

Kookmin Best Ins. Co., Ltd. v Greater N.Y. Mut. Ins. Co.

2020 NY Slip Op 32516(U)

July 28, 2020

Supreme Court, New York County

Docket Number: 653985/2015

Judge: Robert R. Reed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT R. REED PART IAS MOTION 43EFM

Justice

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KOOKMIN BEST INSURANCE COMPANY, LTD. US BRANCH (FORMALLY LEADING INSURANCE GROUP INSURANCE CO., LTD.

Plaintiff,

- v -

GREATER NEW YORK MUTUAL INSURANCE COMPANY,

Defendant.

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INDEX NO. 653985/2015
MOTION DATE 03/16/2020
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 62, 63, 64, 65, 66, 67, 68, 70

were read on this motion to/for DISCOVERY

Robert R. Reed, J.:

In this insurance action, defendant Greater New York Mutual Insurance Company moves for an order: (1) pursuant to CPLR 3126, to preclude plaintiff, Kookmin Best Insurance Company, Ltd. (formally Leading Insurance Group Insurance Co., Ltd.), from offering evidence at trial or to strike its answer [sic]; and (2) pursuant to CPLR 3124, to compel plaintiff to respond to the notice of discovery and inspection personally served on it on December 5, 2019. The motion is unopposed.

Background

On November 19, 2019, defendant took the examination before trial of Frank Rodriguez, a claims litigation supervisor, with plaintiff (defendant exhibit B; Rodriguez dep tr at 11). During the deposition, there was a question concerning the claim number for a claim relating to an underlying tort lawsuit filed by nonparty Carla Sravoskufis (id. at 16). Rodriguez did not recall the claim number, and defendant made a demand for the claim number, with plaintiff's counsel

agreeing to follow up in writing (*id.* at 17). In addition, defense counsel “put a demand on the record for the claim notes that appear in the WWE system and the Image Right System” (*id.* at 127). Plaintiff’s counsel responded that she would “take that under advisement [and] ask[ed] that [defendant] follow up all requests in writing” (*id.*) Defendant also “put a demand for the certified policy to the extent that it hasn’t already been produced” (*id.*). Plaintiff’s counsel asked for clarification as to what defendant wanted certified and a discussion was then held off the record concerning the exhibit (*id.*).

At a status conference held on December 5, 2019, the court was notified that “additional discovery [was] needed as a result of the EBT held on November 19, 2019” (12/5/19 status conference order, NYSCEF Doc. No. 60). The court ordered that “(1) Post-EBT demands [were] to be served within 14 days; (2) Responses with[in] 45 days; (3) Any remaining party witness depositions to be completed [within] 60 days” (*id.*).

Defendant’s assistant general counsel affirms that “[i]mmediately before the last conference with the Court held on December 5, 2019, [he] personally served a Notice for Discovery and Inspection upon plaintiff” (Messier affirmation in good faith, ¶ 4; defendant exhibit A). By letter dated January 15, 2020, Messier advised plaintiff’s counsel that he had served a notice of discovery and inspection, and had not yet received a response. Defendant requested plaintiff provide responses within seven days (defendant exhibit C; Messier affirmation, ¶ 7). As of the date of this motion’s filing, it is alleged, the requested documents had not yet been received by defendants.

By stipulation dated February 13, 2020, the parties agreed to adjourn the instant motion’s submission date to March 6, 2020, with plaintiff’s opposition to be “filed/served” on or by

February 27, 2020. Defendant's reply was to be due on March 5, 2020. No opposition has been filed.

Discussion

CPLR 3124 provides that “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . , the party seeking disclosure may move to compel compliance or a response.” On a motion brought pursuant to CPLR 3124, the burden is on the party seeking the disclosure to establish a basis for the production sought (*Rodriguez v Goodman, M.D.*, 2015 NY Slip Op 31412[U], *5 [Sup Ct, NY County 2015]). Plaintiff, as the opposing party, has the burden of establishing that the “disclosure sought is improper” (*Roman Catholic Church of Good Shepherd v Tempco Sys.*, 202 AD2d 257, 258 [1st Dept 1994]).

