

<b>Nick's Garage, Inc. v State Farm Fire &amp; Cas.</b>
2019 NY Slip Op 34018(U)
December 13, 2019
Supreme Court, Onondaga County
Docket Number: 2014EF4771
Judge: Donald A. Greenwood
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**At a Motion Term of the Supreme  
Court of the State of New York,  
held in and for the County of  
Onondaga on November 6, 2019.**

**PRESENT: HON. DONALD A. GREENWOOD  
Supreme Court Justice**

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

**NICK'S GARAGE, INC. and JEFFREY'S  
AUTO BODY, INC.,**

**Plaintiffs,**

**v.**

**STATE FARM FIRE AND CASUALTY  
and STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,**

**Defendants.**

**DECISION AND ORDER  
ON MOTION**

**Index No.: 2014EF4771  
RJI No.: 33-17-3735**

**APPEARANCES: CECELIA R.S. CANNON, ESQ. and GREGORY D. ERIKSEN, ESQ., OF  
BOUSQUET HOLSTEIN, PLLC  
For Plaintiffs**

**ALICE A. TRUEMAN, ESQ., OF HURWITZ & FINE, P.C.  
For Defendants**

The plaintiffs move the Court to compel the defendants to respond to their first Notice to Produce. The plaintiffs filed their motion to compel defendants on May 31, 2019. The parties met with the previous justice assigned to attempt to resolve the discovery. After conferencing, the plaintiff asked that the matter be heard. At oral argument on November 6, 2019 the parties indicated to the Court that while some discovery had been provided, other parts had not, or some were in an unacceptable "document dump". The Court directed the parties to submit letters outlining what was still in dispute with regard to the May motion to compel. The parties'

submissions were by letter dated November 13, 2019 for the plaintiff and the defendants by letter dated November 20, 2019. This Court's ruling is therefore limited to the issues raised in the two letter submissions. Any issues from the original motion not raised in these letters are deemed to be settled. The plaintiffs acknowledge that the defendants, in response to demands Nos. 1 and 2, have provided "a significant number of claims file documents, which include photographs, and they have continued to supplement this production."

With regard to demands Nos. 3, 4, 21, 22, 26 and 27, which the plaintiffs have acknowledged that the defendants have stated that they will provide but are still "forthcoming", some from as far back as January 2019, all of these "forthcoming" documents shall be provided to the plaintiffs by no later than February 14, 2020.

With regard to the demands listed in the November 13, 2019 Bousquet letter to the Court, the Court finds that the demands Nos. 7 and 8 should be responded to if that defendant has that information as part of their business records and if not, that response shall be supplied by affidavit pursuant to CPLR section 4518 by February 14, 2019.

Demands 13, 23, 24 and 25 should be provided to the plaintiffs. The defendants have argued that "such questioning is best suitable for deposition testimony of claims adjusters/claims representatives". However, any documents that would be relied upon by these witnesses and that have been demanded by plaintiffs should be provided. The defendants have claimed privilege with respect to questions 23, 24 and 25. While this case is not in the Commercial Division, there is a significant commercial aspect to the claims here and due to the failure of the parties to resolve their long standing discovery disputes, the Court under its authority to regulate discovery (*see, CPLR section 3103[a]*) hereby orders the parties to follow 22 NYCRR 202.70, Rules 11 -

14-a regarding discovery and disclosure.

The parties are also directed to the Uniform Rules for Trial Courts 202.70, Rule 11-g, Appendix B and are ordered to execute a confidentiality agreement or a modification thereof if they can agree to it, by no later than January 15, 2020. The plaintiffs shall have until February 14, 2020 to provide said responses.

Any claims of privilege for any such documents should be laid out in a privilege log pursuant to Uniform Rules section 202.70, Rule 11-b.

The defendants are further directed to supply the documents demanded as part of Demands Nos. 14 and 15. As the Appellate Division Fourth Department has stated in its October 5, 2018 Decision in this matter

“defendants’ submissions raise an issue of fact whether defendants breached the relevant insurance policies by paying labor rates during the relevant time period that fall below a reasonable market rate.”

*Nick’s Garage, Inc. v. GEICO Indemnity Company, et al*, 165 AD3d 1621 (2018).

Therefore, the discovery sought by plaintiffs on this issue is clearly material and necessary and must be provided no later than February 14, 2020.

Furthermore, contrary to the defendants’ argument in their November 20, 2019 submission that the plaintiffs have attempted to improperly “buttress their arguments based on a deceptive practices allegation of which they currently have no information” and therefore have no need for demands Nos. 14 and 15, the Appellate Division clearly stated

“that same issue of fact precludes defendants from establishing their entitlement to summary judgment dismissing plaintiffs’ respective General Business Law section 349 causes of action insofar as those causes of action are asserted on their own behalf based on damages plaintiffs allegedly suffered.”

*Nick’s Garage, supra*.


Therefore, the items sought in discovery demands Nos. 14 and 15 are material and necessary to that cause of action as well.

Any documents that the defendant considers privileged shall be identified as such with the specific privilege that is asserted in a privilege log pursuant 22 NYCRR 202.70(11). If the parties are unable to agree they are directed to employ a Special Master pursuant to that Rule.

**THIS DECISION CONSTITUTES THE ORDER OF THE COURT.**

**ENTER**

**Dated: December 13, 2019**  
**Syracuse, New York**



**DONALD A. GREENWOOD**  
**Supreme Court Justice**

Papers Considered:

1. Plaintiffs' Notice of Motion to Compel, dated May 31, 2019.
2. Affirmation of Gregory D. Eriksen, Esq. in support of plaintiffs' motion, dated May 31, 2019, and attached exhibits.
3. Plaintiffs' Memorandum of Law, dated May 31, 2019.
4. Affirmation of Alice A. Trueman, Esq. in opposition to plaintiffs' motion, dated September 5, 2019, and attached exhibits.
5. Defendants' Memorandum of Law, dated December 5, 2019.
6. Affidavit of Jeffrey Lyman in support of plaintiffs' motion, dated September 12, 2019.
7. Affirmation of Gregory D. Eriksen, Esq. in support of plaintiffs' motion, dated September 12, 2019, and attached exhibits.

8. Plaintiff's Reply Memorandum of Law, dated September 12, 2019, and attached Appendix A.
9. Letter of Gregory D. Eriksen, Esq., dated October 23, 2019.
10. Supplemental Letter of Gregory D. Eriksen, Esq., dated November 13, 2019
10. Letter of Alice A. Trueman, Esq., dated November 20, 2019.