Hernandez-Moctezuma v Bronx-Lebanon Hosp. Ctr.
2013 NY Slip Op 32749(U)
July 31, 2013
Sup Ct, Queens County
Docket Number: 17574/2009
Judge: Sidney F. Strauss
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[* 1]

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS IA PART 11
Justice

--X

JOSE LUIS HERNANDEZ-MOCTEZUMA and ERIKA BAUTISTA CONTRERAS,

Plaintiffs,

-against-

THE BRONX-LEBANON HOSPITAL CENTER, ET. AL.,

Defendants.

--X

Index No. 17574/2009

Motion Dates: May 28, 2013
June 19, 2013

Seq. Nos.: 9&10

SIGN DESIGN GROUP OF NEW YORK, INC.,

Third-Party Plaintiff,

-against-

G.S. SIGN GAESUNG 01 STUDIO DESIGN GROUP, ET. AL.,

Third-Party Defendants.

--X

TP Index No.: 350089/2011

HOLT CONSTRUCTION CORP.,

Second Third-Party Plaintiff,

-against-

GS SIGN & AWNING CORP., ET. AL.,

--X

Second TP Index No.: 350166/2011

[* 2]

---X
GOLD STAR AWNING & SIGN CORP.,

Third Third-Party Plaintiff, Third TP Index No.: 17574/2009

-against-

JMK CONSTRUCTION GROUP, LTD.,

Third Third-Party Defendant.
---X
GOLD STAR AWNING & SIGN CORP.,

Fourth Third-Party Plaintiff, Fourth TP Index No.: 17574/2009

-against-

MT. HAWLEY INSURANCE COMPANY
and RLI INSURANCE COMPANY,

Fourth Third-Party Defendants,

and

JMK CONSTRUCTION GROUP, LTD.,
ET. AL.,

As Nominal Fourth
Third-Party Defendants.
---X

The following papers numbered 1 to 14 were read on the motion of the fourth third-party defendant, Mt. Hawley Insurance Company ("Mt. Hawley") seeking an order quashing the subpoena by third-party defendant/second third-party defendant Gold Star Awning & Sign Corp. ("Gold Star") and issuing a protective order declaring that Mt. Hawley be under no obligation to produce documents sought in the subpoena, and requiring Gold Star to pay all costs, attorneys fees and disbursements incurred therein, as well as that of RLI Insurance Company with Mt. Hawley Insurance Company ("RLI-Mt. Hawley"), seeking an order pursuant to CPLR 3211(a)(3), dismissing the fourth third-party action with prejudice.

	PAPERS NUMBERED
Notice of Motion (9) - Affirmation - Exhibits..........	1 - 3
Opposition Affirmation - Exhibits............................	4 - 5
Response to Opposition Affirmation........................	6
Notice of Motion(10) - Affirmation - Exhibits.........	7 - 9
Opposition Affirmation - Exhibits...........................	10 - 11
Opposition Affirmation..	12
Opposition Affirmation..	13
Reply Affirmation..	14

In the interests of judicial economy, the court will address Sequence 10, RLI-Mt. Hawley's motion to dismiss, pursuant to CPLR 3211(a)(3), the fourth third-party action as against it, first.

The underlying action seeks to recover for damages sustained by the plaintiff in a construction accident that occurred at Bronx-Lebanon Hospital. Plaintiff commenced the initial action, seeking relief pursuant to Labor Law 200, 240(1) and 241(6). Gold Star, the fourth third-party plaintiff, alleges in the fourth third-party action, that RLI-Mt. Hawley is integral to the main action inasmuch as Gold Star claims that said defendants have erroneously disclaimed coverage to their insureds, JMK, Bronx-Lebanon and Holt, and that in the event of a finding of liability as against them, Gold Star would be deprived of the insurance coverage for contribution and indemnification.

RLI-Mt. Hawley relies upon the decision in *Lang v Hanover Ins. Co.*, 3 NY3d 350 [2004], to support their contention that the action as against them must be dismissed, pursuant to CPLR 3211(a)(3). The motion pursuant to CPLR 3211 (a)(3) is denied since defendants have failed to set forth any claim that plaintiff does not have "legal capacity to sue", as per this section of the CPLR. Furthermore, their reliance upon the *Lang* case is misplaced in this instance because here, it is not the injured party-plaintiff, himself, seeking direct payment from the insurer, but rather, an interested party in the underlying action. It is clear that "New York courts, under similar circumstances, have permitted a party who, although not privy to the insurance contract, would nevertheless stand to benefit from the insurance policy to bring a declaratory judgment action to determine whether the insurer owed a defense and/or coverage under the policy (see, *Curreri v. Allstate Ins. Co.*, 37 Misc 2d 557; *De Abreu v. Lumbermans Mut. Cas. Co.*, 32 Misc 2d 634)." (*Reliance Ins. Co. of N.Y. v Garsart Bldg. Corp.*, 122 AD2d 128 [2d Dept. 1986]; see also, *Tepedino v Zurich-American Ins. Group*, 220 AD2d 579 [2d Dept. 1995].)

