

**Three Boroughs, LLC v Endurance Am. Specialty  
Ins. Co.**

2015 NY Slip Op 32629(U)

August 21, 2015

Supreme Court, New York County

Docket Number: 652264/2014

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 48

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THREE BOROUGHS, LLC,

Plaintiff,

-against-

ENDURANCE AMERICAN SPECIALTY INSURANCE  
CO.,

Defendant.

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**Index No.: 652264/2014**

**DECISION AND ORDER**

**JEFFREY K. OING, J.:**

Having considered the parties' letter briefs dated June 25, July 1, and July 10, 2015, the Court finds that defendant Endurance American Specialty Insurance Co.'s ("Endurance") communications with its named insured regarding the underlying Queens County action are discoverable and should be produced to plaintiff.

**Factual Background**

Plaintiff Three Boroughs LLC ("Three Boroughs") claims it is an additional insured under Endurance's policy issued to its named insured, OM General Contractors Corp. ("OM"). In the underlying Queens County action, an OM employee commenced a personal injury action against Three Boroughs for injuries arising out of a construction accident. Three Boroughs impleaded OM and Endurance, but subsequently discontinued against Endurance. Three Boroughs now brings this declaratory judgment action seeking a declaration that it qualifies as an additional insured under OM's general liability policy issued by Endurance.

### Discussion

In support of its position that the discovery sought by plaintiff should not be produced, Endurance relies on the "Kandel-Finegold rule," annunciated in Kandel v Tocher, 22 AD2d 513 (1st Dept 1965), and Finegold v Lewis, 22 AD2d 447 (2d Dept 1965). Pursuant to this rule, in tort cases, reports, investigations and statements "involved in the performance of an insurer's responsibility under automobile liability insurance" are not discoverable (Kandel, 22 AD2d at 515). The rule has evolved to protect all liability insurers. That legal principle is, however, inapplicable to this declaratory judgment action. In declaratory judgment actions such as the one here, "documents prepared in the ordinary course of an insurance company's investigation to determine whether to accept or reject coverage and evaluate the extent of a claimant's loss are not privileged and are, therefore, discoverable" (Brooklyn Union Gas Co. v American Home Assur. Co., 23 AD2d 190, 191 [1st Dept 2005]). Communications which occurred before the date that defendant had reasonable grounds to reject the claim are considered gathered in the ordinary course of business and, thus, generally subject to discovery unless prepared solely in anticipation of litigation.

Here, Endurance has not met its burden to show that the material sought was prepared solely for litigation and not in the regular course of its business. To the extent that Endurance argues, in the alternative, that the communications sought are

not relevant, discovery under Article 31 of the CPLR is broad and requires that, "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101[a]). "The words 'material and necessary' as used in section 3101 must be 'interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy" (Matter of Kapon v Koch, 23 NY3d 32, 38 [2014], quoting Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 [1968])).

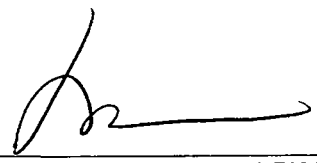
In this action, Three Boroughs is seeking a declaration that it qualifies as an additional insured under Endurance's general liability policy issued to OM, and that as such Endurance should defend and indemnify it in the underlying Queens County action. Certainly, communications between Endurance and OM until the date of Endurance's decision to deny coverage to Three Boroughs are thus relevant to the instant dispute and discoverable herein.

To the extent that Endurance argues that this entire action is frivolous because the contracts between Three Boroughs and OM did not require OM to name Three Boroughs as an additional insured, that is an argument that should be reserved for a dismissal motion and not relevant to this discovery dispute. Insofar as Endurance argues that Three Boroughs is improperly seeking the instant documents to use in the Queens County action, that is a matter for that Court to determine. This decision only concerns the instant declaratory judgment action.

Accordingly, based on the foregoing, Endurance is directed to produce all communications, including any investigative reports, between it and its insured predating its decision to deny coverage to Three Boroughs within 20 days after service of a copy this order with notice of entry.

This constitutes the decision and order of the Court.

Dated: 8/21/15



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

JEFFREY K. OING  
J.S.C.