

Santoro v GEICO

2011 NY Slip Op 32564(U)

September 27, 2011

Supreme Court, Nassau County

Docket Number: 0016434-10

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,

Justice

TRIAL/IAS, PART 21
NASSAU COUNTY

THERESA M. SANTORO,

Decision and Order

Plaintiff,

MOTION SUBMITTED:

May 26, 2011

-against-

MOTION SEQUENCE:03, 04

INDEX NO. 001634-10

GEICO,

Defendant.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Notice of Cross Motion	2
Affirmation in Opposition and Reply	3
Reply Affirmation	4

In an action to recover supplementary underinsured motorist (SUM) coverage pursuant to an automobile liability insurance policy issued by the Defendant, the Plaintiff moves for an order, *inter alia*, pursuant to CPLR 3124, compelling the Defendant to produce: its insurance claims file; for a further deposition, the claims examiner responsible for handling the Plaintiff's SUM claim, and for a deposition, the "claims supervisor". The Plaintiff also moves, pursuant CPLR 2221, for an order granting her leave to renew the branch of her motion which, in effect, sought an order pursuant to CPLR 3212 (g), and which was denied by the court in an order dated July 20, 2010. The Defendant cross-moves pursuant to CPLR 3103 (a) for a protective order: regarding the Plaintiff's demand for disclosure of the claims file; and denying Plaintiff's motion to the extent that it seeks a further examination of the claims examiner and a deposition of the claims supervisor. The Defendant also opposes Plaintiff's motion for leave to renew and seeks an order, pursuant to CPLR 3124, compelling the Plaintiff to provide an authorization to obtain medical records of a prior treating orthopedic surgeon.

For the reasons that follow, the Plaintiff's motion and the Defendant's cross motion are granted in part and denied in part.

Disclosure of the Defendant's Claim File

The burden of demonstrating that specific material is not subject to discovery under 3101[d][2] because it was prepared solely in anticipation of litigation is upon the party opposing such disclosure (*McCarthy v Klein*, 238 AD2d 552 [2d Dept 1997]). The burden is met "by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation" (*Bombard v Amica Mutual Insurance Co.*, 11 AD3d 647 [2d Dept 2004]; *McCarthy v Klein*, 238 AD2d at 553-54, *supra*; *Landmark Insurance Co. v Beau Rivage Restaurant*, 121 AD2d 98 [2d Dept 1986]).

At bar, the Defendant wrote in a letter, dated February 16, 2011, that "the issue here is the evaluation of the value of a claim [and] [t]hat does not permit the Plaintiff to seek [Defendant's] claim file, which is otherwise privileged" (Ex. "5" to Plaintiff's Motion). Given the Defendant's "mere blanket assertion of privilege", the Defendant has failed to identify which documents are privileged and, thus, has *a fortiori* failed to demonstrate that such documents were prepared in anticipation of litigation (*McCarthy v Klein*, 238 AD2d at 554, *supra*; *Gibson v Encompass Insurance Co.*, 23 AD3d 1047 [4th Dept 2005 [affirming denial of the insurer's motion to strike the plaintiff's notice to produce the insurer's claim file]).¹

Moreover, the payment or rejection of a claim is "part of the regular course of business of an insurance company" (*Bombard v Amica Mutual Insurance Co.*, 11 AD3d at 648, *supra*). In this regard, reports prepared by insurance adjusters, investigators, etc., before a decision is made on a claim are thus not privileged and are discoverable "even when those reports are mixed/multi-purpose reports, motivated in part by the potential for litigation with the insured" (*Id.*; *Woodson v American Transit Insurance Co.*, 280 AD2d 328 [1st Dept 2001] [materials prepared by an insurer in contemplation of defending a claim against an insured are not privileged in subsequent litigation by the insured against the insurer respecting the insurer's handling of the claim]; *Fireman's Insurance Company of Newark, New Jersey v Gray*, 41 AD2d

¹ It is also noted that the Defendant failed to comply with CPLR 3122(a), which provides that if a party objects to disclosure, such objection must be made within 20 days of service of the notice for disclosure by serving a response stating with reasonable particularity the reasons for such objection. On December 14, 2010, the Plaintiff served a combined demand for discovery and inspection on defense counsel (Ex. "2" to Plaintiff's Motion). The demand asked for the production of a complete and certified copy of the entire claim file (Ex. "2" to Plaintiff's Motion). The Defendant did not oppose this demand until February 16, 2011 (Ex. "5" to Plaintiff's Motion).

863 [3d Dept 1973] [underwriting and claim files in an uninsured motorist coverage claim did not consist of material prepared for litigation as action for a declaratory judgment was against the insurers themselves as distinguishable from litigation of an action against their insureds which insurers were called upon to defend’’]).

The Defendant’s suggestion that discovery of the claim file is unwarranted because the Plaintiff’s claim was not rejected is without merit.² Significantly, the Defendant’s payment of \$75,000 pursuant to a SUM policy with a \$300,000 limit is akin to a partial rejection of the claim (*see, Palmieri v Allstate Insurance Co.*, 289 AD2d 314 [2d Dept 2001]). Accordingly, disclosure of Defendant’s claim file up until the time Defendant made its’ offer of \$75,000 is material and necessary for the prosecution of Plaintiff’s action.³ In this regard, a further deposition of the senior claims examiner ZeZe Giwa-Osagie (“claims examiner”) is warranted, limited in scope to the contents of the claim file prepared prior to the time that Defendant conveyed its offer of \$75,000.

Plaintiff’s request to depose the claim’s supervisor, Travis Huebner (“supervisor”), is denied inasmuch as it was the claims examiner who set up the claim file and handled the Plaintiff’s claim from its inception (Ex. “6” to Plaintiff’s Motion at pp. 28-29). The isolated statements at the deposition of the claims examiner that the supervisor “set the reserve” and “had input with regard to this claim” are insufficient, at this juncture, to require his deposition (*see Yeshiva Tifferes Torah v Keshet International Trading Corp.*, 246 AD2d 538 [2d Dept 1998]).

With respect to that branch of the Plaintiff’s motion seeking leave to renew her motion for summary judgment, the court notes the following: In a prior motion for summary judgment, the Plaintiff, in effect, asked the court to determine for trial, issues of liability respecting the happening of the accident and that she suffered a serious injury (CPLR 3212[g]). In its decision and order dated, July 20, 2010, the court, *inter alia*, denied the branch of the motion seeking a determination respecting liability for the happening of the accident.

In the instant motion, the Plaintiff seeks renewal based on deposition testimony from the claims examiner taken subsequent to the July 20, 2010 order in which she stated that the Defendant had determined that Plaintiff was not responsible for the happening of the accident. Nevertheless, inasmuch as the relief previously requested sought a determination of “liability” –

² The Plaintiff asserts that “[i]f there had been a rejection of coverage, then the basis upon which the carrier reached that conclusion could arguably be discoverable” (Affidavit in Support of Cross Motion at p 7).

³ The claims examiner testified at her deposition that the claim was “put into suit after [she] made the offer” of \$75,000 (Ex. “6” to Plaintiff’s Motion at p 61).

that is, actual responsibility for the happening of the accident, and the evidence presented herein, though germane to Defendant's alleged bad faith, does not establish the fact of Plaintiff's freedom from fault in the accident. Accordingly, the branch of the motion seeking leave to renew is denied.

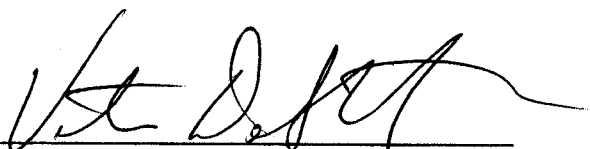
Defendant's Cross Motion

The branch of the Defendant's cross motion seeking an order compelling the Plaintiff to provide an authorization to obtain medical records from the Plaintiff's prior treating orthopedic surgeon (Dr. Daniel Rich) is granted. Notwithstanding Plaintiff's argument that the orthopedic surgeon treated her for unrelated injuries and that she "is not claiming an injury to her knees" (Plaintiff's Affirmation in Opposition and Reply at ¶¶ 20-21), her bill of particulars alleges that she suffered, *inter alia*, a contusion on her right knee and decreased range of motion in her knee and that such injuries will "affect the plaintiff's mobility and consequently the quality of her life" (Ex. "D" to Defendant's Motion). Accordingly, Plaintiff is directed to provide an authorization of the Plaintiff's prior treating orthopedic surgeon.

Based on the foregoing, it is hereby ordered that: the branch of the Plaintiff's motion seeking production of the claim file is granted to the extent indicated herein and said file shall be produced within 15 days of the date hereof; the branch of the Plaintiff's motion seeking a further deposition of ZeZe Giwa-Osagie is granted and such deposition shall be limited in scope to matters pertaining to the claim file and shall take place within 45 days of the date hereof; the Plaintiff's motion is denied in all other respects. The branch of Defendant's cross motion seeking a protective order with respect to its claim file is granted in part and denied in part, as indicated herein; the branch of Defendant's cross motion seeking a protective order regarding the further deposition of Zeze Giwa-Osagie is granted in part and denied in part, as indicated herein; the Defendant's cross motion is, in all other respects, granted, and the Plaintiff shall provide the requested authorization within 15 days of the date hereof.

This constitutes the decision and order of the court.

DATE: September 27, 2011



Hon. Vito M. DeStefano, J.S.C.

ENTERED
SEP 28 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE