

Donohue v Fokas

2012 NY Slip Op 33801(U)

July 9, 2012

Supreme Court, Richmond County

Docket Number: 102068/11

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:102068/11
Motion No.:001**

MICHAEL DONOHUE,

Plaintiff

**DECISION & ORDER
HON. JOSEPH J. MALTESE**

against

**PETER FOKAS and
IMMANUEL LUTHERAN CHURCH,**

Defendants

**RICHMOND COUNTY CLERK
2012 JUL 20 PM 4:04
DIVISION OF LAW & EQUITY**

The following items were considered in the review of the following motion to quash a subpoena duces tecum.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

National Fire Insurance Co. of Hartford ("National Fire") moves this court for an order quashing a subpoena duces tecum issued by the plaintiff seeking the discovery of a 1) copy of the cause and origin report; fire investigation report; interviews; photographs; diagrams; expert reports and denial of claims, if any, in the first party indemnity file; 2) name and address of any expert hired; and 3) if a subrogation action was commenced a copy of the summons and complaint and other exchanges in the action. The motion is denied.

This is an action to recover for personal injuries sustained by the plaintiff while he was fighting a fire at Richmond Garden Center on April 10, 2010. The garden center was owned by the defendant Peter Fokas and insured by National Fire. The garden center was situated on property owned by the defendant Immanuel Lutheran Church. The plaintiff sustained injuries

when an explosion occurred while he was removing a section roofing cut by a colleague to vent the burning. The explosion threw the plaintiff from peaked roof onto a flat roof below.

On April 11, 2010 Immanuel Lutheran Church submitted a claim to National Fire. As a result of the claim, National Fire opened a claim file and proceeded to investigate the claims generated from the fire. As part of National Fire's investigation it engaged the services of Rimkus Consulting Group, Inc. ("Rimkus") to prepare a cause and origin report. Rimkus produced a cause and origin report dated June 3, 2010. On April 13, 2011 the plaintiff submitted a claim to National Fire.

A fire marshal was dispatched to the scene. His report concluded that the fire was caused by electrical wire insulation. According to the plaintiff the marshal's report is the only evidence regarding how the fire began. The plaintiff served a subpoena on National Fire seeking the production of: 1) a copy of the cause and origin report, fire investigation report, interviews, photographs, diagrams, expert reports, and denial of claims, if any, in the first-party indemnity file for the fire; 2) the name, address, and phone number of any expert hired by or on behalf of the insurance company to investigate the cause and origin of the aforementioned fire; and 3) with respect to any subrogation action, a copy of the summons complaint, index number, all pleadings, name and address of adverse counsel, and all exchanges with adverse counsel including 3101(d) exchanges.

National Fire objects to the production of these materials and brings this motion to quash the subpoena arguing that the materials are privileged work product.

In support of its motion to quash, National Fire argues that the cases *Kandel v. Tocher*¹ and *Finegold v. Lewis*² preclude the production of these materials. In particular the movant cites

¹ 22 AD2d 513 [1st Dep't 1965].

² 22 AD2d 447 [2^d Dep't 1965].

to the Appellate Division, First Department's language in *Kandel* which states:

... once an accident has arisen there is little or nothing that the insurer or its employees do with respect to an accident report except in contemplation and in preparation for eventual litigation or for a settlement which may avoid the necessity of litigation.³

However, the plaintiff argues that in this instance the report produced by National Fire is the type of report which is generally produced by the movant in the ordinary course of the insurance business. The plaintiff cites the Appellate Division, Second Department's decision in a declaratory judgment action entitled *Landmark Ins. Co. v. Beau Rivage Rest.*⁴ In that case the Appellate Division reviewed a trial court decision denying a protective order preventing the discovery of reports produced by an independent adjuster and arson expert. In affirming the trial court's determination the Appellate Division, Second Department held that,

... in distinguishing between an expert's report prepared in the regular course of business to aid an insurance carrier's decision in evaluation of a claim and an expert's report prepared exclusively for anticipated litigation, the date a firm decision to disclaim coverage is made is the relevant date, rather than the date a carrier has reason to investigate the legitimacy of the loss.⁵

Here, while this action is not one for a declaratory judgment, it is evident that the report made less than two months after the fire and nearly a year before the commencement of this action was produced in the ordinary course of business. National Fire's argument that the disclosure of this report would have a chilling effect on accident investigations in the future, and prejudice Peter Fokas' interests as well as its own is unavailing. This is especially true given the fact that the defendant, Peter Fokas has not joined in this motion. Consequently, National Fire's

³*Kandel v. Tocher*, 22 AD2d 513, 515 [1st Dep't 1965].

⁴ 121 AD2d 98 [2d Dep't 1986].

⁵ *Id.* at 101.

motion to quash is denied.

Accordingly, it is hereby:

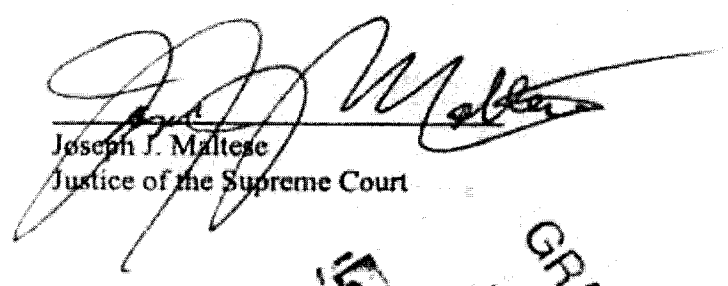
ORDERED, that the motion to quash made by National Fire Insurance Company of Hartford is denied; and it is further

ORDERED, that National Fire Insurance Company of Hartford shall produce 1) a copy of the cause and origin report, fire investigation report, interviews, photographs, diagrams, expert reports, and denial of claims, if any, in the first-party indemnity file for the fire; 2) the name, address, and phone number of any expert hired by or on behalf of the insurance company to investigate the cause and origin of the aforementioned fire; and 3) with respect to any subrogation action, a copy of the summons complaint, index number, all pleadings, name and address of adverse counsel, and all exchanges with adverse counsel including 3101(d) exchanges, by August 15, 2012; and it is further

ORDERED, that the parties to this action shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor, on August 29, 2012 at 9:30 a.m. for a compliance conference.

ENTER,

DATED: July 9, 2012


Joseph J. Maltese
Justice of the Supreme Court

GRANTED
JUL 19 2012
Stephen J. Fink