To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

----------x

MAGNOLIA ELIZABETH LOPEZ,

Plaintiff,

-against-

CHRIS GUAGNINI and VALERIE GUAGNINI,

Defendants.

----------x

DECISION and ORDER

Index No. 59945/11
Seq. No. 2
Motion Date: Feb. 24, 2014

LEFKOWITZ, J.

The following papers were read on plaintiff's motion seeking to: (1) strike defendants' answer for failing to comply with discovery orders, or (2) compel defendants to produce the insurance letter received by them concerning defendants' dog as testified to by defendant Valerie Guagnini ("Mrs. Guagnini"), or (3) strike defendants' answer or preclude defendants from offering evidence at the time of time of trial, or alternatively, (4) compel defendants to produce the insurance letter to the court for an *in camera* inspection to determine if it is discoverable and (5) following the *in camera* inspection to compel the insurance agents to appear for deposition and (6) extending plaintiff's time to file a note of issue. Defendants oppose the motion.

Order to Show Cause-Motion -Affirmation in Support
Exhibits A-N
Affirmation in Opposition

Upon the foregoing papers and upon oral argument heard on February 24, 2014, this motion is determined as follows:

Plaintiff seeks damages for personal injuries suffered when she was allegedly bitten by defendants' dog while plaintiff was employed as a housekeeper in defendants' home. During her deposition on April 26, 2013, Mrs. Guagnini testified, among other things, that she saw her dog bite plaintiff's arm on January 18, 2011. Mrs. Guagnini further testified that after the incident, an insurance representative came to defendants' home to speak with her and to inspect the dog. Mrs. Guagnini testified that after the insurance agent's inspection she received a letter from the insurance company to remove the dog from defendants' home. She also testified that subsequent to the receipt of that letter the defendants put the dog to sleep.

Subsequent to Mrs. Guagnini's deposition, plaintiff served a Further Notice for Discovery and Inspection dated May 29, 2013 which demanded, among other things, production of the insurance letter referenced by Mrs. Guagnini during her deposition.

On June 6, 2013, the parties appeared for a compliance conference at which time defendants were directed to respond to plaintiff's May 29, 2013 demand within 30 days. By letter dated July 3, 2013, plaintiff reminded defendants of the court's directive and enclosed another copy of the May 29, 2013 demand.

Plaintiff contends that the parties appeared for further compliance conferences on August 14, 2013 and September 24, 2013, and despite additional directives by the court on both occasions to respond to plaintiff's May 29, 2013 demand, defendants failed to provide a response to the May 29, 2013 demand.

The parties appeared for another compliance conference on October 24, 2013, at which time defendants produced a response to the May 29, 2013 demand. It is plaintiff's contention that this response was inadequate in that it failed to include a response to paragraph #3 of the demand concerning the aforementioned insurance letter. Plaintiff contends that defendants' counsel made representations at the conference that the letter would be forthcoming. The matter was adjourned to November 15, 2013 so defendants could produce the insurance letter. At the November 15, 2013 conference, defendants had yet to produce the insurance letter and the court directed defendants to respond to plaintiff's demand for the insurance letter. The matter was adjourned to December 6, 2013.

On November 15, 2013, plaintiff sent a good faith letter to defendants demanding that they produce the insurance letter. In a letter dated November 19, 2013, plaintiff's counsel was advised by defense counsel that it had received and reviewed the insurance letter and objected to its production on the grounds that the letter is protected by privilege as it was prepared in contemplation of trial.

Plaintiff argues that defendants' failure to produce the letter despite several court orders and five conferences and numerous oral representations by defendants' counsel that the document was being searched for constitutes willful and contumacious conduct sufficient to justify striking defendants' answer.

"The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court." *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 (2d Dept 2007). To invoke the drastic remedy of striking a pleading, or of preclusion, a court must determine that the party's failure to disclose is willful and contumacious. *Greene v Mullen*, 70 AD3d 996 (2d Dept 2010); *Maiorino v City of New York*, 39 AD3d 601 (2d Dept 2007); *Kingsley v Kantor*, 265 AD2d 529 (2d Dept 1999). "Willful and contumacious conduct can be inferred from repeated noncompliance with court orders...coupled with no

excuses or inadequate excuses" (*Russo v Tolchin,* 35 AD3d 431, 434 [2d Dept 2006][citations omitted]; *see also Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]. While the court sympathizes with plaintiff's frustration concerning the numerous court conferences which have been necessitated by defendants' failure to respond to its discovery demands, the striking of defendants' answer is not warranted at this time.

Alternatively, plaintiff seeks to compel defendants to produce the insurance letter and following the production of the letter and identification of the insurance agent who conducted the inspection of defendants' dog, that plaintiff be allowed time to serve the agent with a nonparty subpoena to appear for a deposition. Plaintiff argues that contrary to defendants' contention the insurance letter is not protected by privilege. Plaintiff contends that materials prepared in anticipation of litigation enjoy only a conditional immunity and that defendants bear the burden of demonstrating that the letter is immune from discovery. Plaintiff argues that once defendants have satisfied this burden the burden then shifts to plaintiff to demonstrate that she has a substantial need for the material and that the material cannot be duplicated without undue hardship.

Plaintiff argues that defendants have failed to demonstrate that the letter falls within the conditional privilege of materials prepared in anticipation of litigation. Plaintiff contends that defendants have failed to sustain their burden because they failed to identify the particular material to which the immunity attaches and have failed to establish with specificity that the material was prepared exclusively in anticipation of litigation.

Moreover, plaintiff states that in the event that defendants do establish that the letter falls within the conditional privilege, that plaintiff can nevertheless satisfy the substantial need and undue hardship test. Plaintiff states that defendants contend that prior to the subject incident they were not aware that their dog had vicious propensities. It is plaintiff's contention that the letter may include information provided by defendants to the insurance agent concerning prior incidences of violence by defendants' dog. Since the dog is no longer available for examination, plaintiff contends the insurance agent's inspection of the dog is highly relevant and necessary to plaintiff's prosecution of her case. Since Mrs. Guagnini testified that she did not have specific knowledge of the particulars of the letter, plaintiff contends she is entitled to, not only its discovery but to the deposition of the agent/s who examined the dog and prepared the letter. Plaintiff further contends that the insurance letter is discoverable as it was prepared in the ordinary course of business of the insurance carrier's investigation of the claim.

Alternatively, plaintiff requests that defendants be required to produce the insurance letter for an *in camera* inspection so that the court may determine which portions of the letter are discoverable and which portions are protected by privilege.

In opposition defendants contend that they have complied with all proper discovery demands and that an *in camera* review of the letter will demonstrate that it is privileged as material prepared by the insurance carrier in anticipation of litigation. Defendants' counsel contends that it had agreed to produce the letter before reviewing it on the assumption that it was

a standard form notifying defendants that counsel had been retained in the action. However, once his office received the subject letter from the insurance carrier counsel states he then realized that the letter constituted material prepared in anticipation of litigation and as such is protected from disclosure under CPLR 3101 (d)(2). Defendants contend that an *in camera* review of the letter will demonstrate that the letter was prepared by the insurance carrier in anticipation of litigation and does not contain statements by or from the defendants regarding this action or any incident prior to the one which is the subject of this action.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Despite this general rule, materials prepared in anticipation of litigation or for trial may be obtained only upon a showing that the party seeking discovery has substantial need for the materials and is unable to obtain the information without undue hardship (CPLR 3101 [d][2]).

The burden of proving that a statement is privileged as material prepared solely in anticipation of litigation or trial is on the party opposing discovery (*Agovino v Taco Bell 5083*, 225 AD2d 569 [2d Dept 1996]), and the protection claimed must be narrowly construed (*148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009]; *Vivitorian Corp. v First Cent. Ins. Co.*, 203 AD2d 452, 453 [2d Dept 1994]; *Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD2d 190, 191 [1st Dept 2005]). The party asserting this privilege bears the burden of making this showing by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation (*New York Schools Ins. Reciprocal v Milburn Sales Co., Inc.*, 105 AD3d 716 [2d Dept 2013]). Conclusory assertions contained in an attorney's affirmation, not based on personal knowledge, that the materials sought are not discoverable on the basis that they were prepared exclusively in anticipation of litigation are insufficient to establish the privilege (*Agovino v Taco Bell 5083, supra*; *Miranda v Blair Tool & Mach. Corp.*, 114 AD2d 941 [2d Dept 1985]; *Matos v Akram & Jamal Meat Corp.*, 99 AD2d 527 [2d Dept 1984]).

The payment or rejection of an insurance claim is part of the regular business of an insurance company and reports that aid in the processing of the claim are, therefore, discoverable (*Bombard v Amica Mut. Ins. Co.*, 11 AD3d 647, 648 [2d Dept 2004]; *Landmark Ins. Co. v Beau Rivage Rest.*, 121 AD2d 98, 101 [2d Dept 1986]). Accordingly, the courts have held that reports of insurance investigators or adjusters prepared during the processing of a claim to determine whether to accept or reject coverage are discoverable since they are prepared in the regular course of business, unless it is demonstrated that the reports were prepared solely in anticipation of litigation (*148 Magnolia*, 62 AD3d at 487; *Brooklyn Union Gas Co.*, 23 AD2d at 190). If the party seeking to prevent disclosure makes the required showing, the burden shifts to the party seeking disclosure to establish that there is a substantial need for materials and they cannot be obtained elsewhere without undue hardship (*Straus v Ambinder*, 61 AD3d 672 [2d Dept 2009]).

The parties appeared for oral argument of this motion, at which time plaintiff's counsel provided the insurance letter to the Court for an *in camera* review. The Court having reviewed the letter finds that the letter was not prepared in anticipation of litigation. However, the Court concludes that the letter does not provide relevant evidence concerning the subject dog's propensity for biting. Moreover, the letter does not include any information concerning the subject dog or the incident involving plaintiff and the dog. Accordingly, it is the determination of this Court that the insurance letter is not relevant and material to plaintiff's claims and plaintiff is not entitled to its disclosure.

In light of the foregoing, it is:

ORDERED that the branch of plaintiff's motion seeking to strike defendants' answer is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking to compel defendants to produce the January 14, 2013 insurance letter is denied; and it is further

ORDERED that the branch of the motion seeking to compel the deposition/s of the nonparty insurance agent/s who conducted the inspection of defendants' dog and wrote the January 14, 2013 letter is denied: and it is further

ORDERED that plaintiff is directed to serve defendants with a copy of this order with notice of entry within ten (10) days of entry; and it is further,

ORDERED that the parties are directed to appear for a conference in the Compliance Part, Room 800, on April 1, 2014, at 9:30 AM and defendants are directed to pick up the in camera submission from the Compliance Part Clerk.

This constitutes the Decision and Order of this Court.

Dated: White Plains, New York
March 28, 2014

HON. JOAN B. LEFKOWITZ, J.S.C.

To:

David Horowitz, P.C.
By William J. Sanyer, Esq.
Attorneys for plaintiff
276 Fifth Avenue, Suite 306
New York, NY 10001
BY NYSCEF