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

EMILY LAITMON,

Plaintiff,

-against-

TRADER JOE'S EAST, INC. d/b/a TRADER JOE'S GROCERY, and CW VILLAGE SQUARE LLC,

Defendants.

----------x

DECISION & ORDER

Index No. 53396/2013
Decision Date: Sep. 9, 2014
Motion Seqs. #1-2

MARKUS, C.A.R.,

The following papers numbered were read on: (1) this motion by plaintiff to compel discovery pursuant to CPLR 3101(g) and CPLR 3124 (Motion Sequence #1); and (2) this motion by defendants for a protective order pursuant to CPLR 3103(a) against certain of plaintiff's discovery demands:

Motion Sequence #1: Order to Show Cause, Aff. in Support, Exhs. 1-11
Dorfman Affirmation
Memorandum of Law
Affirmation in Opposition
Affidavits of Service

Motion Sequence #2: Order to Show Cause, Aff. in Support, Exhs. A-G
Affirmation of Good Faith
Memorandum of Law
Affirmation in Opposition, Exh. 1
Affirmation in Reply
Affidavits of Service

Upon the foregoing papers, and the parties having waived oral argument, the motions are consolidated for purposes of decision and are determined as follows:

This personal injury action arises out of a slip and fall that plaintiff Emily Laitmon allegedly sustained on July 2, 2011, inside the Trader Joe's grocery store in Larchmont, New York. Plaintiff commenced the instant action by summons and complaint dated March 11, 2013, against defendants Trader Joe's East, Inc., a California corporation, and CW Village Square, LLC, a Delaware limited liability company, both of which entities plaintiff alleges control the Larchmont grocery. After both defendants answered, the parties entered into a Preliminary

Conference Order dated January 14, 2014, after which this Court (Lefkowitz, J.) issued an Order of Reference pursuant to CPLR 3104 directing the undersigned Court Attorney-Referee to hear and report on discovery issues thereafter arising in this action. Pursuant to such authority, the parties appeared before the undersigned for a compliance conference on April 29, 2014. At such compliance conference, the undersigned reserved decision as to defendants' objections to items numbered 11-12 in plaintiff's Demand for Discovery and Inspection, concerning accident reports and related communications with Trader Joe's independent and nonparty claims administrator, Gallagher Basset Services, Inc. (hereinafter "GBS"), as follows:

> 11. Please provide copies of all reports of interviews or conversations between any Trader Joe's employee and any employee or agent of Gallagher Basset Services, Inc. [concerning plaintiff's accident].
>
> 12. Please provide copies of all Gallagher Basset reports and memoranda concerning the Plaintiff's accident.

On July 10, 2014, by so-ordered stipulation pursuant to CPLR 4317(a), the parties delegated to the undersigned power to hear and determine the instant dispute as to the discoverability of the "accident report and/or related communications between defendant (or defendant's agent) and its independent claims adjustor or administrator concerning the alleged accident at issue in this litigation." Pursuant to such stipulation and the briefing schedule issued that day, plaintiff now moves pursuant to CPLR 3101(g) and 3124 by Order to Show Cause to compel such disclosures (Motion Sequence #1), and defendants move pursuant to CPLR 3103(a) by Order to Show Cause for protective orders against such disclosures (Motion Sequence #2). These motions now come before the undersigned to hear and determine pursuant to the so-ordered CPLR 4317(a) stipulation.

In support of plaintiff's motion to compel and in opposition to defendants' motion for a protective order, plaintiff asserts that defendants previously disclosed to plaintiff a one-page statement by Mr. George Cooper, allegedly a GBS employee, dated July 5, 2011 – some 21 months before plaintiff commenced this litigation – stating that "Customer fell[.] There was water on the floor." Plaintiff further asserts that a Trader Joe's employee Pamela Reis, manager of the Larchmont store, testified at her deposition that she contacted Mr. Cooper about this incident, thus giving rise to Mr. Cooper's report. Plaintiff further asserts that Trader Joe's indicated that it is self-insured, and thus no privilege can attach to the documentation and communications as to whose disclosure Trader Joe's objects. Rather, plaintiff avers, any communication from Trader Joe's to GBS, and any accident report or other documentation arising from such communication, occurred within the scope of Trader Joe's ordinary business and therefore is discoverable. In plaintiff's papers opposing defendants' Order to Show Cause, plaintiff also seeks a continued deposition of Ms. Reis to ask her to answer a question that, plaintiff asserts, defendants blocked at Ms. Reis' deposition concerning the subject of her discussion with a GBS representative about plaintiff's accident.

In opposition to plaintiff's motion to compel and in support of defendants' motion for a protective order, defendants assert that plaintiff's discovery demand is "vague, ambiguous, overbroad, oppressive, unduly burdensome and outside the scope of discovery." Defendants also assert that there is no other accident report to disclose and no other communications to disclose. To the extent that there are responsive communications, however, defendants assert that they are privileged inasmuch as they were prepared in contemplation of litigation within the meaning of CPLR 3101(d)(2). Defendants also assert that any such communications properly should be the subject of discovery demands on GBS rather than defendants.

It is axiomatic that parties are entitled to liberal discovery of "all matters material and necessary in the prosecution" of their action (CPLR 3101[a]), and the determination of what is "material and necessary" is within the sound discretion of the trial court (*see e.g. Andon v 302-304 Mott Assocs.*, 94 NY2d 740 [2000]). The phrase "material and necessary" is "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 Clepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The foregoing standards vest in the trial court broad discretion to supervise discovery and issue such determinations as necessary to vindicate litigant rights and enforce litigant duties arising in the individual case (*see Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

On a CPLR 3124 motion to compel discovery, the movant bears the burden of specifying with particularity the documents subject to disclosure, and demonstrating their materiality and necessity based on the foregoing standards (*see e.g. Foster*, 74 AD3d at 1140). Where a movant makes that *prima facie* demonstration and the respondent resisted discovery on grounds such as undue burden, privilege or confidentiality, respondent may show that a protective order nevertheless should issue against all or some of such discovery to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person" (CPLR 3103[a]). The burden of invoking and demonstrating the applicability of any privilege, or any assertion of confidentiality, specifically lies on the party asserting the privilege, and the protection claimed must be narrowly construed to vindicate the liberal disclosure presumption of CPLR article 31 discovery (*see e.g. Spectrum Sys. Intern. Corp. v Chemical Bank*, 78 NY2d 371 [1991]; *Ural v Encompass Inc. Co. of America*, 97 AD3d 562 [2d Dept 2012]; 148 *Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009]).

As a prefatory matter, this Court rejects defendants' boilerplate assertion that plaintiff's demand is "vague, ambiguous, overbroad, oppressive, unduly burdensome and outside the scope of discovery." As limited by the CPLR 4317(a) stipulation, and as memorialized by plaintiff's papers, the sole issue at this time is a dispute concerning the discovery of statements made by defense agents to GBS, and documents underlying or memorializing the same, concerning plaintiff's alleged accident. There is no vagueness, ambiguity, overbreadth, oppression or undue burden in this request, and defendants do not substantially show otherwise. Accordingly, defendants' motion for a protective order pursuant to CPLR 3103(a) on that basis is denied.

Neither are defendants correct in their suggestion that the potential availability of nonparty discovery – in this instance, seeking discovery from GBS – precludes plaintiff from seeking the instant relief against defendants or absolves defendants of their discovery obligations under CPLR article 31. For that proposition, defendants apparently misread *Matter of Kapon v Koch* (23 NY3d 32 [Apr. 3, 2014]), which holds quite the opposite – that the potential availability of party discovery does not estop parties from pursuing discovery from nonparties. As such, defendants are wrong that plaintiff's instant motion is an "apparent attempt to circumvent the rules [for] obtaining discovery from a non-party" (Def. Mem of Law [Motion Sequence #2], at 3). Plaintiff's application to compel defendants to provide discovery in their possession, or subject to their control, is properly before the Court at this time, and defendants' procedural objection is without merit.

Despite the foregoing, however, this Court must deny plaintiff's motion on two independent grounds, both related to the threshold showing that CPLR 3124 requires. While the parties primarily dispute the applicable law -- including whether and to what extent "accident reports" and associated claims files are discoverable under the circumstances presented (*see e.g. Jacaruso v Keyspan Energy Corp.*, 109 AD3d 585 [2d Dept 2013]; *Litvinov v Hudson*, 74 AD3d 1884 [4th Dept 2010]; *Sigelakis v Washington Group LLC*, 46 AD3d 800 [2d Dept 2007]; Recant *v Harwood*, 222 AD2d 372 [1st Dept 1995]; *see also* CPLR 3101[d][2], [g] -- this Court cannot reach these legal questions because plaintiff failed to carry her CPLR 3124 threshold showings.

The first threshold defect in plaintiff's position is that plaintiff failed to show with particularity what documentary discovery defendants are withholding. While plaintiff asserts that there is a "hint" of additional discovery besides the GBS accident report previously disclosed (Pl. Mem in Opposition [Motion Sequence #2], at para 10), CPLR 3124 requires that plaintiff not only plead it but substantially demonstrate it. A "hint" is far from sufficient: the mere fact that defense employee names appear on GBS documents heretofore disclosed does not overcome defendants' repeated proffer of written assurances that no such written discovery exists, and Mr. Cooper's affidavit that no further documents exist responsive to plaintiff's demand. Plaintiff offers no basis for this Court to reject those affidavits, and on the facts presented, this Court perceives no factual basis to do so. Moreover, especially given these facts and circumstances, this Court cannot accept plaintiff's suggestion (*see id.*, at para 2) that defendants' argument in the alternative (*i.e.* that *even if* there were such responsive discovery, the same would be privileged against disclosure) itself tends to establish the existence of such responsive discovery. Thus, this Court concludes that plaintiff failed to carry her CPLR 3124 burden to show with particularity the existence of potentially discoverable material.

The second independent basis to deny plaintiff's motion is that, on this case's facts and circumstances, plaintiff failed to show that further disclosures reasonably would be calculated to lead to discoverable evidence within the meaning of CPLR 3101(a). Plaintiff concedes that Ms. Reis testified to the names of persons whom GBS interviewed or potentially interviewed, and plaintiff's motion papers make no further availing argument concerning the relevance of any other discovery. Plaintiff's statement about the allegedly deficient nature of the GBS accident

report previously disclosed ("It may be that defendant and Gallagher Basset made a conscious decision to make a bare bones accident report, keeping out of the report information that would have been prejudicial to Trader Joe's") is speculative and unsubstantiated. Whether or not plaintiff may have other remedies, compelling disclosure of defendants' investigation and claim file, under the circumstances presented, would appear to countenance a fishing expedition without sufficient record basis. For the foregoing reasons, this Court has no basis to conclude that defendants withheld discovery in violation of CPLR 3101(g) or CPLR 3124, and likewise has no basis to reach the question of whether any additional discovery might or might not be privileged within the meaning of CPLR 3101(d)(2).

As to the further deposition of Ms. Reis that plaintiff demands, that application is not properly before this Court inasmuch as plaintiff did not timely raise the matter at a pre-motion Compliance Conference in accordance with the Differentiated Case Management Rules of this Court. Moreover, such demand was not the subject of plaintiff's motion to compel discovery pursuant to CPLR 3124 and CPLR 3101(g). This Court further notes that plaintiff's own papers concedes that such demand is predicated on this Court granting plaintiff's discovery demand. Thus, this Court has no basis to pass on such request at this time. Accordingly, it is hereby:

ORDERED that plaintiff's motion to compel discovery (Motion Sequence #1) is denied; and it is further

ORDERED that defendants' motion for a protective order pursuant to CPLR 3103(a) (Motion Sequence #2) is granted, and plaintiff's demands numbered 11 and 12, as denominated in this Decision and Order, are stricken; and it is further

ORDERED that defendants shall cause this Decision and Order, with Notice of Entry, to be served on plaintiff by NYSCEF within seven days hereof; and it is further

ORDERED that counsel for all parties are directed to appear in the Compliance Part, Room 800, of this Courthouse, on September 29, 2014, for further proceedings consistent herewith.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
Sept. 9, 2014

DAVID EVAN MARKUS, C.A.R.

TO: Jerold W. Dorfman
Attorney for Plaintiff
131 Larchmont Avenue
Larchmont, New York 10538
By NYSCEF