

**Kotz v Still**

2014 NY Slip Op 31234(U)

May 7, 2014

Supreme Court, Suffolk County

Docket Number: 20425/09

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK  
CALENDAR CONTROL PART - SUFFOLK COUNTY

COPY

**PRESENT:**

**HON. PAUL J. BAISLEY, JR., J.S.C.**

-----X  
JEFFREY GERALD KOTZ and THERESA M.  
KOTZ, individually and as Husband and Wife,

Plaintiffs,

-against-

MERWIN R. STILL, M. STILL EQUIPMENT  
CORP., P.K. METALS SUFFOLK INDUSTRIAL  
RECOVERY CORP. and P.K. METALS d/b/a  
SUFFOLK INDUSTRIAL RECOVERY CORP.,

Defendants.

-----X  
HURWITZ & FINE, P.C.  
1300 Liberty Building  
Buffalo, New York 14202

INDEX NO.: 20425/09  
CALENDAR NO.: 201201793MV  
MOTION DATE: 4/17/14  
MOTION SEQ. NO.: 010 MOT D;  
011 MOT D; 012 MOT D

**PLAINTIFFS' ATTORNEY:**  
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Garden City, New York 11530

**DEFENDANTS' ATTORNEYS:**  
AHMUTY, DEMERS & McMANUS  
200 I.U. Willets Road  
Albertson, New York 11507

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Upon the following papers numbered 1 to 59 read on these motions for contempt, to quash subpoena and for open commission; Notice of Motion/ Order to Show Cause and supporting papers 1-11; 12-15; 16-18; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 19-24; 25-17; 28-29; 30-33; 34-36; 37-38; 39-40; Replying Affidavits and supporting papers 39-40; 41-45; 46-57; 58-59; Other     ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by defendants P.K. Metals, Suffolk Industrial Recovery Corp. and P.K. Metals d/b/a Suffolk Industrial Recovery Corp. (SIR) brought on by Order to Show Cause (Emerson, J.) dated February 26, 2014 seeking an order pursuant to CPLR 2304, 2308 & 3103 deeming the Notice to Admit dated October 21, 2013 served upon defendants Merwin R. Still and M Still Equipment Corp. (Still) admitted and adjudging non-party Farm Family Insurance Company in contempt upon its failure to comply with a judicial subpoena duces tecum and testificandum is denied; and it is further

**ORDERED** that the motion by non-party Farm Family Casualty Insurance Company (Farm Family) seeking an order pursuant to CPLR 2304 quashing the subpoenas served by the moving defendants is granted; and it is further

**ORDERED** that the Still defendants' application for an award of costs including an award of reasonable attorneys fees from the SIR defendants is denied; and it is further

**ORDERED** that the motion by plaintiffs Jeffrey G. Kotz and Theresa M. Kotz seeking an order pursuant to CPLR 3108 granting an open commission for the purpose of conducting an examination before trial to be video-taped and introduced at trial of plaintiff's treating orthopedic

surgeon is granted to the extent that plaintiffs shall serve and submit a proposed order with respect to the deposition to be taken in Indiana at a mutually convenient date and time for counsel for all parties. The proposed order for the open commission shall be served on counsel for all parties within ten days of the date of this order and shall be submitted to the Court on or before May 16, 2014. Plaintiffs shall also be responsible to reimburse counsel for the defendants with respect to costs related to the out-of-state deposition for transportation and lodging only.

Plaintiffs personal injury action seeks damages for injuries sustained by plaintiff Jeffrey Gerald Kotz on December 11, 2008 when plaintiff Kotz's right leg became pinned between his vehicle's rear bumper and the rear bumper of a pick-up truck being driven by defendant Merwin R. Still. Plaintiff Kotz had parked his truck near a weigh station on premises owned by the Suffolk Industrial Recovery defendants and was standing outside the vehicle when Still's truck backed into him.

Court records indicate that a note of issue was filed on September 18, 2012 and the action is presently scheduled on the Calendar Control Part Ready Day calendar on June 30, 2014. On October 21, 2013 the SIR defendants served a Notice to Admit on the Still defendants seeking an admission that six Farm Family Insurance policies were "in full force and effect" insuring the Still defendants on the date of the incident. By Response dated November 5, 2013 the Still defendants objected to the six paragraph demand stating that the Notice called for "conclusions of law" and was unclear about the identity of each policy and concerning the use of the term "was in full force and effect".

In October, 2013 and January, 2014 the SIR defendants served two subpoenas on Farm Family's insurance agent (Purdy & Associates) and on Farm Family, each seeking complete copies of the six insurance policies issued to the Still defendants. Neither Farm Family nor Farm Family's agent provided copies of those policies to the SIR defendants.

Defendants SIR's motion seeks an order deeming the statements of fact set forth in the Notice to Admit conceded by the Still defendants and adjudging the non-party insurer, Farm Family, in contempt based upon its failure to provide copies of the six insurance policies issued to the Still defendants. Defendants contend that the Court must compel Farm Family to produce copies of all six policies together with copies of claims files, underwriting files and correspondence relative to the policies of insurance.

In opposition to defendants' motion and in support of its motion to quash the subpoenas, the non-party Farm Family submits an affidavit from a claims representative and four affirmations of counsel and claims that the SIR defendants are not entitled to obtain the six policies and claims files directly from the insurer since Farm Family is not a named party to this action. Farm Family contends that the defendants remedy is to demand that the Still defendants provide copies of the insurance policies which are relevant to the claims asserted by the plaintiffs. Farm Family argues that many of the documents contain confidential and privileged material and maintains that the defendants are not entitled to obtain what is, in essence, discovery material 20 months after the note of issue has been filed.

In further opposition to defendants' motion, the Still defendants submit an attorney's affirmation and claim that the Notice to Admit is improper since it seeks admissions to issues of

Stills' coverage under the Farm Family policies. The Still defendants claim that their denials to items #1-#6 are valid since the SIR defendants failed to provide any of the six referenced policies and since it is unclear what the phrase "in full force and effect" means under these circumstances.

In support of the plaintiffs' motion for an open commission for the purpose of conducting an out-of-state videotaped deposition of Kotz's treating orthopedic surgeon for use at trial, plaintiffs submit two affirmations of counsel and claim that the deposition is necessary because the medical doctor is not available for testimony in New York. Plaintiffs claim that they notified defendants' counsel and seek an open commission for a mutually convenient date to conduct the deposition in Indianapolis, Indiana. Plaintiffs' motion is opposed by all defendants. Counsel for the defendants claim that plaintiffs provided no prior notice of counsel's intention to conduct an out-of-state deposition on the eve of trial and argue that if the Court grants plaintiffs' application, the plaintiffs must provide all costs related to conducting the out-of-state deposition.

Parties to litigation are entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR Section 3101 (a)). This provision has been liberally construed to require disclosure "of any facts bearing on the controversy which will assist the parties' preparation for trial by sharpening the issues and reducing delay and prolixity" (*Allen v. Crowell-Collier Publishing Co.*, 21 NY2d 403, 406, 288 NYS2d 449 (1968)). Litigants do not have carte blanche to demand production of any documents or other tangible items that they speculate might contain useful information (*see Beckles v. Kingsbrook Jewish Medical Center*, 36 AD3d 733, 830 NYS2d 203 (2<sup>nd</sup> Dept., 2007) and a party will not be compelled to comply with disclosure demands that are unduly burdensome, lack specificity, seek privileged material or irrelevant information, or are otherwise improper (*Astudillo v. St. Francis-Beacon Extended Care Facility, Inc.*, 12 AD3d 469, 784 NYS2d 645 (2<sup>nd</sup> Dept., 2004)).

CPLR Section 2304 provides:

**Motion to quash, fix conditions or modify.**

A motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable. If the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the supreme court.... Reasonable conditions may be imposed upon the granting or denial of a motion to quash or modify.

The purpose of a subpoena is not disclosure but the furnishing of proof. A subpoena duces tecum may not be used for the purposes of discovery or to ascertain the existence of evidence, but rather the purpose of a subpoena is to compel production of documents that are relevant and material to facts at issue in a pending judicial proceeding (*Matter of Board of Education of City of New York v. Hankins*, 294 AD2d 360, 741 NYS2d 717 (2<sup>nd</sup> Dept., 2002); *Matter of Terry D.*, 81 NY2d 1042, 601 NYS2d 451 (1993)).

22 NYCRR 202.21 (e) provides that within 20 days after service of a note of issue and certificate of readiness, any party to the action may move to vacate the note of issue "upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if

it appears that a material fact in the certificate of readiness is incorrect.” A party seeking additional discovery after expiration of the 20-day period provided in 22 NYCRR 202.21 (d), however must show “unusual or unanticipated circumstances develop(ed) subsequent to the filing of the note of issue and certificate of readiness which require additional pre-trial proceedings to prevent substantial prejudice” (22 NYCRR 202.21 (d); see *Utica Mutual Insurance Company v. P.M.A. Corporation*, 34 AD3d 793, 826 NYS2d 138 (2<sup>nd</sup> Dept., 2006); *Audiovox v. Benyamini*, 265 AD2d 135, 707 NYS2d 137 (2<sup>nd</sup> Dept., 2000)).

The record shows that by Demand dated August 17, 2009 the SIR defendants sought disclosure of the insurance agreements insuring the Still defendants relevant to this action. Thereafter a November 1, 2009 preliminary conference order required disclosure of insurance coverage pursuant to CPLR 3101(f) on or before December 10, 2009. By Response dated November 16, 2009 the Still defendants identified two policies (including policy numbers) with policy limits of \$1 million each occurrence. However copies of the two insurance policies were never produced. Neither the plaintiff nor the SIR defendants made a motion pursuant to CPLR 3124 &/or CPLR 3126 compelling the production of the policies during discovery, and a certificate of readiness confirming all discovery was complete was filed in September, 2012.

The SIR defendants’ subpoenas seek not only copies of the two relevant insurance agreements but also copies of four additional policies together with Farm Family’s claims files and correspondence directly from the insurer. Although copies of the two insurance policies (relevant to this action) are relevant and were discoverable during the discovery phase of this litigation, there has been no showing that the four additional policies, or the claims files and correspondence compiled by the insurer, are discoverable by the SIR defendants. Moreover, a subpoena issued directly to the insurer for such records is clearly an improper mechanism to obtain these records under these circumstances since the subpoenas, in this instance, are being used for the purpose of discovery and since Farm Family is not a party to the action and therefore not required to produce underwriting files or the policies at issue (see *Lang v. Hanover Insurance Company*, 3 NY3d 350, 787 NYS2d 211 (2004)). Defendants remedy was to seek production of the two arguably relevant insurance files from the Still defendants. Accordingly the SIR defendants motion seeking an order adjudging the insurer Farm Family in contempt must be denied and the motion by non-party Farm Family seeking an order quashing the subpoenas must be granted.

Requests to admit are intended to eliminate from litigation factual matters which will not be in dispute at trial (CPLR 3123; *Berg v. Flower Fifth Avenue Hospital*, 102 AD2d 760, 476 NYS2d 895 (1<sup>st</sup> Dept., 1984)). It is to be used regarding specific facts upon which there is general agreement; it is not to be used concerning issues which will be in dispute at trial that are legitimately in controversy for the purpose of proving or disproving a party’s claims (see *DeSilva v. Rosenberg*, 236 AD2d 508, 654 NYS2d 30 (2<sup>nd</sup> Dept., 1997); *Sagiv v. Gamache*, 26 AD3d 368, 810 NYS2d 481 (2<sup>nd</sup> Dept., 2006); *Nacherilla v. Prospect Park Alliance*, 88 AD3d 770, 930 NYS2d 643 (2<sup>nd</sup> Dept., 2011)). Moreover the purpose of a notice to admit is not to obtain information in lieu of other disclosure devices (*Falkowitz v. Kings Highway Hospital*, 43 AD2d 696, 349 NYS2d 790 (2<sup>nd</sup> Dept., 1973); *Priceless Custom Homes v. O’Neill*, 104 AD3d 664, 960 NYS2d 455 (2<sup>nd</sup> Dept., 2013)).

A review of the SIR defendants’ Notice to Admit reveals that only item # 3 has any relevance to the issues underlying this action since that policy number (3152C4053) has been identified by the Still defendants as providing coverage for the underlying incident. No legal basis exists to grant the

defendants' application to deem the Notice admitted and/or to strike the Still defendants' response since five of the six "admissions" refer to irrelevant policies and since the issue of whether the excess/umbrella policy provided coverage under the relevant policy number (item # 3) remains in dispute among the parties. Defendants' motion for an order seeking an order pursuant to CPLR 3123 must therefore also be denied.

CPLR 3108 provides:

**R 3108. Written questions; when permitted.**

A deposition may be taken on written questions when the examining party and the deponent so stipulate or when the testimony is to be taken without the state. A commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state.

Plaintiffs have made the required showing of necessity to warrant an order granting the application for an open commission. Plaintiffs shall be required to reimburse counsel for the defendants the reasonable costs associated with travel and lodging but not attorneys fees. Plaintiffs shall submit a proposed order for the purpose of scheduling a mutually convenient date for all counsel to attend the video taping of the deposition of the medical witness within ten days of the date of this order.

22 NYCRR Section 130-1.1 (a) provides:

The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorneys fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart.....

Although the SIR defendants' motion to strike the Still defendants' response to its Notice to Admit was denied, the Court in its discretion, declines to impose sanctions.

Dated: May 7, 2014

**HON. PAUL J. BAISLEY, JR.**  
J.S.C.