Nouveau El. Indus., Inc. v New York Mar. & Gen. Ins. Co.
2018 NY Slip Op 30202(U)
January 11, 2018
Supreme Court, New York County
Docket Number: 157891/2016
Judge: Gerald Lebovits
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 7

----------X

NOUVEAU ELEVATOR INDUSTRIES, INC.,

Plaintiff,

-against- Index No.: 157891/2016

NEW YORK MARINE AND GENERAL INSURANCE COMPANY,

Defendant.

----------X

HON. GERALD LEBOVITS, J.:

Plaintiff Nouveau Elevator Industries, Inc. (Nouveau) seeks a declaration that it is entitled to insurance coverage from defendant New York Marine and General Insurance Company (Marine).

In this motion, sequence number 001, plaintiff moves for an order striking the answer (CPLR 3126) or, in the alternative, an order compelling disclosure (CPLR 3124). In its counsel's affirmation, plaintiff requests alternative relief of a conditional, self-executing order striking the answer if defendant fails to comply with any order to compel that is issued as a result of this motion.

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." The words "material and necessary" are "liberally interpreted to require disclosure, upon request, of any facts bearing on the controversy which will assist in sharpening the issue for trial" (*Roman Catholic Church of Good Shepherd v Tempco Sys.*, 202 AD2d 257, 258 [1st Dept 1994]).

In moving, plaintiff claims that defendant agreed to provide certain underwriting and claims file documents in response to plaintiff's Notice for Discovery and Inspection (D&I). Plaintiff asserts that, on February 28, 2017, defendant served a response to the D&I, but did not produce the underwriting and claims files, and objected to the requests.

Defendant opposes the motion and argues that plaintiff also has not met its discovery obligations. While there is authority suggesting that a party's own discovery deficiencies may be considered when determining sanctions sought by that party against another (*Vaca v Village View Hous. Corp.*, 145 AD3d 504, 505 [1st Dept 2016]), defendant points to nothing that permits a party to avoid its own discovery obligations merely because another party has done the same. In addition, in reply, plaintiff provides documents to dispute defendant's contention that plaintiff has not provided discovery, and asserts that it has made an extensive production.

Defendant also argues that the motion should be denied because the good faith affirmation that defendant submits is inadequate. Under 22 NYCRR 202.7 (c)

> "[t]he affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held"

(*accord 241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470, 471 [1st Dept 2013] [finding that affidavit demonstrating efforts made by moving party must show that party's diligent attempt to confer to resolve a good faith dispute and the nature of that party's efforts to reconcile with opposing counsel]).

The good faith affirmation that plaintiff submits is conclusory and does not comport with the requirements of 22 NYCRR 202.7 (a) and (c). But the record contains another affirmation from plaintiff's counsel (Mitchell moving affirmation) that provides some details about plaintiff's efforts, with exhibits. One of the exhibits is an email from defendant's counsel, dated February 15, 2017. This email demonstrates that counsel for the respective parties discussed defendant's production, and that plaintiff agreed to extend the time for defendant to respond to the D&I. Thus, the moving submissions demonstrate that: (1) defendant was served with the D&I; (2) counsel for the parties engaged in a phone call about the demanded disclosure; and (3) defendant's counsel sent a confirmatory email about the conversation, which contains what is, at least, a clarification about what plaintiff was demanding. Defendant then produced a timely "response" to the D&I, on February 28, 2017, but one which did not contain the documents discussed in the February 15, 2017 email. In April 2017, plaintiff sent an email to defendant which states:

> "Eileen,
>
> I am following up for the remainder of ProSight's responses, in accordance with our agreement
>
> Bill"

(Mitchell moving affirmation, exhibit F).

The February 15, 2017 email may, as plaintiff states, indicate that defendant agreed to provide the documents enumerated therein. But the email also may be read as merely listing the documents plaintiff was seeking, and indicating defendant's agreement to provide a response, with objections, including privilege. Defendant then served a document response to the D&I, interposing numerous objections, including attorney-client privilege. The April 2017 email, reprinted above, does not contain a request to confer about the matter. While this may have been due to plaintiff's belief that an agreement already had been reached as to the scope of document production, plaintiff has not adequately demonstrated compliance with the requirements of 22 NYCRR 202.7 (c).

In any event, the striking of a pleading is a remedy generally reserved for egregious cases of willful failure to comply with discovery orders (*see Christian v City of New York*, 269 AD2d 135, 137 [1st Dept 2000] ["imposition of the harshest penalty available to the court was an improvident exercise of discretion"]; *compare Fish & Richardson. P.C. v Schindler*, 75 AD3d 219, 221–22 [1st Dept 2010] [striking answer appropriate where "pattern of noncompliance with court orders was willful, contumacious and in bad faith"]; *accord Postel v New York Univ. Hosp.*, 262 AD2d 40, 42 [1st Dept 1999] ["Mere lack of diligence in furnishing some of the requested materials is not grounds for dismissal of the action]). No order has been previously issued in this case, and a preliminary conference has not yet been held. The record, as a whole, does not demonstrate that Marine's conduct warrants the harsh sanction of striking the answer.

Still, through its timely, February 28, 2017 discovery response, Marine represented that it would be providing certain documents, and should have done so well before now. Generally, concerning an insurer's claims files, any immunity that may be afforded to such files (*see Kandel v Tocher*, 22 AD2d 513, 515 [1st Dept 1965]), does not apply when the file is sought by an insured suing its insurer concerning an underlying claim (*see Woodson v American Tr. Ins. Co.*, 280 AD2d 328, 328 [1st Dept 2001]; *Paramount Ins. Co. v Eli Constr. Gen. Contr.*, 159 AD2d 447 [1st Dept 1990]; *accord Advanced Chimney, Inc. v Graziano*, 153 AD3d 478, 480 [2d Dept 2017] [holding that payment or rejection of claims is regular business of an insurance company and reports made to help decide to pay or reject a claim not privileged and are discoverable]; *Ashkenazi v AXA Equit. Life Ins. Co.*, 91 AD3d 576, 577 [1st Dept 2012] [denying summary judgment because additional disclosure concerning insurer's underwriting conduct required]). Furthermore, "the burden of showing that disclosure is improper is upon the party asserting it" (*Roman Catholic Church of Good Shepherd*, 202 AD2d at 258 [holding that insurance reports prepared before claim paid or rejected discoverable]). There is a "strong public policy favoring full disclosure," and the party seeking to withhold disclosure based on privilege carries the burden of demonstrating that a privilege is applicable and operates to preclude disclosure (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 157 AD2d 444, 447 [1st Dept 1990], *affd as mod*, 78 NY2d 371 [1991]).

The claims and underwriting files that plaintiff seeks are addressed in item numbers two and three of the D&I. The February 15, 2017 email, and the defendant's response to the D&I, indicate, at that juncture, a narrowing of the scope of items sought in numbers two and three of the D&I to: (1) underwriting material indicating the genesis of the Per Project Aggregate Endorsement to the Marine Policies; and (2) claims materials concerning claims against Nouveau that fall within the completed operations coverage of the policies (as opposed to ongoing operations), that concern or relate to Marine's decision to issue letters to Nouveau about potential exhaustion of the completed operations aggregates of the Marine policies issued to Nouveau.

Defendant argues that the parties should be required to attend a preliminary conference to set a discovery schedule. Discovery conferences are useful for that purpose, and to resolve certain discovery issues. However, defendant points to nothing to demonstrate that a party seeking disclosure is required to wait until a conference to obtain it. Defendant also provides no

excuse for its failure to timely produce the documents that defendant, in its own response, indicated that it would provide. It is well known that trial courts have broad powers of discretion over disclosure (CPLR 3104 [a]; *Daniels v City of New York*, 291 AD2d 260, 260 [1st Dept 2002]; and certainly over the scheduling of disclosure (*Diaz v City of New York*, 117 AD3d 777, 777–78 [2d Dept 2014] [internal quotation marks and citation omitted] ["The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court"]). Consequently, within 30 days of the date of this order, defendant shall produce to plaintiff the nonprivileged documents which, in its response to the D&I, defendant indicated that it would produce. These documents are addressed in the February 15, 2017 email. If there are any responsive documents that defendant contends are genuinely protected by privilege, then, with its production, defendant must provide a privilege log (CPLR 3122 [b]).[2]

In light of the foregoing, it is

ORDERED that plaintiff's motion is granted to the extent of requiring defendant NEW YORK MARINE AND GENERAL INSURANCE COMPANY to produce to plaintiff, within 30 days of the date of this decision and order, documents responsive to numbers two and three of plaintiff's First Notice of Discovery and Inspection, dated January 17, 2017, as modified by the parties, as reflected in defendant's counsel's February 15, 2017 email, and a privilege log if there are any responsive documents withheld by defendant, and the motion is otherwise denied; and it is further

ORDERED that a preliminary conference shall be held on April 11, 2018, at 11:00 a.m., in Part 7, Courtroom 345, at 60 Centre Street, New York, NY 10007.

DATED: January 11, 2018

J.S.C.
HON. GERALD LEBOVITS
J.S.C.

[2] Plaintiff includes other discovery demands in its moving papers, but does not indicate that they were not complied with, or discuss those demands. Of course, the parties are not precluded by this order from seeking additional documents. This decision sets a deadline for defendant's production relating to the D&I, and makes no rulings concerning privilege.