



Essex Ins. Co. v Fuscaldo Enters., Ltd.

2014 NY Slip Op 33019(U) (2014) | Cited 0 times | New York Supreme Court | March 10, 2014

[CPLR

SUPREME COURT OF OF YORK COUNTY OF COMPLIANCE PART

ESSEX INSURANCE COMP

Plaintiff,

FUSCALDO BOB MYERSON, CLUB, TEMPLE HUDSON T.R.U. ARMOR BUILDINGS,
CONSTRUCTION COMP BUILT CORPORATION, · ff

ON 3-'IL20H WESTCHESTER COUNTY

DECISION ORDER

10, 2014

Seq.

PRECISION COMPONENTS, · SALES CORP. ARMOR ; f\LE:U

. \ \ · \Ow"" 1\Mo\\\'f LEFKOWITZ, , "∴ · ... , ·

pursuant CPLR 3103(a) T.R.U. CPLR

motiotJ. CPLR 10, 2014:

Seq. Order Show 10 Platt T.R.U.

Seq. Order Show

30-31 To commence the statutory time period for appeals as ofright 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

THE STATE NEW WESTCHESTER - ANY,



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-against-

ENTERPRISES, LTD., RHINEBECK TENNIS LLC, WARREN SMITH ARCHITECTS, LLC,
VALLEY CONTRACTING, INC., STEEL INC., JEFFREY HATTER, MID-STEEL ANY, STEEL
INC., I LED AND ENTERED

CLERK

&

Index No. 636/2012

Decision Date: Mar.

Motion 4, 5 & 6

INC., STRAIGHT STEEL AND DEVELOPMENT, INC.,

Defendants. \ .. J.

The following papers numbered 1 to 43 were read on: (1) this motion by plaintiff to for a protective order against certain of defendants' discovery demands (Motion Sequence #4); (2) this motion by defendant Hudson Valley Contracting, Inc., pursuant to 3124 to compel plaintiff to provide a copy of its entire underwriting file regarding an insurance policy issued to defendant Fuscaldo Enterprises, Ltd.; and (3) this by defendant Jeffrey Hatter pursuant to 3124 to compel plaintiff to comply with such defendant's discovery demands on plaintiff dated January

Mot. #4: to Cause, Aff. in Support, Exhs. A-G 1-9 Koke (Steel Built) Aff. in Support (Hatter) Aff. in Opposition, Exhs. A-B 11-13 Cordrey (Hudson Valley Contr.) Aff. in Opp., Exhs. A-B 14-16 Affidavits of Service 17-21

Mot. #5: Amended to Cause, Aff. in Support, Exhs. A-E 22-28 Greenman (Essex) Aff. in Opposition 29 Affidavits of Service

-1- [* 1] Order

39-40

10, 2014,

Order 2013 "August 2013 Order"), "Fuscaldo") "Rhinebeck"), "Mid Steel"). under "Essex"), \$50,000.



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On 2010,

defendants 17045/2010), Order 2012. On 2010, 2011, \$50,000 policy. \$50,000

2013 Order

2011, October 2011, 2013 Order Order October 2013 "October Order"),

CPLR

2013, Mot. Seq. #6: to Show Cause, Aff. in Support, Exhs. A-E 32-38 Palmiotto (Myerson & Rhinebeck Tennis) Affs. in Support Affidavits of Service 41-43

Upon the following papers and the proceedings held on March the three motions are consolidated for purposes of decision and are decided as follows:

This declaratory judgment action arising from an underlying personal injury action has a substantial history before this Court. As narrated in the prior Decision and of this Court (Lefkowitz, J.) dated August 18, (hereinafter defendant Fuscaldo Enterprises, Ltd. (hereinafter contracted to perform certain construction work at co defendant Rhinebeck Tennis Club, LLC (hereinafter and subcontracted for performance of certain of such work with Mid-Steel Construction Company (hereinafter Fuscaldo operated a commercial general liability policy issued by plaintiff Essex Insurance Company (hereinafter with a general per occurrence limit of \$1 million and sub-limit allegedly applicable when Fuscaldo uses a subcontractor but fails to secure status as an additional insured under the subcontractor's own liability policy. or about January 8, Jeffrey Hatter allegedly was impaled by a sharp wall fastener protruding from a wall at Rhinebeck while playing tennis there: this incident is the subject of Hatter's underlying personal injury action against many of the instant (see Jeffrey Hatter v Bob Meter son, et al. Index No. which action is pending before this Court by venue change pursuant to Decision and of this Court (Lefkowitz, J.) dated August 21, or about July 27, Fuscaldo notified Essex of the Hatter suit, and Essex has been paying for Fuscaldo's defense therein. By letter dated September 21, Essex notified Fuscaldo that Essex would apply the insurance policy's sub-limit to the Hatter claim because Fuscaldo was not an additional insured under Mid-Steel's insurance Essex then commenced the instant action for declaratory judgment that the sub-limit applies, that Essex is entitled to withdraw from defense upon exhaustion of this sub-limit, and that Essex is entitled to reimbursement of defense costs expended in excess of the sub-limit.

This Court's August granted certain branches of plaintiff Essex's motion for a protective order against certain of defendants' then-pending discovery demands, and also granted certain branches of defendants' reciprocal motions to compel discovery from Essex. As to respective coverage opinions dated August 31, and 18, whose discovery the parties disputed, the August directed an in camera review to determine discoverability. Upon review, this Court (Lefkowitz, J.), by dated 3, (hereinafter 3



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held that the coverage letters constituted confidential communications between Essex and its attorney prepared in the course of professional employment for the purpose of obtaining legal advice. Accordingly, the Court concluded that these coverage letters constitute privileged attorney work product exempt from disclosure, and granted Essex a protective order against 'such disclosure pursuant to 3103(a).

Three new motions relating to discovery now are pending before this Court. In fall

-2- [* 2] Order ("December

Order"), "post-EBT 10, 2014], " "post-EBT" "timely "shall 2014]." On 10, "post-EBT" Order, ,alia:

"I.

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• plaintiffs

"2. plaintiffs

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• depositions." depositions were conducted of Joseph Feichtel of Markel Service, Inc., Essex's claims service manager for the Hatter claim, and Mr. Feichtel's supervisor, Mary Kuhn Dowd. Thereafter, this Court issued a Compliance Conference dated December 19, 2013 directing that Discovery and Inspect demands shall be served on or before [January and that responses to such demands served [pursuant to such order] be served on or before [January 31, January 2014, the closing date for demands under the December 2013 Hatter propounded on Essex a post-EBT Notice of Discovery and Inspection demanding, inter

A copy of the file entries:

containing within the computer file system of plaintiff Essex/Markel Insurance Company/Markel



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Services, Inc.,

relating to the coverage determination (and excluding any entries made for evaluation/investigation/assessment of liability of the insured by retained defense counsel),

described at the respective depositions of plaintiff through its witnesses Mary Kuhn Dowd and Joseph Fiechtel, as contained in the 'coverage,' 'investigation,' and 'diary' sections, and

prepared/entered or reviewed by witnesses Mary Kuhn Dowd and Joseph Fiechtel.

A copy of telephone log/entries:

containing records of telephone calls relating to the investigation and coverage determination,

to: (1) the insured, (2) plaintiff's investigator, and (3) insurance carrier for subcontractor/defendant Mid-Steel,

as testified to/described by plaintiff witnesses Mary Kuhn Dowd and Joseph Fiechtel at their respective

Hatter's post-EBT discovery demand also noticed further depositions of Ms. Dowd and Mr. Feichtel to examine them concerning the foregoing demanded disclosures.

Hudson Valley, on or about January 7, 2014, propounded on Essex post-EBT Discovery and Inspection demands substantially comparable to Hatter's demands, including but not limited to emails among Ms. Dowd and Mr. Feichtel concerning the same, copies of communications

-3- [* 3] concerning

file"

. employees."

January 2014, 2010, 2013,

October Order

2013 Order

3103(a)



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2014, for

10, 2014,

·In follow-up" "post-EBT"

2013 between Mr. Feichtel and Fuscaldo the same, and a copy of the initial letter from Essex to Fuscaldo acknowledging the Hatter suit. Hudson Valley also demanded a copy of Essex's electronic claims file and "a complete copy of [Essex's] underwriting for the Hatter claim. The propounded demands stipulate that they purport not to "seek any correspondence, communication or notes which embody attorney/client privileged communications between an attorney and Essex

In response to the foregoing demands, on 28, Essex produced a 22-page printout of its computer file for the Hatter claim, with record dates between July 27, and December 2, as well as certain emails - some with redactions. To such disclosures as re conveyed to this Court in its motion papers, Essex attached an itemized privilege log indicating that each such redaction protects the confidentiality of either an attorney-client communication, attorney work product, materials prepared in contemplation of litigation, and/or materials specifically prepared in the defense of the underlying Hatter litigation. Beyond the foregoing disclosures, Essex generally objected to the Hatter and Hudson Valley demands as violative of attorney-client privilege or the work product doctrine for the reasons stated in this Court's 3 concerning the privileged status of Essex's coverage letters in the Hatter claim. Essex also objected on grounds that Hudson Valley's demands exceeded the scope of the post EBT demand for which the December made provision; Essex therefore asserts that such demands are untimely given discovery deadlines fixed by this Court's prior orders.

In Motion Sequence #4, Essex moves pursuant to CPLR for a protective order against the balance of the foregoing discovery demands and against any future similar discovery demand. In Motion Sequence #5, Hudson Valley moves pursuant to CPLR 3124 to compel Essex to comply with Hudson Valley's demand of January 7, at least to the extent of compelling an in camera review of Essex's redacted responses, and costs and disbursements. In Motion Sequence #6, Hatter moves pursuant to CPLR 3124 to compel Essex to comply with Hatter's demand of January in unredacted form, and to compel further depositions of Ms. Dowd and Mr. Feichtel after such further disclosures. Given the subject-matter relationships among the motions and papers in respective support and opposition thereof, this Court deems all papers submitted on any of the motions as responsive to all of them.

support of Essex's motion for a protective order, Essex distinguishes between Hatter's demands, which Essex characterizes as "largely appropriate to the depositions, and Hudson Valley's demands, which Essex deems far beyond the scope of a demand and untimely at this late stage of litigation. As to Hatter's demands to which Essex did not comply or produced redacted materials, Essex implies that Hatter wrongly uses the depositions to attempt circumvention or erosion of this Court's October Order, which held that documents containing legal advice Essex obtained in development or



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assertion of its position concerning the Hatter claim are privileged and non-discoverable. Essex asserts that notes of telephone conversations between Feichtel and outside coverage counsel concerned legal advice respecting coverage under the Essex policy for the Hatter claim, and thus are privileged against disclosure. This same result, Essex asserts, obtains for any reports, internal analyses or correspondence exchanged internally or with outside coverage counsel, the same being prepared

-4- [* 4] October 2013 Order.

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deposition" Pl's

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"[t]here foreclosed." 2011, "Discuss UW liability." "in likelihood"

\$50,000

Steel Steel Sales in anticipation of and during the course of Hatter's underlying action or the instant declaratory action. According to Essex, the mere fact that deponents reviewed certain privileged materials in preparing for their depositions does not vitiate privilege or otherwise render these documents discoverable. Essex asserts that the redactions of the 22-page computer claim file and emails are limited to materials going to defense of Fuscaldo and thus are privileged under the reasoning of this Court's Further, Essex submits an affidavit by Mr. Feichtel asserting that while he perused the claim file notes in preparation for his deposition, he not review the file notes for content relating to defense, including investigation in furtherance of the defense, of Fuscaldo against Hatter's claim. I did not rely on the claim file notes insofar as relating to the defense of Fuscaldo in testifying at my (Feichtel Aff., Motion, Exh. B, at 2). Essex also points to the transcript of Ms. Dowd's deposition, in which she testified that she did not review any of the notations made in the investigation section of the Hatter claim file (see Tr. [Dowd], at 67), or Feichtel's notes in preparation for the deposition (see id. at 61, 66). the foregoing basis, Essex implies that the balance of these materials are not relevant as follow-up to Feichtel's deposition and thus Hatter's demands, to the extent Essex has not already complied with them, are overbroad. Afortiori, Essex asserts, Hudson Valley's demands are altogether overbroad both for the foregoing reasons and because they make no distinction between the insurer's claim file and materials concerning defense, which this Court already deemed to be protected against disclosure. To the extent that Hudson Valley also demands the entire claim file, as well as other materials underlying the Hatter claim (e.g. emails notifying Essex of the claim) Essex asserts that the same should be denied because time long ago expired properly to demand these materials.



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In opposition to Essex's motion for a protective order and in support of its own motion to compel discovery, Hatter asserts that both Dowd and Feichtel entered notes into the computer file as to the Hatter claim, and that the same therefore should be discoverable to the extent that they aided in the process of deciding whether the policy provides coverage. These materials, Essex asserts, were prepared by the carrier and not by counsel, and thus are not privileged. Hatter asserts that by relying on these materials in preparation for the deposition, the deponents waived Essex's privilege. For its part, Hudson Valley reiterates that it seeks no protected information, and that are no discovery orders of this [C]ourt indicating that discoveries sought by Hudson are Hudson Valley pleads that the heart of this case is the meaning of an entry in Essex's claim file notes of August 17, in which the following entry appears: with [on information and belief, Essex] intent as to whether sublimit if insured has independent Explication of this entry, asserts Hudson Valley, is necessary by means of the remainder of the underwriting file all contains Fuscaldo's application for insurance, correspondence among Fuscaldo and Fuscaldo's broker regarding the insurance provided, and other documentation tending to explicate the effective date and applicability of the sub-limit. For their parts, Rhinebeck and defendant Bob Myerson join in Hudson Valley's motion for the reasons stated in Hudson Valley's papers; and defendants Built and Straight Corp. join in Hatter's motion for the reasons stated in Hatter's papers. No papers were received on these motions from defendants Fuscaldo, Warren Temple Smith Architects, LLC, Armor Steel Buildings, Inc., Mid-Steel Construction Company, Precision Components, Inc., or Armor Development, Inc.

-5- [* 5] prosecution" 3101[a]),

necessary" 302- 304 740 [2000]). necessary" the

reason" 21NY2d403 2010)).

1106, 1108 2010]; 30 2006)). On 3103

device" "prevent courts" 3103

Preliminazy October 2012,

Orders 2013; 20, 2013; 2013; October 2013; 2013. Orders "any waived."

"post-EBT" 2014.

Conferenc-es

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relevant

Order 2013, "post-EBT" It is axiomatic that parties are entitled to liberal discovery of "all matters material and necessary in the of their action (CPLR and the determination of what is "material and is within the sound discretion of the trial court (see e.g. Andon v Mott Assocs., 94 NY2d The phrase "material and is "interpreted liberally to require disclosure, upon request, of any facts bearing on controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and (Allen v Crowell-Collier Publishing Co., [1968]; Foster v Herbert Clepoy Corp., 74 AD3d 1139 [2d Dept The foregoing standards vest in the trial court broad discretion to supervise discovery and issue such determinations as necessary to vindicate litigant rights and enforce litigant duties arising in the individual case (see Mironer v City of New York, 79 AD3d [2d Dept Auerbach v Klein, AD3d 451, 452 [2d Dept a CPLR motion for a protective order against discovery, the movant (here, Essex) bears the burden to show that a protective order "denying, limiting, conditioning or regulating the use of any disclosure is necessary to unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the (CPLR [a]). Conversely, on a CPLR 3124 motion to compel discovery, the proponents (here, Hatter and Hudson Valley) bear the burden to show their entitlement to the discovery demanded.

Turning first to Hudson Valley's demand for the entirety of Essex's claim file and other documents underlying the Hatter claim, this Court takes judicial notice that after the parties entered into a Conference Stipulation on or about 19, the parties thereafter appeared for five compliance conferences over the next 14 months, with Compliance Conference entered on each of January 8, March June 4, 11, and December 23, Each of these five Compliance Conference directs that disclosure demands not raised at the Compliance Conference are deemed Essex asserts, and Hudson Valley does not materially dispute, that notwithstanding these five clear directives, the first time Hudson Valley demanded the entirety of Essex's claim file and documents underlying the file was in Hudson Valley's ostensible demand in January Hudson Valley does not seek to justify or excuse this apparently late discovery demand, and this Court perceives no sufficient basis to perceive why Hudson Valley could not make such discovery demands before or at any of the five Compliance over the last 14 months. Neither does Hudson Valley adequately demonstrate that discovery of the entirety of Essex's claim file or the documents underlying the file is and necessary to Hudson Valley's defense of this action. While discovery of an electronic claim file of this nature can be relevant in a particular case (see e.g. Melworm v Encompass Indem. Co., 112 AD3d 794 [2d Dept this Court discerns no basis to hold, as the moving defendants suggest, that such materials always are and discoverable. Neither does Melworm or any other case to which the moving defendants cite, or of which this Court is aware, stand for the proposition that an electronic claims file properly can be demanded and must be disclosed at any stage of litigation. Nor can this Court conclude that Essex's refusal to tender such discovery violated the Compliance Conference of December 19, which provided only for discovery arising out of the Dowd and Feichtel depositions. Hudson Valley does not adequately demonstrate to this Court that the deposition testimony rendered such materials relevant to Hudson Valley's defense. For the foregoing reasons, so much of Hudson Valley's motion



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-6- [* 6] CPLR

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2013 Order

2002]).

·However,

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CPLR 3101

502

ORDERED CPLR pursuant to 3124 to compel Essex to disclose its entire claim file for the Hatter incident is denied, and the branch of Essex's reciprocal motion pursuant to 3103(a) for a protective order against such disclosure is granted.

Turning to the balance of the pending discovery demands by Hatter and Hudson Valley, this Court's August previously narrated the blackletter law that in its instant assertion of privilege, Essex must demonstrate that the information sought to be protected from disclosure constitutes a confidential communication from an attorney to a client for the purpose of obtaining legal advice or services (*All Waste Systems, Inc. v Gulf Ins. Co.*, 295 AD2d 379 [2d Dept As to such redacted disclosure as Essex tendered in response to the remaining discovery demands by Hatter and Hudson Valley, and notwithstanding the suggestion of Hatter, Steel Built and Straight Steel in their papers, Essex denominated in its itemized privilege log the specific privilege invoked for each redacted document. this Court cannot properly discern the applicability of such privilege without inspecting unredacted copies of the materials in question. Accordingly, the motions by Hatter and Hudson Valley, as joined by the various moving co-defendants, are granted to the extent of directing an in camera review of such documents as Essex heretofore tendered to Hatter and Hudson Valley in redacted form, or that Essex withheld on privilege in response to the discovery demands of January enumerated above, such review to be of unredacted versions of the documents either withheld or tendered in redacted form. In so ruling, however, this Court does not hold that any of the foregoing documents are material and necessary to the defense of this action. In light of the testimony of Dowd and the affidavit of Feichel concerning the nature of their pre-deposition review of these documents, it remains to be determined whether any of the redacted or withheld materials reasonably may lead to discoverable evidence within the meaning of (a), and whether there is a colorable basis to conclude that deponent reliance on such documents had the effect of waiving any privilege attaching thereto (see e.g. *Grieco v Cunningham*, 128 AD2d [2d Dept 1987]). By its nature, such determinations depend, in part, on the



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exact contents of these materials, and therefore the same must be reviewed in camera. For much the same reason, without in camera review of these materials, this Court cannot discern whether further depositions of Dowd and Feichtel based on such disclosures might be appropriate. Accordingly, further determination of defendants' respective motions to compel discovery of the foregoing materials, and determination of Essex's motion for a protective order against such discovery, are reserved pending such in camera review.

All relief not specifically reserved or granted herein to any of the moving defendants is denied. The moving defendants did not demonstrate the relevance of the further discovery demanded. Neither has Hudson Valley shown that Essex's position on these applications is so devoid of merit that Hudson Valley should be awarded motion costs and disbursements in consequence thereof. Accordingly, it is hereby

that the respective applications by the moving defendants pursuant to 3124 (Motion Sequences #5 and #6) are granted to the extent that on or before March 21, 2014, plaintiff shall tender to this Court for in camera inspection unredacted copies of such documents as plaintiff either tendered in redacted form or withheld on privilege grounds, as enumerated in 1

-7- [* 7] plaintiffs

2014;

Part

ORDERED CPLR

ORDERED CPLR 3103(a)

2014 Order

ORDERED Order,

ORDERED 800 9:30am April", 2014, <:# z . '::> V Order

10, 2014

TO: 8 1 h 10017 212-730-7850

Poughkeepsie, 12601 845-471-8065

10009 the privilege log annexed to Essex's motion papers, in response to the respective Notices for



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Demand and Inspection of defendants Hatter or Hudson Valley dated January and further judicial determination concerning the discoverability of these documents is reserved pending such in camera inspection. The foregoing in camera disclosures shall be indexed with particularity to a privilege log specifically enumerating the basis for the privilege asserted for each such document, and shall be delivered to Carolyn Carpenito, Compliance Clerk, on the 8th Floor of this Courthouse; and it further

that all other relief not reserved or granted herein to the moving defendants on their respective 3124 motions to compel discovery is denied; and it is further

that the motion by plaintiff pursuant to for a protective order against discovery is granted against so much of the respective Notices. of Discovery and Inspection of defendants Hatter or Hudson Valley dated January as to which this Decision and does not reserve determination pursuant to in. camera inspection; and it is further

that plaintiff shall serve this Decision and with Notice of Entry thereof, within 7 days of the date hereof; and it is further

I that counsel for all parties shall appear in the Compliance Part, Room of this Courthouse, at for further proceedings.

The foregoing constitutes the Decision and of this Court:

Dated: White Plains, New York March

Nicoletti Gonson Spinner LLP 555 Fifth Avenue, Floor New York, New York FAX: Steinberg Symer & Platt 27 Garden Street New York FAX: Herzfeld & Rubin 125 Broad Street New York, New York FAX: 212-344-3333

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