

TC Ravenswood, LLC v National Union Fire Ins. Co.
2014 NY Slip Op 31163(U)
April 30, 2014
Sup Ct, New York County
Docket Number: 400759/11
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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TC RAVENSWOOD, LLC,

Index No. 400759/11

Plaintiff,

Motion seq. no. 24

-against-

DECISION AND ORDER

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH PENNSYLVANIA
(a/k/a AIG, n/k/a Chartis), ASSOCIATED
ELECTRIC & GAS INSURANCE SERVICES
LIMITED, ACE INA INSURANCE, AND ARCH
INSURANCE COMPANY, and FACTORY
MUTUAL INSURANCE COMPANY,

Defendants.

-----X
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By notice of motion, defendant Factory Mutual Insurance Company (FMIC) moves for an order compelling plaintiff Transcanada, a/k/a TC Ravenswood, LLC to produce for depositions Timothy Gale, Darrell Rose, and Donald Schubert. Transcanada and Marsh & McLennan Companies, Inc., oppose.

I. PERTINENT BACKGROUND

When Transcanada purchased the Ravenswood facility at issue in this litigation, it retained Marsh to negotiate and procure insurance policies for Ravenswood and for litigation management services related to the insurance policies and claims in issue in this matter. The proposed deponents are Marsh employees, and FMIC has already deposed three Marsh

employees. (NYSCEF 522).

According to FMIC, Gale signed the retainer agreement between Transcanada and Marsh, and he supervised one of the three deposed employees and coordinated Marsh's alleged efforts to influence the insurance companies on Transcanada's policy and claim, including drafting an e-mail discussing a telephone call about the claim among upper-level executives at Marsh. Rose was allegedly involved in procuring the insurance policy for Transcanada, determining the insurance values used for the policy, and analyzing the engineering and technical aspects of the claim. Schubert is a machinery expert at Marsh. He had been at with experience with the facility before Transcanada acquired it and has knowledge of past issues and claims related to it. FMIC contends that the employees already deposed have no personal knowledge as to the anticipated testimony of Gale, Rose, or Schubert, and that their depositions are thus material and necessary. (NYSCEF 521).

II. CONTENTIONS

Marsh observes that Gale and Rose reside in Canada and are employed by its foreign subsidiary, Marsh Canada Limited, that Schubert resides in Connecticut and is employed by Marsh USA Inc., and that FMIC has not served subpoenas on them before moving to compel their depositions. (NYSCEF 543). It argues that as the three employees reside out of state, FMIC must obtain a commission or letters rogatory to take their depositions, and denies that the employees who have been deposed lack sufficient knowledge of the proposed testimony of these employees. Marsh also maintains that permitting the additional depositions would be overly burdensome, given the numerous depositions already taken by FMIC and the documents produced by Marsh during the two years of discovery in these matters. (NYSCEF 542).

Transcanada argues that FMIC fails to establish that the depositions are material and necessary, and that FMIC cites no authority for the proposition that it can be compelled to produce out-of-state Marsh witnesses for deposition. (NYSCEF 557).

In reply, FMIC relies on CPLR 3101(a)(1), claiming that it permits the depositions of a party's agent, and alleges that it is undisputed that Marsh is Transcanada's agent, and also maintains that it properly served subpoenas on Marsh, a New York corporation, and that in any event, the other Marsh entities are subject to this court's jurisdiction as they are doing or have done business in New York. It reiterates that the depositions are material and necessary. (NYSCEF 568).

By letter dated March 4, 2014, Transcanada submits a recent United States Supreme Court decision, *Daimler AG v Bauman*, 134 S Ct 746 (2014), in support of its argument that the out-of-state Marsh entities are not subject to jurisdiction here even if they had been doing business in New York. By letter dated March 12, 2014, FMIC denies that *Daimler* applies.

II. ANALYSIS

Pursuant to CPLR 3101(a)(1), discovery may be obtained from a party or an agent or employee of a party, as agents and employees are considered to be within a party's control, and therefore are also deemed a party for disclosure purposes. However, agents and employees qualify as a party only when they are in the party's employ or control when the disclosure is sought. Thus, former employees and agents are not within such control and a party seeking disclosure from them must use the procedures for non-party discovery. (Connors, Practice Commentaries, McKinney's Cons Law of NY, CPLR C3101:19).

While FMIC argues that Marsh is Transcanada's agent for the purpose of this litigation

and may be deemed a party, it submits no supporting evidence. The affidavits of Marsh's and Transcanada's employees on which FMIC relies reflect that Marsh was hired to act as Transcanada's agent before the incident at issue and before the instant action was commenced, and that the last consulting agreement between Transcanada and Marsh expired in 2012. (NYSCEF 280). Thus, as FMIC has not established that Marsh is under Transcanada's control, it has also failed to demonstrate that Marsh should be deemed a party here. That Transcanada argued, in a prior motion, that Marsh was its agent for the purpose of asserting that certain documents were privileged is irrelevant to whether Marsh is currently Transcanada's agent.

Consequently, Marsh's employees are non-parties, and as they reside outside of New York, a commission or letters rogatory is required for their production for deposition. (*See* CPLR 3106[b] [subpoena for deposition required when person to be examined is not party or employee of party]; CPLR 3108 [commission or letters rogatory may be issued where necessary or convenient for taking of deposition out of state]; *see In re Oxycontin II*, 76 AD3d 1019 [2d Dept 2010] [New York courts lack authority to subpoena out-of-state nonparty witnesses]; *Lewis v Baker*, 279 AD2d 380 [1st Dept 2001] [court had no authority to order non-party non-resident witness to appear for deposition; plaintiff had not moved for commission or letters rogatory]; *White v Bronx Lebanon Hosp. Ctr.*, 240 AD2d 212 [1st Dept 1997] [subpoena served by defendants upon out-of-state nonparty witness had no legal effect in New York]).

Therefore, Transcanada may not be compelled to produce the requested Marsh employees. (*Compare Standard Fruit & Steamship Co. v Waterfront Commn. of New York Harbor*, 43 NY2d 11 [1977] [corporation doing business in New York may be subpoenaed to testify through officers and employees even if they are not within state]).

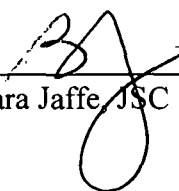
In light of this result, I need not consider the parties' remaining contentions.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Factory Mutual Insurance Company's motion for an order compelling Transcanada a/k/a TC Ravenswood, LLC to produce for depositions Timothy Gale, Darrell Rose, and Donald Schubert is denied.

ENTER:



Barbara Jaffe, JSC

DATED: April 30, 2014
New York, New York