Davidson v Ted Herrmann's Auto Body, Inc.
2013 NY Slip Op 32748(U)
April 8, 2013
Sup Ct, Westchester County
Docket Number: 52455/11
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

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RICHARD DAVIDSON,

Plaintiff,

-against-

TED HERRMANN'S AUTO BODY, INC., TED HERRMANN'S REALTY, INC., and TED HERRMANN'S REALTY CORPORATION,

Defendants.

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DECISION & ORDER

Index No. 52455/11
Motion Date: April 8, 2013

LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order pursuant to CPLR 3124 compelling defendant to produce all documents, including notes, accident reports, transcripts, statements and tapes, concerning or relating to communications concerning the accident at issue between defendants' insurer and any present or former employee, agent or principal of defendants.

Order to Show Cause - Affirmation in Support - Exhibits 1-11
Affirmation in Opposition - Exhibit A

Upon the foregoing papers and the proceedings held on April 8, 2013, this motion is determined as follows:

In this action, plaintiff seeks damages for personal injuries which he allegedly sustained when he slipped and fell down an exterior staircase located at defendants' premises on March 30, 2010. Plaintiff served multiple document demands upon defendants seeking, inter alia, (1) communications between defendants and defendants' insurer, (2) notes concerning communications between defendants and defendants' insurer, (3) transcripts of any communications, documents prepared by defendants for defendants' insurer, (4) defendants reports to defendants' insurer regarding plaintiff's incident, (5) statement of Fernando Toledo and Justo Rojas, a former and current employee of defendant Ted Herrmann's Auto Body, Inc. (hereinafter "defendant Auto Body"), concerning plaintiff's incident, and (6) any audio and taped recordings of Fernando Toledo and Justo Rojas regarding plaintiff's accident. Defendants objected to the foregoing demands on the ground that the demanded material was prepared in anticipation of litigation or trial and was exempt from disclosure as attorney work product or

otherwise privileged. Despite the objections, defendants produced copies of claim file notes including communications by plaintiff to defendants' insurer, responded that they were not in possession of any transcripts, responded that they were conducting an ongoing search for documents prepared by defendants concerning the incident for their insurer, and responded that they are not in possession of any audio or taped recordings of Fernando Toledo or Justo Rojas. Defendants refused to provide the statements of Fernando Toledo and Justo Rojas. Defendants identified Fernando Toledo, an employee of defendant Auto Body, as the sole eyewitness to plaintiff's accident.

At his deposition, Fernando Toledo testified that he had worked for defendant Auto Body for 29 years, many as the general manager, was fired in June 2012, is unemployed, but hopes to be rehired by defendant Auto Body.

Plaintiff now seeks an order compelling defendants to provide "notes, accident reports, transcripts, statements and tapes, concerning or relating to communications concerning the accident at issue between defendants' insurer and any present or former employee, agent or principal of defendants." Plaintiff contends that the sole eyewitness, Fernando Toledo, gave only deposition testimony favorable to defendants, including his testimony that, although he could not see plaintiff's feet, plaintiff had jumped over a step which caused him to fall. Plaintiff asserts that since Mr. Toledo hopes to be rehired by defendant Auto Body, he had motivation to lie in order to get his job back. Accordingly, plaintiff asserts that it is necessary to obtain any statement Mr. Toledo gave to defendants' insurer in order to determine if there are any conflicts with his recent deposition testimony. With respect to Justo Rojas, a current employee of defendant Auto Body, who drove plaintiff home after the accident, plaintiff contends that he will be deposed soon and any statement he gave to defendants' insurer is also needed in order to assess his credibility. Plaintiff further contends that any statements made by Ted Herrmann, defendants' owner, should also be produced in order to assess his credibility since he must have spoken to defendants' insurer and will also be deposed. Plaintiff also seeks to examine the statements of defendants' employees since defendants' counsel has stated that the videotape of defendants' surveillance camera at the top of the subject staircase, which was allegedly viewed by several employees on the day of the accident, including Mr. Toledo, Mr. Herrmann and Mr. Rojas, no longer exists.

In support of the motion, plaintiff relies upon case law, wherein the courts held that statements given to liability insurer's claims departments were not immune from discovery as material prepared solely in anticipation of litigation (*Agoviono III v Taco Bell I,* 225 AD2d 569 [2d Dept 1996]; *Meiliken v Hart*, 261 AD2d 370 [2d Dept 1999]; *Sigelakis v Washington Group*, 46 AD3d 800 [2d Dept 2007]). Plaintiff further contends that defendants cannot meet their burden of showing that the demanded discovery materials were prepared solely in anticipation of litigation, and therefore are not privileged under CPLR 3101 (d)(2). Moreover, plaintiff contends that even if defendants met their burden, plaintiff is entitled to the discovery due his substantial need for the materials in order to prepare his case and his inability to obtain the substantial equivalent of the materials by other means. Plaintiff asserts that the only way to show

discrepancies between the statements given by Mr. Toledo and defendants' other employees to defendants' insurer and their deposition testimony is to obtain the statements. Plaintiff further contends that since Mr. Toledo is a nonparty, the disclosure of his inconsistent statements should be directed.

Defendants oppose the motion. Initially defendants contend that plaintiff's demand for documents is overbroad since plaintiff seeks "all notes, accident reports, transcripts, statements and tapes" between defendants' insurer and any employee, agent or principal of defendants and fails to limit the discovery to a relevant time period or exclude material protected by the attorney-client privilege or work product privilege. Defendants further contend that the materials sought are privileged under CPLR 3102 (d)(2) as (1) material created solely in preparation of litigation, or (2) attorney's work product. With the exception of the statements of Mr. Toledo and Mr. Herrmann, defendants assert that nearly every document, note or communication in the claim file is from counsel for defendants and contains opinions, impressions and analysis regarding plaintiff's claim and the litigation. Defendants contend that the statements or reports obtained by or prepared by defendants' insurer or counsel during the investigation of plaintiff's claim were made in preparation of litigation. Defendants further contend that the courts have held that pre-litigation statements made to a party's own insurer for the purpose of investigating a claim, including statements and reports, are conditionally privileged under CPLR 3102 (d)(2). Defendants also assert that plaintiff had not established a "special need" for the demanded documents or "undue prejudice" justifying the production of the privileged documents in the claim file. Defendants contend that the fact that plaintiff wants to test the credibility of the witnesses is not a "special need" warranting production of the privileged documents, and there is no prejudice since plaintiff has had the opportunity to depose the witnesses. Defendants assert that the case law relied upon by plaintiff does not support plaintiff's contention that the material is not subject to a privilege or that a special need exists for the production of privileged material. Accordingly, defendants contend that plaintiff has failed to demonstrate that the materials sought are not privileged or that any special need for the materials exists.

In opposition to the motion, defendants submit the affidavit of an employee of defendants' insurer who avers therein as follows: The claim file consists of notes by claim representatives, as well as communications by counsel for defendants, and that the material in the claim file is all dated after the insurance claim was opened and the insurer began its investigation of plaintiff's alleged accident. The material in the claim file was made in preparation of the defense of plaintiff's claim. Two documents in the claim file "may qualify" as statements from Mr. Herrmann and Mr. Toledo. The statement of Mr. Herrmann was obtained by an insurance investigator after the present litigation was filed solely for the purpose of investigating and defending against plaintiff's claim, and was not maintained for any regular business practice or procedure. Mr. Toledo was an employee of defendant Auto Body at the time his statement was obtained by a claims representative at defendants' insurer on August 1, 2011, after the litigation was commenced, and was obtained for the purpose of investigating plaintiff's claim and in preparation of a defense. The employee of defendants' insurer further avers that the claim file does not contain any accident reports of plaintiff's accident maintained for any regular business

practice or procedure. The only reports in the claims file are reports to defendants' insurer from defendants' counsel and include counsel's analysis and opinions relating to plaintiff's claim and litigation.

The general rul is that there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]). However, CPLR 3011 (b) and (c) provide that privileged material and attorney's work product shall not be discoverable. Moreover, CPLR 3101 (d)(2) provides that "materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has a substantial need of the materials in preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Accordingly, materials prepared solely in anticipation of litigation are conditionally immune from discovery.

The party asserting that the discovery sought is privileged or immune from discovery bears the burden of establishing the privilege or immunity (*Koump v Smith*, 25 NY2d 287, 294 [1969] ; *Bombard v Amica Mut. Ins. Co.*, 11 AD3d 647 [2d Dept 2004]; *Mavrikis v Brooklyn Union Gas Co.*, 196 AD2d 689 [1st Dept 1993]). Therefore, "[t]he burden of proving that a statement is privileged as material prepared solely in anticipation of litigation or trial is on the party opposing discovery" (*Sigelakis v Washington Group, LLC*, 46 AD3d 800, 800 [2d Dept 2007]). To sustain the burden of demonstrating that the material was prepared solely in anticipation of litigation, the party asserting the privilege must identify the particular material and privilege asserted and establish with specificity that the material was prepared exclusively in anticipation of litigation (*New York Schools Ins. Reciprocal v Milburn Sales Co.*, 2013 WL 1319390 [2d Dept]; *Ural v Encompass Ins. Co. of Am.*, 97 AD3d 562, 566 [2d Dept 2012]).

"The written statement of an eyewitness to an accident is 'truly material prepared for litigation'" (*Rojas v New York City Auth.*, 276 AD2d 684, 264 [2d Dept 2000], *quoting Zellman v Metropolitan Transp. Auth.*, 40 AD2d 248, 251 [2d Dept 1973]). A statement of a nonparty eyewitness or a defendant to defendant's insurer has been held to be conditionally privileged as material prepared in anticipation of litigation, and not discoverable unless plaintiff can demonstrate "a substantial need" for the statement and is unable to obtain the substantial equivalent (*Davila v Environmental Prods. & Svcs.*, 270 AD2d 224 [2d Dept 2000] [audio tape recording of defendant's statement to insurer not discoverable]; *Rojas v New York City Auth.*, 276 AD2d at 684 [eyewitness statement to claims examiner not discoverable]; *Gaglia v Wells*, 112 AD2d 138 [2d Dept 1985] [where defendant could not recall accident and only other witness to the accident had amnesia, plaintiff was entitled to defendant's statement to insurer since material could not be duplicated]). However, a party must demonstrate that the statements were taken solely in anticipation of litigation in order to establish that the statements are conditionally privileged from disclosure (*Agovino III v Taco Bell 5083*, 225 AD2d 569 [2d Dept 1996]). Conclusory assertions by counsel that the statements were taken in anticipation of litigation, without more, are insufficient to sustain a party's burden of demonstrating that the statements were taken exclusively for litigation and are entitled to a conditional privilege (*New York Schools*

Ins. Reciprocal v Milburn Sales Co., 2013 WL 1319390 [2d Dept]; *Ural v Encompass Ins. Co. of Am.*, 97 AD3d at 566; *Sigelakis v Washington Group*, 46 AD3d at 800; *Agovino III v Taco Bell 5083*, 225 AD2d at 571).

Initially, this court determines that defendants, through the affidavit of the employee of defendants' insurer, have established that documents sought by plaintiff on the present motion are privileged as attorney's work product or are conditionally privileged as material prepared solely in preparation of litigation. The statements by Fernando Toledo and Ted Herrmann to investigators from defendants' insurer regarding plaintiff's accident were prepared solely in anticipation of litigation and are conditionally immune from discovery. Moreover, plaintiff has failed to demonstrate that the substantial equivalent of the material sought could not be obtained by other means without undue hardship (*Davila v Environmental Prods. & Svcs.*, 270 AD2d at 224; *Rojas v New York City Auth.*, 276 AD2d at 644). Notably, plaintiff has had or will have the opportunity to take the depositions of Mr. Toledo and Mr. Herrmann and obtain their statements regarding their accounts of the accident, the circumstances surrounding their statements to investigators for defendants' insurer and the contents of their statements (*Salzer v Farm Family Life Ins. Co.*, 280 AD2d 844 [3d Dept 2001]; *cf. Gaglia v Wells*, 112 AD2d 138 [where defendant could not recall accident and only other witness to the accident had amnesia, plaintiff was entitled to defendant's statement to insurer since material could not be duplicated]). Plaintiff's contention that Fernando Toledo had a motivation to lie during his deposition merely raises an issue of fact and credibility to be determined by the trier of fact at trial.

With respect to the allegation that a videotape of the accident was maintained by defendants and viewed by defendants' employees, but no longer exists, plaintiff may seek an adverse inference charge at trial.

In view of the foregoing, it is

ORDERED that plaintiff's motion to compel discovery is denied; and it is further

ORDERED that plaintiff is directed to serve a copy of this decision and order with notice of entry upon defendants within ten (10) days of entry; and it is further

ORDERED that counsel are directed to appear for a conference in the Compliance Part, Courtroom 800, on April 19, 2013 at 9:30 A.M.

Dated: White Plains, New York
April 8, 2013

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

TO:

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cc: Compliance Part Clerk