

**Country-Wide Ins. Co. v Long Is. Spine Specialists  
PC**

2021 NY Slip Op 30115(U)

January 12, 2021

Supreme Court, New York County

Docket Number: 650688/2020

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

-----X

COUNTRY-WIDE INSURANCE COMPANY

Plaintiff,

- v -

LONG ISLAND SPINE SPECIALISTS PC a/a/o
JACQUELINE NICHOLS

Defendant.

-----X

INDEX NO. 650688/2020

MOTION DATE 11/13/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISCOVERY

I. BACKGROUND

In this action pursuant to Insurance Law § 5106(c) seeking de novo review of the no-fault benefits claim of defendant Long Island Spine Specialists PC's (LI Spine) a/a/o Jacqueline Nichols (Nichols), LI Spine moves pursuant to CPLR 3124 to compel the plaintiff insurer to respond to certain outstanding discovery demands. The plaintiff opposes the motion and cross-moves pursuant to CPLR 3103(a) for a protective order striking the defendant's demands. The motion and cross-motion are granted to the extent discussed herein.

On March 1, 2017 Nichols was allegedly involved in a motor vehicle accident and claimed no-fault benefits under her insurance policy with the plaintiff. Nichols received medical treatment from, among others, LI Spine, who submitted claims for no-fault benefits to the plaintiff as Nichols' assignee. The plaintiff denied LI Spine's claim on the basis that the services provided were not medically necessary. LI Spine then commenced an arbitration against the plaintiff seeking reimbursement in the amount of \$26,506.04. The arbitrator awarded LI Spine the full amount sought and following an appeal to a master arbitrator the award was affirmed.

This action ensued, with the plaintiff seeking a declaration that it is not obligated to pay the amounts awarded in the underlying arbitrations. LI Spine answered and made demands for discovery and inspection on March 1, 2020. On July 7, 2020, a preliminary conference was held in this matter and the plaintiff was ordered to respond to LI Spine's demands on or before July 29, 2020. Following the plaintiff's responses, this motion and cross-motion ensued.

## II. DISCUSSION

CPLR 3101(a) provides that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" and this language is "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." Oowski v AMEC Constr. Mgt., Inc., 69 AD3d 99, 106 (1<sup>st</sup> Dept. 2009) quoting Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406-407 (1968). Pursuant to CPLR 3124, the court may compel compliance upon failure of a party to provide discovery. It is within the court's discretion to determine whether the materials sought are "material and necessary" as legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence. See Roman Catholic Church of the Good Shepard v Tempco Systems, 202 AD2d 257 (1<sup>st</sup> Dept. 1994). A motion to compel responses to discovery demands and interrogatories is properly denied where the demands and interrogatories seek information that is irrelevant, overly broad, or burdensome. See Alba v Ford Motor Co., 111 AD2d 68 (1<sup>st</sup> Dept. 1985); Albert v Time Warner Cable, 255 AD2d 248 (1<sup>st</sup> Dept. 1998). Where discovery sought is improper, the court has broad discretion in supervising disclosure and to grant a protective order pursuant to CPLR 3103. See Foster v Herbert Slepoy Corp., 74 AD3d 1139 (2<sup>nd</sup> Dept. 2010).

LI Spine seeks to compel responses to its second and fourteenth demands for discovery and inspection. The second demand requests a copy of all pleadings, arbitration request forms, decisions, orders, stipulations, awards or other determinations rendered in any other action or

arbitration arising from the underlying accident. The plaintiff provided relevant documents to any proceedings between it and LI Spine, but refused to provide documents relating to other actions and arbitrations arising from the underlying action, claiming that they were irrelevant to the underlying issue in this action – whether LI Spine’s services were rendered without medical necessity. The fourteenth demand seeks a full copy of the claim file and special investigations unit (SIU) files and reports relating to this matter. The plaintiff objected to these demands claiming that divulging such information would cause disclosure of privileged information.

The discovery sought in LI Spine’s second demand is overbroad and seeks irrelevant information as the demands for documents in other proceedings arising from the underlying accident would not have any relevance to the plaintiff’s claim that LI Spine’s services rendered to Nichols were not medically necessary. Contrary to LI Spine’s contention, none of the documents sought would implicate the doctrine of collateral estoppel. Collateral estoppel may be invoked against a party to preclude litigation of an issue decided against that party in a prior adjudication if there is “an identity of issue which has necessarily been decided” in the prior proceeding and there was “a full and fair opportunity to contest the decision now said to be controlling.” Acevedo v Holton, 239 AD2d 194 (1<sup>st</sup> Dept. 1997) see also Doscher v Mannatt, Phelps & Phillips, LLP, 148 AD3d 523 (1<sup>st</sup> Dept. 2017). However, in the absence of privity between providers, the determinations in prior no-fault proceedings cannot be accorded res judicata or collateral estoppel effect against the plaintiff. See Jamaica Med. Supply, Inc. v N.Y. Cent. Mut. Fire Ins. Co., 34 Misc. 3d 21 (App. Term 2<sup>nd</sup>, 11<sup>th</sup> & 13<sup>th</sup> Jud. Dists. 2011); see generally Zimmerman v Tower Ins. Co. of New York, 13 AD3d 137 (1<sup>st</sup> Dept. 2004). Here, the issue sought to be reviewed, the plaintiff’s denial of LI Spine’s claims based upon a lack of medical necessity, would not have been necessarily decided in any arbitration between the plaintiff and any other medical provider. Thus, the defendant’s motion to compel is denied as to the second demand, and the plaintiff’s motion for a protective order is granted to the extent that the plaintiff is not required to provide further responses to the second demand.

As to the discovery sought in the fourteenth demand, the plaintiff's objection on the grounds of privilege is unavailing. It is well settled that the burden of establishing that documents sought are covered by a certain privilege rests on the party asserting the privilege. See Spectrum Sus. Intl. Corp. v Chemical Bank, 78 NY2d 371 (1991); Priest v Hennessy, 51 NY2d 62 (1980); Gulf Ins. Co. v Transatlantic Reinsurance Co., 13 AD3d 278 (1<sup>st</sup> Dept. 2004). Generally, if a party withholds any documents in response to discovery demands on the basis of a privilege, it must submit a detailed privilege log under CPLR 3122(b), identifying each document withheld and setting forth a basis for the assertion of a privilege as to each. See McClier Corp. v United States Rebar, Inc., 66 AD3d 416 (1<sup>st</sup> Dept. 2009). Merely asserting "boilerplate claims of privilege ... [is] insufficient as a matter of law." New York State Elec. & Gas Corp. v Lexington Ins. Co., 160 AD2d 261 (1<sup>st</sup> Dept. 1990). More specific to this case, the First Department has held:

"Reports of insurance investigators or adjustors, prepared during the processing of a claim, are discoverable as made in the regular course of the insurance company's business.' (Brooklyn Union Gas v America Home Assur. Co., 23 AD3d at 190 [1<sup>st</sup> Dept. 2005]). 'Furthermore, attorney work product applies only to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy' (Id. at 190-191). 'Documents prepared in the ordinary course of an insurance company's investigation to determine whether to accept or reject coverage and to evaluate the extent of the claimant's loss are not privileged and are, therefore, discoverable. In addition, such documents do not become privileged merely because an investigation was conducted by an attorney.' [citations omitted]."

Venture v Preferred Mut. Ins. Co., 153 AD3d 1155, 1159 (1<sup>st</sup> Dept. 2017).

Here, the plaintiff makes only conclusory allegations that the SIU file contains privileged information and provided no privilege log. Nor is any allegation made that an attorney, or

anyone else in particular, was involved in the investigation. Thus, the plaintiff failed to comply with the requirements of CPLR 3122(b) and, since it has not otherwise demonstrated a basis to deny this demand for the report of an insurance investigation (see Venture v Preferred Mut, Ins. Co., supra), it must turn over the subject SIU file to the defendant.

III. CONCLUSION

For the reasons set forth above, the defendant’s motion to compel discovery is granted as to its fourteenth demand, and otherwise denied, and the plaintiff’s cross-motion for a protective order is granted as the second demand, and otherwise denied.

Accordingly, it is hereby,

ORDERED that the defendant’s motion pursuant to CPLR 3214 to compel discovery is granted to the extent that the plaintiff is to respond to the defendant’s fourteenth demand for discovery and inspection within 20 days, and the motion is otherwise denied, and it is further

ORDERED that the plaintiff’s cross-motion pursuant to CPLR 3103 for a protective order is granted to the extent that the plaintiff is not required to provide any further responses to the defendant’s second demand, and the cross-motion is otherwise denied; and it is further,

ORDERED that the parties shall appear for a telephonic status conference on February 5, 2021, at 11:00 a.m.

This constitutes the Decision and Order of the court.

  
NANCY M. BANNON, J.S.C.  
HON. NANCY M. BANNON

1/12/2021  
DATE

CHECK ONE:

MOTION

CROSS-MOTON

CASE DISPOSED  
GRANTED  
GRANTED

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
GRANTED IN PART

OTHER