

Salazar v Hartigan

2022 NY Slip Op 31059(U)

April 4, 2022

Supreme Court, New York County

Docket Number: Index No. 157483/2018

Judge: Barbara Jaffe

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

PRESENT: HON. BARBARA JAFFE PART 12

Justice

-----X

KRISTOFER SALAZAR,

Plaintiff,

- v -

PATRICK HARTIGAN, MACAO ENTERPRISES
LLC D/B/A MACAO TRADING COMPANY,

Defendants.

-----X

INDEX NO. 157483/2018

MOTION DATE _____

MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 122-144, 147-155 were read on this motion for discovery.

By notice of motion, plaintiff moves pursuant to CPLR 3042 and 3126 for an order striking defendants' answers or precluding them from presenting evidence at trial, or pursuant to CPLR 3124 compelling them to respond to his notice of discovery and inspection dated October 8, 2021. Defendant Macao Trading Company i/s/h/a Macao Enterprises LLC (Macao) opposes, as do third-party defendants.

By stipulation dated December 17, 2021, plaintiff agreed to withdraw the motion as against defendant Hartigan only. (NYSCEF 154).

I. Contentions

Plaintiff contends that Macao failed to provide any discovery in response to his demands, whereby he sought, among other things, insurance documents pertaining to the underlying litigation. He also claims that third-party defendants failed to respond entirely, despite his repeated attempts.

In opposition, Macao contends that it responded to plaintiff's demands on October 12,

2021, although it declined to provide documents which had been previously provided, for which it asserted privilege, or that it did not possess. It argues that plaintiff accepted its discovery responses without objection until now, and that he cites no specific objections to its responses.

Third-party defendants assert that as the notice of motion fails to specify that plaintiff seeks relief from them, the motion should be denied as to them, and that plaintiff's affirmation of good faith is insufficient as to them. Even if the motion were proper, they argue, plaintiff's demands are vague, seek materials not in their possession or control, are improper and irrelevant, or are privileged. Any failure to comply with plaintiff's demands, they maintain, is neither willful nor contumacious.

In reply, plaintiff argues that insurance files are discoverable, and are not privileged even if prepared in anticipation of litigation. He contends that the court may consider relief against third-party defendants which does not significantly differ from that sought in the notice of motion and should do so in the interests of judicial economy.

II. Analysis

A. Third-party defendants

While a court may grant relief that is not specified in a notice of motion that is "warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party" (*Trazzera v Trazzera*, 199 AD3d 855 [2d Dept 2021], quoting *Frankel v Stavsky*, 40 AD3d 918, 918-919 [2d Dept 2007]), as plaintiff fails to state in his notice of motion, or in his accompanying papers, that he seeks relief from third-party defendants, and does so for the first time in its his reply papers, it is not considered. (CPLR 2214[a]; see e.g. *DaimlerChrysler Ins. Co. v Seck*, 82 AD3d 581 [1st Dept 2011] [vacatur of order striking answer warranted where

plaintiff's notice of motion sought only to extend its time to file a note of issue, with no relief requested against defendant]; *Arriaga v Michael Laub Co.*, 233 AD2d 244 [1st Dept 1996] [trial court did not err in declining to strike counterclaim where relief not demanded in notice of motion or "wherefore" clause]).

B. Macao

Pursuant to CPLR 3101(a), "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action . . ." What is "material and necessary" is generally left to the court's sound discretion and may include "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." (*Andon ex rel. Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 746 [2000], quoting *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]).

There are three categories of protected materials in the CPLR: attorney-client communications, attorney work product, and trial preparation materials. (CPLR 3101 [b], [c], [d]; *Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 376-77 [1991]). "The burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed, and its application must be consistent with the purposes underlying the immunity." (*Id.*).

"Reports of insurance investigators or adjusters, prepared during the processing of a claim, are discoverable as made in the regular course of the insurance company's business." (*Brooklyn Union Gas Co. v Am. Home Assur. Co.*, 23 AD3d 190 [1st 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 a 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.” (*Id.* at 191 [internal quotation marks omitted]; *Venture v Preferred Mut. Ins. Co.*, 153 AD3d 1155 [1st Dept 2017]; *Ntl. Union Fire Ins. Co. of Pittsburgh, Pennsylvania v TransCanada Energy USA, Inc.*, 119 AD3d 492, 493 [1st Dept 2014], *lv. dismissed* 24 NY3d 990 [2014]).

Here, Macao conclusorily labels as privileged the insurance documents sought by plaintiff, thereby failing to meet its burden. (*See Ligoure v City of New York*, 128 AD3d 1027 [2d Dept 2015] [attorney’s affirmation with conclusory assertions that documents are privileged as made in anticipation of litigation, without more, insufficient to sustain burden of establishing privilege]; *New York Schools Ins. Reciprocal v Milburn Sales Co., Inc.*, 105 AD3d 716 [2d Dept 2013] [same]; *Agovino v Taco Bell 5083*, 225 AD2d 569 [2d Dept 1996] [attorney’s affirmation about privilege applying to insurance reports insufficient]).

C. Discovery sanctions

Pursuant to CPLR 3126, the court may issue an order striking a party’s pleading, prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses if the party refuses to obey a discovery order or willfully fails to disclose information that “ought to have been disclosed.” The party moving for such a penalty must establish that the other party’s failure to comply with a discovery order was willful, contumacious, or in bad faith. (*Williams v Shiva Ambulette Serv. Inc.*, 102 AD3d 598, 599 [1st

Dept 2013]). That conduct is willful and contumacious may be inferred from a failure to comply with court orders absent adequate excuses. (*Henderson-Jones v City of New York*, 87 AD3d 498 [1st Dept 2011]).

As plaintiff does not allege that Macao violated any court orders, or that it engaged in any other willful and contumacious conduct, sanctions are not imposed.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff’s motion is granted to the extent of directing Macao to produce insurance documents as requested in plaintiff’s notice of discovery and inspection dated October 8, 2021, within 20 days of the date of this order, and is otherwise denied; and it is further

ORDERED, that the parties are directed to either enter into a stipulation encompassing their next compliance conference on or before June 8, 2022, or appear for the conference in room 341, 60 Centre Street, New York, New York, on June 8, 2022 at 2:15 pm or virtually if necessary.

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BARBARA JAFFE, J.S.C.

4/4/2022
DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER
 FIDUCIARY APPOINTMENT

REFERENCE

CHECK IF APPROPRIATE: