

5512 OEAAJB Corp. v Hamilton Ins. Co.

2019 NY Slip Op 33942(U)

July 22, 2019

Supreme Court, Nassau County

Docket Number: 606397/17

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.



SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

5512 OEAAJB CORP.,

Plaintiff,

- against -

HAMILTON INSURANCE COMPANY and
INTER INSURANCE AGENCY,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 606397/17
Motion Seq. No.: 07
Motion Date: 05/30/19

INTER INSURANCE AGENCY,

Third-Party Plaintiff,

- against -

INTERNATIONAL UNDERWRITING AGENCY, INC.,

Third-Party Defendant.

HAMILTON INSURANCE COMPANY,

Second Third-Party Plaintiff,

- against -

BRIAN OKANE,

Second Third-Party Defendant.

The following papers have been read on this motion:

	Papers Numbered
Order to Show Cause, Affirmation and Exhibits	1
Affirmation in Opposition	2

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR §§ 3108 and 3111, for an order directing the issuance of an Open Commission to enable it to obtain documents from, and take the deposition of, New Jersey resident, Steven Dejuri, a non-party witness, and to request the Superior Court of New Jersey to issue a subpoena to Steven Dejuri to produce documents and to appear and submit to his deposition at a date, time and place to be set by the Superior Court of New Jersey.

Defendant/second third-party plaintiff Hamilton Insurance Company (“Hamilton”) opposes the motion.

In support of the motion, counsel for plaintiff submits, in pertinent part, that, “[w]hen Plaintiff received HAMILTON’s document production, it revealed that HAMILTON had retained York Risk Services Group, Inc. (‘York’) to act as HAMILTON’s third party administrator (‘TPA’) to handle the adjustment and investigation of Plaintiff’s claim. In fact, the denial letter issued by Jeanette Dixon, Esq. on HAMILTON’s behalf specifically referenced York at the TPA for HAMILTON on Plaintiff’s claim.... Nearly all of the documents HAMILTON produced containing York’s letterhead were signed and drafted by a non-party named Steven Dejuri.... For this reason, Plaintiff served a subpoena on Mr. Dejuri at his business address (‘the Subpoena’).... Because HAMILTON moved to quash the Subpoena that was served on an out-of-state witness without a Commission, Plaintiff withdrew the subpoena and now moves for a Commission.” See Plaintiff’s Affirmation in Support Exhibits A-D.

Counsel for plaintiff adds, in pertinent part, that, “[t]he CPLR allows for the use of out of state commissions to secure disclosure from a witness located out of state. [citation omitted].... Upon information and belief, Mr. Dejuri resides and works in the State of New Jersey.... Plaintiff respectfully requests that its instant application be granted because the necessary witness, Mr. Dejuri works and resides in New Jersey and thus is not subject to the subpoena power of the Courts of this State. This Honorable Court, however, is empowered, pursuant to CPLR §§ 3108 and 3111 to issue an Order for an Open Commission to take Mr. Dejuri’s deposition.... Plaintiff attempted to conduct Mr. Dejuri’s deposition without involving this Honorable Court, however, HAMILTON filed a motion to quash the subpoena and has not indicated that it will voluntarily allow Mr. Dejuri, a material and necessary witness to this action, to appear for a deposition.... The deposition of non-party witness Steven Dejuri is critical to Plaintiff’s ability to ascertain further mater, relevant and necessary information to effectively prosecute it (*sic*) case against HAMILTON. Based on the document production produced by HAMILTON, it is evident that Mr. Dejuri of York had critical, relevant and material information to the prosecution of Plaintiff’s claims against HAMILTON. For example, the limits of liability on the policy issued by HAMILTON for Plaintiff’s building damages are in the amount of \$1,100,000.00. Documents produced by HAMILTON establish that Mr. Dejuri performed an inspection of the subject premises, and concluded that the amount and scope of Plaintiff’s damages exceeded the policy limits. Based on Mr. Dejuri’s investigation and reports, HAMILTON acknowledged the damages exceeded the policy limits and authorized payments in this amount. Conducting Mr. Dejuri’s deposition would establish the parties agree on the amount and scope of building damages sustained by Plaintiff as a result of the fire, further limiting the issues to be tried. It is finally worth mentioning that the reports as produced by HAMILTON contain printing and

typographical errors, as well as black and white photos which are barely visible. HAMILTON has represented to me that this is the only format in which they possess York's file. Accordingly, the production of Mr. Dejuri's file in its original format is likewise material and necessary to Plaintiff's claims in this action." See Plaintiff's Affirmation in Support Exhibit B.

In opposition to the motion, counsel for defendant/second third-party plaintiff Hamilton argues, in pertinent part, that, "[a] Subpoena Duces Tecum may not be used for the purposes of discovery or to ascertain the existence of evidence, [citation omitted], or to 'fish for impeaching material', [citation omitted]. Rather, its purpose is to 'compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding.' [citation omitted]. A showing that certain documents carry a potential for establishing relevant evidence is insufficient; rather a party must put forth some factual predicate which would make it reasonably likely that documentary information will bear relevant evidence. [citations omitted]. In their (*sic*) affirmation in support, ..., plaintiff readily admits that they (*sic*) have copies of all of Mr. Dejuri's reports, stating his conclusions regarding the damage to plaintiff's premise (*sic*). In other words, plaintiff has admitted that they (*sic*) have the documents demanded in their (*sic*) subpoena. To the extent that plaintiff complains of printing errors and photos which are barely visible, Defendant does not oppose plaintiff's request for clearer images, if such images do, in fact, exist. Pursuant to CPLR § 3120(2), documents demanded shall be described with reasonable particularity. The subpoena at issue here seeks the 'entire file maintained in connection with Your investigation and adjustment of the claim by Plaintiff 5512 OEAAJB CORP. for the January 20, 2017 loss of the property located at 5512 Merrick Road, Massapequa, New York, with HAMILTON INSURANCE COMPANY, including but not limited to: notes correspondence, e-mails, photographs, reports, memoranda, invoices, proposals, appraisals, estimates, computer diary entries, recommendations, reviews and other writings'. Nowhere in

this subpoena does it limit this demand in any way, despite the fact that, per Judge Sher's prior orders, discovery in this matter is limited to issues of the amount of damages. Such a demand is in violation of the requirements of CPLR § 3120(2), making this subpoena facially defecting. [citation omitted]. As such, to the extent that the overbroad subpoena issued by Plaintiff to non-party Steven Dejuri requiring the production of unspecified and unknown documents which may or may not exist, without limitation for subject matter, privilege or relevance, violates CPLR § 3111 and § 3120, said subpoena is procedurally and fatally defective. Further, this subpoena demands that Mr. Dejuri appear for a deposition in order to 'establish the parties agree on the amount and scope of the building damages' however, as set forth above, plaintiff is already in possession of copies of Mr. Dejuri's reports, setting forth his conclusions regarding the damage to plaintiff's premise (*sic*). Hence, the only reason for this deposition would be to impermissibly 'fish for impeaching material' or attempt to unnecessarily bolster plaintiff's theories, neither of which are appropriate uses for a subpoena ad testificandum."

To be entitled to the issuance of commission, plaintiff is required to demonstrate that the witness outside of New York would not cooperate with a notice of deposition, would not voluntarily come within New York or that the judicial imprimatur accompanying a commission would be necessary or helpful when seeking the assistance of the foreign court in compelling the witness to attend the examination. *See Sorrentino v. Fedorczuk*, 85 A.D.3d 759, 925 N.Y.S.2d 150 (2d Dept. 2011); CPLR §§ 3108 and 3109.

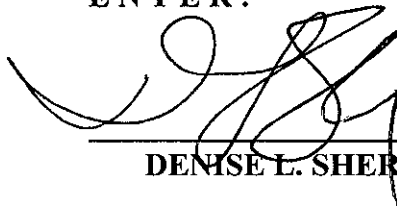
The Court finds that, in the papers before it, plaintiff has demonstrated that "the judicial imprimatur accompanying a commission would be necessary or helpful when seeking the assistance of the foreign court in compelling the witness to attend the examination." Furthermore, the Court does not find the subject subpoena to be overbroad.

Accordingly, plaintiff's motion, pursuant to CPLR §§ 3108 and 3111, for an order directing the issuance of an Open Commission to enable it to obtain documents from, and take the deposition of, New Jersey resident, Steven Dejuri, a non-party witness, and to request the Superior Court of New Jersey to issue a subpoena to Steven Dejuri to produce documents and to appear and submit to his deposition at a date, time and place to be set by the Superior Court of New Jersey, is hereby **GRANTED**.

The parties shall appear for a Certification Conference in IAS Part 32, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on July 23, 2019, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
July 22, 2019

ENTERED

JUL 23 2019

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**