

<b>Gateway II Dev. Partners LLC v Indian Harbor Ins. Co.</b>
2014 NY Slip Op 30294(U)
January 30, 2014
Sup Ct, New York County
Docket Number: 154861/2012
Judge: Eileen A. Rakower
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**PRESENT: Hon. EILEEN A. RAKOWER**  
*Justice*

**PART 15**

**GATEWAY II DEVELOPMENT PARTNERS LLC,  
CATSPA W CONSTRUCTION CORP., AND  
LANDMARK AMERICAN INSURANCE COMPANY,**

**Plaintiffs,**

**INDEX NO. 154861/2012**

**- v -**

**MOTION DATE \_\_\_\_\_**

**INDIAN HARBOR INSURANCE CO.,  
VEZANDIO CONTRACTING CORP., JUAN  
TAPIA, NATIONAL UNION FIRE  
INSURANCE COMPANY OF PITTSBURGH,  
PA, AND ADMIRAL INSURANCE COMPANY,**

**MOTION SEQ. NO. # 002**

**MOTION CAL. NO. \_\_\_\_\_**

**Defendant.**

**INDIAN HARBOR INSURANCE CO.,**

**Plaintiff,**

**INDEX NO. 152453/2012**

**-v-**

**VEZANDIO CONTRACTING CORP., AND  
JUAN TAPIA,**

**Defendants.**

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

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

PAPERS NUMBERED

1, 2

Answer – Affidavits – Exhibits \_\_\_\_\_

3

Replying Affidavits \_\_\_\_\_

4

**Cross-Motion:      Yes      X      No**

Gateway II Development Partners LLC (“Gateway II”), Catspaw Construction Corporation (“Catspaw”) and Landmark American Insurance Company’s motion (“Landmark”) (collectively, “Movants”), move pursuant to CPLR §3124, to compel Indian Harbor Insurance Company (“Indian Harbor”) to supplement its discovery responses and specifically, to produce documents

relating to its claim, investigation and underwriting file. Indian Harbor opposes.

On December 9, 2009, Juan Tapia (“Tapia”) was injured while working at a construction project at 2080 Lexington Avenue, New York, New York, when a wall collapsed and fell on top of him. Vezandio allegedly “owned, operated, controlled, and managed, and/or served as construction manager or general contractor of the Premises.” Tapia commenced an action in Queens County Supreme Court entitled *Tapia v. 125<sup>th</sup> Street Gateway Ventures LLC, 126<sup>th</sup> Street Ventures LLC, Vezandio Contracting Corp., Gateway Development II, LLC and Catspaw Builders, Inc.*, (Index No 221-10) (the “Underlying Lawsuit”) to recover for his personal injuries.

This matter involves two separate declaratory actions pertaining to coverage with respect to the Underlying Lawsuit.

In one action, Movants seek a declaration that they qualify as additional insureds on the Indian Harbor Policy with respect to the Underlying Lawsuit. *Gateway II Development Partners LLC, Catspaw Construction Corp., and Landmark American Insurance Co. v. Indian Harbor Insurance Co., Vezandio Contracting Corp., Juan Tapia, National Union Fire Insurance Company of Pittsburgh PA, and Admiral Insurance Company*, (Index No. 154861/2012).

In the other action (Index No. 152453/2012), Indian Harbor seeks a declaration that Indian Harbor does not owe defense and/or indemnity coverage to Vezandio in connection with the Underlying Lawsuit, based on the terms and conditions of the Commercial General Liability Policy Indian Harbor issued to Vezandio (Policy No ESG002764901). Additionally, Indian Harbor seeks a declaration that it is entitled to withdraw its defense of Vezandio with respect to the Underlying Lawsuit, and recoup the amounts incurred in connection with Vezandio’s defense. (*Indian Harbor Insurance Co. v. Vezandio Contracting Corp., and Juan Tapia* (Index No. 152453/2012).

Movants seek to compel Indian Harbor to produce the following categories of documents: tenders, notices of claims, notices of suit and Indian Harbor’s responses (Demand No. 1); all investigation reports, statements or any other information with respect to Indian Harbor’s investigation of Juan Tapia’s alleged accident, claim and suit (Demand No. 4); all documents regarding correspondence between Indian Harbor and Vezandio with respect to the Underlying Litigation

(Demand No. 5); documents regarding Juan Tapia's complaint, and all documents relating to Indian Harbor's determination that coverage is not afforded to Vezandio or to Plaintiffs for Juan Tapia's accident, claim or suit (Demand No. 11); claim files, correspondence, defense counsel files; documents supporting Indian Harbor's position that there was no written contract between Vezandio, Gateway II Development Partners, and Catspaw Construction Corporation that was in effect on December 9, 2009 (Demand No. 13); all documents to support Indian Harbor's contention that coverage is precluded to Gateway and Catspaw based on the exclusion Designated Ongoing Operations Endorsement that is alleged to be in Indian Harbor's Policy (Demand No. 14); and all document with respect to Indian Harbor's compliance with Insurance Law 3420(d) with respect to claims for coverage by the parties for Juan Tapia's accident, claim and suit (Demand No. 15).

Indian Harbor objected to these demands as overly broad" and as seeking "irrelevant and privileged information." In addition, as to some of the demands, Indian Harbor responded, "Notwithstanding the foregoing, the responsive and non-privileged documents in Indian Harbor's possession are annexed hereto as Exhibit A. Indian Harbor reserves its right to supplement this response should additional documents become available."

Indian Harbor opposes, contending that it has produced all relevant, non-privileged, responsive documents in its possession. Indian Harbor contends that the remainder of the documents requested are protected by the attorney-client privilege, and that "should this Court wish to conduct an in-camera review of the information withheld by Indian Harbor based on the attorney-client privilege, Indian Harbor will furnish the Court a privilege log." Indian Harbor further contends that the underwriting file is proprietary information and not relevant. Indian Harbor contends that what is relevant is whether Movants qualified as additional insureds on Indian Harbor's Policy and specifically, whether they each entered into a contract with Vezandio wherein Vezandio agreed to provide each of the Plaintiffs with additional insured coverage.

CPLR §3101(a) generally provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and that "[t]he test is one of usefulness and reason"

(Allen v. Cromwell-Collier Publishing Co., 21 N.Y.2d 403, 406 [1968]).

Movants are entitled to documents relating the subject claim and investigation to the extent they are not privileged. Indian Harbor therefore is directed to produce all documents that it has withheld based on attorney client privilege with an accompanying privilege log for an in camera inspection.

However, Movants have failed to demonstrate how Indian Harbor's underwriting file is material and necessary to their claim that Movants qualified as additional insureds on Indian Harbor's Policy.

Wherefore, it is hereby,

ORDERED that Indian Harbor is directed to produce all documents that it has withheld based on attorney client privilege with an accompanying privilege log for an in camera inspection within 30 days of receipt of a copy of this order with notice of entry thereof.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: JANUARY 30, 2014



HON. EILEEN A. JUSKOWER

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE