

Sordoni Constr. Co. v Chartis Ins. Co. of Canada
2019 NY Slip Op 33784(U)
December 24, 2019
Supreme Court, New York County
Docket Number: 452106/2016
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46

SORDONI CONSTRUCTION CO. and OLD
REPUBLIC GENERAL INSURANCE CORP.,

Index No. 452106/2016

Plaintiffs

- against -

DECISION AND ORDER

CHARTIS INSURANCE CO. OF CANADA,
CANATAL STEEL USA INC., WESTCHESTER
SURPLUS LINES INSURANCE COMPANY, SAFETY
AND QUALITY PLUS, INC., WESTERN
HERITAGE INSURANCE COMPANY, NORTH
AMERICAN IRON WORKS, INC., and CANAL
STEEL, INC.,

Defendants

LUCY BILLINGS, J.S.C.:

Plaintiffs move to lift the automatic stay of disclosure pending the litigation and determination of defendant Western Heritage Insurance Company's motion for summary judgment dismissing the claims against this one defendant. The court grants plaintiffs' motion for three reasons. C.P.L.R. § 3214(b); Polsky v. 145 Hudson St. Assoc., L.P., 100 A.D.3d 426, 426 (1st Dep't 2012).

I. REASONS TO LIFT THE STAY OF DISCLOSURE

First, disclosure has lagged far behind in this 2016 action where the parties have conducted only one deposition, due in large part to Western Heritage's noncompliance with repeated orders requiring its disclosure. Whether the court denies Western Heritage's motion or grants it, and the action still continues against the other defendants, it must progress with

disclosure in the meantime.

Second, not only will plaintiffs' claims against the other defendants survive Western Heritage's motion for summary judgment, but so may plaintiffs' claims against Western Heritage survive. Western Heritage previously moved for summary judgment, but withdrew the motion due to deficiencies in Western Heritage's prima facie defense and impediments posed by other parties' opposition. While Western Heritage may have cured those deficiencies and overcome those impediments in part, Western Heritage's description of the changes in its motion that is not yet before the court is unconvincing as to the motion's prospective success.

While the parties' depositions may provide only hearsay recitations of the governing insurance policies, other contracts, and denials or disclaimers of insurance coverage, which all speak for themselves, Western Heritage fails to show that it has produced all such relevant documents. These documents are necessary for plaintiffs and co-defendants to oppose Western Heritage's motion for summary judgment. Therefore the need for this disclosure to oppose the pending motion for summary judgment is a third reason to permit that disclosure. C.P.L.R. § 3212(f); Jackson v. Hunter Roberts Constr. Group, LLC, 161 A.D.3d 666, 667 (1st Dep't 2018); Baghban v. City of New York, 140 A.D.3d 586, 586 (1st Dep't 2016); Rodriguez Pastor v. DeGaetano, 128 A.D.3d 218, 227-28 (1st Dep't 2015); Figueroa v. City of New York, 126 A.D.3d 438, 439 (1st Dep't 2015).

II. THE DISCLOSURE NEEDED

Western Heritage has withheld and redacted documents from its claim file that plaintiffs have requested, but which it maintains are privileged, without producing a privilege log, or are irrelevant, because they post-date its denial of coverage to plaintiffs. Western Heritage also has provided an affidavit of a search for further non-privileged, relevant documents, finding none.

First, to the extent that Western Heritage claims the documents plaintiffs seek are privileged or protected under C.P.L.R. § 3101(c) or (d)(2), Western Heritage still must review the documents that plaintiffs have requested, ascertain whether any requested documents are not privileged or protected, produce any such documents, C.P.L.R. § 3120(1)(i), and otherwise respond by specifying an applicable privilege or protection in a privilege log. C.P.L.R. § 3122(a)(1) and (b). E.g., Stephen v. State of New York, 117 A.D.3d 820, 820-21 (2d Dep't 2014); Ural v. Encompass Ins. Co. of Am., 97 A.D.3d 562, 566-67 (2d Dep't 2012). The privilege log must include the type of document, the subject, the date of the document, and other information necessary to identify the document, including the persons to whom it was sent or from whom it was received. C.P.L.R. § 3122(b).

Second, Western Heritage fails to show that documents created after its denial of coverage will not lead to evidence about its handling of plaintiffs' claim and formulation of its position on coverage before denying coverage or about relevant

issues other than its coverage position. Therefore Western Heritage must produce all documents pre-dating plaintiffs' commencement of this action that plaintiffs have requested.

Finally, the parties are entitled at minimum to examine Western Heritage at a deposition concerning the claim file documents in Western Heritage's possession, custody, or control; its search for documents; and the reasons for the excessive time Western Heritage took to issue its denial.

No other party has shown why its deposition may not proceed as well. Defendants Westchester Surplus Lines Insurance Company and its insured Safety and Quality Plus, Inc., oppose their depositions, insisting that plaintiffs' claims against these defendants are unsustainable because the court in the underling action where plaintiffs seek coverage has determined that Safety and Quality Plus was not negligent. Therefore it is not liable for non-contractual indemnification or contribution to plaintiffs or co-defendants, but this determination does not bear on whether it is liable for contractual indemnification, including defense expenses, which Westchester Surplus Lines would be responsible to cover, or breach of a contract to procure insurance.

In sum, these defendants fall far short of the extraordinary showing required for a protective order against parties' depositions, see Lipin v. Bender, 84 N.Y.2d 562, 570 (1994); Jones v. Maples, 257 A.D.2d 53, 56 (1st Dep't 1999), "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person," and do not even move for such

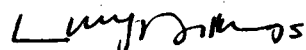
relief. C.P.L.R. § 3103(a). See Emile v. Big Brothers/Big Sisters of New York City, Inc., 292 A.D.2d 297, 298 (1st Dep't 2002). "Any party may take the testimony of any person by deposition," without an initial showing of materiality. C.P.L.R. § 3106. See Seltzer v. Bayer, 272 A.D.2d 263, 266 (1st Dep't 2000); Fasciglione v. D.C.D. Advert., Ltd., 256 A.D.2d 215, 215 (1st Dep't 1998).

III. CONCLUSION

Consequently, consistent with the Status Conference Order dated December 12, 2019, pending the determination of defendant Western Heritage Insurance Company's motion for summary judgment, and in light of the expectation that the court will not grant summary judgment dismissing all claims, the court grants plaintiffs' motion to lift the stay of disclosure to the following extent. C.P.L.R. § 3214(b); Polsky v. 145 Hudson St. Assoc., L.P., 100 A.D.3d at 426. Defendant Western Heritage Insurance Company shall produce the documents specified above and the required privilege log by January 10, 2020. The deposition of plaintiff Sordoni Construction Co. shall proceed January 7, 2020, at 10:00 a.m. The deposition of defendant Chartis Insurance Co. of Canada shall proceed January 13, 2020, at 10:00 a.m. The depositions of defendants Westchester Surplus Lines Insurance Company and Safety and Quality Plus, Inc., shall proceed January 16, 2020, at 10:00 a.m. The deposition of defendant Western Heritage Insurance Company shall proceed January 30, 2020, at 10:00 a.m. If its motion for summary

judgment is submitted sufficiently in advance, the motion will be scheduled to be heard January 23, 2020, at 11:00 a.m., at which time, when all parties' positions on the motion are fully before the court, Western Heritage Insurance Company may revisit whether reinstatement of a stay against its deposition is warranted.

DATED: December 24, 2019



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