

<b>Tower Ins. Co. of N.Y. v Lowe</b>
2014 NY Slip Op 30732(U)
March 20, 2014
Supreme Court, New York County
Docket Number: 103495/2009
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: Saliann Scarpulla  
Justice

PART 19

Index Number : 103495/2009  
TOWER INSURANCE CO OF NEW YORK  
vs.  
LOWE, CYRIL  
SEQUENCE NUMBER : 003  
COMPEL

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 and cross motion  
are determined in accordance with  
the accompanying decision/order.

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

FILED

MAR 26 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/20/14



J.S.C.

HON. SALIANN SCARPULLA

- 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: CIVIL TERM: PART 19

----- X  
TOWER INSURANCE COMPANY OF NEW YORK

Plaintiff,  
-against-

Index No. 103495/09  
Subm. Date: 11/20/2013  
Motion Seq. 003

CYRIL LOWE, DENISE SNELL, individually and as  
administratrix of the Estate of LESLIE SNELL and  
NEW YORK CITY HEALTH AND HOSPITALS  
CORPORATION,

**DECISION AND ORDER**

Defendant.

----- X  
For Plaintiff:  
Law Office of Steven G. Fauth, LLC  
40 Wall Street, 28<sup>th</sup> Floor  
New York, New York 10005

For Defendant Denise Snell:  
Goidel & Siegel, LLP  
122 East 42<sup>nd</sup> Street, Suite 4500  
New York, New York 10168

**FILED**

MAR 26 2014

Papers considered in review of the motion and cross- motion:

Notice of Motion.....	1
Notice Cross-Motion.....	2
Reply .....	3

COUNTY CLERK'S OFFICE  
NEW YORK

HON. SALIANN SCARPULLA, J.:

In this declaratory judgment action, plaintiff Tower Insurance Company of New York (“Tower”) moves to compel compliance with a March 28, 2013 subpoena duces tecum and ad testificandum requiring non-party Goidel & Siegel, LLP to appear for a deposition and produce certain documents, to compel a further deposition of defendant Denise Snell, individually and as administratrix of the estate of Leslie Snell (“Snell”), for costs of the continued deposition, and to compel full and complete responses to its March 28, 2013 discovery demands. Snell cross-moves for an order quashing the subpoenas

served by Tower, a protective order in favor of Denise Snell to protect her from appearing for another deposition and from responding to Tower's March 28, 2013 discovery demands, and an order precluding Tower from offering evidence at trial or in the alternative compelling Tower to produce the claim file as directed by the court in the March 27, 2013 order.

On April 7, 2007, Leslie Snell was injured at Cyril Lowe's ("Lowe") home. He subsequently died on September 6, 2007 at Coler Goldwater Specialty Hospital and Nursing Facility, which is owned, operated and controlled by NYCHCC. Lowe had a homeowners insurance policy issued by Tower, which required that Lowe notify Tower of any potential claims "as soon as is practical." According to Tower, it received notice of the incident on March 25, 2008 when Lowe called in the claim to Tower's automated call-in center. Snell claimed that she provided independent notice to Tower.

In or about December 2008, Snell commenced a wrongful death action, *Denise Snell v. New York City Health and Hospitals Corporation, "John Does 1-25" and Cyril Lowe*, 117341/08 ("the underlying action"). In the instant action, Tower seeks a judgment declaring that it is not obligated to defend or indemnify Lowe or Snell in the underlying action on the ground that they failed to provide timely notice of the claim, in violation of the terms of the insurance policy. Lowe has not appeared in this action.<sup>1</sup>

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<sup>1</sup> Previously, judgment was entered against Lowe on default, and NYCHHC's cross motion for summary judgment dismissing the complaint insofar as asserted against it was granted.

\* 4]

Tower received notice of the underlying lawsuit on January 20, 2009, and sent two letters disclaiming coverage, one on April 15, 2008 and one on January 24, 2009.

According to Snell, she was only able to obtain her father's autopsy report in January 2008, and at that time, decided to pursue a claim and tried to find out the identity of Lowe's insurance carrier. Lowe would only divulge that information in March 2008. Snell claimed that she informed Tower of the claim immediately after learning that Tower was Lowe's insurance carrier in March 2008.

Previously, Tower moved for summary judgment on its complaint asserted against Snell and Snell cross moved for summary judgment dismissing the complaint insofar as asserted against her. In an order dated October 8, 2011, the court denied the motion and cross motion, finding an issue of fact as to whether Snell acted diligently in investigating the claim and in ascertaining Tower's identity as the insurer and in notifying it of the accident.

On March 13, 2013, Snell appeared for a deposition to specifically address the issue of her independent notice to Tower of the accident and the claim, and her efforts, if any, to identify Tower as Lowe's insurer during the eleven month period following her father's accident. The questioning was based on two affidavits provided by Snell, from April 13, 2011 and from March 12, 2013. In her April 13, 2011 affidavit, she provided that:

Based on the autopsy report, I was informed by my counsel, a meritorious claim could be pursued on behalf of myself and my father's estate. Therefore, my

counsel and I contacted [Lowe] to inquire if he had a homeowner's insurance carrier. Initially, Lowe refused to disclose this information, saying he did not think Leslie would have wanted him to be sued. However, after contacting Lowe several more times and advising him that I was seeking appointment as Administratrix of Leslie's estate to pursue a wrongful death claim, Lowe finally identified [Tower] as insurance carrier. As soon as I learned the identity of Lowe's insurance carrier, I informed my legal counsel and they mailed a letter to Tower providing notice of the claims I was pursuing against Lowe.

In her March 12, 2013 affidavit, she provided that she herself did "not contact [Tower] by telephone at any time between April 7, 2007 and January 23, 2009."

At the March 13, 2013 deposition, Snell's counsel prevented her from answering questions about communications between her and her attorney, steps taken by her and her attorney to first identify the insurance carrier, when the carrier was notified, and when a decision to file a lawsuit was made, on the ground of attorney-client privilege and/or work product. Also, Tower maintained that it needed, *inter alia*, the retainer agreement, and copies of all communications between Snell and her counsel up until March 25, 2008 to clarify the time frame from which Snell was represented by counsel so that it could be determined whether counsel's efforts on behalf of Snell were diligent in investigating the identity of Lowe's insurer and providing notice. The court was contacted during the deposition, and the court instructed the deposition to continue, with the transcript pages setting forth the dispute marked, and submitted to the court with case law.

Tower now moves to compel compliance with a March 28, 2013 subpoena duces tecum and ad testificandum requiring Snell's attorney, Goidel & Siegel, LLP to appear for a deposition and produce certain documents, to compel a further deposition of Snell, for

costs of the continued deposition, and to compel full and complete responses to its March 28, 2013 discovery demands. In support of its motion, Tower argues that Snell must answer the questions posed to her at her deposition because she impliedly waived the attorney-client privilege by (1) asserting the privilege as a result of her affirmative act of claiming to have given independent notice to Tower; and (2) placing the privileged information at issue via her affirmative act of submitting affidavits attesting that all efforts made to give independent notice to Tower were done through Goidel & Siegel, LLP. In addition, allowing the privilege would deny the opposing party access to information vital to its defense. Specifically, Tower wants responses to questions about all conversations internally within the law firm, and with Snell, regarding efforts, attempts and actions taken to notify Tower of the claim and the underlying action.

Snell cross-moves for an order quashing the subpoenas served by Tower, a protective order in her favor to protect her from appearing for another deposition and from responding to Tower's March 28, 2013 discovery demands, and an order precluding Tower from offering evidence at trial or in the alternative compelling Tower to produce the claim file as directed by the court in the March 27, 2013 order. In support of her cross motion and in opposition to Tower's motion, Snell argues that (1) the subpoena issued to Goidel and Siegel, LLP must be quashed because it does not contain a statement setting forth the reason why the subpoena was issued, in violation of CPLR §3101(a)(4); (2) in any event, the subpoena must be quashed because it seeks to elicit testimony that is

protected by the attorney-client privilege and attorney work product; (3) any outstanding questions, not covered by the attorney-client privilege, should be answered by way of an affidavit or notice to admit; (4) a protective order must be issued protecting Snell from appearing at a deposition and responding to discovery demands because the testimony and documents sought are covered by the attorney-client privilege; and (5) Tower has still failed to produce the non-privileged portions of the claim file, as ordered by the court on March 27, 2013 and therefore, Tower should be precluded from offering this evidence at trial.

### **Discussion**

A subpoena duces tecum served on a nonparty is facially defective and unenforceable if it neither contains, nor is accompanied by, a notice stating the circumstances or reasons such disclosure is sought or required. *See Kooper v. Kooper*, 74 A.D.3d 6 (2<sup>nd</sup> Dept. 2010). Here, however, the lack of such notice is not fatal given that Goidel and Siegel, LLP was made aware at Snell's March 16, 2013 deposition that Tower intended to notice it for deposition and demand certain documents. Further, Tower clearly articulated the circumstances and reasons for the deposition and discovery demanded in its motion papers. *See Velez v. Hunts Point Multi-Serv. Ctr., Inc.*, 29 A.D.3d 104 (1<sup>st</sup> Dept. 2006).

The attorney-client privilege applies to confidential communications between clients and their attorneys made in the course of professional employment. CPLR

§4503(a). However, the privilege is not limitless. It has long been recognized that the attorney-client privilege can constitute an obstacle to the truth-finding process, the invocation of which should be cautiously observed to ensure that its application is consistent with its purpose. *Priest v. Hennessy*, 51 N.Y.2d 62, 68 (1980). An “at issue” waiver of the privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information. *Deutsche Bank Trust Co. of Ams. v. Tri-Links Inv. Trust*, 43 A.D.3d 56, 63 (1<sup>st</sup> Dept. 2007).

Here, in its October 8, 2011 order, this court found an issue of fact as to whether Snell acted diligently in investigating the claim and ascertaining Tower’s identity as the insurer, and in notifying Tower. Snell’s defense in this action centers around her assertion that she did act diligently in investigating the claim and in providing independent notice to Tower. She clearly states that she did not herself contact Tower by telephone at any time between April 7, 2007 and January 23, 2009, and also states that she and her counsel contacted Lowe to ascertain the identity of his insurance carrier. She claims that as soon as she learned that his insurance carrier was Tower, she told her counsel, who then mailed a letter to Tower providing notice. Therefore, determining whether or not Goidel and Siegel, LLP, on her behalf, diligently notified Tower is

required to determine the validity of her defense. As such, Goidel and Siegel, LLP's efforts made on Snell's behalf to notify Tower have been put at issue by Snell and are discoverable. Without this information, Tower would be deprived of vital evidence.

The court finds that Tower shall submit interrogatories to Snell and Goidel and Siegel, LLP on the limited issue of Goidel and Siegel, LLP's efforts made on Snell's behalf to notify Tower. Snell and Goidel and Siegel, LLP shall either respond or object to the interrogatories. Any objections will be reviewed by the court, and frivolous objections will be subject to sanctions. In addition, Snell shall produce copies of communications between her and Goidel and Siegel, LLP and copies of pages in the memo book referred to by Snell during the March 13, 2013 deposition, both relevant to the limited issue of Goidel and Siegel, LLP's efforts made on Snell's behalf to notify Tower, to the court for an in camera inspection. Finally, Goidel and Siegel, LLP must produce copies of communications between it and Snell, and any additional documents relevant to the limited issue of Goidel and Siegel, LLP's efforts made on Snell's behalf to notify Tower, to the court for an in camera inspection.

In addition, attorney retainer agreements are not privileged in the usual case, and are discoverable if relevant. *Priest v. Hennessy*, 51 N.Y.2d 62, 68 (1980). Here, Tower seeks the retainer agreement between Goidel and Siegel and Snell to determine the time frame that Snell was represented by counsel and therefore, it is discoverable.<sup>2</sup>

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<sup>2</sup> Tower's demand for the OCA statement and Snell's power of attorney is denied because it provides no reason for needing these documents.

That portion of Snell's cross motion seeking an order precluding Tower from offering evidence at trial, or in the alternative compelling Tower to produce the claim file as directed by the court in the March 27, 2013 order is denied as academic as Tower produced the claim file on April 19, 2013.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Tower Insurance Company of New York's motion is granted only to the extent that:

(1) Denise Snell shall serve upon Tower, within 30 days of the date of this order, a copy of her retainer agreement with Goidel and Siegel, LLP, and she shall submit to the court for an in camera inspection, within 30 days of the date of this order, copies of communications between her and Goidel and Siegel, LLP relevant to the limited issue of Goidel and Siegel, LLP's efforts made on Snell's behalf to notify Tower, and copies of pages in the memo book referred to by Snell during the March 13, 2013 deposition relevant to the limited issue of Goidel and Siegel, LLP's efforts made on Snell's behalf to notify Tower; and

(2) Goidel and Siegel, LLP shall submit to the court for an in camera inspection, within 30 days of the date of this order, copies of communications between it and Snell and any additional documents relevant to the limited issue of Goidel and Siegel, LLP's efforts made on Snell's behalf to notify Tower; and

(3) Tower shall serve upon Snell and Goidel and Siegel, LLP interrogatories limited to the issue of Goidel and Siegel, LLP's efforts made on Snell's behalf to notify Tower, within 30 days of the date of this order, and Goidel and Siegel, LLP and Snell shall respond and/or object within 30 days of receipt of the interrogatories; and the motion is otherwise denied; and it is further

ORDERED that defendant Denise Snell, individually and as administratrix of the estate of Leslie Snell's cross motion is denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
March 20, 2014

ENTER:



\_\_\_\_\_  
Saliann Scarpulla, J.S.C.

**FILED**

MAR 26 2014

COUNTY CLERK'S OFFICE  
NEW YORK