CPLR 3126 authorizes the court to sanction a party who “refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed.” In addition, a failure to comply with discovery, particularly after a court order has been issued, may constitute the “dilatory and obstructive, and thus contumacious, conduct warranting the striking of [a party’s pleading]” (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998]). “The striking of a party’s pleadings should not, however, be imposed except in instances where the party seeking disclosure demonstrates conclusively that the failure to disclose was willful, contumacious or due to bad faith” (*Hassan v Manhattan & Bronx Surface Tr. Operating Auth.*, 286 AD2d 303, 304 [1st Dept 2001]). For example, the sanction of striking a party’s pleading is warranted when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court (*Yoon v Costello*, 29 AD3d 407 [1st Dept 2006]).

Defendant asserts that the discovery sought is needed in order to prosecute the affirmative defenses in the case. Specifically, it asserts that the discovery is necessary based on deposition testimony confirming that plaintiff has not produced certain documents and information to defendant, including, but not limited to: (a) communications between plaintiff and the attorney retained by plaintiff to jointly represent two clients (plaintiff's named insured and plaintiff's additional insured, who was concurrently an insured of defendant's), including a settlement analysis and trial value of the underlying tort lawsuit, which plaintiff seeks to recoup from defendant; (b) the claim notes and other materials documenting plaintiff's process and reasoning for determining that it would, after defending the additional insured for a substantial period of time, attempt to deny coverage to the additional insured; and (c) plaintiff's analysis of the exposure of the additional insured for the damages for which the plaintiff ultimately paid a settlement, which it now seeks to recoup from defendant. Defendant claims that plaintiff confirmed that these documents, which were not provided, do in fact exist (Messier affirmation in good faith, exhibit B).

Though plaintiff has not opposed this motion, the court is not inclined to "exercise the 'drastic remedy' of striking [plaintiff's pleading]" (*Figueroa v City of New York*, 129 AD3d 596, 597 [1st Dept 2015] [citation omitted]), as the court cannot, at this time, say that plaintiff's failure to comply with the court's December 2019 discovery order was "willful," contumacious or due to "bad faith" (*W & W Glass, LLC v 113 York Ave. Realty Co., LLC*, 83 AD3d 438, 438 [1st Dept 2011] ["there appear to be no prior motions by plaintiff to compel disclosure, rendering any motion to strike the answer pursuant to CPLR 3126 premature in this case"];¹ *cf. Rodriguez v*

¹ Here, a prior motion made by defendant to compel and/or preclude, i.e., motion sequence no. 003, was subsequently withdrawn (NYSCEF Doc. No. 59).


United Bronx Parents, Inc., 70 AD3d 492, 492 [1st Dept 2010] [failure to comply with five successive disclosure orders held willful and contumacious]). The court, however, directs plaintiff to provide responses to the outstanding discovery within 30 days from the filing of this order on NYSCEF. Should plaintiff fail to remedy these deficiencies, defendant may file an affirmation detailing plaintiff's failure, with due notice, seeking renewal of this motion.

Conclusion

Accordingly, it is

ORDERED that the motion by defendant Greater New York Mutual Insurance Company for an order to preclude plaintiff Kookmin Best Insurance Company, Ltd. (formally Leading Insurance Group Insurance Co., Ltd.), from offering evidence at trial or to strike its answer [*sic*]; and CPLR 3124 to compel plaintiff to respond to the notice of discovery and inspection personally served on December 5, 2019, is granted to the extent that plaintiff has 30 days from the filing of this order on NYSCEF to provide outstanding discovery responses as detailed above, but is otherwise denied. Should plaintiff fail to comply, defendant may file an affirmation detailing plaintiff's failure, with due notice, seeking renewal of this motion.

7/28/2020
DATE


ROBERT R. REED, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE