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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ~~JOAN M. KENNEY~~ Justice
JOAN M. KENNEY

PART 8

General Motors Acceptance Corporation and American Automobile Insurance Company,

-v-

New York Central Mutual Fire Insurance Company,

INDEX NO. 109668/06
MOTION DATE 1/26/12
MOTION SEQ. NO. 003

The following papers, numbered 1 to 20, were read on this motion to/for preclude

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	No(s). 1-8
Answering Affidavits — Exhibits	No(s). 9-16
Replying Affidavits	No(s). 17-20

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: May 9, 2012

JOAN M. KENNEY, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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General Motors Acceptance Corporation and American Automobile Insurance Company,

Plaintiffs,

-against-

New York Central Mutual Fire Insurance Company,

Defendant.

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DECISION AND ORDER
Index Number.:109668/2006
Motion Seq. No.: 003

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to preclude, direct an adverse inference charge at trial and for summary judgment.

Papers	**Numbered**
Notice of Motion, Affidavits and Exhibits	1 - 8
Affirmation in Opposition & Exhibits	9 - 16
Reply Affirmation	17 - 20

Plaintiff seeks an Order of Preclusion; an Order directing an adverse inference charge against defendant at trial; and an Order, pursuant to CPLR 3212, for summary judgment in plaintiff's favor on the issue of liability.

FACTUAL BACKGROUND

Briefly, plaintiffs General Motors Acceptance Corporation (GMAC) and American Automobile Insurance Company (AAIC), seek to recover monies they paid towards a settlement of an underlying personal injury matter (the Sette Action) on grounds that defendant, New York Central Mutual Fire Insurance Company (NYCM), as the primary insurer of GMAC, failed to settle the Sette Action prior to trial, resulting in a jury verdict of $1.5 million dollars, exposing GMAC and its excess insurance carrier, AAIC to the $1.2 million dollars paid in excess of NYCM's $300,000.00 policy limits (the bad faith action).

On June 30, 2011, this Court issued a conditional order and directed defendant to produce:

(1) [t]ranscriptions of committee meeting audio recordings regarding the Sette Action maintained by NYCM employee, David Vibbard; (2) lotus Notes maintained by claims personnel concerning the Sette Action as testified to by NYCM witness, Beth Menuez,; and (3) all correspondence between defendant, NYCM and Baxter & Smith (now known as Baxter, Smith & Shapiro) regarding the Sette Action up to the time of the commencement of this bad faith action (the June 30, 2011 order). This Court further Ordered that a failure to comply with this Court's directive could result in both an Order of Preclusion, as well as an adverse inference charge against defendant at trial.

On or about August 19, 2011 defendant's produced an Affirmation of Compliance (the compliance affirmation) together with attached documents and an August 12, 2011 affidavit from defendant's assistant vice president, Diane Wildey. In this affidavit, Diane Wildey asserted, plainly, that she located the following documents annexed to the compliance affirmation:

1. A copy of a transcription for the only committee meeting Diane Wildey recalls on the Sette Action, which took place on May 19, 2000 (annexed as Exhibit "A" to the compliance affirmation);
2. A copy of the File Review Analysis for the Sette Action which contains the "lotus notes" about which Beth Menuez testified to during her deposition on April 7, 2009 (annexed as Exhibit "B" to the compliance affirmation); and
3. Copies of correspondences between Baxter & Smith and defendant, NYCM, regarding the Sette Action.

ARGUMENTS

Plaintiff now seeks an Order precluding defendant from offering any evidence in opposition to plaintiff's claim of liability and an adverse inference charge at trial because: (1) defendant failed to comply with this Court's June 30, 2011 order. In particular, plaintiff avers that no transcription(s) of the committee meeting(s) were in fact produced and only letters from Baxter & Smith were produced, rather than all written correspondences between Baxter & Smith and defendant NYCM,

as directed to do so by the Court. Plaintiff also seeks an Order directing judgment in their favor on the issue of liability, pursuant to CPLR 3212.

Defendant contends that plaintiff's motion must be denied because: (1) the summary judgment motion is untimely; (2) plaintiff's relief seeking to preclude defendant from offering any evidence in opposition to plaintiff's claim of liability is equivalent to an Order striking defendant's answer for alleged spoilation of evidence and this Court has already held by its June 30, 2011 Order that plaintiff failed to demonstrate entitlement to said relief; and (3) defendant fully complied with this Court's directive and produced the requested documents, rendering plaintiff's motion, moot in its entirety.

DISCUSSION

To the extent that plaintiffs seek any dispositive relief, pursuant to CPLR 3212, said application is denied, as untimely. There can be no dispute that this Court directed that any dispositive motions be interposed no later than July 4, 2010.[1]

Upon review of the documents submitted with the compliance affirmation, this Court concludes that defendant has willfully and contumaciously failed to comply with discovery demands and Court orders. Exhibit "A" to the compliance affirmation is not a copy of a transcription meeting held on May 19, 2000. Rather it appears to be a summary of facts in the Sette Action. Exhibit "A"

[1]It is noted that defendant timely interposed a dispositive motion (Motion Seq.001) pursuant to CPLR 3212, which is currently *sub judice*. This Court has held in abeyance, *sua sponte*, defendant's dispositive motion until the motion to strike defendant's answer for failing to comply with discovery (Motion Seq. 002), submitted at the same time as defendant's dispositive motion, was resolved and discovery fully completed. Notably, discovery issues continue to be a contentious matter between the parties. Rather than deny defendant's dispositive motion as premature for failure to complete discovery (see also CPLR 3212), this Court held in abeyance determination of defendant's summary judgment motion and granted defendant an opportunity to cure its failure to produce demanded and ordered discovery.

to the compliance affirmation is a document dated April 24, 1994, years before the purported May 19, 2000 committee meeting in question. Dave Vibbard, a NYCM employee who was said to have maintained the transcriptions of the audio recordings of these committee meetings produced an affidavit dated August 12, 2011, as part of the compliance affirmation (Exhibit "3") stating that he was "not in possession of any documents or files concerning the" Sette Action. There can be no doubt that these documents were, in fact, maintained by him at some point, however, absent any explanation as to where these documents are, or what happened to them after it was in his possession, this Court can only surmise and conclude that the documents went missing and/or were destroyed during the course of this litigation. No one with personal knowledge of the facts presented an affidavit setting forth what search Dave Vibbrad conducted to produce the transcriptions of the committee meeting audio recordings. In fact, there has been a blatant disregard for the submission of any reasonable explanation as to the location of these, and other, documents. In sum, Dave Vibbard's affidavit is devoid of any facts that would clarify what happened to the documents sought to be produced and claimed to have existed by defendant itself.

Diane Wildey's statement in her latest affidavit dated, January 10, 2012, asserts that Dave Vibbard didn't have to assert that he searched for documents in order to comply with this Court's order because she personally "conducted a search of any documents responsive to the" Court's order. This argument is spacious and more to the point, it's the first time defendant asserts that one of its many employees who handled the Sette Action, searched for the missing documents which are the subject of this motion. The affidavit Diane Wildey presented in support of the compliance affirmation merely stated that she "located the following documents." Clearly Exhibit 'A" to the compliance affirmation did not comply with this Court's directive and something has happened to

these documents/audio recordings/transcriptions of committee meetings etc. that have not been produce despite testimony from defendant itself that it did, at some point in time during the course of the instate litigation, exist.

Exhibit "B" to the compliance affirmation, is labeled "File Review Analysis for Liability for Claims" with an open date of January 9, 2001 and a liability close date of October 17, 2007. Plaintiff does not seem to object to the fact that these contain the missing "lotus notes" as previously demanded.

Exhibit "C" of the compliance affirmation are the purported correspondences from Baxter & Smith to defendant, NYCM. It is obvious, from the content of these correspondences, that Baxter & Smith was responding to correspondences from NYCM, yet copies of defendant's correspondence(s) were omitted from production. Diane Wildey, by affidavit dated January 10, 2012, now claims that all of *her* communications with Baxter & Smith were by way of a telephone conversation(s) and any references in Baxter & Smith's letters claiming that they were replying to NYCM's written communications, is, in Diane Wildey's belief, referenced in error.

This Court finds, however, that Diane Wildey's statements are self-serving assertions because defendant has not produced any statements from Baxter & Smith claiming that their letters referencing correspondences from defendant NYCM was written in error and was a mistake on Baxter & Smith's part. It is noted that Diane Wildey herself identified in the compliance affirmation that she was able to locate the correspondences *between* Baxter & Smith and defendant NYCM (emphasis added), yet failed to produce all these documents. Lastly, Baxter & Smith's letters are addressed to employees other than Diane Wildey and no affidavits have been presented by these employees that they didn't communicate and/or provide written responses to Baxter & Smith.

At this juncture, this Court can only conclude that defendant has willfully failed to produce discovery as demanded and Court ordered. It is apparent that documents once in defendant's possession have been destroyed during the course of this litigation, since it was during the course of this litigation that defendant admitted to possessing the now "missing" documents. Diane Wildey's affidavit dated October 8, 2010, contends that even if transcriptions of committee meetings did exist, they were destroyed. No explanation is provided to this Court as to how and when they could have been "destroyed." Diane Wildey asserts in her affidavit in support of the compliance affirmation that she located the transcription and purportedly attached same as Exhibit "A"therein. Diane Wildey does not explain when it was she suddenly "located" them or how and when they were purportedly "destroyed" if they did exist. Nevertheless, it is apparent she had not located any of the transcription(s) of meetings as none was produced and she erroneously identifies "Exhibit A" to the compliance affirmation as the transcript, when it is clearly not a transcription of meetings, but rather a summary of some kind regarding the Sette Action.

Plaintiff has proven that NYCM has prejudiced their ability to effectively prosecute this bad faith action. The continued evasive responses, the lack of production of documents, the fact that defendant was in possession of documents that are now missing and went missing during the course of this bad faith action without any viable and reasonable explanation by defendant, the repeated mis-characterization/ mis-representation of the identity of documents that have been produced, etc. lends itself, at this juncture, to not only an adverse inference charge at trial against defendant, but also an Order of preclusion against defendant. Contrary to defendant's contention, issuance of both such orders is not contradictory, nor prohibitive, under the circumstances of this case and is not the equivalent of striking defendant's answer. At this point, plaintiff has presented a prima facie

entitlement to the claim of spoilation of evidence by defendant. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the issue of liability, pursuant to CLR 3212, is denied, as untimely; and it is further

ORDERED that plaintiff's motion seeking an Order of Preclusion and an Order directing an adverse inference charge against defendant, at trial, is granted; and it is further

ORDERED that plaintiffs, having established that defendant has willfully failed and refused to provide discovery as directed by Orders dated, June 30, 3011, July 31, 2008, April 30, 2008 and November 15, 2007, and without reasonable justification, defendant having failed and refused to produce documents respecting transcription of committee meetings and all correspondences by and between Baxter & Smith and defendant, NYCM , in addition to the admission by defendant that document(s) have been destroyed, this Court directs and Orders that at the time of trial of this matter, plaintiff shall be entitled to a charge on spoilation of evidence/adverse inference charge against defendant and defendant is precluded from offering any evidentiary proof with respect to documents regarding transcription of committee meetings and/or all correspondences by and between Baxter & Smith and defendant, in defense and/or in opposition to plaintiff's prosecution of the within bad faith claim; and it is further

ORDERED that the parties proceed to mediation, forthwith,

DATED: January 31, 2012

ENTER:

Hon. Joan M. Kenney
J.S.C.