

<b>Belfer v Travelers Ins. Co.</b>
2014 NY Slip Op 31980(U)
July 25, 2014
Supreme Court, New York County
Docket Number: 100603/11
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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SHIRA G. BELFER,

Plaintiff,

-against-

TRAVELERS INSURANCE COMPANY a/k/a  
Travelers Indemnity Company, a/k/a Travelers Casualty  
and Surety Company, a/k/a The Farmington Casualty  
Company, VICTORIA OWNERS CORP., VIRGINIA  
MANNING, F&L CLAIMS SERVICE, INTERSTATE  
INDEMNITY CO., JOHN DOE INDEMNITY  
COMPANY,

Defendants.  
-----X

BARBARA JAFFE, JSC:

**For plaintiff, self-represented:**

Shira G. Belfer  
600 Columbus Ave., #13A  
New York, NY 10024  
212-243-1572

**For Coop defendants:**

Tracy J. Abatemarco, Esq.  
Wood Smith *et al.*  
222 E. 41<sup>st</sup> St., 21<sup>st</sup> Fl.  
New York, NY 10017  
212-999-7100

By order to show cause, plaintiff moves pursuant to CPLR 3124 and 3126 for an order compelling the Coop defendants to provide discovery demands and striking their answer upon their failure to do so. Defendants oppose.

Plaintiff contends that defendants have failed to provide her with certain information and/or documents, which defendants dispute.

A. Environmental tests

Plaintiff seeks copies of any environmental tests performed in the building. (Affidavit of Shira Belfer, dated May 7, 2014 [Belfer Affid.]). Defendants contend that the request is overly broad as environmental tests done in any part of the building other than plaintiff's apartment are

[\* 2]

irrelevant, and observe that they had produced a copy of the test performed on her apartment. (Affirmation of Tracy J. Abatemarco, Esq., dated May 15, 2014 [Abatemarco Aff., Exh. B].)

Absent any reason to believe that environmental tests performed on parts of the building other than plaintiff's apartment would lead to relevant evidence concerning the environmental state of her apartment after the incident, I find that defendants have complied with this demand. To the extent that the City of New York performed its own tests, as plaintiff alleges, defendants deny possessing the test results and plaintiff does not claim otherwise.

B. Records of discussions between defendants and Travelers as to plaintiff's claim and damages

Plaintiff argues that communications between defendants and Travelers, her insurance company, regarding her claim are relevant as they may show defendants' and Travelers's positions as to their relative responsibility for the flood in her apartment, as well as the reasons for partially denying her request for reimbursement for her damages. She denies that communications between defendants and Travelers are protected by privilege.

Defendants assert that plaintiff may obtain Travelers's records directly from Travelers, and that communications between them and Travelers are attorney-client privileged as they arise out of communications between an insured and its insurer.

To the extent that plaintiff seeks Travelers's documents, she may subpoena them directly from Travelers. However, as Travelers was plaintiff's insurance carrier, not defendants, there is no confidential relationship between them, and defendants do not allege that the documents may contain privileged communications between them and their attorney or their insurance company. Moreover, if the documents concern Travelers' investigation into plaintiff's claim and whether to deny or pay it, the documents are not privileged. (*See Ntl. Union Fire Ins. Co. of Pittsburgh v*

*Transcanada Energy USA, Inc.*, 114 AD3d 595 [1<sup>st</sup> Dept 2014] [documents prepared in ordinary course of insurer's investigation of whether to pay or deny claim not privileged, even if investigation conducted by attorney]). Thus, defendants must respond to plaintiff's request for these documents.

C. Records maintained by defendants related to maintenance of building's heating system, including all pipes and conduits transmitting fluids within building

Plaintiff contends that her request for records related to the whole building for the last 10 years is relevant to whether defendants properly maintained the system building-wide and whether they were on notice of any problems with the system based on prior incidents or accidents. Defendants argue that the demand is overly broad and burdensome.

As the records for the entire building may show both whether there were problems in the overall heating system that may have contributed to the flood and also whether defendants had notice of any problems with the system before the flood, they are relevant, but will be restricted to the five years before the incident, from 2004 to 2009. (*See Santiago v Pyramid Crossgates Co.*, 243 AD2d 955 [3d Dept 1997] [granting motion to compel discovery of all prior incidents similar to one at issue; condition of entire mall roof and prior instances of leaks throughout mall material to inquiry of defective design, construction and maintenance of mall ceiling and roof and to question of notice of conditions and failure to correct them]; *see also Bush v Mechanicsville Warehouse Corp.*, 69 AD3d 1207 [3d Dept 2010] [jury could have found that defendant had constructive notice of dangerous condition where accident occurred by knowledge of recurring problems with roof leaks elsewhere in warehouse]; *Armstrong v Ogden Allied Facility Mgt. Corp.*, 281 AD2d 317 [1<sup>st</sup> Dept 2001] [constructive notice may be found based on

similar hazardous condition known to have existed for at least two years elsewhere in building)).

D. Copies of claim filed by defendants with their insurance company related to plaintiff's incident

Defendants have satisfactorily established that the documents supplied by them to plaintiff, and annexed to their opposition papers, provide the information requested by plaintiff in this demand.

E. Copy of provision in the Coop's proprietary lease, if any, that pertains to the Coop's responsibility for damages or repairs in event of incident similar to plaintiff's

Defendants are directed to specify the provision(s) in the proprietary lease governing damages and/or repairs related to the incident at issue here.

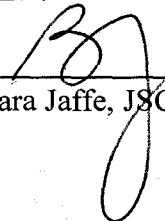
Accordingly, it is hereby

ORDERED, that plaintiff's motion to compel is granted to the extent that defendants are directed, within 45 days of the date of this order, to provide plaintiff with the following:

- (1) Records or documents related to discussions with Traveler's concerning plaintiff's claim and/or damages;
- (2) Records regarding maintenance of the building's heating system, including all pipes and conduits transmitting fluids within the building, from 2004 to 2009; and
- (3) A statement regarding which provision(s) of the propriety lease relates to the incident and/or repairs and damages at issue here; and it is further

ORDERED, that the parties are directed to appear for a compliance conference on September 24, 2014 at 2:15 pm, in Room 279, 80 Centre Street, New York, New York.

ENTER:




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Barbara Jaffe, JSC

DATED: July 25, 2014  
New York, New York