

By Design LLC v Samsung Fire & Mar. Ins. Co. Ltd.
2017 NY Slip Op 31637(U)
July 28, 2017
Supreme Court, New York County
Docket Number: 652412/2016
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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BY DESIGN LLC,

Plaintiff,

Index No. 652412/2016

- against -

SAMSUNG FIRE & MARINE INSURANCE
CO. LTD. (U.S. BRANCH); and
SAMSUNG FIRE & MARINE MANAGEMENT
CORPORATION,

Defendants.
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Hon. C. E. Ramos, J.S.C.:

In motion sequence 002, plaintiff By Design LLC ("By Design") moves pursuant to CPLR § 3124 for an order compelling defendants Samsung Fire & Marine Insurance Co. Ltd. ("Samsung Insurance") and Samsung Fire & Marine Management Corporation ("Samsung Management") (collectively, "Samsung") to produce all documents responsive to By Design's first request for production. Samsung cross-moves for an order of protection pursuant to CPLR § 3103(a).

Background

According to the complaint, in 2015, By Design arranged to manufacture and sell to Macy's Merchandising Group, Inc. ("Macy's") an order of clothing items worth approximately \$1,500,000, which Macy's planned to sell in the fall 2015 season (Complaint, ¶ 2). The goods arrived in New York earlier than the delivery window set by Macy's for delivery to its warehouse, so By Design stored them temporarily in a third-party warehouse

("Jordan Logistics") (*id.* at ¶ 2). On July 22, 2015, a fire burned down the Jordan Logistics warehouse and destroyed the goods worth approximately \$1,500,000 (*id.* at ¶ 28).

Samsung Insurance issued to By Design a Marine Open Cargo insurance policy (the "Policy") effective from April 17, 2015 to April 17, 2016 (*id.* at ¶ 15). The Policy provides for a limit of liability of \$5,000,000 for "any one conveyance" that was "in transit" (*id.* ¶ 16). By Design argues that its claim of loss is covered under at least one of three clauses in the Policy, namely the "Warehouse to Warehouse Clause," the "Marine Extension Clause," and the "Consolidation, Deconsolidation & Containerization Clause" (*id.* at ¶¶ 18-21).

Samsung denied coverage for the loss because the goods were not "in transit" after they were delivered to the Jordan Logistics warehouse and that Jordan Logistics was the final destination under the policy (*id.* at ¶ 36).

By Design asserts that the goods were destined for Macy's and not for Jordan Logistics (*id.* at ¶ 5).

By Design instituted this action seeking declaratory relief and damages for breach of contract and tortious interference with contract. The claims are based on Samsung's denial of coverage under the Policy and Samsung Management's direction to Samsung Insurance to "wrongfully deny" insurance coverage under the

Policy for losses suffered by By Design resulting from the fire at Jordan Logistics (*id.* at ¶ 1).

Discussion

On June 14, 201, By Design served its first request for the production of documents on Samsung (Crawford Aff., Ex. A).

Samsung produced some documents from its claims file for the By Design claim, but failed to produce other documents (Crawford Aff., Ex. B). Samsung also objected to multiple of By Design's requests, claiming that they were subject to the attorney-client privilege and/or work product doctrine (Crawford Aff., Ex. B, E).

By Design is moving to compel Samsung to produce:

- a) Samsung's general claims handling documents or manuals (Request 18);
- b) claims notes from the By Design claims file (Requests 3 and 4);
- c) the complete file of Crawford Survey Services ("Crawford") and any adjuster, accountant, forensic accountant, or person hired by Samsung concerning the loss (Requests 5-7);
- d) claims files for the last ten claims made under the three provisions at issue along with the claims file from the action entitled, *Hankook Tire America Corp. v Samsung Fire & Marine Insurance Co. Ltd.*, bearing the

Index number 653948/2015 (the "Hankook case") (Requests 8 and 9);

e) Samsung's underwriting materials and guidelines (Requests 15, 16, 17, and 19);

f) information on the reserves Samsung set for By Design's claim (Request 32); and

g) any communications between Samsung and any reinsurer (Requests 30 and 31) (Crawford Aff., Ex. A).

CPLR § 3124 provides, "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article...the party seeking disclosure may move to compel compliance or a response."

With respect to relevancy, CPLR § 3101(a) states that "there 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 terms "material and necessary" are "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 Publishing Co.*, 21 NY2d 403, 406 [1968]).

Moreover, "the burden of establishing any right to protection is on the party asserting it," and is to be narrowly

construed (*Spectrum Sys. Intl Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]). CPLR § 3103(a) provides "[t]he court may at any time on its own initiative, or on motion of any party...make 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."

With regard to Request 18, this Court grants By Design's motion to compel. By Design argues that because Samsung denied coverage of By Design's claim, general claims handling documents are relevant to the issue of whether Samsung interpreted the Policy correctly and whether its present interpretation is consistent with past interpretations. Samsung represents that it "could not find the [claims handling policy] that was in effect during the time this claim arose," and that they now have it (Tr. 2/23/2017, 13:9-17). Samsung shall produce documents in its possession, custody or control that are responsive to Request 18.

With regard to Requests 3 and 4, Samsung argues that these requests seek documents that are subject to the attorney-client privilege or work product doctrine.

Privileged matter and attorney's work product are not discoverable, while materials prepared in anticipation of litigation or trial are discoverable only upon a showing of substantial need and undue hardship in obtaining equivalent

materials (CPLR 3101[b], CPLR 3101[c], CPLR 3101[d][2]). The attorney-client privilege applies when the communications between attorney and client are "primarily or predominantly of a legal character" for the purpose of rendering professional legal advice (*Spectrum Sys. Int'l Corp.*, 78 NY2d at 377-78).

The privilege does not apply to basic claims investigations conducted in an insurer's regular course of business, unless the insurer had issued a coverage denial (*McClier Corp. v United States Rebar, Inc.*, 66 AD3d 416, 416 [1st Dept 2009] ["documents prepared in an insurer's ordinary course of business in investigating whether to accept or reject coverage are discoverable"]).

Moreover, "[w]hile the work product doctrine protects from discovery documents prepared to assist in anticipated or ongoing litigation, it does not insulate documents created in the ordinary course of business...[i]f the claim has not yet been rejected the documents are part of the claim investigation process and are not work product" (*Amoco Oil Co. v Hartford Acc. & Indem. Co.*, 1995 WL 555696; *2-3 [SDNY 1995]).

Samsung represents that it made the decision to deny coverage on December 8, 2015 (Tr 2/23/2017, 8:22-23). This Court can only assess the extent, if any, of the privileged nature of the documents by conducting an *in camera* review of the By Design claim file documents leading up to the coverage denial decision

on December 8, 2015 before sharing the documents with By Design (*Spectrum Sys. Int'l Corp.*, 78 NY2d at 378). Therefore, this portion of By Design's motion to compel is held in abeyance, pending an *in camera* review.

By Design's motion to compel is granted with respect to Requests 5, 6 and 7. Samsung agreed to produce the Crawford file during the January 4, 2017 conference before the Court (Zonghetti Aff., ¶ 55). Samsung admits that it has not produced the documents responsive to this request and has agreed to do so (Tr 2/23/2017, 15:6-7).

By Design's motion is granted in part and denied in part with respect to Requests 8 and 9. By Design argues that Samsung has not provided a sufficient explanation for the coverage denial in its letter to By Design dated December 15, 2015, and thus, reviewing the last ten claims files is necessary to assess Samsung's interpretation of the Policy term "in transit" (Crawford Supp. Aff., Ex. A).

Regarding the Hankook case, By Design argues that because that litigation involves a loss under a Samsung Cargo Insurance Policy similar to the Policy at issue here, the claims file for the loss is relevant to show Samsung's claims handling practices and interpretation of its policy provisions.

Samsung opposes the request for the claims files of the last ten claims filed under the three Policy provisions at issue as

overly broad and unduly burdensome, due to the manner in which the encrypted electronic files is stored. With respect to the Hankook case claim file, Samsung argues that because the Hankook claim was denied based on the applicability of the "Infidelity Warranty" of the open cargo policy and did not involve the "in transit" Policy term, that file will not yield relevant information.

Insofar as the claims files from the last ten claims filed under the three policy provisions at issue are likely to yield information relevant to this case, Samsung shall produce those. Nevertheless, By Design has not demonstrated that the Hankook case file is material and necessary to the prosecution of By Design's claims.

With regard to Requests 15, 16, 17, and 19, By Design's motion to compel is granted to the extent that the documents are not privileged. By Design argues that these documents may lead to relevant information concerning Samsung's knowledge of By Design's business model and the anticipated risks associated with By Design's operations. Because Samsung has argued that a portion of these documents are privileged, Samsung shall produce them first for an *in camera* review.

As to Request 32, By Design's motion to compel is denied with respect to that portion of the motion which sought production of information on the reserves Samsung had set for By

Design's claim. Reserve information is not relevant to the insurance coverage issue raised in this action (*40 Rector Holdings, LLC v Travelers Indem. Co.*, 40 AD3d 482, 483 [1st Dept 2007]). While By Design is alleging that Samsung's coverage denial was made without legitimate basis and in bad faith, this case involves a dispute over insurance coverage and to this extent, reserve information is not material or necessary to the prosecution of By Design's claims (*Id.*).

By Design has withdrawn Requests 30 and 31, based on Samsung's representation that it had no communications with any reinsurers. By Design has agreed to accept that representation, so long as that representation remains accurate.

Finally, Samsung has not demonstrated that a protective order is warranted.

Accordingly, it is hereby

ORDERED that plaintiff's motion to compel production (002) is denied in part and granted in part to the extent of compelling Samsung to produce responsive documents to By Design's first set of demands, numbers 3-9 and 15-19 within 30 days of the entry of this order with notice of entry; and it is further

ORDERED that defendants' cross-motion for a protective order (002) is denied in its entirety. Defendants shall bring the designated documents, along with its privilege log, directly to chambers (room 691) on or before 20 days from entry of this

order.

Dated: July 28, 2017

ENTER: _____



J.S.C.

CHARLES E. RAMOS