Halpin v Chubb Indem. Ins. Co.
2019 NY Slip Op 31083(U)
April 17, 2019
Supreme Court, Suffolk County
Docket Number: 63696/2013
Judge: William G. Ford
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SHORT FORM ORDER **INDEX NO.: 63696/2013**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motions Submit Date: 08/30/18
Mot Seq 005 MG

PLAINTIFF'S COUNSEL:
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JAMES C. HALPIN,

Plaintiff,

-against-

CHUBB INDEMNITY INSURANCE COMPANY,

Defendant.

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In this electronically filed action, concerning defendant's motion to quash plaintiff's subpoena for expert witness deposition testimony, the following papers were considered: NYSCEF Docket Entries ## 156 – 190; and upon due deliberation and full consideration of all of the foregoing, it is

ORDERED that defendant's motion to quash three subpoenas for expert witness depositions pursuant to CPLR 2304 and CPLR 3101(d)(1)(iii) is **granted** as follows; and it is further

ORDERED that plaintiff's subpoenas for expert witness depositions of three of defendant's experts previously designated and exchanged with the plaintiff are hereby **quashed** in accord as provided below; and it is further

ORDERED that counsel for the parties are further directed to proceed with remaining pretrial discovery and to provide an updated status report to the Court on remaining items in dispute preventing certification of this matter as ready for trial or the commencement of dispositive motion practice;

ORDERED that defense counsel is hereby directed to serve a copy of this decision and order with notice of entry electronically via NYSCEF and by electronic mail on plaintiff's counsel; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be

required; and it is further

As this is the third motion resolved the Court in this litigation, the Court refers the parties and their counsel to prior decisions and orders for a recitation of the salient facts and circumstances.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

As pertinent to the pending application and necessary for its resolution, the material and relevant facts and circumstances are as follows. Plaintiff is an owner of a second seasonal home located in Westhampton Beach, Suffolk County, New York which sustained damage in Superstorm Sandy in October 2012. Plaintiff is an insured of defendant for property damage to that residence. Following the storm, he filed a claim for property damage, and retained a public adjuster to assist in the claims process. As part of the claim assessment process, defendant retained engineering, architectural and construction experts to inspect plaintiff's residence. Unbeknownst to defendant at that time, plaintiff had separately retained an engineer to inspect and conduct a damage assessment of his property.

During pretrial discovery, defense counsel learned that plaintiff's prelitigation engineering consultant visited plaintiff's property on the same date, prior to its engineer's inspection. Having learned this, defense served a subpoena on plaintiff's counsel seeking discovery from plaintiff's pretrial litigation consultant. Plaintiff moved to quash that subpoena on grounds of litigation and attorney-client privilege as well as improper expert disclosure. This Court denied that motion and permitted defendant to depose the plaintiff's pretrial litigation expert denying plaintiff's assertions of privilege, noting that the expert was not designated a trial expert pursuant to CPLR 3101(d). Thus, this Court ruled that defendant could depose plaintiff's engineer as a fact percipient witness on a limited scope basis.

During the course of that examination before trial, plaintiff asserted objections that defendant's examination exceeded its limited factual scope. The transcript was marked for ruling and the parties brought discovery applications to compel and to protect before the Court. On defendant's application seeking clarification of the Court's prior order, this Court reiterated that plaintiff's engineering prelitigation consultant had not been designated a trial expert, was retained at a time prior to any party reasonably foreseeing or consideration litigation, and thus could be properly deposed on factual matters and observations. Moreover, this Court deferred to a later date a determination as to the admissibility or propriety of discovery of non-factual and expert conclusions, findings or determinations by plaintiff's engineering consultant.

In that fashion, discovery has proceeded. At the most recent conference in this matter, counsel advised the Court that notwithstanding the issues raised by defendant's pending application, all that remains is a further site inspection of plaintiff's property, and perhaps additional document production.

SUMMARY OF THE PARTIES' CONTENTIONS & ARGUMENTS

Preceding this motion was a document demand by plaintiff seeking the production of reports prepared by the engineering firm Wiss Janney Elstner on behalf of defendant for property damage claims made by homeowners who are defendant's insureds who sustained Sandy related

storm damage to their property. During conferencing, this Court limited that request to any and all similar Sandy property damage claims arising from the Long Island's south shore. Despite identifying approximately 102 separate claims, defense counsel has stated that the plaintiff's request has resulted in a voluminous document production requiring review and redaction for irrelevant and personally sensitive information. The Court agreed that such a redaction should take place. Despite being referenced in the moving papers by plaintiff that document production was still outstanding and late on defendant's part, at the last conference held on April 4, 2019, neither party raised this issue, thus the Court deems it waived or resolved at this juncture.

The Expert Witnesses at Issue

During the property damage claims process on plaintiff's claim to defendant, defendant dispatched three separate consultants to plaintiff's property to inspect and evaluate damage. The first, Andrew Osborn, P.E., a licensed professional engineer evaluated plaintiff's property on December 7, 2012 and concluded in a report to defendant dated January 11, 2013, that plaintiff's property sustained primarily flood (water) damage[1], with some wind damage. Osborn did conclude that plaintiff's property was structurally sound.

These conclusions were contrary to plaintiff's claims that a decorative or ornamental privacy "wing-wall" on the residence's exterior had acted as a sail in Sandy's storm winds, causing wracking of the premises and torsion upon the property's foundation. Based upon the perceived discrepancy, plaintiff requested, and defendant acquiesced to a reinspection of property taking place sometime in April 2013. Thereafter Osborn prepared and submitted a supplemental report dated May 28, 2013 disputing and ruling out plaintiff's theory, particularly recommending against raising the home from the foundation or providing for roof replacement, determining related damages as preexisting or excluded under plaintiff's property insurance policy.

Defendant also retained an architect Douglas Stieve to examine plaintiff's property in view of plaintiff's public adjuster's property damage estimate calling for total roof replacement and siding repair. Stieve inspected the property on April 25, 2013, and his conclusions were reflected in the May 28, 2013 supplemental report exchanged with plaintiff's public adjuster. Therein, Stieve concluded that plaintiff's property sustained damage to its siding on the eastern side of the residence, as well as damage to the northern bedroom's skylight and flashing. However, Stieve concurred with a prior assessment that the roofing damage was preexisting.

Lastly, in and around this time, defendant hired an additional construction/building expert to evaluate plaintiff's property in response to plaintiff's public adjuster's claim for construction contingency losses/damage. This expert was Frank Hartmann, IV[2]. His evaluation resulted in defendant offering an adjustment of plaintiff's claim in the amount of $ 125,595.36, which was subsequently amended to $ 148,999.46[3] as part of the May 28, 2013 supplemental report.

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1 This distinction was significant insofar as plaintiff carried separate flood damage insurance which entailed a separate Sandy related damage claim which is not the subject of these proceedings.
2 Defense counsel advises that this individual is no longer employed by JS Held, Inc. and has despite due diligence not been located. Thus, defendants claim that in the event plaintiff's subpoena is sustained, they will designate another individual so employed responsive to the discovery demand.
3 Also, outside of the record of the instant application is the fact that defendant previously adjusted plaintiff's claim

DISCUSSION

Plaintiff has served subpoenas seeking pretrial deposition testimony of each of the experts outlined above from defendant in requests served in February 2018. In response, defendant has moved pursuant to CPLR 2304 to quash those subpoenas as violative of CPLR 3101(d)(1)(iii) in that they seek improper expert disclosure. Defendant asserts that at this point, each witness has been designated as trial expert witnesses and their reports or conclusions have been exchanged with plaintiff's counsel. Thus, defendant argues the subpoenas should be quashed because plaintiff has failed to demonstrate the existence of special circumstances warranting deviation from ordinary approach in the law prohibiting depositions of expert witnesses.

Plaintiff opposes defendant's application on a few different grounds. First, plaintiff argues fairness and estoppel. Citing this Court's previous rulings, plaintiff argues that he is entitled to a fact deposition of defendant's three experts much the same way defendant was able to depose its prelitigation engineering consultation previously. Next, plaintiff argues that defendant's designation of the three witnesses as experts is a bad faith attempt to shield relevant and material disclosure. Here, plaintiff argues that the experts are not true experts, being retained by entities closely associated with the defendant, and thus they should be treated as ordinary non-party witnesses evaluated under CPLR 3101(a)(4). Lastly, plaintiff suggests that defendant's expert witness designations are untimely or were unreasonably delayed.

At the outset, it is noted that courts presiding over similar disputes have determined that the mere fact that an insurance carrier defendant's hiring of an expert during the property damage claim process does not later deprive the carrier from later designating that consultant as a trial witness, nor does it save plaintiff from showing special circumstances to support a request for an expert witness deposition (*see e.g.* ***Russo v Quincy Mut. Fire Ins. Co.***, 256 AD2d 1164, 1164, 683 NYS2d 445, 446 [4th Dept 1998]; *accord* ***Kaufman v Lund Fire Products Co., Inc.***, 8 AD3d 242, 243, 777 NYS2d 686, 687 [2d Dept 2004]; ***Kane v Triborough Bridge and Tunnel Auth.***, 40 AD3d 1040, 1042, 837 NYS2d 245, 246 [2d Dept 2007]).

Thus, the pertinent standard concerning plaintiff's expert witness deposition subpoenas has evolved to hold that "[s]pecial circumstances must be shown to support discovery against a nonparty under CPLR 3101(a)(4). But separately, "CPLR 3101(d)(1)(iii) requires a showing of special circumstances to warrant the deposition of a party's expert witness. Although the "special circumstances" requirement of CPLR 3101(d)(1)(iii) is more than a nominal barrier to discovery, such circumstances exist where physical evidence is "lost or destroyed" or "where some other unique factual situation exists", such as proof "that the information sought to be discovered cannot be obtained from other sources" (***Brooklyn Floor Maintenance Co. v Providence Washington Ins. Co.***, 296 AD2d 520, 521-22, 745 NYS2d 208, 210 [2d Dept 2002]; ***Mead v Benjamin***, 201 AD2d 796, 797, 607 NYS2d 472, 473 [3d Dept 1994][ruling that under CPLR 3101(d)(1)(iii) mere conclusory allegations that discovery is necessary are insufficient to support a subpoena for expert witness pretrial deposition testimony]).

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for substitute seasonal accommodations.

Thus, the Second Department has clearly ruled that a subpoena for an expert witness deposition is properly quashed upon a failure to demonstrate special circumstances (***McGowan v Great N. Ins. Co.***, 88 AD3d 665, 665-66, 930 NYS2d 881 [2d Dept 2011]; ***Bernardis v Town of Islip***, 95 AD3d 1050, 1051, 944 NYS2d 626, 628 [2d Dept 2012]; ***N. Shore Towers Apartments, Inc. v Zurich Ins. Co.***, 262 AD2d 468, 468, 691 NYS2d 327 [2d Dept 1999]; ***232 Broadway Corp. v New York Prop. Ins. Underwriting Ass'n***, 171 AD2d 861, 567 NYS2d 790, 790 [2d Dept 1991]). This rule may be observed in operation in the matter of ***Dixon v City of Yonkers***, 16 AD3d 542, 792 NYS2d 514, 515 [2d Dept 2005] where in plaintiff's wrongful death action, counsel served a subpoena for a deposition of defendant's expert botanist who defendant had yet to designate as a trial expert. Under the particular circumstances then presented, the Second Department determined that because plaintiff plead wrongful death due to a falling tree, which had been subsequently removed from the accident scene, "special circumstances" existed supported enforcement and compliance with the deposition subpoena since material and tangible evidence was no longer accessible to the plaintiff (*see also* ***Hallahan v Ashland Chem. Co.***, 237 AD2d 697, 698, 654 NYS2d 443, 445 [3d Dept 1997][reasoning that special circumstances permitting a deposition of an opponent's trial expert exist where, material physical evidence underlying a claim is lost or destroyed or otherwise becomes unavailable for further inspection or where some other unique factual situation exists]).

Accordingly, prior rulings of this Court have recognized this limitation (*compare* ***Mut. Ass'n Administrators, Inc. v Natl. Union Fire Ins. Co. of Pittsburgh, Pa***, 45 Misc3d 1223(A), 5 NYS3d 328 [Sup Ct, Suffolk Co. 2014][finding *inter alia* defendant demonstrated special circumstances justifying limited pretrial discovery of expert witness where plaintiffs principal was unable to answer basic inquiries into the bookkeeping practices, or regarding specific entries in the corporation's financial records, and identified expert as the sole person who could respond to those inquiries]; *with* ***Vogel v Benwil Indus., Inc.***, 267 AD2d 230, 231, 699 NYS2d 493, 494 [2d Dept 1999][holding special circumstances did not exist and thus subpoena for expert witness deposition properly quashed where disappearance of tangible physical evidence prior to party's inspection of it did not constitute "special circumstances" under CPLR 3101[d][1][i] because it was available for inspection for a sufficient period of time before its loss or destruction, and the expert witness disclosure submitted by the plaintiff reasonably detailed the subject matter on which his expert is expected to testify]; *accord* ***Melendez v R.C. Archdiocese of New York***, 277 AD2d 64, 64, 717 NYS2d 518 [1st Dept 2000][quashing subpoena for deposition of expert witness finding no existence of special circumstances where expert witness disclosure of report provided requestor with a clear idea of what the nature of the testimony, including expert's opinion as to the extent of plaintiff's damages and diagnosis]; *same* ***Matthews v St. Vincent's Hosp. and Med. Ctr. of New York***, 6 Misc3d 1009(A), 800 NYS2d 349 [Sup Ct, New York Co 2004][no special circumstances found where witness' report clearly indicated the nature of the expert's proposed testimony]).

The Fourth Department has similarly ruled special circumstances exist supporting plaintiff's expert witness deposition subpoena in a fire property damage matter where defendant movant demonstrated that fire debris had been removed by the time the matter commenced depriving the litigants from access to material and tangible evidence. Under those circumstances however, the court cautioned the parties that the deposition would be limited to a witness examined on "factual observations and procedures ... excluding any inquiry regarding expert opinion" (***Flex-O-Vit USA, Inc. v Niagara Mohawk Power Corp.***, 281 AD2d 980, 980, 722 NYS2d 671, 672 [4th Dept 2001]).

CONCLUSION

Applying the cogent body of law to the present circumstances, the Court finds as follows. Plaintiff has not made a case supported by evidence that a unique or special set of circumstances exists here. Beyond unsupported speculation or conclusion, plaintiff has not substantiated its claim that Wiss Janey's engineers exists as the adjunct or extension of defendant's claims department. The mere fact that Wiss Janey's engineers serviced defendant on approximately 103 Long Island Sandy related property damage claims does not by itself warrant abrogation of the CPLR 3101(d)(iii) special circumstance doctrine. More importantly, here plaintiff's own engineering consultant inspected plaintiff's premises within a reasonable amount of time from defendant's experts' evaluations. There is no plausible claim here by plaintiff that tangible, relevant or material evidence has been destroyed or withheld. Further, defendant represents, without dispute by plaintiff, that expert reports containing conclusions and findings by defendant's three experts have already been exchanged with plaintiff during discovery. Thus, this Court is guided by the holdings of ***Vogel*** and ***Melendez*** *supra* and finds that plaintiff's opposition does not establish the existence of special circumstances to support deviation from the general rule to permit pretrial examination of defendant's trial witnesses.

Lastly, this Court is not persuaded that defendant's posture on its application deviates from its prior litigation position or otherwise runs afoul of the law of the case doctrine. The previous and determinative distinction resulting in examination of plaintiff's prelitigation engineering consultant was that plaintiff of his own volition determined not to designate that witness as a trial expert for reasons only known to the plaintiff. Here however, defendant designated its three witnesses as trial experts. Although plaintiff's argument has come close to suggesting that those designations were of bad faith or untimely, under the law, those arguments are misplaced (*see* ***Rivers v Birnbaum***, 102 AD3d 26, 35-36, 953 NYS2d 232, 238 [2d Dept 2012][noting that even though CPLR 3101(d)(1) plainly dictates that a party on request must identify the experts it "expects to call as an expert witness at trial, " the statute does not go further to specify precisely when a party must disclose its expected trial experts on demand. Therefore, an expert designation disclosure discovery demand which does not explicitly "require a party to respond to a demand for expert witness information 'at any specific time and/or does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute' will not support a motion to strike for failure to provide timely expert disclosure]).

Accordingly, in view of all of the foregoing, defendant's motion to quash plaintiff's three expert witness deposition subpoenas is hereby **granted** and those subpoenas are therefore hereby **quashed**.

The foregoing constitutes the decision and order of this Court.

Dated: April 17, 2019
Riverhead, New York

WILLIAM G. FORD, J.S.C.

______ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**