SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48
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GRANITE STATE INSURANCE CO., ET AL.,

Plaintiffs,

-against-

R&Q REINSURANCE CO.,

Defendant.

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Index No.: 654494/2013

Mtn Seq. Nos.: 001 & 002

DECISION AND ORDER

JEFFREY K. OING, J.:

In motion seq. no. 001, defendant R&Q Reinsurance Company ("R&Q") moves for an order: (1) vacating this Court's Decision and Order dated February 10, 2015, or, alternatively, for an in camera review of the documents at issue therein, and (2) appointing a Special Referee to supervise discovery pursuant to CPLR 3104(b).

In motion seq. no. 002, R&Q moves for an order dismissing counts III, IV, IX and X of plaintiffs' amended complaint due to their alleged failure to provide disclosure related thereto or, in the alternative, to compel discovery in connection with those claims. Subsequent to the submission of motion seq. no. 002, the parties stipulated to a discontinuance without prejudice of counts III and IV of the amended complaint (June 4, 2015 Stip., NYSCEF Doc. No. 113).

Motion Seq. No. 001

In the Order dated February 10, 2015 and entered February 11, 2015 (NYSCEF Doc. No. 23), this Court held that the documents sought by R&Q were protected by the attorney-client privilege because, among other things, neither the "common interest" exception nor the "at issue" exception to the attorney-client privilege applied to the instant dispute. As indicated in that decision, the Court issued its Order following letter briefing from the parties, together with consideration of all submitted exhibits, and following a lengthy in-court conference. Thus, R&Q's motion, although not expressly styled as such, is deemed to be a motion to renew or reargue because it seeks reconsideration of a prior determination.

A motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221(e)[2]). Given that R&Q fails to proffer any argument that there has been a change in the law and that it does not "point to any new fact that would change the prior determinations," that branch of the motion to renew this Court's February 10, 2015 order is denied.

On a motion to reargue, the movant must demonstrate that the Court either (1) overlooked or misapprehended the relevant facts,

or (2) misapplied a controlling principle of law (William P. Paul Equip. Corn. v Kassis, 182 AD2d 22, 27 (1st Dept 1992). New arguments that were not previously advanced may not be brought up on reargument, nor may a reargument motion be used as a vehicle to repeat or reargue what has already been considered and determined (Id., Foley v Roche, 68 AD2d 558 [1st Dept 1979]).

R&Q failed to demonstrate that this Court overlooked or misapprehended the relevant facts. Turning to the controlling case law, this Court did not misapply the applicable law. As the Court's decision explained:

> the documents sought by defendant R&Q Reinsurance Co. are protected by the attorney-client privilege. Because the dispute here is between an insurer and a reinsurer, the common interest doctrine is inapplicable to the issue of waiver of privilege (American Re-Insurance Co. v United States Fid. & Guar. Co., 40 AD3d 486, 491 [1st Dept 2007]). Nor does "[a]n insurer place the bona fides of a settlement at issue merely by alleging in a pleading that the settlement was reasonable and in good faith . . . [n]or can an 'at issue' waiver of the privilege be premised on the contention that a portion of the underlying privilege was allocated tp bad faith claims" (Id. at 492) (internal citation omitted). Moreover, here, unlike in American Re-Insurance Co., supra, plaintiffs did not "place the matter at issue" through deposition testimony thus opening the door to additional discovery.

(February 10, 2015 Order, NYSCEF Doc. No. 23).

Accordingly, that branch of the seeking reargument this Court's February 10, 2015 order is denied.

Turning to that branch of R&Q's motion to appoint a Special Referee, the decision to make such a reference pursuant to CPLR 3104 is within the Court's discretion. Where both parties do not consent to the appointment of a Special Referee, as here, the Appellate Division has cautioned that the supervisory power of a referee should be exercised sparingly and its exercise is not warranted in the absence of special circumstances (DiGiovanni v Pepsico, Inc., 120 AD2d 413 [1st Dept 1986]). This Court finds no such special circumstance here. Indeed, discovery in this matter is nearly complete. Under these circumstances, referring the remaining discovery to a Special Referee at this juncture would only serve to delay the discovery process.

Accordingly, that branch of the motion for a reference of all discovery to a Special Referee is denied.

Motion Seq. No. 002

The remaining aspect of this motion concerns counts IX and X of the plaintiffs' amended complaint. In counts IX and X, plaintiffs seek a declaration that R&Q, as plaintiffs' reinsurer, must pay any future billings from plaintiffs relating to certain Cutter Laboratories, Inc. and Baxter Travenol Laboratories claims (respectively, the "Cutter" and "Baxter" claims). Plaintiffs allege that they expect to incur future Cutter and Baxter-related losses (Abrams Affirm., Mtn Seq. 002, ¶ 14). Specifically, "[f]or Cutter, Plaintiffs anticipate additional claims against Cutter not included in the Cutter Settlement, which will generate

additional claims against Plaintiffs for insurance coverage. For Baxter, there are remaining payments that Plaintiffs must make under the Baxter settlement, which expressly requires future payments ... [Both of which] will likely trigger reinsurance billings to R&Q" (Id.).

The principle is well settled that striking a pleading is a drastic remedy that is only warranted where noncompliance with discovery directives is "clearly established to be both deliberate and contumacious," or due to a party's bad faith (Catarine v Beth Israel Medical Ctr., 290 AD2d 213, 215 [1st Dept 2002]; Mateo v City of New York, 274 AD2d 337 [1st Dept 2000]). Even in circumstances "where the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on their merits" (Catarine, 290 AD2d at 215, citing Elemery Corp. v 773 Assocs., 168 AD2d 246 [1st Dept 1990]).

Here, the parties have engaged in an extraordinarily protracted meet and confer process in an attempt by plaintiffs to narrow R&Q's discovery demands with respect to the Cutter and Bendix claims. There is no evidence in the record, however, to indicate that plaintiffs' conduct during this process, and specifically their failure to produce documents during the "meet and confer" was willful, contumacious or carried out in bad faith.

To be sure, plaintiffs must provide discovery relating to Counts IX and X if they seek to pursue those claims. As such, to

facilitate this process, R&Q is directed to re-serve its document demands and interrogatories with respect to the Cutter and Bendix claims, amended to reflect the parties' meet and confer discussions if applicable, within ten days of this decision and order. Plaintiffs are then directed to produce responsive documents and respond to said interrogatories within 30 days of their receipt of R&Q's demands. To the extent that the parties cannot agree on whether certain documents should be produced or have other discovery issues, they are to jointly contact the Court for a discovery conference to resolve any issues after plaintiffs make their initial response and production. In the event plaintiffs fail to produce any discovery according to this schedule, R&Q is permitted to renew its motion for all appropriate relief.

Accordingly, it is

ORDERED that defendant's to vacate this Court's prior order and to appoint a special referee (mtn seq. no. 001) is denied; and it is further

ORDERED that defendant's to dismiss plaintiffs' counts IX and X (mtn seq. no. 002) is denied.

Dated: 7/21/15

HON. JEFFREY K. OING, J.S.C.