As to that branch of the motion seeking to sever the fourth third-party action from the underlying action, same is dened. Absent any showing of prejudice to a substantial right, the court is not required to sever the actions. (See CPLR 602; *Chiarello v Rio*, 101 AD3d 793 [2d Dept. 2012].) "The grant or denial of a request for severance is a matter of judicial discretion, which should not be disturbed on appeal absent a showing of prejudice to a substantial right of

the party seeking severance" (*Chiarello v Rio*, 101 A.D.3d 793, 797, 957 N.Y.S.2d 133; see *Quiroz v. Beitia*, 68 A.D.3d 957, 960, 893 N.Y.S.2d 70; *Naylor v. Knoll Farms of Suffolk County, Inc.*, 31 A.D.3d 726, 727, 818 N.Y.S.2d 460). '[T]his discretion should be exercised sparingly' (*Shanley v. Callanan Indus.*, 54 N.Y.2d 52, 57, 444 N.Y.S.2d 585, 429 N.E.2d 104). Indeed, severance is inappropriate where there are common factual and legal issues and the interests of judicial economy and consistency of verdicts will be served by having a single trial (see *Naylor v. Knoll Farms of Suffolk County, Inc.*, 31 A.D.3d at 727, 818 N.Y.S.2d 460)." (*Zili v City of New York*, 105 AD3d 949 [2d Dept. 2013].) The movants have failed to establish that any question exists as to whether or not the causes of action asserted against all of the defendants present common factual and legal issues; moreover, they have not set forth any evidence from which the court could discern, that would result in prejudice to a substantial right should there be a single trial. (see, *Zili v City of New York,* supra; citing, *Mothersil v Town Sports Intl*., 24 AD3d 424 [2d Dept. 2005]; *Ingoglia v Leshaj*, 1 AD3d 482 [2d Dept. 2003].)

Accordingly, the motion of RLI-Mt. Hawley, seeking an order dismissing the fourth third-party complaint as against it, with prejudice, is denied in full.

As to the motion of Mt. Hawley, seeking an order quashing Gold Star's subpoena as it relates to possible insurance coverage of Gold Star's co-defendants, "[i]n the tort case in which the defendant is represented and defended by an attorney retained by the defendant's liability insurer, the insurer's whole file of the case qualifies as litigation material and is conditionally immune" (Siegel, NY Prac § 348 [Materials prepared for litigation]; *Grotallio v Soft Drink Leasing Corp.*, 97 AD2d 383 [1st Dept 1983] ["The contents of an insurer's claim file which have been prepared for litigation against its insured are immune from disclosure (*Kandel v. Tocher*, 22 A.D.2d 513, 256 N.Y.S.2d 898 [1st Dept 1965]) ..."].) However, despite Mt. Hawley's reliance upon *Grotallio*, it is clear that this rule only applies to actions in which the insurer has represented the insured (Siegel, NY Prac § 348), and not when the insurer is representing itself. (See e.g., *Greenfield v Giambalvo*, 36 Misc.3d 1209(A) [Sup. Ct. NY Co. 2012]; *Hauc v Maryland Cas. Co*., 2011 N.Y. Slip Op 31746[U] [Sup Ct. NY Co. 2011].)

The threshold requirement for discovery is that the disclosure sought is "material and necessary in the prosecution or defense of an action," applies to non-parties as well as parties, provided that the non-party is given "notice stating the circumstances or reasons such disclosure is sought or required." (CPLR § 3101[a][4]; see generally *Kooper v Kooper*, 74 AD3d 6 [2d Dept. 2010].) "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.' " (*Id*; *Rawlins ex rel. Rawlins v St. Joseph's Hosp.,*--- N.Y.S.2d ----, 2013 WL 3770665 [4th Dept. 2013].)

Here, Mt. Hawley has not provided sufficient evidence demonstrating an issue as to whether the information sought is immune or for that matter, produced in furtherance of litigation. To the extent Gold Star seeks information as it relates to Mt. Hawley's determination

to reject coverage, that information is discoverable. (See, *McClier Corp v United States Rebar, Inc.*, 66 AD3d 416 [1st Dept. 2009].)"It is incumbent on the party seeking disclosure 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, and unsubstantiated bare allegations of relevancy are insufficient to establish the factual predicate regarding relevancy" (See, *Wadolowski v Cohen*, 99 AD3d 793 [2d Dept. 2012], citing, *Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420 [4th Dept. 1989][citations omitted]; see *Foster v Herbert Slepoy Corp*., 74 AD3d 1139 [2d Dept. 2010].) "The supervision of discovery, and the setting of reasonable terms and conditions for disclosure, are matters within the sound discretion of the trial court." (*Bernardis v Town of Islip*, 95 AD3d 1050 [2d Dept. 2012]; see *Kooper v Kooper*, supra.)

Finally the court notes that Mt. Hawley attached as a true and correct copy the Commercial General Liability Policy (No. MGL0158027), to its other motion seeking to dismiss the fourth third-party action, so as to that policy, the motion is denied as moot. As to the remaining documents sought by Gold Star, Mt. Hawley's motion is also denied.

Dated: July 31, 2013

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SIDNEY F. STRAUSS, J.S.C.