

Zupko Painting Inc. v United First Ins. Co.

2024 NY Slip Op 34498(U)

February 29, 2024

Supreme Court, Queens County

Docket Number: Index No. 700116/2022

Judge: Nicole McGregor Mundy

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.

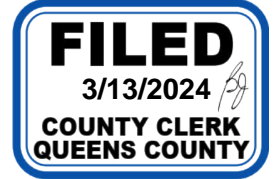
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. NICOLE McGREGOR MUNDY
Acting Justice

IA PART 7



-----x
ZUPKO PAINTING INC.,

Plaintiff(s),

-against-

UTICA FIRST INSURANCE COMPANY and
T.A. TAX & INSURANCE BROKERAGE INC.

Defendant(s).

Index
No.:700116/2022

Motion Date:
September 5, 2023
October 17, 2023

Motion
Seq. No.:003, 004
& 005

-----x

The following numbered papers read on these motions by the plaintiff Zupko Painting Inc. (seq. 3) for summary judgment on the issue of liability and declaratory relief; by defendant Utica First Insurance Company (Utica)(seq. 4) for penalties for plaintiff's noncompliance with discovery demands or, alternatively, to compel plaintiff's compliance with discovery demands; and another motion by plaintiff (seq. 5) for a protective order staying discovery pending determination of plaintiff's dispositive motion.

Papers
Numbered

Motion Seq. No. 3
Notice of Motion - Affirmation - Exhibits..... EF 59-69

Motion Seq. No. 4
Notice of Motion - Affirmation - Exhibits..... EF 73-96
Answering Affirmation..... EF 106
Reply Affirmation - Exhibit..... EF 107-108

Motion Seq. No. 5
Notice of Motion - Affirmation - Exhibits..... EF 99-103
Answering Affirmation - Exhibits..... EF 111-114
Answering Affirmation..... EF 115

Upon the foregoing papers it is Ordered that the motions are determined as follows:

In this action, plaintiff seeks a declaration that defendant Utica First owes a duty to defend plaintiff in an underlying personal injury action entitled *Jara v 606 West 57 (LIHTC) LLC and Zupko Painting* (Sup. Ct. Queens County, Index No. 704117/2020) (underlying action). In an Order dated November 23, 2022, the Court (Ventura, J.), among other things, granted Utica's motion to dismiss the Complaint pursuant to CPLR §3211 [a] to the extent of dismissing the punitive damages claim and claims seeking relief on behalf of non-party 606 West 57 (LIHTC) LLC, but otherwise denied the motion. Plaintiff now moves for summary judgment (1) on the issue of Utica's liability and for a declaration that it owes a duty to defend plaintiff in the underlying action, (2) declaring Utica is obligated to reimburse plaintiff for legal fees and expenses plaintiff incurred in the underlying action, and (3) finding that plaintiff is entitled to counsel of its own choosing in the underline action, paid for by Utica (see CPLR §3001; §3212 (b)). Utica moves for penalties against plaintiff for its failure to comply with discovery demands (see CPLR §3126), and alternatively to compel compliance with those demands (see CPLR §3124). Plaintiff separately moves for a protective order and a stay on discovery pending resolution of the summary judgment motion (see CPLR §3103, §3214(b)).

The Court first addresses plaintiff's motion for a protective order and for a stay of discovery (seq. 5). Regarding the branch of the motion seeking a protective order, a court may issue a protective order "denying, limiting, conditioning or regulating the use of any disclosure device [to prevent] unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR §3103(a)). In addition, "[s]ervice of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute" (CPLR §3103(b)). Plaintiff argues that any expense in providing discovery would be unreasonable because the November 23, 2022 order found that Utica could not show it did not have a duty to defend. However, this mischaracterizes the holding of the court, which merely denied Utica's motion to dismiss pursuant to CPLR §3211(a)(7) because Utica relied on an affidavit that contained hearsay which was insufficient to support dismissal based on a policy exclusion. Since a policy exclusion may relieve an insurer of its duty to defend (see *Swan USA, Inc. v Wesco Ins. Co.*, 217 AD3d 987, 989 [2d Dept 2023]; *Sammy v First Am. Tit. Ins. Co.*, 205 AD3d 949, 954-55 [2d Dept 2022]), discovery to enable an insurer to oppose or support a motion for summary judgment is appropriate. Although

plaintiff correctly notes that the court found the account of Utica's employee regarding a statement by plaintiff's principal was hearsay, as will be discussed below, Utica maintains that plaintiff failed to comply with a notice to take plaintiff's deposition. Plaintiff also argues that the duty to defend may be established by reference to the complaint in the underlying action and the relevant insurance policy. However, Utica's assertion of a policy exclusion requires discovery beyond those documents. Since plaintiff supports its conclusory claims of financial hardship from discovery with only an attorney affirmation (see *Gonzalo v Fragomeni*, 221 AD3d 586, 587 [2d Dept 2023]), and fails to demonstrate the other factors required for issuance of a protective order (see *Kim & Bae, P.C. v Sunki Lee*, 173 AD3d 990, 993 [2d Dept 2019]; *Noy v Noy*, 160 AD3d 887, 887-88 [2d Dept 2018]), granting such an order is unwarranted and this branch of plaintiff's motion is denied.

Regarding the branch of the motion seeking a stay, plaintiff contends that its motion for summary judgment stays disclosure. "Service of a notice of motion under rule §3211, §3212, or §3213 stays disclosure until determination of the motion unless the court orders otherwise" (CPLR §3214 [b]). As Utica points out, the preliminary conference order dated January 24, 2023, provides that motions for summary judgment "made before the filing of the Note of Issue do not stay discovery." Since no party has filed a note of issue, which requires certification that discovery is complete (see 22 NYCRR § 202.21 [b], [d]; *Gelin v New York City Tr. Auth.*, 189 AD3d 789, 793 [2d Dept 2020]), and a need for discovery exists, (see *Reilly v Oakwood Hgts. Community Church*, 269 AD2d 582, 582 [2d Dept 2000]), a stay of discovery is denied.

Turning to Utica's motion, a court may impose discovery sanctions when a party disobeys a discovery order or willfully does not disclose information the court finds should be disclosed (see *Galarza v 25 Hope St. Assoc., LLC*, 209 AD3d 984, 986 [2d Dept 2022]; *McNelis v Thomas*, 171 AD3d 1038, 1039 [2d Dept 2019]). The penalty imposed is within the court's discretion (see *Galarza*, 209 AD3d at 986; *H.R. Prince, Inc. v Elite Env'tl. Sys., Inc.*, 107 AD3d 850, 851 [2d Dept 2013]). A party must have acted willfully and contumaciously for a discovery sanction to be imposed against it (see *Galarza*, 209 AD3d at 986; *McNelis*, 171 AD3d at 1039; *Kyung Soo Kim v Goldmine Realty, Inc.*, 73 AD3d 709, 709 [2d Dept 2010]). "The willful and contumacious character of a party's conduct can be inferred from either (1) the repeated failure to respond to demands or comply with court-ordered discovery, without a reasonable excuse for these failures, or (2) the failure to comply with court-ordered discovery over an extended period of time" (*Williams v Suttle*, 168

AD3d 792, 793 [2d Dept 2019]; see also *Maliah-Dupass v Dupass*, 166 AD3d 873, 875 [2d Dept 2018]).

Here, Utica contends that plaintiff neither responded to its discovery requests nor appeared for a deposition. Utica supports its motion with copies of the Preliminary Conference Order dated January 24, 2023, which required depositions to be conducted and other disclosure to be provided within a certain amount of time after the Order; its Notice of Deposition dated January 24, 2023; its Notice of Discovery and Inspection and First Set of Interrogatories, both dated February 14, 2023; a Compliance Conference Order dated April 25, 2023, which provided a further timetable for discovery; and email correspondence from March to May 2023 from Utica's counsel to plaintiff's counsel generally attempting to resolve discovery disputes and schedule plaintiff's deposition, and to the court seeking a conference to resolve discovery disputes. Repeated failure to proceed with a deposition or respond to discovery demands, in violation of orders, without any explanation supports a finding willful and contumacious behavior (see *Galarza*, 209 AD3d at 986; *Henry v Atlantis Rehabilitation & Residential Healthcare Facility, LLC*, 194 AD3d 1021, 1023 [2d Dept 2021]; *Nationstar Mtge., LLC v Jackson*, 192 AD3d 813, 816 [2d Dept 2021]; *Sparakis v Gozzer Corp.*, 177 AD3d 1011, 1012-13 [2d Dept 2019]; *H.R. Prince, Inc.*, 107 AD3d at 851).

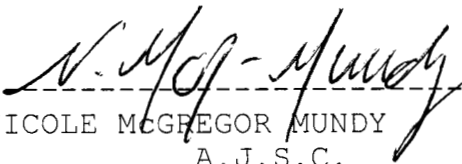
In opposing the motion, plaintiff merely argues that Utica is not entitled to discovery because of the prior order and that its pending summary judgment motion stayed discovery, which the Court rejected as set forth above. Plaintiff does not present evidence of partial or belated compliance with the discovery demands to undermine Utica's showing of the willful and contumacious character of plaintiff's conduct (*cf. Lopez v Maggies Paratransit Corp.*, 210 AD3d 1066, 1067-68 [2d Dept 2022]; *Cooper v Mt. Sinai Hosp.*, 208 AD3d 453, 454-55 [2d Dept 2022]). Plaintiff provides no explanation for not complying with the discovery demands or Preliminary Conference and Compliance Conference Orders (see *McNelis*, 171 AD3d at 1039-40; *Kyung Soo Kim, Inc.*, 73 AD3d at 710). Nor does plaintiff rebut Utica's evidence that plaintiff did not respond to attempts to resolve the discovery disputes. In addition, although the Preliminary Conference Order scheduled the Compliance Conference for April 25, 2023, plaintiff filed its motion for summary judgment on April 17, 2023, eight days before that conference, despite Utica's prior service of notices requesting discovery and inspection, interrogatories, and a deposition. The Court further notes that plaintiff had not complied with Utica's discovery demands dated February 14, 2023, or the Preliminary Conference and Compliance Conference Orders at least through August 2, 2023, as evinced in an order of this court (*McKetney Butler, J.*)

of the same date which, among other things, directed plaintiff to respond to those demands. Under the circumstances, dismissal of the Complaint is warranted (see CPLR §3126 [3]; *Sheikh v Poplardo*, 207 AD3d 775, 776 [2d Dept 2022]; *Ewa v City of New York*, 186 AD3d 1195, 1196 [2d Dept 2020]; *Williams*, 168 AD3d at 793-94). However, given that the period of plaintiff's noncompliance with discovery orders was not extensive and the court now makes clear that a stay on discovery is unwarranted, a conditional order of dismissal is appropriate (see generally *Cobo v Pennwalt Corp. Stokes Div.*, 185 AD3d 650, 651-52 [2d Dept 2020]; *Corex-SPA v Janel Group of N.Y., Inc.*, 156 AD3d 599, 600 [2d Dept 2017]).

Finally, regarding plaintiff's summary judgment motion, considering that court-ordered discovery remains outstanding, the motion is denied as premature (see CPLR §3212 [f]; *Daniels v City of New York*, 117 AD3d 981, 982 [2d Dept 2014]).

Accordingly, plaintiff's motion for a protective order and to stay discovery (seq. 5) is denied. Utica's motion to strike plaintiff's complaint for its willful failure to provide discovery (seq. 4) is granted and the action is dismissed **unless, within 30 days from service of copy of this Order with notice of entry upon plaintiff, plaintiff responds to Utica's notices of discovery and inspection, and interrogatories, all dated February 14, 2023, and produces a person with knowledge of the events at issue in this action for deposition.** Plaintiff's motion for summary judgment is denied without prejudice and with leave to renew if the complaint has not been dismissed, upon completion of discovery.

Dated: **FEB 29 2024**



NICOLE MCGREGOR MUNDY
A.J.S.C.

