Pergament v Government Empls. Ins. Co.
2021 NY Slip Op 34333(U)
September 9, 2021
Supreme Court, Nassau County
Docket Number: Index No. 609083/18
Judge: David J. Gugerty
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. DAVID J. GUGERTY, J.S.C.

---X TRIAL/IAS PART 24

MARC A. PERGAMENT, ESQ. AS CHAPTER 7 TRUSTEE OF THE ESTATE OF MELISSA GACE BRYANT,

Plaintiff,

- *against* -

Index No. 609083/18
Mot. Seqs. 005, 006
Submit Date 5/25/21

GOVERNMENT EMPLOYEES INSURANCE COMPANY ("GEICO"), PICCIANO & SCAHILL, LLP, and GILBERT J. HARDY, ESQ.,

Defendants.

---X

The following papers were read on these motions: NYSCEF Numbered

Notice of Motion, Affirmation, Memorandum of Law and Exhibits (005)	172-193
Notice of Cross-Motion, Affirmation and Exhibits (006)	195-210
Memorandum of Law in Reply (005)	214
Affirmation in Opposition and Exhibits (006)	216-218

Defendants Picciano & Scahill, LLP and Gilbert J. Hardy, Esq. (hereinafter referred to collectively as "PSLLP") have moved by notice of motion (005) for an order pursuant to CPLR §3103 for a protective order denying and/or limiting plaintiff's discovery demands dated December 18, 2019. Plaintiff has cross-moved as against all defendants for an order pursuant to CPLR §3126 compelling defendants to provide outstanding discovery under a date certain deadline, or, in the alternative, for an in camera inspection of the requested documents.

The instant action was commenced by the Bankruptcy Trustee for a former client of defendants and contains causes of action for bad faith, breach of implied warranty, and punitive damages as against GEICO, and legal malpractice as against PSLLP. The allegations arose based on PSLLP's representation of Melissa Gace Bryant (hereinafter "Bryant") in an underlying personal injury action entitled Anna Bedard v. Melissa Gace, Nassau County Supreme Court Index No. 17555/2011 (hereinafter the "Underlying Action"), as well as PSLLP's post-judgment representation of Bryant and other actions undertaken post-judgment.

Bryant was represented by PSLLP during the course of prior proceedings involving claims arising from a motor vehicle accident in which she was involved on December 7, 2009.

GEICO was Bryant's insurance carrier and, accordingly, provided representation through PSLLP. After no settlement was reached, the matter proceeded to trial and on July 8, 2016, the jury in the Underlying Action returned an aggregate verdict against Bryant of $1,945,000.00 which totaled $2,303,555.77 after adding interest and costs. With insurance carrier GEICO tendering the policy limit of $300,000.00 and another $1,109.70 in interest, there remained a judgment as against Bryant in the amount of $2,002,446.07 (hereinafter the "Judgment").

Thereafter, the plaintiff in the Underlying Action (hereinafter "Bedard"), by counsel, extended an offer to accept a full assignment of rights to pursue an action for bad faith, malpractice, etc. against GEICO and PSLLP, and in exchange Bedard would waive her rights to collect on the Judgment. PSLLP conveyed the offer to Bryant and advised Bryant to consult with outside counsel. On January 30, 2017, PSLLP provided Bryant with contact information for two attorneys they recommended, and Bryant ultimately met with and retained one of those two attorneys, Neil H. Greenberg, Esq. of Neil H. Greenberg & Associates P.C. (hereinafter "Greenberg"). GEICO, by PSLLP, moved in the Underlying Action to set aside the verdict, and Bedard cross-moved to disqualify PSLLP as counsel to Bryant. By Decision and Order on Motion dated February 28, 2017, The Honorable Julianne T. Capetola denied the motion to set aside the verdict, and disqualified PSLLP as counsel for Bryant. Bryant ultimately filed for bankruptcy.

Plaintiff served demands for discovery dated December 18, 2019 (hereinafter the "Demand") in which they requested thirty-eight (38) items of discovery. Defendants objected, for various reasons, to items eight (8) through thirty-eight (38)[1]. Notably, items 1-26 were directed to GEICO, and items 27-38 were directed to PSLLP.

PSLLP have moved for a protective order with respect to items 28-32, 34, 35, 37 and 38, which seek the following:

28. How many current cases does Defendant P&S handle for GEICO?
29. How many cases did P&S handle for GEICO at the time of Plaintiff BEDARD entering judgment?
30. Any and all contract for services in effect during the pendency of the underlying action/claim.
31. The approximate date when services began between, between GEICO and P&S and total number of cases handled.
32. Defendant HARDY's hire date and title at the firm as well as employee file.
34. Names of all cases referred to Neil Greenberg, Esq. that were handled by defendant P&S, dates of referral, nature of case and reason for referral.
35. Names of all cases referred by Neil Greenberg, Esq to defendants P&S, dates of referral, nature of case and reason for referral.
37. Any actions (other than the present one) against the firm where bad faith was alleged (aff if none).
38. Any actions or claims (other than the present one) the firm is aware of where bad

[1] The specific requests will not be fully restated herein for the sake of brevity but are part of the court record as both Exhibit Q to defendant's motion (005) and Exhibit 4 to plaintiff's cross motion (006).

faith was alleged against a party or their carrier on a matter where they represented the party in an underlying action. (see #7 - not looking for bad faith letters) (aff if none)

PSLLP claims that items 28-31 and 34-35 are overbroad and seek discovery that is neither material nor relevant to any claims or defenses. They further argue that the demands seek potentially confidential documents and information from PSLLP.

Plaintiff contends that, inasmuch as the claims against GEICO and PSLLP consist of more than just legal malpractice and include breach of fiduciary duty, that information pertaining to the ongoing relationship between GEICO, PSLLP and Greenberg are material and necessary to the extent that plaintiff alleges a coordinated effort between the three as against the interests of Bryant.

CPLR §3103(a) states that, "The court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts".

"Material and necessary" are terms to be interpreted liberally to require disclosure of any facts bearing on the controversy which will narrow the issues, reduce delay, and assist in preparation for trial. *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403 [1968]. The test to determine whether an item sought is material and necessary is one of usefulness and reason. *Id.*

As it pertains to items 28, 29, and 31, the demand seeks only a numerical figure as to numbers of cases that fall into certain categories, and an approximate date upon which the professional relationship between GEICO and PSLLP began. Therefore, PSLLP's claims of privilege and overbroad requests are unavailing and responses to these items will be directed.

Item 30 which seeks "Any and all contract for services in effect during the pendency of the underlying action/claim" is overbroad to the extent that it fails to limit the scope of inquiry. However, any and all contracts for services *as between GEICO and PSLLP* in effect during the pendency of the Underlying Action are material and relevant to the matters before the court and therefore a response to that item, with the aforementioned limitation as to scope, will be directed.

With respect to items 34 and 35, PSLLP incorrectly claims that the demand seeks production of documents related to cases referred between PSLLP and Greenberg. The demand seeks no documents, but rather a synopsis of each matter. The claim that the demand is overbroad has validity in that the scope of the items requested are not limited as to timeframe, and therefore must be limited. Accordingly, responses to items 34 and 35 will be directed, limited in scope to referrals from 2012, five years prior to the referral of Bryant to Greenberg by PSLLP, through the present.

Item 32 seeks defendant Hardy's employee file, which PSLLP asserts is not discoverable absent a claim for negligent hiring. PSLLP also notes that they already provided an "Employee Profile Report" which set forth Hardy's home address, date of hire, current employment status and title. Plaintiff, in their cross-motion and opposition papers, does not directly address the request for Hardy's employee file or set forth a basis for its relevance to the instant proceedings and accordingly, a protective order is warranted with respect to Item 32.

Items 37 and 38 seek a list of actions involving PSLLP with respect to claims of bad faith. PSLLP argues that the information sought is outside the scope of their representation of Bryant therefore is not relevant to claims of legal malpractice, but fails to address the claim for punitive damages in their initial motion papers. On reply, PSLLP argues that the requests are overbroad inasmuch as "As a law firm in general, and indeed one which predominately litigates insurance defense cases (i.e., the practice area which was the genesis of "bad faith" claims), the marginal, if any, benefit plaintiff could possibly attain by learning that the law firm may have defended a case involving a claim of bad faith against a codefendant carrier (not GEICO) would be far outweighed by the significant length of time the law firm would spend on combining [sic] through decades of complaints to try and identify those which might have included a claim of bad faith against a carrier defendant".

Punitive damages are permissible where the actions complained of evince a high degree of moral turpitude and are aimed at the public generally, which plaintiff states is the basis for these requests which are necessary to demonstrate a course of conduct such that defendants' conduct can be shown to have been aimed at the public. *Walker v Sheldon*, 10 NY2d 401 [1961].

Plaintiff contends that the requested items are material and necessary for the purpose of demonstrating a course of conduct aimed at the public.

PSLLP's claims that the Items 37 and 38 of the Demand are overbroad is valid to the extent that information pertaining to prior bad faith actions involving insurance carriers or other clients other than GEICO are beyond the scope of the relevant inquiry. Accordingly, responses will be required as to Items 37 and 38, limited in scope to actions involving GEICO, and limited in scope to legal actions commenced as against PSLLP and/or GEICO as opposed to actions and claims as originally requested.

GEICO has opposed the cross-motion as it relates to them on procedural grounds, arguing that they were not the initial movant and therefore inappropriately named as the subject of a cross-motion. Plaintiff concedes this point, but argues that, in the interest of judicial economy, inasmuch as the defect could be cured by re-filing the very same motion and as GEICO has opposed the instant motion on a substantive basis, the procedural error should be overlooked and the motion should be decided on the merits.

A technical defect, such as a motion improperly filed as a cross-motion as is the case here, may be disregarded where the opposing party had ample opportunity to be heard on the merits of the relief sought and there is no alleged prejudice. *Volpe v. Canfield*, 237 A.D.2d 282 (2d. Dept. 1997). Accordingly, the motion shall be determined on the merits.

GEICO objects to the requests contained in Items 8, 9, 12-15, 16-19, 20-21, 22, 24, 25 and 26.

Item 8 seeks "Complete unredacted claim handling file from beginning to end, including the post judgment portion, of the underlying claim. Any documents withheld requires a privilege log itemizing each document and given full description of said documents in accordance with the current case law". GEICO contends that they already complied with a subpoena for all claim notes up to the verdict in the Underlying Action, along with a privilege log which they attach to their papers as Exhibit 2. For each and every post-verdict entry contained in the privilege log, GEICO lists an objection which states, for every entry, "Post verdict claims material". GEICO argues that plaintiff's request for post-verdict claims file entries is "completely improper" and cites the matter of *VGFC Realty II, LLC v D'Angelo* which involves entries in a privilege log which were objected to based upon attorney-client privilege and makes no mention of insurance carrier post-verdict claim files. 114 A.D.3d 765 (2d. Dept. 2014). Other than their conclusory statement that the request is improper and the wholly distinguishable single case cited, GEICO has failed to set forth a valid legal argument for their failure to respond to this item in the Demand and shall therefore be directed to provide responses thereto along with a privilege log setting forth any valid objections to individual items.

Item 9 seeks "Names of every individual/employee who worked on this underlying claim, each listing their job title, and in what capacity they participated in the claim handling process, and time period involved". GEICO simply states that the demand is improper without any support for that assertion and, accordingly, they have failed to set forth a valid legal argument for their failure to respond and shall be directed to comply therewith.

Items 12 through 15 seek the following:

12. Number of cases P&S handled for GEICO at time of the judgment entered in the underlying matter.
13. Number of cases referred to P&S from GEICO for handling at present.
14. The approximate date when services began between, between GEICO and P&S and total number of cases handled to date.
15. Any and all documentation regarding any Employee Incentive / Bonus Structure for resolving claims and/or closing files in effect in New York at any time before entry of judgment in the underlying action

GEICO objects to these items collectively, stating that these demands are irrelevant, improper, and unrelated to claims of bad faith and malpractice. However, as discussed above with respect to Items 28, 29 and 31 which seek substantially similar statistical information as Items 12, 13 and 14 from PSLLP, the demands are relevant as to the issue of punitive damages and the information is therefore discoverable. Although GEICO objects to Item 15, a review of their response to the Demand reflects that they stated therein that "There is no Bonus Structure to resolve claims in which plaintiff seeks an amount in excess of the applicable policy limits, such as plaintiff in the underlying lawsuit" which is responsive and therefore no further disclosure is required with respect to this item.

Items 16 and 17, request the following:

16. All claims handling guidance materials.
    - All training manuals.
    - All courses in effect in New York during the "pendency" of the underlying claim (starting in 2009).
17. All "internal documentation" regarding handling bad faith claim demands, process, procedure, training, incentives, resolution, handling," etc.

GEICO's objections to these items consist of a discussion of the merits of the underlying action and a statement that these requests are "beyond objectionable". The cases cited by GEICO pertain to the validity of the bad faith cause of action and have nothing to do with discovery matters. Therefore, GEICO has failed to set forth a cognizable legal objection to the requested discovery and shall be required to comply with same.

Items 18 – 21 seek the following:

18. Identify any and all BAD FAITH CLAIMS currently pending or resolved within the last 7 years in New York against GEICO or its affiliated entities, as well as the details and status of the claim and Court Caption and Index Number if suit was brought. [This demand does not anticipate bad faith letters or mere allegations during pending litigation - rather it focuses on bad faith claims that arose after a judgment was obtained or a verdict reached. See #7 above)]
19. Identify any and all BAD FAITH CLAIMS currently pending or resolved within the last 7 years in the United States against GEICO or its affiliated entities as well as the details and status of the claim and Court caption & index number if suit was brought. [Again, this demand does not anticipate bad faith letters or allegations - rather it focuses on bad faith claims that arose after a judgment was obtained or a verdict reached. See #7 above)]
20. Identify any and all punitive damages actually assessed against GEICO within last 7 years in New York as a result of bad faith in claims handling as well as Court caption and index number, and if paid; when and how much.
21. Identify any and all punitive damages actually assessed against GEICO within last 7 years in USA as a result of bad faith in claims handling as well as Court caption and index number, and if paid; when and how much.

All of the items listed from 18 to 21 seek information pertaining to other actions which plaintiff states are material and relevant to the issue of punitive damages in order to demonstrate a course of conduct directed toward the public. GEICO objects to these requests as irrelevant and overbroad.

GEICO correctly notes that bad faith law and litigation differs significantly from state, making a nationwide inquiry inapplicable here, as well as overly burdensome. Additionally, the differentiation between a "claim" and an action, where suit has been filed, is vital here in an effort to pare down the inquiry to matters more likely to be viable and non-frivolous in nature. Accordingly, a protective order shall be granted with respect to Item 21 as same is overbroad and irrelevant, and responses will be directed as to Items 18 and 19 but the scope shall be limited to legal actions actually commenced and not simply claims. A response to Item 20 shall be directed.

With respect to Item 22 through 25, the requests are prospective and overbroad inasmuch as they seek documentation pertaining to discovery in the matters potentially uncovered in response to Items 18 and 19 as well as internal documentation and internal policy changes resulting from matters potentially uncovered in response to Items 18 and 19. The requests are premature at best and in any event wholly overbroad and overly burdensome. Accordingly, plaintiff's application for an order compelling GEICO to respond to same must be denied.

As to Item 26, plaintiff has provided no explanation as to the relevance of the requested employee file and therefore compliance with that demanded item will not be directed.

Accordingly, it is hereby:

ORDERED, that the motion by defendants Picciano & Scahill, LLP and Gilbert J. Hardy, Esq. is granted in part and denied in part as noted above and reflected hereafter. With respect to Item 32 of the December 18, 2019 discovery demand, the motion for a protective order is granted, and it is further

ORDERED, that plaintiff's cross-motion seeking to compel discovery is granted in part and denied in part, and accordingly, defendants Picciano & Scahill, LLP and Gilbert J. Hardy, Esq. shall provide answers to the outstanding discovery demands as follows:

- Within thirty (30) days of the date of the instant order, defendants Picciano & Scahill, LLP and Gilbert J. Hardy, Esq. shall provide responses to items 28, 29, and 31
- Within thirty (30) days of the date of the instant order, defendants Picciano & Scahill, LLP and Gilbert J. Hardy, Esq. shall provide a full response to item 30, as amended herein to limit the scope of inquiry to "Any and all contract for services *as between GEICO and PSLLP* in effect during the pendency of the underlying action/claim"
- Within thirty (30) days of the date of the instant order, defendants Picciano & Scahill, LLP and Gilbert J. Hardy, Esq. shall provide responses to items 34 and 35 as amended herein to limit the scope of inquiry to the time period covering 2012 through the present
- Within thirty (30) days of the date of the instant order, defendants Picciano & Scahill, LLP and Gilbert J. Hardy, Esq. shall provide responses to items 37 and 38 as amended herein to limit the scope of inquiry to legal actions commenced as against PSLLP where PSLLP was representing GEICO in the underlying action

and defendant GEICO shall provide answers to the outstanding discovery demands as follows:

- Within thirty (30) days of the date of the instant order, defendant GEICO shall provide responses to items 8, 9, 12, 13, 14, 16, and 17
- Within thirty (30) days of the date of the instant order, defendant GEICO shall provide responses to items 18 and 19 as amended herein to limit the scope of inquiry to legal actions commenced as against GEICO

- Within thirty (30) days of the date of the instant order, defendant GEICO shall provide a response to item 20
- The motion is denied with respect to items 21, 22, 23, 24 or 25 and no responses thereto shall be required.

All applications not specifically addressed herein are denied.

Counsel shall appear for a conference via Microsoft Teams on November 16, 2021 at 10:30 a.m.

This constitutes the decision and order of this court.

Dated: September 9, 2021
Mineola, New York

ENTER:

HON. DAVID J. GUGERTY, J.S.C.

ENTERED
Sep 13 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE