

**Greenaway v Tri-State Consumer Ins. Co.**

2015 NY Slip Op 32754(U)

February 20, 2015

Supreme Court, Nassau County

Docket Number: 600260/14

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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ELBERT GREENAWAY and AUGUSTINA GREENAWAY, on behalf of themselves and all other persons similarly situated,

TRIAL/IAS PART 36  
NASSAU COUNTY

Plaintiffs,

Index No.: 600260/14  
Motion Seq. No.: 02  
Motion Date: 12/15/14

- against -

TRI-STATE CONSUMER INSURANCE COMPANY,

Defendant.

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**The following papers have been read on this motion:**

	Papers Numbered
Order to Show Cause, Affirmation and Exhibits, Affidavit and Exhibits	1
Memorandum of Law in Opposition, Affirmation and Exhibit	2

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 2304, for an order quashing the *subpoenas ad testificandum* served upon non-parties Cliff Smith, Joe DeRosa, Robert Perratta, Lauren Pape, Esq. and David Feen, Esq.; or, alternatively moves for an order allowing its counsel the right to object to questions and responses at the subject non-party depositions, to be marked for a ruling by the Court. Plaintiffs oppose the motion.

On January 17, 2014, plaintiffs Elbert Greenaway and Augustina Greenaway electronically filed a Summons and Verified Class Action Complaint on behalf of themselves

and all other persons similarly situated. The Verified Complaint alleges that defendant engaged in deceptive acts and practices and defrauded its policyholders by routinely deducting contractors' overhead and profit from all of its repair or replacement cost estimates, by routinely obtaining several contractors' estimates and cherry-picking the lowest one to utilize in adjusting policyholders' claims and otherwise disregarding estimates it arbitrarily believes to be too expensive and by cancelling payments made to policyholders, as well as stalling and delaying the investigation of claims, as punishment when policyholders retain representation. *See* Defendant's Affirmation in Support Exhibit B.

Counsel for defendant submits that the subject *subpoenas ad testificandum* are "facially defective and seeking confidential and privileged information." *See* Defendant's Affirmation in Support Exhibit A. Counsel adds that "[i]f the Court does not see fit to quash the subpoenas, Tri-State requests that the Court limit the scope of the demanded depositions based on the attorney-client privilege between Tri-State and each of Ms. Pape and Mr. Feen respectively, who both served as Tri-State's general counsel, as well as based on the Severance and Confidentiality agreements between Tri-State and each of Mr. DeRosa and Mr. Feen, respectively.... Moreover, even if the Court ultimately determines that the motion to quash the subpoenas should not be granted, the parties require guidance from the Court regarding the testimony that the non-parties may offer in light of privileged information held by Ms. Pape and Mr. Feen as well as Severance and Confidentiality agreements between Tri-State and each of Mr. DeRosa and Mr. Feen." *See* Defendant's Affidavit in Support Exhibits A and B.

Counsel for defendant adds that "[p]rior to Tri-State serving its Answer, the Plaintiffs served five (5) non-party subpoenas seeking deposition testimony.... Each of the non-party

subpoenas is devoid of specifics about the Lawsuit, testimony which the Greenaways are seeking from the non-parties or the basis for the subpoena.... Initially, none of the subpoenas specifically set forth the facts or allegations of the Lawsuit, the basis for the subpoena or the scope of the testimony sought, as required by New York law.... Each of the subpoenas merely provide as the 'reason' for the deposition: The reason for this deposition is that the Plaintiff has commenced this lawsuit against the Defendant for breaches of contract with regard to work performed by TRI-STATE CONSUMER INSURANCE COMPANY and their policyholders to [which] you are a material witness.... The subpoenas are devoid of any specific information to apprise the non-parties of the circumstances or reasons why the requested disclosure is sought or required. According to New York law, the party subpoenaing the non-party must first 'sufficiently state the circumstances or reasons underlying the subpoena.' [citation omitted]. The purpose of this requirement is 'presumably to afford a nonparty who has no idea of the parties's dispute or a party affected by such request an opportunity to decide how to respond' [citation omitted] and 'to apprise a stranger to the litigation the circumstances or reasons why the requested disclosure was sought or required.' [citation omitted]. Thus, a subpoena served on a non-party must contain the required notice stating why the disclosure is sought. [citation omitted]. Here, the only information provided in the five (5) notices for deposition is the fact that this Lawsuit was commenced and that the non-party is a material witness.... There is nothing in the subpoenas to apprise a stranger to the litigation the circumstances or reasons why the requested disclosure was sought or required. As a result, the subpoenas are deficient on the face and must be quashed as a matter of New York law." *See* Defendant's Affirmation in Support Exhibit A.

With respect to the subpoenas served upon Joe DeRosa and David Feen, Esq., counsel for

defendant submits that “[e]ach of Joe DeRosa and David Feen, Esq. were employed by Tri-State.... As part of their respective terminations, Mr. DeRosa and Mr. Feen each entered into substantially similar Severance and Confidentiality Agreement (*sic*) with Tri-State.... According to the terms of the Severance and Confidentiality Agreements, Mr. DeRosa and Mr. Feen were each to return to Tri-State all documents in his/her respective possession, regardless of the format.... Accordingly, the demands in the subpoenas on Mr. DeRosa and Mr. Feen for documents relating to the Greenaways, are rendered moot as any documents that Mr. DeRosa, and Mr. Feen may have had which is related to the Greenaways was to be returned to Tri-State and will thus be part of Tri-State’s production to the Greenaways. Moreover, pursuant to the terms of the Severance and Confidentiality Agreements, Mr. DeRosa and Mr. Feen agreed that: any and all confidential and/or non-public knowledge or information, concerning Tri-State, and/or its affairs, which you obtained during the course of your employment, will not be discussed by you to any third party and you agree to conceal and protect such confidential and/or non-public knowledge and information from all third parties.... Due to the sparse details of the subpoenas, as discussed above, it is impossible to discern if the Greenaways intend to seek confidential and/or non-public information about Tri-State from Mr. DeRosa and/or Mr. Feen.” See Defendant’s Affidavit in Support Exhibits A and B.

With respect to the subpoenas served upon Lauren Pape, Esq. and David Feen, Esq., counsel for defendant submits that “[b]oth Ms. Pape and Mr. Feen were, at different times, general counsel for Tri-State.... As a result of their respective positions as counsel for Tri-State, any information sought as part of the deposition may be subject to attorney-client privilege. Tri-State is the owner of the privilege and has no intent of waiving it.... As general counsel for Tri-State, all information and consultation regarding any claim, which involved Mr. Feen or Ms.

Pape would be legal in nature and, thus, privileged. As a result, the subpoenas on Mr. Feen and Ms. Pape should be quashed.... However, to the extent that the Court does not quash these subpoenas for the reasons discussed herein, the Court should limit the scope of the subpoenas to non-privileged information.”

With respect to the subpoenas served upon David Feen, Esq. and Cliff Smith, counsel for defendant submits that “[t]he subpoenas served on Mr. Feen and Mr. Smith should each be quashed because neither David Feen nor Cliff Smith had any connection to the Greenaways’ claim.... Because the Greenaways are seeking the deposition of Mr. Feen and Mr. Smith to obtain information about Tri-State’s handling of the claim, it will be impossible to uncover anything legitimate from either witness as neither witness worked on the Greenaways’ claim. Accordingly, because neither Mr. Smith nor Mr. Feen has information about the Greenaways’ claim, each of the subpoenas on Mr. Smith and Mr. Feen should be quashed.”

In support of its motion, defendant provides the Affidavit of Penny Hart, President of defendant company. *See* Defendant’s Affidavit in Support.

In opposition to the motion, counsel for plaintiffs submits that “[d]uring defendant’s purported investigation of the claim, there was a significant amount of communication between Plaintiffs’ counsel, Scott E. Agulnick, Esq., and a number of Defendant’s employees and vendors, whom as set forth more fully below, have been subpoenaed to appear in this instant action for an oral examination as non-parties.”

Counsel for plaintiffs argues that “[a]t bar, the subpoenas at alleged issue contain more than sufficient information to apprise the witnesses of the surrounding circumstances of the instant litigation. Notwithstanding, the reason for the subpoena is succinctly stated the in the body of the document itself: ‘The reason for this deposition is that Plaintiffs have commenced

this lawsuit against the defendant for breaches of contract against the defendant with regard to work by TRI-STATE CONSUMER INSURANCE COMPANY and their policyholders to which you are a material witness.’... The body also apprises the witnesses that the depositions will concern ‘...estimates, invoices, repairs..... and any other work...’ pertaining to the Greenaways and other TRI-STATE CONSUMER INSURANCE COMPANY insureds.... Moreover, the proposed non-party deponents have been in contact with Scott Agulnick, plaintiffs’ counsel in this matter, and have been apprised of the precise nature of the litigation involved and the testimony and documents that will be sought. ... If any doubt lingers regarding the notice requirement, the Court can resolve same by considering the contents of these opposition papers to TRI-STATE CONSUMER INSURANCE COMPANY’s motion which provide ample basis for the testimony and documents demanded. ‘The lack of such notice is not fatal and may be remedied by the showing of circumstances and reasons made in response to a motion to quash the subpoena [citation omitted].... Indeed, the proposed non-party witnesses are hardly strangers to these proceedings and, in fact, were intimately involved with the claims department and adjustment of insurance claims, and were quite familiar with TRI-STATE CONSUMER INSURANCE COMPANY’S inner workings.” *See* Defendant’s Affirmation in Support Exhibit A; Plaintiffs’ Agulnick Affirmation in Opposition.

Counsel for plaintiffs additionally argues that “[d]efendant next argues that because two of the subpoena recipients entered into agreements with TRI-STATE CONSUMER INSURANCE COMPANY, that they should be shielded from discovery for that reason alone. First off, the defendant only provides the signed agreement of Feen. There is no executed agreement provided for DeRosa.... Even if we were to presume such document exists, it is not controlling on this issue. Indeed the agreement itself acknowledges that a subpoena overrides the

terms of the agreement, only giving TRI-STATE CONSUMER INSURANCE COMPANY the right to move for a protective order.”

Counsel for plaintiffs further submits that “[d]efendant concedes that Pape and Feeney (*sic*) ‘may have’ acted as claims managers for TRI-STATE CONSUMER INSURANCE COMPANY but argues that as long as the communications were primarily or predominantly legal in nature, the privilege applies. However, according to the information plaintiffs’ counsel has received from sources not bound by privilege or agreement, they were acting precisely as claims managers in virtually all of their dealings with TRI-STATE CONSUMER INSURANCE COMPANY with little or no legal advise taking place.... Merely because such an investigation was undertaken by attorneys will not cloak the reports and communications with privilege [citation omitted] because the reports, although prepared by attorneys, are prepared as part of the ‘regular business’ of the insurance company. [citation omitted]. Moreover, evaluating the extent of potential liability of the insured, which would necessarily include assessment of damages, is within the ordinary course of business of an insurance company, and therefore is not privileged even though it has been conducted by retained counsel to perform examinations under oath. [citation omitted]. Therefore, those communications which occurred before the date that the defendants had reasonable grounds to reject the claim [citation omitted] are not immune from discovery. The record shows that Mr. Feen and Ms. Pape were primarily engaged in claims handling - an ordinary business activity for an insurance company.”

Counsel for plaintiffs also asserts that “[d]efendant argues that Feen and Smith were not involved with the Greenaways’ claim and thus should not be permitted to testify. However, as defendant well knows, this case is not simply concerned with the Greenaways, but also involves a potential class of thousands of individual homeowners. The subpoenas concern not just

Greenaway but ‘any TRI-STATE CONSUMER INSURANCE COMPANY insureds’....”

CPLR § 3101(a) provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” The phrase “material and necessary” is “to be 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 Publ. Co.*, 21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968). *See also Tower Ins. Co. of N.Y. v. Murello*, 68 A.D.3d 977, 889 N.Y.S.2d 852 (2d Dept. 2009). The Court of Appeals’ interpretation of “material and necessary” in *Allen v. Crowell-Collier Publ. Co.*, *supra*, has been understood “to mean nothing more or less than ‘relevant.’” *See* Patrick M. Connors, PRACTICE COMMENTARIES, MCKINNEY’S CONSOLIDATED LAWS OF NEW YORK, BOOK 7B, CPLR C3101:5. However, “unlimited disclosure is not mandated, and the rules provide that the court may issue a protective order ‘denying, limiting, conditioning or regulating the use of any disclosure device’ to ‘prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.’” *County of Suffolk v. Long Is. Power Auth.*, 100 A.D.3d 944, 954 N.Y.S.2d 619 (2d Dept. 2012). *See also Accent Collections, Inc. v. Cappelli Enters., Inc.*, 84 A.D.3d 1283, 924 N.Y.S.2d 545 (2d Dept. 2011); *Yoshida v. Hseuh-Chih Chin*, 974 N.Y.S.2d 580, 2013 NY Slip Op 07469 (2d Dept. 2013).

CPLR § 3101(a)(4) provides that the parties to an action are entitled to “full disclosure of all matter material and necessary in the prosecution or defense of an action” from non-parties “upon notice stating the circumstances or reasons such disclosure is sought or required.” *See American Heritage Realty LLC v. Strathmore Ins. Co.*, 101 A.D.3d 1522, 957 N.Y.S.2d 495 (3d Dept. 2013).

As stated, the standard for subpoenaed materials from a non-party is material and necessary. *See Matter of Kapon v. Koch*, 23 N.Y.3d 32, 988 N.Y.S.2d 559 (2014). “An application to quash a subpoena should be granted ‘[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious’ ... or where the information sought ‘in utterly irrelevant to any proper inquiry.’” *Matter of Kapon v. Koch, supra* at 38 quoting *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 525 N.Y.S.2d 816 (1988). *See also Matter of Hogan v. Cuomo*, 67 A.D.3d 1144, 888 N.Y.S.2d 665 (3d Dept. 2009); *Gertz v. Richards*, 233 A.D.2d 366, 650 N.Y.S.2d 584 (2d Dept. 1996); *Technology Multi Sources, S.A. v. Stack Global Holdings, Inc.*, 44 A.D.3d 931, 845 N.Y.S.2d 357 (2d Dept. 2007); *Liberty Company v. Rogene Industries, Inc.*, 272 A.D.2d 382, 707 N.Y.S.2d 911 (2d Dept. 2000). The words ‘material and necessary’ as used in the Civil Practice Law provision governing ‘disclosure of all matter material and necessary in the prosecution or defense of an action’ must be 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. *See Matter of Kapon v. Koch, supra*.

The Court notes that, while defendant argues that “[t]he subpoenas are devoid of any specific information to apprise the non-parties of the circumstances or reasons why the requested disclosure is sought or required,” the subpoenas do cite specific information, stating on their face that “[t]he reason for this deposition is that the Plaintiff has commenced this lawsuit against Defendant for breaches of contract with regard to work performed for TRI-STATE CONSUMER INSURANCE COMPANY and their policy holders to which you are a material witness.” *See* Defendant’s Affirmation in Support Exhibit A.

The Court further notes that defendant failed to provide a signed and executed Severance

and Confidentiality Agreement between itself and non-party witness Joe DeRosa. Therefore, any arguments made that the subpoena served upon Joe DeRosa should be quashed based on said Agreement are without merit. *See* Defendant's Affidavit in Support Exhibit A.

Furthermore, the Court finds that the confidentiality provision contained in paragraph six (6) of the subject Confidentiality and Severance Agreement with non-party David Feen, Esq. is overly broad. The non-specificity of said clause makes it impossible for the Court to determine what exactly defendant is claiming to be confidential or what would require the release of a trade secret. Accordingly, defendant's motion to quash the subject subpoena served upon David Feen, Esq. based upon said Agreement alone is denied. *See* Defendant's Affidavit in Support Exhibit B.

However, as the Court held in *Matter of Kapon v. Koch*, 37 Misc.3d 1211(a), 961 N.Y.S.2d 361 (New York County Supreme Court 2012), "[o]bviously, petitioners are not in a position to know whether confidential information would be disclosed during the non-party depositions until the questions are posed, the answers to which would reveal allegedly confidential information. However, 'protective orders should be limited to trade or business secrets and are required to be specific' *Mann v. Cooper Tire Co.*, 33 AD3d 24 [1<sup>st</sup> Dept 2006], citing *Bristol, Litynski, Wojcik v. Town of Queensbury*, 166 A.D.2d 772, 773-774 [3d Dept m1990].)" In *Matter of Kapon v. Koch*, *supra*, the Court permitted the non-parties' counsel to object at the non-party depositions and the witnesses to decline to answer any question at said depositions on the ground that the answer would divulge confidential information or trade secrets of the named defendant. The Court held that "[e]very such question to which this objection is raised shall be marked for a ruling, which shall be made upon respondent's motion. In the alternative, petitioners and respondents may agree to appoint a private referee/special master to

determine any objections raised at the non-party depositions.”

This Court is inclined to follow the model set forth in *Matter of Kapon v. Koch, supra*. Accordingly, counsel for defendant is permitted to object to any questions posed to non-party witness David Feen, Esq. in which the answer would divulge confidential information or trade secrets of the defendant. Every such question to which this objection is raised shall be marked for a ruling and, upon submission of the objections to the Court after the deposition, the Court or a special referee appointed by the Court can make a determination as said objections.

The attorney-client privilege, which is codified in CPLR § 4503(a), “fosters the open dialogue between lawyer and client that is deemed essential to effective representation”; since it constitutes an “obstacle” to the “truth-finding process,” the privilege must be narrowly construed. *See Willis v. Willis*, 79 A.D.3d 1029, 914 N.Y.S.2d 243 (2d Dept. 2010) quoting *Spectrum Sys. Intl. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 575 N.Y.S.2d 809 (1991) and *Matter of Priest v. Hennessey*, 51 N.Y.2d 62, 431 N.Y.S.2d 511 (1980). Not all communications to an attorney are privileged; it must be shown that the information sought to be protected from disclosure was a “confidential communication” made to the attorney for the purpose of obtaining legal advice or services. *See Matter of Priest v. Hennessey, supra* at 69.

The Court finds that defendant has failed to show “that the information sought to be protected from disclosure was a ‘confidential communication’ made to the attorney for the purpose of obtaining legal advice or services.” *See Matter of Priest v. Hennessey, supra*. Therefore, the request to quash the subpoenas served upon non-parties Lauren Pape, Esq. and David Feen, Esq. based upon the grounds of attorney-client privilege is denied.

Furthermore, all applications not specifically addressed are denied.

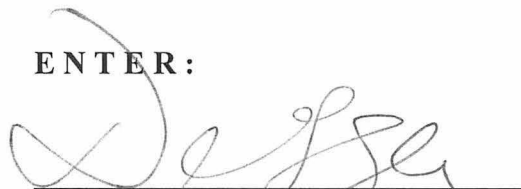
Based upon the foregoing, the branch of defendant's motion, pursuant to CPLR § 2304, for an order quashing the subpoenas ad testificandum served upon Cliff Smith, Joe DeRosa, Robert Perratta, Lauren Pape, Esq. and David Feen, Esq. is hereby **DENIED**.

The branch of defendant's motion for an order allowing its counsel the right to object to questions and responses at the subject non-party depositions, to be marked for a ruling by the Court, is hereby **GRANTED to the extent** as detailed above.

All parties shall appear for a Certification Conference in IAS Part 36, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on February 24, 2015, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER :



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
February 20, 2015

**ENTERED**  
FEB 25 2015  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE