

<b>Old Republic Gen. Ins. Corp. v Scala Contr. Co., Inc.</b>
2021 NY Slip Op 30514(U)
February 22, 2021
Supreme Court, New York County
Docket Number: 653234/2018
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

*Justice*

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OLD REPUBLIC GENERAL INSURANCE CORP.,  
Individually, and a/s/o CAPE CHURCH ASSOCIATES,  
L.L.C., and T.G. NICKEL & ASSOCIATES, LLC,

Plaintiff,

INDEX NO. 653234/2018

MOTION DATE 07/10/2020

MOTION SEQ. NO. 006

- v -

SCALA CONTRACTING CO., INC., NC., SCOTTSDALE  
INSURANCE COMPANY, RED HOOK CONSTRUCTION  
GROUP-II, L.L.C., CERTAIN UNDERWRITERS AT  
LLOYDS, LLOYD'S AMERICA, INC., GENERAL STAR  
INDEMNITY CO.,

Defendants.

**DECISION + ORDER ON  
MOTION**

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LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 158, 159, 160, 161, 162, 163, 164, 165, 166

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, the motion of plaintiff Old Republic General Insurance Corp. ("Plaintiff") pursuant to CPLR 3124 to compel defendants Scottsdale Insurance Company ("Scottsdale") and Certain Underwriters at Lloyds, Lloyd's America, Inc. ("Lloyds") to respond to Plaintiff's outstanding discovery demands and pursuant to CPLR 3126 to strike the answers of Scottsdale and Lloyds for failure to comply with said demands is granted in part and to the extent set forth in the following memorandum decision.

**Background**

In this action, Plaintiff, individually, and as subrogee of non-parties Cape Church Associates, L.L.C. ("Cape Church") and T.G. Nickel Associates, LLC ("TG Nickel"), seeks

defense and indemnification from defendants Scottsdale, Lloyds, General Star Indemnity Co. (“Gen Star”) (together, the “Insurance Defendants”), Red Hook Construction Group-II, L.L.C. (“Red Hook”), and Scala Contracting Co., Inc. (“Scala”), in connection with an underlying claim and suit for personal injuries commenced by non-party Celidonio Molina Campos (“Campos”). Cape Church is the owner of certain real property located in New York, New York (the “Premises”). Sometime prior to March 2017, Cape Church hired TG Nickel to perform certain renovation and construction work at the Premises. TG Nickel then hired Red Hook to perform a portion of the work, and Red Hook, in turn, hired Scala. Campos was an employee of Scala who was allegedly injured while performing demolition work at the Premises and subsequently commenced the underlying personal injury action.

As relevant to this motion, Plaintiff alleges that the contract between TG Nickel, Plaintiff’s subrogor, and Red Hook required Red Hook to obtain insurance to cover its work at the Premises and to name Cape Church and TG Nickel as additional insureds to the policy. Red Hook obtained a policy of insurance from Lloyds and an excess policy of insurance from Scottsdale (complaint ¶¶ 13-14). Scala also obtained a policy of insurance from Scottsdale (*id.* ¶ 11). Plaintiff’s fourth cause of action for contract reformation alleges that the additional insureds endorsement to the Lloyds policy is marked “SAMPLE,” which Plaintiff alleges was a mutual mistake by Lloyds and Red Hook, whose intent was that the endorsement should instead read “As Required by Contract” (*id.* ¶ 55). Plaintiff seeks to reform the policy accordingly. Plaintiff’s seventh cause of action seeks a declaration that it is an additional insured under the Scottsdale policy by virtue of being an additional insured to the Lloyds policy, which provides that all additional insureds under the “controlling underlying policy,” i.e., the Lloyds policy, will automatically be an additional insured under the Scottsdale policy.

On December 11, 2018, Plaintiff served certain discovery demands upon all defendants, including, *inter alia*, combined demands on all defendants, notices of discovery and inspection on Lloyds and Scottsdale, and interrogatories on both Lloyds and Scottsdale. When Lloyds and Scottsdale did not respond, on July 10, 2020, Plaintiff filed this motion to compel Scottsdale and Lloyds to respond to the outstanding discovery demands and to strike the answers of Lloyds and Scottsdale for their failure to comply with said demands. Lloyds and Scottsdale oppose on the grounds that they each served responses to Plaintiff's demands after the motion was filed. On reply, Plaintiff asserts that the responses served were deficient and that each defendant failed to produce certain responsive documents. Specifically, Plaintiff seeks disclosure of Lloyds' underwriting file, including the application for insurance, on the basis that it is relevant to the additional insured endorsement marked "SAMPLE," and material and necessary to this action. Plaintiff also seeks disclosure of Lloyds' entire claims file and claim notes. From Scottsdale, Plaintiff seeks to compel disclosure of the application for the policy that Scottsdale issued to Scala, in order to determine if Scala sought coverage from Scottsdale which sought to name Cape Church and TG Nickel as additional insureds under the policy. Plaintiff also seeks the claims notes maintained by Scottsdale under both the excess policy issued to Red Hook and the policy issued to Scala. Plaintiff also seeks Scottsdale's underwriting files. Finally, Plaintiff states that neither Lloyds nor Scottsdale have produced a privilege log for any items withheld as privileged and should be compelled to do so.

CPLR 3101(a) provides that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action." The words "material and necessary" are "liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issue at trial" (*Roman Catholic Church of Good Shepherd v*

*Tempco Systems*, 202 AD2d 257, 258 [1st Dept 1994]). CPLR § 3101 (b) and (c) protect “privileged” and “work product of an attorney” from disclosure. CPLR § 3101 (d)(2) provides that “materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party’s representative (including an attorney, a consultant, surety, indemnitor, insurer, or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”

An insurer’s underwriting files and claim files typically contain both discoverable items and items that were prepared anticipation of litigation or are privileged. For example, New York courts have held that, generally, documents in a claim file of a liability insurer are accorded immunity from disclosure in a litigation against its insured as material prepared in anticipation of litigation (*Kandel v Tocher*, 22 AD2d 513 [1st Dept 1965]; *Finegold v Lewis*, 22 AD2d 447 [2d Dept 1965]), but certain materials prepared by the insurer in the ordinary course of business (*id.* at 515-516), documents that have a mixed use (*Agovino v Taco Bell 5083*, 225 AD2d 569, 571 [2d Dept 1996]), and reports made by investigators and adjusters, before a decision is made to pay or reject the insurance claim, are generally discoverable (*Donohue v Fokas*, 112 AD3d 665, 667 [2d Dept 2013]). Moreover, courts have held that the so-called *Kandel-Finegold* rule will apply to immunize the insurer’s file accumulated in the insured’s suit, but not in a prior and distinct one (*Bennett v Troy Record Co.*, 25 AD2d 799 [3d Dept 1966]; *see also Kent v Maryland Casualty Co.*, 25 AD2d 653 [1st Dept 1966]).

On the present record, and where Lloyds and Scottsdale have not produced a privilege log for documents withheld due to a purported privilege, this court cannot determine whether all

of the documents Plaintiff seeks from the Lloyds and Scottsdale insurance underwriting and claim files are discoverable or if they were created solely in anticipation of litigation or are privileged. Plaintiff has not given a compelling reason why the *entirety* of the underwriting and claims files are discoverable, but portions of both may be. To that end, Lloyds and Scottsdale shall produce responsive, non-privileged portions of the underwriting and claims files to Plaintiff, and to the extent that either Lloyds or Scottsdale assert that any of the documents withheld are privileged, such documents shall not be produced, but the defendant shall produce a privilege log that conforms to the requirements set forth in CPLR 3122 (b). However, the application for the Lloyds policy issued to Red Hook is relevant to the issue of the intent of the contracting parties with respect to additional insureds to the policy and to the question of fact regarding whether Red Hook sought to add Cape Church and TG Nickel as additional insureds to the policy. The application for the Scottsdale policy issued to Scala is similarly relevant to the factual issue of whether Scala sought to add Cape Church and TG Nickel as additional insureds under the policy. An application for insurance would not be prepared in anticipation of litigation or otherwise privileged and is thus discoverable. Therefore, Lloyds and Scottsdale shall produce the applications for insurance to Plaintiff.

Plaintiff also objects to Lloyds' and Scottsdale's responses to Plaintiff's interrogatories, asserting that the defendants "objected to every interrogatory and did not provide a response for the factual basis for any of their defenses," and "[e]ven the simplest interrogatories were not responded to" (NYSCEF Doc. No. 166 ¶ 8). Scottsdale submitted its interrogatory responses in opposition to the motion, and Plaintiff has correctly noted that Scottsdale has provided broad objections to each interrogatory, including several purported objections which state that "Scottsdale objects to this interrogatory as premature insofar as discovery has not been

completed” (NYSCEF Doc. No. 163). This is improper, particularly in light of Scottsdale’s delay in responding to Plaintiff’s demands. Therefore, Scottsdale shall provide supplementary interrogatory responses that conform to the CPLR and the Uniform Civil Rules for the Supreme Court. Lloyds’ interrogatory responses were not submitted on the motion and are not currently before the court. Therefore, these shall be addressed in a conference to be scheduled by the court.

Finally, the court does not find that the conduct of Lloyds and Scottsdale with respect to discovery has been willful, deliberate, or contumacious in a manner necessary to invoke the court’s discretion to strike their answers (*Hunter Mechanical Corp. v Salkind*, 237 AD2d 180, 180 [1st Dept 1997] [“Striking the answer of a party is an ‘extreme and drastic penalty,’ warranted where the conduct is ‘clearly deliberate or contumacious’”]). That portion of Plaintiff’s motion is, therefore, denied.

Accordingly, it is

ORDERED that Plaintiff’s motion to compel discovery and strike the answer of defendants Lloyds and Scottsdale is granted in part, and to the extent set forth hereinabove; and it is further

ORDERED that, within 30 days of the filing of this order, defendant Lloyds shall produce to Plaintiff responsive, non-privileged, portions of the underwriting and claims files for the policy issued to Red Hook, including the application for insurance; and it is further

ORDERED that, within 30 days of the filing of this order, defendant Scottsdale shall produce to Plaintiff responsive, non-privileged, portions of the underwriting and claims files for the policies issued to Red Hook and Scala, including the application for insurance for the Scala policy; and it is further

ORDERED that, to the extent that Lloyds and Scottsdale assert that any of the documents withheld from the production ordered herein are privileged, such documents shall not be produced, but the defendant shall produce a privilege log that conforms to the requirements set forth in CPLR 3122 (b); and it is further

ORDERED that, within 30 days of the filing of this order, Scottsdale shall provide supplemental interrogatory responses to Plaintiff; and it is further

ORDERED that a status conference will be held in this matter via Microsoft Teams on April 7, 2021 at 11:00 a.m.

This shall constitute the decision and order of the court.

ENTER:



<u>2/22/2021</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE