

<b>Cleary v Automobile Ins. Co of Hartford, Connecticut</b>
2012 NY Slip Op 33844(U)
November 19, 2012
Supreme Court, Westchester County
Docket Number: 50320/11
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X  
ANDREW CLEARY and KIRSTEN CLEARY,

Plaintiffs,

**DECISION & ORDER**

-against-

Index No. 50320/11  
Motion Date: Nov. 19, 2012  
Seq. No.: 2

THE AUTOMOBILE INSURANCE COMPANY  
OF HARTFORD, CONNECTICUT, ONE OF THE  
TRAVELERS PROPERTY CASUALTY  
COMPANIES and ALLIED CUSTOM BUILDERS,  
INC.,

Defendants.

-----X  
LEFKOWITZ, J.

The following papers were read on this motion by Plaintiffs Andrew Cleary (hereinafter "Mr. Cleary") and Kirsten Cleary (hereinafter collectively "Plaintiffs") for an order pursuant to CPLR § 3124 compelling defendant The Automobile Insurance Company of Hartford, Connecticut, One of the Travelers Property Casualty Companies (hereinafter "Travelers") to produce documents responsive to Plaintiffs' (a) document request nos. 42, 43 and 50 (seeking documents relating to other claim files); and (b) document request nos. 27, 28, 34 and 35 (seeking marketing materials relating to Travelers' handling, investigation and underwriting of claims). Travelers opposes the motion.

- Order to Show Cause - Affirmation in Support-
- Exhibits A-M
- Memorandum of Law in Support
- Memorandum of Law in Opposition- Exhibit A

Upon the foregoing papers and the proceedings held November 19, 2012, the motion is decided as follows:

Plaintiffs commenced this action by filing a summons and complaint on or about March 24, 2011 asserting causes of action against Travelers for a declaratory judgment, breach of contract, violation of its duty of good faith and fair dealing, and violation of General Business Law § 349. This action arises out of homeowner policies which Travelers issued to Plaintiffs concerning their residence located at 9 Irving Place, Irvington, New York, Westchester County (hereinafter the "premises"). On or about November 18, 2008, Plaintiffs entered into a contract

for significant renovation of the premises which were performed by defendant Allied Custom Builders, Inc. (hereinafter "Allied"). Plaintiffs moved out of the premises during the construction.

During the course of construction, there was a heavy rain storm (occurring in early April, 2009) and two separate incidents, one involving a pipe in one of the premises' bathrooms (occurring on April 19, 2009) and another involving the sink in the cellar of the premises (occurring in late October 2009) which combined to cause significant water damage to the premises (hereinafter collectively the "water damage incidents"). As a result, the premises and Plaintiffs' possessions located at the premises suffered significant damage, including mold. Plaintiffs contend that despite repeated reassurances that it would remedy the water damage and remove the mold, Allied failed to remove the mold and repair the water damage. Plaintiffs returned to their home in March 2010.

On March 7, 2010, Mr. Cleary noticed mold in the cellar. Plaintiffs contacted Herman Sabath, a certified microbial consultant, Ph.D., MPH, CMC, of International Environmental Diagnostics, Inc., to review the mold condition (hereinafter "Dr. Sabath"). Dr. Sabath inspected the premises on March 8, 2012 and advised in his preliminary report that very high levels of toxic mold were present in the premises.

On March 19, 2012 Mr. Cleary contacted his agent at the Allan Block Agency with whom Plaintiffs dealt in respect to the policies (hereinafter the "Block Agency"). The Block Agency contacted Travelers concerning the damage caused by the water damage incidents. It is Plaintiffs' contention that Travelers then indicated, without conducting an investigation, that it would deny coverage on the basis that the damages fell within the 'mold exclusion' in the policies. On March 22, 2012, Plaintiffs submitted their written claim along with the Dr. Sabath's preliminary report. Upon receipt of the claim Travelers advised Plaintiffs, again without an investigation of the underlying circumstances, that mold was not a covered peril under the policy and that Plaintiffs should consider submitting a claim under Allied's insurance policy.

