

**Hee Sun Choi v Metroplitan Tr. Auth.**

2014 NY Slip Op 33978(U)

March 4, 2014

Supreme Court, New York County

Docket Number: 111367/11

Judge: Michael D. Stallman

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: Hon. MICHAEL D. STALLMAN**  
*Justice*

**PART 21**

**HEE SUN CHOI,**

**Plaintiff,**

**- v -**

**METROPOLITAN TRANSIT AUTHORITY, NEW YORK  
CITY TRANSIT AUTHORITY, MTA NEW YORK CITY  
TRANSIT AUTHORITY DIVISION OF PARATRANSIT,  
M.V. PUBLIC TRANSPORTATION INC. and GERARD F.  
CHADWICK,**

**Defendants.**

**INDEX NO. 111367/11**

**MOTION DATE 3/13/14**

**MOTION SEQ. NO. 003**

**FILED**

**MAR 18 2014**

**COUNTY CLERK'S OFFICE  
NEW YORK**

**(And a third-party action.)**

The following papers, numbered 1 to 6 were read on this motion for a protective order

Notice of Motion; Affirmation — Exhibits A-E, F [Affidavit] — **No(s). 1; 2-4**  
Affidavit of Service \_\_\_\_\_

Affirmation in Opposition — Exhibits A-D — Affirmation of Service \_\_\_\_\_ **No(s). 5-6**

**Upon the foregoing papers, it is ordered that this motion by defendants/third-party plaintiffs for a protective order is denied; and it is further**

**ORDERED that, within 35 days, defendants/third-party plaintiffs are directed to provide a copy of the statement made by non-party Joyce Cochran, as described by Cochran on pages 42-43 of her EBT testimony.**

**In this action, plaintiff alleges that, on March 31, 2011, she was struck while in a crosswalk walking south on the west side of Broadway across West 34<sup>th</sup> Street, by an Access A Ride vehicle operated by defendant Chadwick.**

**A non-party witness, Joyce Cochran, testified at her deposition that she was a passenger in Chadwick's vehicle, seated "in the middle." (Balsamo Opp. Affirm., Ex C.) When asked if she spoke to anybody from**

**(Continued . . . )**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

the M.T.A. in connection with the incident, Cochran stated that she was interviewed, gave a statement, and signed a statement. (*Id.*)

Cochran was then shown a "Witness Report" which states, in pertinent part, "Ms. Cochran stated that the female pedestrian 'came out of nowhere.'" (Balsamo Opp. Affirm., Ex A.) The "Witness Report" also states that the exact location of the witness [Cochran] was "Rear of Passenger AAR vehicle #717, seated behind AAR driver." (*Id.*) Cochran denied signing the "Witness Report". (Balsamo Opp. Affirm., Ex C.)

Following Cochran's EBT, plaintiff served a supplemental discovery demand dated August 22, 2011 for a copy of a written statement that Cochran referred to at her EBT, a statement which was apparently made to another investigator.

Defendants now move for a protective order vacating the supplemental discovery demand. According to defendants, Cochran's statement is privileged as material prepared in anticipation of litigation. An investigator avers that he interviewed Cochran, and that the statements he took were provided to his employer, a Claims Service Bureau, a third-party administrator. (Scarglato Affirm., Ex E [Veneable Aff.] ¶ 3.) The investigator states that he was not retained by defendants. (*Id.*)

Plaintiff seeks the written statement Cochran made to the investigator so that plaintiff may compare the signature on that statement to Cochran's purported signature on the "Witness Report", and to see if Cochran told the investigator whether she was sitting either behind the driver, or in the middle of the seat, which would bear on Cochran's field of vision.

"[T]he burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity." (*Spectrum Systems Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991].)

(Continued . . .)

“Documents prepared in the ordinary course of an insurance company’s investigation to determine whether to accept or reject coverage and to evaluate the extent of a claimant’s loss are not privileged and are, therefore, discoverable. In addition, such documents do not become privileged ‘merely because an investigation was conducted by an attorney.’”

(*Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 191 [1st Dept 2005].) “Moreover, when statements are given to a liability insurer’s claims department as part of an internal investigation or for internal business purposes, as well as for defense purposes, they are not immune from discovery as material prepared solely in anticipation of litigation.” (*Sigelakis v Washington Group, LLC*, 46 AD3d 800, 800 [2d Dept 2007].) That is, “if litigation is only one of the motives of a report, the report is not immune from discovery.” (*Mavrikis v Brooklyn Union Gas Co.*, 196 AD2d 689, 690 [1st Dept 1993].)

Here, defendants/third-party plaintiffs did not meet their burden of demonstrating that Cochran’s statement to the investigator was not prepared in the regular course of business of the third-party Claims Service Bureau, but prepared solely in anticipation of litigation. Defendants/third-party plaintiffs did not provide enough information about the circumstances of the investigation to meet their burden of establishing that the qualified privilege applies here.

The Court rejects defendants/third-party plaintiffs’ suggestion to conduct an *in camera* review of the statement. A review of the contents of Cochran’s statement will not help the Court to determine whether the statement was taken in the ordinary course of business of the Claims Service Bureau, i.e., as part of a determination of whether to accept or reject coverage or an evaluation of the extent of a claimant’s loss, or whether taken solely in anticipation of litigation.

Defendants/third-party plaintiffs appear to assert that an accident report made to the Claims Service Bureau enjoys a qualified privilege, citing *Recant v Harwood* (222 AD2d 372 [1<sup>st</sup> Dept 1995]). There, the Appellate Division, First Department stated, “the applicable rule

(Continued . . . )

is that an accident report, made by a defendant to his liability insurance carrier or to his attorney with respect to a plaintiff's claim, is conditionally privileged . . . ." However, to the extent that *Recant* is read as establishing a blanket rule that reports made to an insurance carrier are privileged as materials prepared in anticipation of litigation, such a rule cannot be reconciled with the Appellate Division's holding ten years later in *Brooklyn Union Gas*, that "[r]eports of insurance investigators or adjusters, prepared during the processing of a claim, are discoverable as made in the regular course of the insurance company's business." (*Brooklyn Union Gas Co.*, 23 AD3d at 190.)

Therefore, defendants/third-party plaintiffs' motion for a protective order is denied, and the Court compels them to provide Cochran's statement.

Copies to counsel.

**FILED**

MAR 18 2014

Dated: 3/11/14  
New York, New York

[Signature], J.S.C.

COUNTY CLERK'S OFFICE  
NEW YORK

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED  NON-FINAL DISPOSITION
- GRANTED  DENIED  GRANTED IN PART  OTHER
- SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

HON. MICHAEL D. STALLINO