

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

2015 NY Slip Op 32755(U)

August 3, 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

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. Nos.: 03, 04  
Motion Dates: 06/04/15  
06/04/15

- against -

TRI-STATE CONSUMER INSURANCE COMPANY,

Defendant.

**The following papers have been read on these motions:**

	Papers Numbered
<u>Notice of Motion (Seq. No. 03), Affirmation and Exhibits and Memorandum of Law</u>	<u>1</u>
<u>Notice of Cross-Motion (Seq. No. 04), Affirmations and Exhibits</u>	<u>2</u>
<u>Affirmation in Further Support of Motion Seq. No. 03 and in Opposition to Cross-Motion Seq. No. 04 and Exhibits</u>	<u>3</u>
<u>Reply Affirmation in Further Support of Cross-Motion Seq. No. 04</u>	<u>4</u>

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

Defendant moves (Seq. No. 03), pursuant to CPLR § 3103, for an order (1) granting a protective order, protecting defendant from responding to plaintiffs' demands; or (2) allowing defendant to produce a representative redacted sampling of responsive materials; or, alternatively (3) issuing a protective order allowing defendant to redact all personal and confidential information contained in the responsive documents; and (4) issuing a confidentiality order to

protect defendant's insureds from use of their information outside of this litigation.

Plaintiffs oppose the motion and cross-move (Seq. No. 04) for an order (1) striking defendant's Answer for willfully and contumaciously refusing to comply with its discovery obligations pursuant to CPLR Article 31, in addition to this Court's Order dated March 27, 2015; or, alternatively, (2) precluding defendant from offering evidence at trial, in its entirety; or, alternatively, (3) compelling defendant to immediately comply with this Court's order dated March 27, 2015. Defendant opposes the cross-motion.

On January 17, 2014, plaintiffs 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 A.

The named plaintiffs seek to bring this class action pursuant to CPLR Article 9, on behalf of themselves and all current and former owners of insurance policies issued by defendant, for the period beginning six (6) years before commencement of this action to the present, who suffered an insurance loss and reported it to defendant. The Verified Complaint asserts five (5) causes of action. The first cause of action asserts a claim for breach of contract on behalf of the named plaintiffs, Elbert Greenaway and Augustina Greenaway. The second cause of action

asserts a claim for violation of General Business Law § 349 on behalf of the named plaintiffs, Elbert Greenaway and Augustina Greenaway. The third cause of action asserts a claim for breach of contract on behalf of the class members. The fourth cause of action asserts a claim for violation of General Business Law § 349 on behalf of the class members. The fifth cause of action seeks a declaratory judgment on behalf of the named plaintiffs, Elbert Greenaway and Augustina Greenaway, and all others similarly situated. *See id.*

Defendant previously moved (Seq. No. 01), pursuant to CPLR § 3211(a)(1) and (7), to dismiss plaintiffs' Verified Class Action Complaint. By Decision and Order dated September 15, 2014, this Court granted defendant's motion to dismiss to the extent that plaintiff's fourth cause of action for violation of General Business Law § 349 on behalf of the class members and fifth cause of action for declaratory judgment on behalf of the named plaintiffs and all others similarly situated were each dismissed.

While this Court's September 15, 2014 Decision and Order did not dismiss plaintiffs' third cause of action for breach of contract on behalf of the class members, this Court has not yet certified the proposed class, nor has this Court adjudicated the named plaintiffs' ability to represent the proposed class.<sup>1</sup> The Court shall not make that determination until after plaintiffs move, pursuant to CPLR § 902, for an order allowing a class action.

While class certification should be determined promptly pursuant to CPLR § 902, the Court has discretion to extend the deadline upon good cause shown, such as plaintiffs' need to conduct pre-class certification discovery to determine whether the prerequisites of a class action

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<sup>1</sup> The assertion by plaintiffs' counsel that this Court has already adjudicated the plaintiffs' ability to represent the class is incorrect. *See* Plaintiffs' Agulnick Affirmation ¶ 4 and Kotchek Affirmation ¶ 4.

set forth in CPLR § 901(a) may be satisfied. *See Rodriguez v. Metropolitan Cable Communications*, 79 A.D.3d 841, 913 N.Y.S.2d 292 (2d Dept. 2010); *Kodirov v. Community Home Care Referral Serv., Inc.*, 35 Misc.3d 1221(A), 951 N.Y.S.2d 86 (Supreme Court Kings County 2012).

On November 17, 2014, a Preliminary Conference Order was signed, which directed that demands for discovery and inspection be served by all sides on or before December 17, 2014. *See* Defendant's Affirmation in Further Support Exhibit 2. On or about December 5, 2014, plaintiffs served defendant with a Demand for Documents, which included requests for "copies of any and all building damage estimates, including but not limited to notes, drafts, correspondence, memorandums (*sic*), letters, emails, faxes prepared by any officers, employees, agents, independent contractors and/or any other individual/entity on behalf of TSC" for the period January 1, 2011 to November 30, 2014. *See* Defendant's Affirmation in Support Exhibit D ¶¶ 2 and 3. On March 10, 2015, defendant served a response to plaintiffs' Demand for Documents, which objected to such demands as "overly broad and unduly burdensome and not reasonably calculated to lead to admissible evidence." *See* Defendant's Affirmation in Support Exhibit E.

A pre-motion telephone conference was held with this Court on March 27, 2015, in which defendant agreed to produce certain documents subject to the execution of a confidentiality agreement by plaintiffs. This conference did not result in the issuance of a written order by this Court. *See* CPLR § 2219(a). Subsequently, counsel for plaintiffs and counsel for defendant failed to agree on the terms of the confidentiality agreement, resulting in defendant's motion (Seq. No. 03) for a protective order and plaintiffs' cross-motion (Seq. No. 04) to strike, preclude or compel.

CPLR § 3103(a) provides that:

"The court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery

is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.”

Plaintiffs argue that defendant’s motion (Seq. No. 03) for a protective order is untimely because defendant failed to timely object to plaintiffs’ Demand for Documents. *See* CPLR § 3122(a). However, even when a motion for a protective order is untimely, the Court is entitled to determine whether the plaintiffs’ document requests were palpably improper. *See Harris v. City of New York*, 211 A.D.2d 663, 622 N.Y.S.2d 289 (2d Dept. 1995).

While 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 use of pre-class certification disclosure should be limited to ascertaining only those facts which are necessary to support an application for class status. *See Gewanter v. Quaker State Oil Ref. Corp.*, 87 A.D.2d 970, 450 N.Y.S.2d 93 (4<sup>th</sup> Dept. 1982). Plaintiffs have failed to demonstrate that there is any need to discover the names or identifying information of other potential class members in order to obtain the information necessary to prove the prerequisites for class action certification pursuant to CPLR §§ 901 and 902.

“The purpose of preclass certification discovery is to ascertain the dimensions of the group of individuals who share plaintiff’s grievance, not to plant the seed of litigation in the minds of those who until now have given no indication of being aggrieved.” *Smith v. Atlas Intl. Tours*, 80 A.D.2d 762, 436 N.Y.S.2d 722 (1<sup>st</sup> Dept. 1981).

To the extent that plaintiffs’ demands seek personal identifying information that does not pertain to the prerequisites for class certification, the requests are improper and a protective order is necessary to protect the privacy of defendant’s policyholders at this pre-certification stage of

the litigation. In light of the impropriety of plaintiffs' demands and the inability of counsel for the parties to reach an agreement on a confidentiality agreement, there is no basis for the harsh penalty of striking defendant's pleading or precluding defendant from offering evidence at trial.

All other arguments raised by the parties herein have been considered and found to be without merit.

Based upon the foregoing, defendant's motion (Seq. No. 03), pursuant to CPLR § 3103, for an order: ((1) granting a protective order, protecting defendant from responding to plaintiffs' demands; or (2) allowing defendant to produce a representative redacted sampling of responsive materials; or, alternatively (3) issuing a protective order allowing defendant to redact all personal and confidential information contained in the responsive documents; and (4) issuing a confidentiality order to protect defendant's insureds from use of their information outside of this litigation is hereby **GRANTED to the extent** that defendant is directed to respond to plaintiffs' Demand for Documents within sixty (60) days of the date of this Order, all documents produced in response to such demand shall contain the relevant claim number, but defendant may redact the names, addresses, telephone numbers and social security numbers of its insureds from such documents. The motion is, in all other respects, **DENIED**.

Plaintiffs' cross-motion (Seq. No. 04) for an order (1) striking defendant's Answer for willfully and contumaciously refusing to comply with its discovery obligations pursuant to CPLR Article 31, in addition to this Court's Order dated March 27, 2015; or, alternatively, (2) precluding defendant from offering evidence at trial, in its entirety; or, alternatively, (3) compelling defendant to immediately comply with this Court's order dated March 27, 2015, is hereby **DENIED**.

All parties shall appear for a Certification Conference in IAS Part 36, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on August 4, 2015, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



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

Dated: Mineola, New York  
August 3, 2015

**ENTERED**  
AUG 04 2015  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE