Central Hudson Gas & Elec. Corp. v Cincinnati Ins. Co.
2022 NY Slip Op 31388(U)
March 2, 2022
Supreme Court, Orange County
Docket Number: Index No. EF003567-2019
Judge: Robert A. Onofry

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

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CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Plaintiff,

- against –

CINCINNATI INSURANCE COMPANY and RAYMOND VAZQUEZ,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF003567-2019

DECISION AND ORDER

Motion Date: December 22, 2021

Motion #3

The following papers numbered 1 to 7 were read and considered on a motion by the Defendant Cincinnati Insurance Company, pursuant to CPLR § 3124, to compel the Plaintiff to provide certain disclosure.

Notice of Motion- Vahey Affirmation- Exhibits A-E- Memorandum of Law	1-4
Opposition- Kurtz Affirmation	5
Reply- Vahey Affirmation - Memorandum of Law	6-7

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted.

Factual/Procedural Background

The action at bar is one of several arising from a construction accident.

The Defendant [herein] Raymond Vasquez was allegedly injured while working for non-party J. Mullen & Sons, Inc. (hereinafter "J. Mullen") on a construction project for the Plaintiff Central Hudson Gas & Electric Company (hereinafter "Central Hudson").

At all relevant times, J. Mullen was insured by the Defendant Cincinnati Insurance Co. (hereinafter "Cincinnati").

In a related declaratory action, the Court declared that Cincinnati had a duty to defend and indemnify J. Mullen in the underlying personal injury.

In the action at bar, Central Hudson sought coverage from Cincinnati as an "additional insured" under the policy issued to J. Mullen.

In a prior decision dated December 2, 2020, the Court held that Cincinnati was obligated to defend and indemnify (if warranted) Central Hudson in the underlying personal injury action.

In the motion at bar, Cincinnati moves to compel Central Hudson to disclose its insurance policy.

In support of its motion to compel, Cincinnati submits an affirmation from counsel, Laurie Vahey.

As background, Vahey asserts as follows.

On February 14, 2020, Cincinnati served Central Hudson with a disclosure demand seeking, *inter alia*, all applicable insurance policies.

On or about May 11, 2020, Central Hudson responded that it was "insured by AEGIS Insurance Services under policy no. XL5113401P with limits of $30 million in excess of a $500,000.00 self-insured retention."

On or about August 14, 2020, Central Hudson made the prior motion which resulted in the order dated December 2, 2020, (*supra*), holding that Cincinnati was obligated to defend and indemnify (if warranted) Central Hudson in the underlying personal injury action.

Thus, on or about December 15, 2020, Cincinnati reiterated its demand for a copy of

Central Hudson's insurance policy, as the December 2, 2020, decision did not consider the priority of coverage amongst insurers pursuant to the applicable insurance policies and contracts.

On or about December 1, 2021, Central Hudson replied: "Central Hudson is self-insured for $500,000 and maintains a policy of insurance in excess of that amount with AEGIS. Since the Declaratory Judgment action has been decided but is now on appeal, [counsel does] not believe Central Hudson is willing to provide any additional information."

Vahey asserts that Cincinnati, in compliance with 22 NYCRR § 202.20-f, initiated a telephone conference with Central Hudson's counsel on December 1, 2021. However, that at that time, Central Hudson advised that it would not be disclosing a copy of the AEGIS policy.

Vahey argues that the policy must be disclosed because it is relevant to determining the priority of coverage.

In opposition to the motion, Central Hudson submits an affirmation from counsel, Eric Kurtz.

Initially, Kurtz asserts, the motion at bar violates the Court's Part Rules, as Cincinnati did not seek a conference before making the motion. Thus, he argues, the motion should be denied on that basis alone.

In any event, he asserts, the motion lacks merit, to wit: Cincinnati argues that the policy is "relevant towards determining priority of coverage which impacts the parties' respective rights and obligations as to the underlying lawsuit."

However, Kurtz contends, this argument is belied by the evidence considered by this Court in its consideration of the prior summary judgment motions, to wit: Pursuant to the terms of the Master Agreement, and as set forth in the Certificate of Liability Insurance: "Project:

CHG&E Corporation, 284 South Ave, Poughkeepsie, NY 12601-4879. Certificate holder is listed as Additional Insured per written contract on a primary & non contributory basis. Waiver of subrogation applies."

Kurtz asserts that the Second Department has held that "if one party's policy is primary with respect to the other policy, then the party issuing the primary policy must pay up to the limits of its policy before the excess coverage becomes effective."

Thus here, he argues, there is simply no basis to compel disclosure of Central Hudson's insurance policy. Rather, as noted by this Court in its prior decision, the work being performed at the time of the underlying accident was performed pursuant to the Master Agreement and J. Mullen had named Central Hudson as an additional insured. Moreover, he notes, the Certificate of Liability Insurance explicitly states: "Certificate holder [Central Hudson] is listed as Additional insured per written contract on a primary & non contributory basis."

Thus, he asserts, Cincinnati must pay up to the limits of its policy before Central Hudson's insurer is implicated,.

Moreover, he argues, "this late effort to force disclosure of the policy, a year after this Court's decision, is plainly improper" to wit: Cincinnati's initial demand was dated February 14, 2020, with Central Hudson's responses thereto dated May 11, 2020. Thus, he notes, it took Cincinnati a year-and-a-half to seek this relief.

Finally, Kurtz notes, although no note of issue was filed in this matter, Cincinnati cross-moved for summary judgment on September 23, 2020, contending that sufficient facts existed to entitle it to judgment as a matter of law. "Put bluntly, if the information sought in the instant motion were material and necessary to this matter then Defendant would have moved to

compel, rather than cross-moving for summary judgment. Instead, it was not until a year after summary judgment had already been decided that Defendant claims the information is 'material and necessary.' As such the defendant is 'guilty of inexcusable delay' and the motion should be denied. But for the pending appeal, this case has already reached its conclusion."

Discussion/Legal Analysis

In general, CPLR 3101(a) provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action." *See generally, Allen v Crowell-Collier Publishing Company,* 21 NY2d 403 (1968); *Friel v Papa, 56* A.D.3d 607 [2nd Dept. 2008]; *Beckles v Kingsbrook Jewish Medical Center,* 36 A.D.3d 733 [2nd Dept. 2007].

Pursuant to CPLR 3124: "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response."

Pursuant to 22 NYCRR 202.7(a)(2), a motion relating to disclosure or to a bill of particulars must be supported by an affirmation stating that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion. The affirmation "shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held." *22 NYCRR 202.7(c).* A motion will be denied when the affirmation does not refer to any communications between the parties that would evince a diligent effort by the movant to resolve the disclosure dispute. *Mironer v City of New York,* 79 AD3d 1106 [2nd Dept. 2010].

Here, Cincinnati's affirmation of good faith is less than compelling. Further, it failed to

comply with the Court's Part Rules concerning conferences. Nonetheless, the Court does not find these flaws to be fatal.

On the merits, the policy is relevant, and disclosure is appropriate. Indeed, significantly, Central Hudson does not claim prejudice or any other substantive basis upon which to deny disclosure. Nor does it claim that disclosure of the policy would be unduly burdensome. Thus, the granting of the requested relief is warranted and will be so ordered.

That said, the Court continues to be baffled as to why parties continue to engage in costly and time-consuming litigation concerning disclosure when the stakes are so low, and judicial resources so scarce.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motion is granted.

This constitutes the decision and order of the Court.

Dated: March 2, 2022
Goshen, New York

ENTER

HON. ROBERT A. ONOFRY, J.S.C.

VIA NYSCEF

TO: COOK, NETTER, CLOONAN, KURTZ & MURPHY, P.C.
ATTORNEYS FOR PLAINTIFF
Office & P.O. Address
85 MAIN STREET, P.O. BOX 3939
KINGSTON, NEW YORK 12402

VAHEY GETZ LLP
Attorneys for Defendant Cincinnati Insurance Company
Office & P.O. Address
144 Exchange Blvd., Suite 400
Rochester, New York 14614