

**Utica First Ins. Co. v Tiberias Constr., Inc.**

2014 NY Slip Op 30225(U)

January 22, 2014

Sup Ct, New York County

Docket Number: 151426/2012

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN

PART 63

Justice

Index Number : 151426/2012  
UTICA FIRST INSURANCE COMPANY  
vs.  
TIBERIAS CONSTRUCTION, INC.  
SEQUENCE NUMBER : 002  
COMPEL DISCLOSURE

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ [No(s). \_\_\_\_\_]

Answering Affidavits — Exhibits \_\_\_\_\_ [No(s). \_\_\_\_\_]

Replying Affidavits \_\_\_\_\_ [No(s). \_\_\_\_\_]

Upon the foregoing papers, it is ordered that this motion is

Motion and Cross-Motion(s) are  
decided in accordance with the *accompanying*  
decision and order  
of the Court issued in motion  
set, \_\_\_\_\_  
dated: \_\_\_\_\_

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

Dated: 1/22/14

EM, J.S.C.  
HON ELLEN M COIN

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

-----x  
 UTICA FIRST INSURANCE COMPANY,

Plaintiff,

Index No. 151426/2012  
 DECISION AND ORDER

-against-

TIBERIAS CONSTRUCTION, INC., et al.,

Defendants.  
 -----x

ELLEN M. COIN, J.:

This is an action by an insurer for a judgment declaring that plaintiff Utica First Insurance Company ("Utica") has no obligation to defend or indemnify defendant Tiberias Construction, Inc. ("Tiberias") and its principal, defendant Michael Borcina ("Borcina"), for a fire that occurred on or about December 25, 2011, in which three children and their grandparents perished. Defendant Matthew Badger ("Badger") is administrator of the estates of his daughters, decedents Lily Badger, Sarah Badger and Grace Badger. In addition, he is assignee of the rights, title and interests of Tiberias in the Utica policies.

Utica contends that Tiberias induced Utica to sell or renew the subject policies based on material misrepresentations in surveys pertaining to and in applications for the policies.

Badger moves for an order (1) compelling Utica to serve further answers to his Second Set of Interrogatories and (2) to produce a statistically relevant sample of Utica's underwriting

files for other policyholders doing business in New York to determine whether Tiberias' alleged misrepresentations were, in fact, material.

Utica cross-moves pursuant to CPLR §3103 for a protective order striking Badger's document demands and opposes Badger's motion to compel further answers to his Second Set of Interrogatories.

### **The Interrogatories**

Each of Badger's Interrogatories requested "the information and belief on which [Utica] relies" to allege certain facts regarding Tiberias' misrepresentations during "Survey 4." Utica made general objections to the Interrogatories as a whole and specific objections as to each. Nevertheless, Utica did provide answers to all of the interrogatories, attaching documents to amplify its answers. The Court notes that depositions have not as yet been held. Under the circumstances here, Badger may take depositions in order to obtain material and necessary information not adequately supplied through the interrogatories. (*Law Offs. Binder & Binder, P.C. v O'Shea*, 44 AD3d 626, 626-627 [2d Dept 2007]) [interrogatory asking defendant to "state facts he relied upon in support of his denials and his special or affirmative defenses" held vague and overbroad; plaintiff should have been permitted to take depositions in order to obtain material and necessary information not adequately supplied through

interrogatories]). Accordingly, so much of Badger's motion as seeks to compel further answers to his Second Set of Interrogatories is denied.

### **The Underwriting Files**

Utica contends that the documents Badger seeks on this motion are neither material nor necessary to his defense of this action (CPLR §3101). Utica cites Insurance Law §3105, which provides that "[n]o misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract." (Ins. Law §3105(b)(1)). Further, it cites Insurance Law §3105(c), which states, "In determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible."

The materiality of an applicant's misrepresentation is ordinarily a factual question, unless the insurer proffers clear and substantially uncontradicted evidence concerning materiality, in which case it is a question of law for the court to determine. (*Carpinone v Mutual of Omaha Ins. Co.*, 265 AD2d 752, 754 [3d Dept 1999]). To establish materiality as a matter of law, a court generally relies upon two categories of evidence: an affidavit

from the insurer's underwriter and the insurer's underwriting manual. (*Kroski v Long Is. Sav. Bank*, 261 AD2d 136, 136 [1<sup>st</sup> Dept 1999]; *Feldman v Friedman*, 241 AD2d 433, 434 [1<sup>st</sup> Dept 1997]).

Utica states that it has provided its underwriting manual to Badger in disclosure, and notes that Utica's underwriter has not as yet been deposed. Thus, it argues that in the absence of testimony that Utica has not always followed its guidelines, Badger is not entitled to disclosure of the sample he seeks of Utica's underwriting files for other policyholders. In so contending Utica relies on a series of cases determining summary judgment motions (*Varshavskaya v Metropolitan Life Ins. Co.*, 68 AD3d 855 [2d Dept 2009]; *Kroski v Long Is. Sav. Bank*, 261 AD2d 136; *Feldman v Friedman*, 241 AD2d 433; *Mehta v New York Life Ins. Co.*, 203 AD2d 8 [1<sup>st</sup> Dept 1994]). The issue here, however, is not whether Utica, at this early stage in the proceedings, is entitled to summary judgment, but whether Utica's production of its underwriting guidelines forecloses Badger from seeking document discovery to determine whether Utica in fact adhered to those guidelines.

Utica concedes that courts have permitted such discovery (*Pavloff Aff* at 6 ¶24, citing *Carpinone v Mutual Of Omaha Ins. Co.*, 265 AD2d 752 [3d Dept 1999]; *Alaz Sportswear v Public Serv. Mut. Ins. Co.*, 195 AD2d 357 [1<sup>st</sup> Dept 1993]; *Ashkenazi v AXA*

*Equit. Life Ins. Co.*, 91 AD3d 576 [1<sup>st</sup> Dept 2012]). Utica seeks to restrict the holdings of its citations, contending that discovery was only required where either the underwriting guidelines were unclear or the underwriter did not testify as to past practices. However, each cited case was a determination of the insurer's summary judgment motion. Here, in contrast, the litigation is in its infancy, with discovery barely begun.

Utica advises that its records contain 41,711 new Artisan's policies issued for the period in question, and contends that in order to review these policies and the underlying applications for similarity to this case Utica would be required to hire additional employees. Badger's statistical expert opines that a random sample of no more than 601 of Utica's underwriting files for Artisan insurance will be adequate for Badger's discovery purposes here. Indeed, Badger's counsel offers to examine the electronic or paper versions of such a sample where they are maintained, and consents to entry of a confidentiality order.

In *Merchants Indem. Corp. of N.Y. v Wallack* (14 AD2d 777 [2d Dept 1961]), the Appellate Division, Second Judicial Department, while restricting the time period in question, affirmed the lower court's order permitting discovery of policies similar to those of the insured and the action of the insurer thereon. Similarly, here, the Court will grant discovery to Badger of the statistically significant sample of Utica's underwriting files.

To deny discovery here would be effectively to grant summary judgment to Utica without giving Badger any opportunity to present facts to oppose it.

Utica argues that 15 U.S.C. §6801 *et seq.* (Gramm-Leach-Bliley Act) prohibits the disclosure of the information sought here, absent authorization from each insured whose underwriting file would be reviewed. However, Utica fails to rebut Badger's contention that the exception contained in 15 U.S.C. §6802(e)(8), which permits such disclosure of nonpublic personal information "to respond to judicial process [for other] purposes as authorized by law," would apply here. (See *e.g. Marks v Global Mtge. Group, Inc.*, 218 FRD 492, 495-496 [SD W Va 2003] ["[E]ven if the GLBA included no exception for civil discovery, the mere fact that a statute generally prohibits the disclosure of certain information does not give parties to a civil dispute the right to circumvent the discovery process"]; *Choate v State Farm Lloyds*, 2005 WL 1109432 [ND Tex.]; *Ex parte National Western Life Ins. Co.*, 899 So.2d 218 [Ala 2004]).

Accordingly, it is hereby

ORDERED that the motion to compel is granted to the extent that plaintiff shall produce to defendant Matthew Badger a random sample of 601 Artisan's insurance policies and applications therefor issued by plaintiff in 2009, 2010 and 2011; such production to be made to defendant in the form in which the

documents are maintained by plaintiff, and the motion is otherwise denied; and it is further

ORDERED that the cross-motion is denied.

This is the decision and order of the Court.

Dated: January 22, 2014



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Ellen M. Coin, A.J.S.C.