On or about March 26, 2012, Travelers sent an engineer to conduct an inspection of the premises. Plaintiffs contend that the inspection was ten minutes long and did not include an investigation of the cause or extent of the mold. Plaintiffs were advised by the engineer to clean up the mold and to install a dehumidifier to remove moisture from the cellar. Plaintiffs contend that shortly after the completion of the engineer's inspection Plaintiffs were notified by Travelers that their claim was going to be denied based on the mold exclusion in their policy.

Plaintiffs instituted this action on March 24, 2011 and Travelers e-filed its answer with cross-claims against Allied on May 3, 2011. Plaintiffs served their First Request for Production of Documents on Travelers on or about July 12, 2011 (hereinafter the "document request"). Travelers served Objections and Response to the document request on October 13, 2011 (hereinafter the "responses"). On or about December 14, 2011, Travelers produced additional documents obtained by its counsel from non-parties. The parties appeared for compliance conferences on July 24, 2012, August 16, 2012 and August 29, 2012.

On August 28, 2012, counsel for Travelers sent Plaintiffs' counsel an email setting forth the legal basis upon which Travelers had based its position concerning the outstanding discovery. The parties appeared on August 29, 2012 at the compliance conference and the compliance conference order which issued directed, inter alia, that Travelers provide to plaintiff certain documents including: its claims handling manual, underwriting file and documents relating to reserves and directed the parties to appear for a further conference on September 11, 2012. Additionally, a discovery motion briefing schedule was issued granting Plaintiffs leave to seek to compel discovery of other claims files and marketing materials.

Plaintiffs brought the instant motion seeking responses to the following discovery demands:

27. Documents and Communications, including brochures, pamphlets, marketing materials, comparison guides and informational literature, generated, used or disseminated by You (Travelers) that describe coverage comparison for high value homes.

28. Documents and communications, including brochures, pamphlets, marketing materials and information literature, generated, used or disseminated by You that describe: the scope of coverage provided by the Policies; Your operations in selling insurance or providing insurance services, including but not limited to claim handling services, during the period of time that You sold the Policies to Plaintiffs; and Your operations in responding to claims for insurance coverage during the period of time that You sold the Policies to Plaintiffs.

34. Documents Concerning any advertising engaged in by You in the State of New York Concerning the Policies and other Travelers' homeowner's insurance policies in the last seven years.

35. Documents and Communications, including, without limitation, brochures, pamphlets, marketing materials, informational literature, generated, used or disseminated by You that describe Travelers' Loss Prevention and Engineering Laboratory.

42. Documents and Communications Concerning claims for insurance coverage resulting from toxic mold in New York that You denied, in whole or in part, in the last seven years.

43. Documents and Communications Concerning claims for insurance coverage resulting from toxic mold in New York that You covered, in whole or in part, in the last seven years.

50. Documents and communications concerning claims for toxic mold handled by G. Davis.

Plaintiffs contend that in addition to denying their claim without any meaningful investigation, Travelers violated GBL §349 by engaging in a pattern and practice of delaying and

avoiding payment under the policies, a practice which harmed them and concerns the public at large. Plaintiffs argue that they have successfully pleaded a cause of action for a claim under GBL§ 349 and as a result are entitled to discovery regarding other similarly-treated policyholders (document requests nos. 42, 43 and 50). In this regard, Plaintiffs rely on the decision in *Wilner v Allstate Insurance Co.*, 71 AD3d 155 (2d Dept 2010), wherein the Appellate Division held that the defendant insurance company was required to produce documents concerning its handling of claims made by other insureds which related to plaintiffs' attempts to establish that defendant engaged in a pattern of deception.

Plaintiffs also cite *Gillen v Utica Mutual Insurance Co.*, 41 AD3d 647 (2d Dept 2007), wherein the Appellate Division determined plaintiff was entitled to responses to interrogatories by defendant insurer concerning allegations that defendant had engaged in deceptive practices of misrepresenting the coverage terms of its policy in violation of GBL § 349. In *Gillen*, the defendant was required to respond to interrogatories which, inter alia, included every complaint made to a government agency or in a judicial proceeding or arbitration in the last five years which complained of defendant's failure or refusal to make a payment required pursuant to one of its policies and to identify each and every policyholder whose claim was rejected in the last five years on the basis that the collapse or partial collapse of a roof/ceiling/floor was due to "cracking" or "settling."

