses to Item 15 may be redacted only as to those portions of the legal bills or invoices that describe the mental impressions, conclusions, opinions and legal theories of plaintiff's attorneys; and it is further

ORDERED, that the plaintiff's cross-motion pursuant to CPLR §3126 seeking to preclude Paragon Restoration Corporation, Great American E and S Insurance Company, Great American Insurance Company of New York and Touro Contracting Corp., for failure to provide responses to the combined demands dated October 13, 2010, or pursuant to CPLR §3124, to compel discovery responses, is granted; to the extent that: Paragon Restoration Corporation, Great American E and S Insurance Company, Great American Insurance Company of New York and Touro Contracting Corp. shall provide responses to plaintiff's Notice of Discovery and Inspection only as to Item 1, and shall provide responses to plaintiff's Demand for Insurance Information, within thirty days from service of a copy of this Order with Notice of Entry or be precluded from offering evidence as to their defenses or counterclaims.

This constitutes the decision and order of this court.

Dated: May 17, 2011

MANUEL J. MENDEZ  
J.S.C.

MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST     REFERENCE

**FILED**

**MAY 19 2011**

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