

Essex Ins. Co. v Fuscaldo Enters., Ltd.

2014 NY Slip Op 33019(U)

March 10, 2014

Sup Ct, Westchester County

Docket Number: 636/2012

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

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
ESSEX INSURANCE COMPANY,

Plaintiff,

-against-

FUSCALDO ENTERPRISES, LTD., BOB MYERSON,
RHINEBECK TENNIS CLUB, LLC, WARREN TEMPLE
SMITH ARCHITECTS, LLC, HUDSON VALLEY T.R.U.
CONTRACTING, INC., ARMOR STEEL BUILDINGS,
INC., JEFFREY HATTER, MID-STEEL CONSTRUCTION
COMPANY, STEEL BUILT CORPORATION, INC.,
PRECISION COMPONENTS, INC., STRAIGHT STEEL
SALES CORP. AND ARMOR DEVELOPMENT, INC.,

Defendants.

-----X
LEFKOWITZ, J.

The following papers numbered 1 to 43 were read on: (1) this motion by plaintiff pursuant to CPLR 3103(a) for a protective order against certain of defendants' discovery demands (Motion Sequence #4); (2) this motion by defendant Hudson Valley T.R.U. Contracting, Inc., pursuant to CPLR 3124 to compel plaintiff to provide a copy of its entire underwriting file regarding an insurance policy issued to defendant Fuscaldo Enterprises, Ltd.; and (3) this motion by defendant Jeffrey Hatter pursuant to CPLR 3124 to compel plaintiff to comply with such defendant's discovery demands on plaintiff dated January 10, 2014:

<u>Mot. Seq. #4:</u> Order to Show Cause, Aff. in Support, Exhs. A-G	1-9
Koke (Steel Built) Aff. in Support	10
Platt (Hatter) Aff. in Opposition, Exhs. A-B	11-13
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**FILED
AND
ENTERED**
ON 3-11 2014
WESTCHESTER
COUNTY CLERK

DECISION & ORDER

Index No. 636/2012

Decision Date: Mar. 10, 2014

Motion Seq. 4, 5 & 6

FILED
MAR 11 2014
TIMOTHY C. IDOMI
COUNTY CLERK
COUNTY OF WESTCHESTER



<u>Mot. Seq. #6:</u> Order to Show Cause, Aff. in Support, Exhs. A-E	32-38
Palmiotto (Myerson & Rhinebeck Tennis) Affs. in Support	39-40
Affidavits of Service	41-43

Upon the following papers and the proceedings held on March 10, 2014, the three motions are consolidated for purposes of decision and are decided as follows:

This declaratory judgment action arising from an underlying personal injury action has a substantial history before this Court. As narrated in the prior Decision and Order of this Court (Lefkowitz, J.) dated August 18, 2013 (hereinafter "August 2013 Order"), defendant Fuscaldo Enterprises, Ltd. (hereinafter "Fuscaldo") contracted to perform certain construction work at co-defendant Rhinebeck Tennis Club, LLC (hereinafter "Rhinebeck"), and subcontracted for performance of certain of such work with Mid-Steel Construction Company (hereinafter "Mid-Steel"). Fuscaldo operated under a commercial general liability policy issued by plaintiff Essex Insurance Company (hereinafter "Essex"), with a general per occurrence limit of \$1 million and \$50,000 sub-limit allegedly applicable when Fuscaldo uses a subcontractor but fails to secure status as an additional insured under the subcontractor's own liability policy. On or about January 8, 2010, Jeffrey Hatter allegedly was impaled by a sharp wall fastener protruding from a wall at Rhinebeck while playing tennis there; this incident is the subject of Hatter's underlying personal injury action against many of the instant defendants (*see Jeffrey Hatter v Bob Meterson, et al.* Index No. 17045/2010), which action is pending before this Court by venue change pursuant to Decision and Order of this Court (Lefkowitz, J.) dated August 21, 2012. On or about July 27, 2010, Fuscaldo notified Essex of the Hatter suit, and Essex has been paying for Fuscaldo's defense therein. By letter dated September 21, 2011, Essex notified Fuscaldo that Essex would apply the insurance policy's \$50,000 sub-limit to the Hatter claim because Fuscaldo was not an additional insured under Mid-Steel's insurance policy. Essex then commenced the instant action for declaratory judgment that the \$50,000 sub-limit applies, that Essex is entitled to withdraw from defense upon exhaustion of this sub-limit, and that Essex is entitled to reimbursement of defense costs expended in excess of the sub-limit.

This Court's August 2013 Order granted certain branches of plaintiff Essex's motion for a protective order against certain of defendants' then-pending discovery demands, and also granted certain branches of defendants' reciprocal motions to compel discovery from Essex. As to respective coverage opinions dated August 31, 2011, and October 18, 2011, whose discovery the parties disputed, the August 2013 Order directed an *in camera* review to determine discoverability. Upon review, this Court (Lefkowitz, J.), by Order dated October 3, 2013 (hereinafter "October 3 Order"), held that the coverage letters constituted confidential communications between Essex and its attorney prepared in the course of professional employment for the purpose of obtaining legal advice. Accordingly, the Court concluded that these coverage letters constitute privileged attorney work product exempt from disclosure, and granted Essex a protective order against such disclosure pursuant to CPLR 3103(a).

Three new motions relating to discovery now are pending before this Court. In fall 2013,

depositions were conducted of Joseph Feichtel of Markel Service, Inc., Essex's claims service manager for the Hatter claim, and Mr. Feichtel's supervisor, Mary Kuhn Dowd. Thereafter, this Court issued a Compliance Conference Order dated December 19, 2013 ("December 2013 Order"), directing that "post-EBT Discovery and Inspect demands shall be served on or before [January 10, 2014]," and that responses to such "post-EBT" demands "timely served [pursuant to such order] "shall be served on or before [January 31, 2014]." On January 10, 2014, the closing date for "post-EBT" demands under the December 2013 Order, Hatter propounded on Essex a post-EBT Notice of Discovery and Inspection demanding, *inter alia*:

"1. A copy of the file entries:

- containing within the computer file system of plaintiff Essex/Markel Insurance Company/Markel Services, Inc.,
- relating to the coverage determination (and excluding any entries made for evaluation/investigation/assessment of liability of the insured by retained defense counsel),
- described at the respective depositions of plaintiff through its witnesses Mary Kuhn Dowd and Joseph Feichtel, as contained in the 'coverage,' 'investigation,' and 'diary' sections, and
- prepared/entered or reviewed by plaintiff's witnesses Mary Kuhn Dowd and Joseph Feichtel.

"2. A copy of plaintiff's telephone log/entries:

- containing records of telephone calls relating to the investigation and coverage determination,
- to: (1) the insured, (2) plaintiff's investigator, and (3) insurance carrier for subcontractor/defendant Mid-Steel,
- as testified to/described by plaintiff witnesses Mary Kuhn Dowd and Joseph Feichtel at their respective depositions."

Hatter's post-EBT discovery demand also noticed further depositions of Ms. Dowd and Mr. Feichtel to examine them concerning the foregoing demanded disclosures.

Hudson Valley, on or about January 7, 2014, propounded on Essex post-EBT Discovery and Inspection demands substantially comparable to Hatter's demands, including but not limited to emails among Ms. Dowd and Mr. Feichtel concerning the same, copies of communications

between Mr. Feichtel and Fuscaldo concerning the same, and a copy of the initial letter from Essex to Fuscaldo acknowledging the Hatter suit. Hudson Valley also demanded a copy of Essex's electronic claims file and "a complete copy of [Essex's] underwriting file" for the Hatter claim. The propounded demands stipulate that they purport not to "seek any correspondence, communication or notes which embody attorney/client privileged communications between an attorney and Essex employees."

In response to the foregoing demands, on January 28, 2014, Essex produced a 22-page printout of its computer file for the Hatter claim, with record dates between July 27, 2010, and December 2, 2013, as well as certain emails – some with redactions. To such disclosures as re-conveyed to this Court in its motion papers, Essex attached an itemized privilege log indicating that each such redaction protects the confidentiality of either an attorney-client communication, attorney work product, materials prepared in contemplation of litigation, and/or materials specifically prepared in the defense of the underlying Hatter litigation. Beyond the foregoing disclosures, Essex generally objected to the Hatter and Hudson Valley demands as violative of attorney-client privilege or the work product doctrine for the reasons stated in this Court's October 3 Order concerning the privileged status of Essex's coverage letters in the Hatter claim. Essex also objected on grounds that Hudson Valley's demands exceeded the scope of the post-EBT demand for which the December 2013 Order made provision; Essex therefore asserts that such demands are untimely given discovery deadlines fixed by this Court's prior orders.

In Motion Sequence #4, Essex moves pursuant to CPLR 3103(a) for a protective order against the balance of the foregoing discovery demands and against any future similar discovery demand. In Motion Sequence #5, Hudson Valley moves pursuant to CPLR 3124 to compel Essex to comply with Hudson Valley's demand of January 7, 2014, at least to the extent of compelling an *in camera* review of Essex's redacted responses, and for costs and disbursements. In Motion Sequence #6, Hatter moves pursuant to CPLR 3124 to compel Essex to comply with Hatter's demand of January 10, 2014, in unredacted form, and to compel further depositions of Ms. Dowd and Mr. Feichtel after such further disclosures. Given the subject-matter relationships among the motions and papers in respective support and opposition thereof, this Court deems all papers submitted on any of the motions as responsive to all of them.

In support of Essex's motion for a protective order, Essex distinguishes between Hatter's demands, which Essex characterizes as "largely appropriate follow-up" to the depositions, and Hudson Valley's demands, which Essex deems far beyond the scope of a "post-EBT" demand and untimely at this late stage of litigation. As to Hatter's demands to which Essex did not comply or produced redacted materials, Essex implies that Hatter wrongly uses the depositions to attempt circumvention or erosion of this Court's October 2013 Order, which held that documents containing legal advice Essex obtained in development or assertion of its position concerning the Hatter claim are privileged and non-discoverable. Essex asserts that notes of telephone conversations between Feichtel and outside coverage counsel concerned legal advice respecting coverage under the Essex policy for the Hatter claim, and thus are privileged against disclosure. This same result, Essex asserts, obtains for any reports, internal analyses or correspondence exchanged internally or with outside coverage counsel, the same being prepared

in anticipation of and during the course of Hatter's underlying action or the instant declaratory action. According to Essex, the mere fact that deponents reviewed certain privileged materials in preparing for their depositions does not vitiate privilege or otherwise render these documents discoverable. Essex asserts that the redactions of the 22-page computer claim file and emails are limited to materials going to defense of Fuscaldo and thus are privileged under the reasoning of this Court's October 2013 Order. Further, Essex submits an affidavit by Mr. Feichtel asserting that while he perused the claim file notes in preparation for his deposition, he "did not review the file notes for content relating to defense, including investigation in furtherance of the defense, of Fuscaldo against Hatter's claim. I did not rely on the claim file notes insofar as relating to the defense of Fuscaldo in testifying at my deposition" (Feichtel Aff., Pl's Motion, Exh. B, at 2). Essex also points to the transcript of Ms. Dowd's deposition, in which she testified that she did not review any of the notations made in the investigation section of the Hatter claim file (*see* Tr. [Dowd], at 67), or Feichtel's notes in preparation for the deposition (*see id.* at 61, 66). On the foregoing basis, Essex implies that the balance of these materials are not relevant as follow-up to Feichtel's deposition and thus Hatter's demands, to the extent Essex has not already complied with them, are overbroad. *A fortiori*, Essex asserts, Hudson Valley's demands are altogether overbroad both for the foregoing reasons and because they make no distinction between the insurer's claim file and materials concerning defense, which this Court already deemed to be protected against disclosure. To the extent that Hudson Valley also demands the entire claim file, as well as other materials underlying the Hatter claim (*e.g.* emails notifying Essex of the claim) Essex asserts that the same should be denied because time long ago expired properly to demand these materials.