Plaintiffs contend that Travelers is required to produce its marketing materials, brochures, pamphlets and information literature as these are also relevant to Plaintiffs' claims of bad faith and violations of GBL §349 (document requests nos. 27, 28, 34 and 35). Plaintiffs argue these documents are relevant to Plaintiffs' claims that Travelers failed to conduct a fair, proper or complete investigation of their claims before denying coverage and are relevant to Plaintiffs' claims that Travelers misrepresents policy provisions and knowingly misleads the public into purchasing homeowners' policies when it does not intend to pay its policyholders for significant claims or properly investigate them. Additionally, Plaintiffs claim they these marketing materials are relevant to Travelers' state of mind and the issue of punitive damages.

In opposition, Travelers argues that the real issue in this case is whether Plaintiffs' claims constitute a covered loss pursuant to the policies. It is Travelers' contention that the documents Plaintiffs seek have nothing to do with Plaintiffs' claim under its policies but rather are solely related to Plaintiffs' claim under GBL§ 349 that Travelers has engaged in a pattern of deceptive practices which affect the public at large. Travelers contends that Plaintiffs have failed to establish a claim under GBL§ 349 and that Plaintiffs are seeking to transform an isolated coverage dispute involving a unique set of facts into a pattern under GBL§ 349.

Travelers argues that it was not advised of the first two water damage incidents, which occurred in April 2009, until October 29, 2010, more than a year after the incidents allegedly occurred despite the fact that Plaintiffs, according to their complaint discovered mold in the premises in May 2009. Travelers also argues that it was not advised of the third water damage incident involving the cellar sink which occurred in October, 2009, until a year later in October,

2010. Travelers argues that when it finally received a notice of claim from Plaintiffs with the report by Dr. Sabath all evidence of the three water damage incidents had been spoliated. Travelers avers that when its engineer inspected the premises he was told nothing about the water damage incidents by Mr. Cleary, but shown only the mold under the stairs and evidence of water seepage through the basement wall. Travelers contends that it denied coverage for Plaintiffs' claim for mold damage by letter dated March 30, 2010 citing, among other things, the policies' exclusions for loss caused by mold, water damage, flood, water below the surface of the ground, weather conditions and faulty, inadequate or defective construction.

Travelers argues that it should not be compelled to produce documents responsive to Plaintiffs' demands for claim files involving different insureds for claims resulting from toxic mold (demands nos. 42, 43, and 50) as they are patently overbroad, and unduly burdensome and are irrelevant to the coverage dispute at issue. Although Plaintiffs seek these documents in support of their claim under GBL§ 349, Travelers argues that these allegations are nothing more than unsupported, conclusory assertions that Travelers' conduct with respect to Plaintiffs' claims constitutes a pattern that affects the public at large. Travelers argues that this is a private contract dispute over policy coverage and is insufficient to state a cause of action under GBL §349. Travelers further opposes the production of its marketing materials (demands nos.27, 28 34, and 35) on the grounds that the request is overbroad and not relevant to Plaintiffs' allegations set forth in the complaint. Defendants argue that like the claim files which Plaintiffs seek, the marketing materials are being sought to support Plaintiffs' claims under GBL§ 349 that Travelers sought to mislead the public into purchasing policies that it does not intend to honor. Travelers argues however that Plaintiffs have not made any specific allegations concerning any representations made by Travelers to the Plaintiffs in connection with the procurement or sale of their policies. Additionally Travelers argues that in the event Plaintiffs' demands are found to be relevant, responding to those demands would place an incredible burden on Travelers in part because the term "toxic mold" is not defined and that it is impossible to know what is meant by claims resulting from toxic mold. Travelers avers that in any seven year period it responds to thousands of claims involving mold and to respond to the demand would require a manual file by file review of thousands of claims files and likely tens of thousands of pages. In support of this argument, Travelers provides the affidavit of Brian Harton, Travelers' Director of Claim Product Management (hereinafter the "Harton Affidavit") in which Mr. Harton avers that a search for "mold" in Travelers' records in New York from 2007 to present yielded a result of 2,933 claims. Mr. Harton avers that a manual review of tens of thousands of pages of documents would be required in order to determine whether these claims come within the documents sought by Plaintiffs.

CPLR§ 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not

have the right to uncontrolled and unfettered disclosure” (*Foster*, 74 AD3d at 1140; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

As a threshold matter plaintiffs claiming the benefit of New York’s consumer protection statute GBL §349 must allege that the defendant’s conduct is consumer-oriented (*Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 24 [1995]) and requires a showing that the practices complained of amount to more than a private contractual dispute (*DePasquale v Allstate Ins. Co.*, 179 FSupp2d 51, 61 [SDNY 2002]). Additionally, in order to allege a claim a plaintiff must demonstrate that the defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof (*Wilner* at 162 citations omitted).

Courts have “[a]most uniformly” held that “disputes between policy holders and insurance companies concerning the scope of coverage” constitute “nothing more than private contractual disputes that lack the consumer impact necessary to state a claim pursuant to Section 349.” (*DePasquale* at 61, and see *Dollar Phone Corp. v St. Paul Fire and Marine Ins. Co.*, 2012 WL 1077448 [EDNY Mar. 9, 2012]; *Wiener v UnumProvident Corp.*, 202 FSupp2d 116, 121 [SDNY 2002]; *Fekete v GA Ins. Co. of N.Y.*, 279 AD2d 300 [1st Dept 2001]. “Private contract dispute[s] involving coverage under the subject policies” is distinguishable from “the consumer-oriented, deceptive conduct aimed at the public at large that GBL § is designed to address” *Zawahir v Berkshire Life Ins. Co.*, 22 A.D3d 841, 842 [2d Dept 2005].

There is nothing in the record which indicates that Plaintiffs’ claims involved anything other than a private contractual dispute concerning the scope of coverage under the policies and as such lacks the broad consumer impact that such a claim requires (see, *DePasquale*). Moreover, other than general conclusory allegations of a pattern of deception, Plaintiffs fail to allege or describe any deceptive conduct by Travelers. The cases upon which Plaintiffs rely are distinguishable from the case at bar. In *Wilner* the plaintiffs sought documents relating to the insurer’s handling of other claims arising from the same incident which were factually similar and supported the plaintiff’s claims of a pattern of conduct. *Gillen* is also inapposite to the present case because in that case there were specific factual allegations that the defendant insurer had engaged in a pattern of refusing to pay valid claims that were not reduced to judgment which went beyond the isolated coverage dispute with the plaintiff. Even if Traveler’s investigation and review of Plaintiffs’ claim was inadequate and its denial of coverage mistaken, such allegations do not constitute deceptive conduct under GBL § 349 (*Shapiro v Berkshire Life Ins. Co.*, 212 F.3d 121 at 127 [2d Cir 2003]) (finding insufficient allegations of deceptive conduct where plaintiff claimed that the defendant insurance company failed to perform a sufficient investigation of a disability claim before denying it).

Additionally, even if this court was to find that Plaintiffs were entitled to documents

relative to a claim under GBL §349, the demands are overbroad and burdensome. In the cases cited by Plaintiffs where insurers were directed to provide documentation of similar insureds, there were parameters which limited the production of the documents to policies which contained specific clauses or for claims made as a result of a common occurrence.

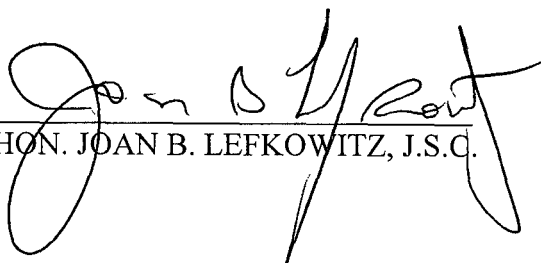
Accordingly, it is

**ORDERED** that Plaintiffs' motion to compel Travelers to produce documents responsive to Plaintiffs' (a) document request nos. 42, 43 and 50 and (b) document request nos. 27,28, 34 and 35 is denied in all respects; and it is further

**ORDERED** that counsel are directed to appear for a conference in the Compliance Part, Courtroom 800, on December 20, 2012 at 9:30 A.M.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
Nov. 19, 2012

  
HON. JOAN B. LEFKOWITZ, J.S.C.

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