

Yong Soon Oh v American Bankers Ins. Co. of Fla.

2019 NY Slip Op 31574(U)

June 4, 2019

Supreme Court, New York County

Docket Number: 154835/2017

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 32

Justice

-----X

YONG SOON OH

Plaintiff,

- v -

AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA
C/O ASSURANT GROUP,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for

PROTECTIVE ORDER

DECISION AND ORDER

Defendant's motion for a protective order pursuant to CPLR § 3103 striking plaintiff's demand for production of defendant's claim file in connection with an underlying personal injury action is denied and defendant is ordered to produce documents as set forth in this decision.

Background

This case arises from an underlying action in which plaintiff was injured as a result of a slip and fall on December 30, 2010 while walking outside a property located at 15-51 215th Street, Bayside in Queens. Plaintiff commenced a personal injury suit in Queens on February 23, 2011 against Hua Jin, the defendant in the underlying action. In his answer, Mr. Jin admitted that he was the owner of the subject property. During the course of litigation, Mr. Jin failed to appear for court-ordered depositions.

After plaintiff filed the note of issue, Jin moved to amend his answer so that he could deny ownership of the property at the time of the accident. Mr. Jin claimed that the property had been transferred to his ex-wife during their divorce. The Supreme Court, Queens County, granted Mr. Jin's motion to amend his answer and plaintiff appealed.

On January 14, 2015, the Appellate Division, Second Department reversed, finding that there was no good reason to allow Mr. Jin to amend his answer so that he could deny ownership (*Yong Soon Oh v Hua Jin*, 124 AD3d 639, 639, 1 NYS3d 307 [2d Dept 2015]). Nine months later, on October 24, 2015, insurance counsel's motion to be relieved as counsel was granted. Thereafter the case went to trial and Mr. Jin defaulted; on July 11, 2016, an inquest was held in which plaintiff was awarded a \$500,000 judgment.

In the instant action, plaintiff seeks to enforce the judgment against defendant insurer, the homeowner's insurance company which insured the home. On December 21, 2012, defendant denied coverage, claiming that Mr. Jin did not own the property at the time of the accident and therefore had no insurable interest.

During discovery in this case, plaintiff sought defendant's insurance claim file in relation to the underlying accident. Defendant makes this motion seeking a protective order so it does not have to produce the file. Defendant insists that the file is privileged because it was prepared in contemplation of litigation; it did not even open up the file until it received the personal injury complaint. Defendant also claims that because plaintiff is a third party to the insurance contract between the insured and the insurer, plaintiff is not entitled to the file.

In opposition, plaintiff alleges it is entitled to the claim file because the defendant is asserting it made a proper insurance disclaimer in the underlying action and plaintiff is entitled to obtain files related to decisions made on that disclaimer. Plaintiff argues that payment or rejection

of claims is part of the regular course of business of an insurance company and therefore the file is not privileged.

In reply, defendant states that the claim file is not a document in the ordinary course of business because the file contains information that extends beyond the scope of the insurance company's initial investigation. Defendant insists that because the file contains documents created *after* the insurer determined that a reason exists to disclaim, the file is privileged. Additionally, defendant alleges that the case at hand involves a third party's (plaintiff) claim against an insurance company and thus the claim file is not discoverable.

Discussion

Pursuant to CPLR § 3103, "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." 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 words material and necessary are, in our view, 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" (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). "The test is one of usefulness and reason. CPLR 3101[a] should be construed . . . to permit discovery of testimony which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable" (*id.* at 406-07 [internal quotations and citation omitted]). "Discovery demands are improper if they are based upon hypothetical speculations

calculated to justify a fishing expedition” (*Forman v Henkin*, 134 AD3d 529, 530, 22 NYS3d 178 [1st Dept 2015] [internal quotations and citation omitted]).

The claim file at issue relates to the underlying action in this case. In that underlying action, the Appellate Division held that Mr. Jin could not amend his answer to deny ownership. Therefore, Mr. Jin was stuck admitting ownership of the subject property and thus, legally had an insurable interest at the time of the accident. If Mr. Jin had an insurable interest, defendant insurers basis for denying coverage based on lack of ownership should be disclosed.

The insurance claim file – as it relates to all aspects of the disclaimer -- is material and necessary in understanding why defendant insurer denied coverage on the basis that Mr. Jin had no insurable interest in light of the Appellate Division decision stating that he admitted owning the property. Although claim files generally contain privileged information, an exception exists when there is a potential for bad faith by the insurer (*Woodson v Am. Transit Ins. Co.*, 280 AD2d 328, 328–29, 720 NYS2d 467 [1st Dept 2001], [holding that “[T]he insurer may not use the attorney-client or work product privilege to shield from disclosure material relevant to the insured’s bad faith action”]).

Here, the Court cannot overlook the discrepancy between the defendant’s action in disclaiming coverage and the Appellate Division decision holding that Jin could not deny that he owned the property. The insurance file as it relates to all aspects of the disclaimer is necessary in understanding this discrepancy and therefore must be produced within thirty days.

The parties are directed to appear for a conference on July 30, 2019 at 2:15 p.m.

Accordingly it is hereby

ORDERED that defendant’s motion for a protective order is denied and it is further

ORDERED that defendant must produce all portions of the insurance file relating to the disclaimer within 30 days.

6/4/19

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

HON. ARLENE P. BLUTH