In opposition to Essex's motion for a protective order and in support of its own motion to compel discovery, Hatter asserts that both Dowd and Feichtel entered notes into the computer file as to the Hatter claim, and that the same therefore should be discoverable to the extent that they aided in the process of deciding whether the policy provides coverage. These materials, Essex asserts, were prepared by the carrier and not by counsel, and thus are not privileged. Hatter asserts that by relying on these materials in preparation for the deposition, the deponents waived Essex's privilege. For its part, Hudson Valley reiterates that it seeks no protected information, and that "[t]here are no discovery orders of this [C]ourt indicating that discoveries sought by Hudson are foreclosed." Hudson Valley pleads that the heart of this case is the meaning of an entry in Essex's claim file notes of August 17, 2011, in which the following entry appears: "Discuss with UW [on information and belief, Essex] intent as to whether sublimit if insured has independent liability." Explication of this entry, asserts Hudson Valley, is necessary by means of the remainder of the underwriting file "in all likelihood" contains Fuscaldo's application for insurance, correspondence among Fuscaldo and Fuscaldo's broker regarding the insurance provided, and other documentation tending to explicate the effective date and applicability of the \$50,000 sub-limit. For their parts, Rhinebeck and defendant Bob Myerson join in Hudson Valley's motion for the reasons stated in Hudson Valley's papers; and defendants Steel Built and Straight Steel Sales Corp. join in Hatter's motion for the reasons stated in Hatter's papers. No papers were received on these motions from defendants Fuscaldo, Warren Temple Smith Architects, LLC, Armor Steel Buildings, Inc., Mid-Steel Construction Company, Precision Components, Inc., or Armor Development, Inc.

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 3103 motion for a protective order against discovery, the movant (here, Essex) bears the burden to show that a protective order “denying, limiting, conditioning or regulating the use of any disclosure device” is necessary to “prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (CPLR 3103[a]). Conversely, on a CPLR 3124 motion to compel discovery, the proponents (here, Hatter and Hudson Valley) bear the burden to show their entitlement to the discovery demanded.

Turning first to Hudson Valley’s demand for the entirety of Essex’s claim file and other documents underlying the Hatter claim, this Court takes judicial notice that after the parties entered into a Preliminary Conference Stipulation on or about October 19, 2012, the parties thereafter appeared for five compliance conferences over the next 14 months, with Compliance Conference Orders entered on each of January 8, 2013; March 20, 2013; June 4, 2013; October 11, 2013; and December 23, 2013. Each of these five Compliance Conference Orders directs that “any disclosure demands not raised at the Compliance Conference are deemed waived.” Essex asserts, and Hudson Valley does not materially dispute, that notwithstanding these five clear directives, the first time Hudson Valley demanded the entirety of Essex’s claim file and documents underlying the file was in Hudson Valley’s ostensible “post-EBT” demand in January 2014. Hudson Valley does not seek to justify or excuse this apparently late discovery demand, and this Court perceives no sufficient basis to perceive why Hudson Valley could not make such discovery demands before or at any of the five Compliance Conferences over the last 14 months. Neither does Hudson Valley adequately demonstrate that discovery of the entirety of Essex’s claim file or the documents underlying the file is material and necessary to Hudson Valley’s defense of this action. While discovery of an electronic claim file of this nature can be relevant in a particular case (*see e.g. Melworm v Encompass Indem. Co.*, 112 AD3d 794 [2d Dept 2013]), this Court discerns no basis to hold, as the moving defendants suggest, that such materials *always* are relevant and discoverable. Neither does *Melworm* or any other case to which the moving defendants cite, or of which this Court is aware, stand for the proposition that an electronic claims file properly can be demanded and must be disclosed at any stage of litigation. Nor can this Court conclude that Essex’s refusal to tender such discovery violated the Compliance Conference Order of December 19, 2013, which provided only for “post-EBT” discovery arising out of the Dowd and Feichtel depositions. Hudson Valley does not adequately demonstrate to this Court that the deposition testimony rendered such materials relevant to Hudson Valley’s defense. For the foregoing reasons, so much of Hudson Valley’s motion

pursuant to CPLR 3124 to compel Essex to disclose its entire claim file for the Hatter incident is denied, and the branch of Essex's reciprocal motion pursuant to CPLR 3103(a) for a protective order against such disclosure is granted.

Turning to the balance of the pending discovery demands by Hatter and Hudson Valley, this Court's August 2013 Order previously narrated the blackletter law that in its instant assertion of privilege, Essex must demonstrate that the information sought to be protected from disclosure constitutes a confidential communication from an attorney to a client for the purpose of obtaining legal advice or services (*All Waste Systems, Inc. v Gulf Ins. Co.*, 295 AD2d 379 [2d Dept 2002]). As to such redacted disclosure as Essex tendered in response to the remaining discovery demands by Hatter and Hudson Valley, and notwithstanding the suggestion of Hatter, Steel Built and Straight Steel in their papers, Essex denominated in its itemized privilege log the specific privilege invoked for each redacted document. However, this Court cannot properly discern the applicability of such privilege without inspecting unredacted copies of the materials in question. Accordingly, the motions by Hatter and Hudson Valley, as joined by the various moving co-defendants, are granted to the extent of directing an *in camera* review of such documents as Essex heretofore tendered to Hatter and Hudson Valley in redacted form, or that Essex withheld on privilege grounds, in response to the discovery demands of January 2014 enumerated above, such review to be of unredacted versions of the documents either withheld or tendered in redacted form. In so ruling, however, this Court does not hold that any of the foregoing documents are material and necessary to the defense of this action. In light of the testimony of Dowd and the affidavit of Feichel concerning the nature of their pre-deposition review of these documents, it remains to be determined whether any of the redacted or withheld materials reasonably may lead to discoverable evidence within the meaning of CPLR 3101(a), and whether there is a colorable basis to conclude that deponent reliance on such documents had the effect of waiving any privilege attaching thereto (*see e.g. Grieco v Cunningham*, 128 AD2d 502 [2d Dept 1987]). By its nature, such determinations depend, in part, on the exact contents of these materials, and therefore the same must be reviewed *in camera*. For much the same reason, without *in camera* review of these materials, this Court cannot discern whether further depositions of Dowd and Feichtel based on such disclosures might be appropriate. Accordingly, further determination of defendants' respective motions to compel discovery of the foregoing materials, and determination of Essex's motion for a protective order against such discovery, are reserved pending such *in camera* review.

All relief not specifically reserved or granted herein to any of the moving defendants is denied. The moving defendants did not demonstrate the relevance of the further discovery demanded. Neither has Hudson Valley shown that Essex's position on these applications is so devoid of merit that Hudson Valley should be awarded motion costs and disbursements in consequence thereof. Accordingly, it is hereby

ORDERED that the respective applications by the moving defendants pursuant to CPLR 3124 (Motion Sequences #5 and #6) are granted to the extent that on or before March 21, 2014, plaintiff shall tender to this Court for *in camera* inspection unredacted copies of such documents as plaintiff either tendered in redacted form or withheld on privilege grounds, as enumerated in

the plaintiff's privilege log annexed to Essex's motion papers, in response to the respective Notices for Demand and Inspection of defendants Hatter or Hudson Valley dated January 2014; and further judicial determination concerning the discoverability of these documents is reserved pending such *in camera* inspection. The foregoing *in camera* disclosures shall be indexed with particularity to a privilege log specifically enumerating the basis for the privilege asserted for each such document, and shall be delivered to Carolyn Carpenito, Compliance Part Clerk, on the 8th Floor of this Courthouse; and it further

ORDERED that all other relief not reserved or granted herein to the moving defendants on their respective CPLR 3124 motions to compel discovery is denied; and it is further

ORDERED that the motion by plaintiff pursuant to CPLR 3103(a) for a protective order against discovery is granted against so much of the respective Notices of Discovery and Inspection of defendants Hatter or Hudson Valley dated January 2014 as to which this Decision and Order does not reserve determination pursuant to *in camera* inspection; and it is further

ORDERED that plaintiff shall serve this Decision and Order, with Notice of Entry thereof, within 7 days of the date hereof; and it is further

ORDERED that counsel for all parties shall appear in the Compliance Part, Room 800 of this Courthouse, at 9:30am on ~~Tuesday~~, April 8, 2014, for further proceedings.

JBL
SSC

Monday

The foregoing constitutes the Decision and Order of this Court:

Dated: White Plains, New York
March 10, 2014


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