Matter of Mercury Ins. Group v Brown-Fort
2013 NY Slip Op 33845(U)
May 1, 2013
Supreme Court, Albany County
Docket Number: 5293-11
Judge: Richard M. Platkin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

STATE OF NEW YORK
SUPREME COURT

COPY

COUNTY OF ALBANY

In the Matter of the Application of
MERCURY INSURANCE GROUP,

Petitioner,

For a Judgment Permanently Staying the Arbitration against

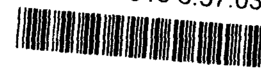
DECISION & ORDER

JOCELYN BROWN-FORT,

Respondent,

-and-

Albany County Clerk
Document Number 11389046
Rcvd 05/03/2013 8:57:03 AM



KHAHONDO ALKEBULAN, MALIKAH A. ALKEBULAN, PROGRESSIVE INSURANCE COMPANY and GEICO INSURANCE COMPANY,

Additional Respondents.

Index No. 5293-11

RJI No.: 01-11-104522

APPEARANCES:

MORGAN MELHUISH ABRUTYN
Attorneys for Petitioner Mercury Insurance Group
(Joseph DeDonato, of counsel)
39 Broadway, Suite 1701
New York, New York 10006

LAW OFFICES OF BRIAN D. RICHARDSON
Attorneys for Proposed Additional Respondent GEICO Insurance Co.
(Brian D. Richardson, of counsel)
4 Airline Drive, Suite 204
Albany, New York 12205

LAW OFFICES OF MARIUS C. WESSER. P.C.
Attorneys for Respondent Jocelyn Brown-Fort
(Marius C. Wesser, of counsel)
323 Washington Avenue, 2nd Floor
Brooklyn, New York 11205

In this proceeding brought pursuant to CPLR article 75, petitioner Mercury Insurance Company ("Mercury") seeks a judgment permanently staying arbitration demanded by respondent Jocelyn Brown-Fort ("respondent"). Previously, Mercury sought an order adding as additional respondents Government Employees Insurance Company ("GEICO"), which is sued here as GEICO Insurance Company, Progressive Insurance Company ("Progressive"), Khahondo Alkebulan ("Mr. Alkebulan"), and Malikah A. Alkebulan ("Ms. Alkebulan"). By Decision & Order dated December 12, 2011, this Court granted the portion of Mercury's motion which sought to add the additional respondents, while temporarily staying the arbitration.[1]

Now, through this motion, petitioner seeks to compel GEICO to comply with petitioner's written demands of September 10, 2012 and November 26, 2012 for a claim file that its representative relied upon during her deposition. GEICO opposes the motion.

BACKGROUND

This proceeding arises from an incident that occurred on October 9, 2010 near the intersection of 1st Street and 26th Avenue in Queens, New York. On that day, respondent, along with her sister, Ms. Alkebulan, and another sister, traveled from Brooklyn to Queens after learning that Mr. Alkebulan was there with Ms. Alkebulan's 2007 Toyota Camry ("the vehicle"). The sisters were seeking to retrieve the vehicle from Mr. Alkebulan. At that time, according to statement by respondent, the Alkebulans were experiencing marital problems, and Mr. Alkebulan had taken the vehicle without Ms. Alkebulan's permission. Upon finding the vehicle parked

---

[1] Subsequently, Progressive was let out of the action.

behind a building in Queens with Mr. Alkebulan and a passenger in it, respondent approached the passenger door, which had a window partially down, seeking to confront Mr. Alkebulan. According to respondent, Mr. Alkebulan started to put the car in reverse, and respondent attempted to toss her cell phone with a "GPS" tracking device into the backseat of the vehicle. During that attempt, respondent's bracelet became caught in the window. Respondent then purportedly ran along the side of the car as it continued to back up until Mr. Alkebulan allegedly turned sharply into respondent. That turn freed respondent's wrist from the vehicle but also caused her to fall to the ground. Respondent eventually was transported to a hospital where she was admitted for approximately 20 days, suffering, among other injuries, fractures to her ribs and skull.

GEICO disclaimed coverage following respondent's submission of a claim. According to that disclaimer letter, GEICO relied, in part, on the intentional act exclusion in the policy, noting: "This disclaimer is made because of [sic] our investigation reveals that you intentionally drove your 2007 Camry Toyota into the person or property of the above name claimant", and also recited that its insured failed to give it timely notice of the claim.

In determining to temporarily stay the arbitration, this Court recited, in pertinent part:

> Since the lack of coverage forming the basis of GEICO's disclaimer rests on a policy exclusion, the timeliness of GEICO's notice of disclaimer becomes an issue (*see Matter of Great Am. Ins. Co. v Tomaino*, 293 AD2d 944, 946 [3d Dept 2002]; *see also Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 189 [2000]). Generally, "[t]he reasonableness of a delay in issuing a disclaimer must be determined from the time the insurer was aware of facts sufficient to disclaim" (*Halloway v State Farm Ins. Cos.*, 23 AD3d 617, 620 [2d Dept 2005], *lv denied* 6 NY2d 708 [2006]; *see Matter of New York Cent. Mut. Fire Ins. Co. v Gordon*, 46 AD3d 1296, 1298 [3d Dept 2007]).

[* 4]

> Here, based on the sparse factual record compiled on the instant application, the Court is unable to determine whether GEICO timely disclaimed coverage (*see* Insurance Law § 3420 [d] [2] [requiring an insurer to give written notice of a disclaimer "as soon as is reasonably possible"]; *New York Cent. Mut. Fire Ins. Co. v Majid*, 5 AD3d 447, 448 [2d Dept 2004]). Further, "timeliness almost always presents a factual question requiring an assessment of all relevant circumstances surrounding a particular disclaimer" (*Continental Cas. Co. v Stradford*, 11 NY3d 443, 449 [2008]). In this instance, the record discloses that the claim arose on October 9, 2010 and that GEICO issued its disclaimer on January 17, 2011. Moreover, GEICO's disclaimer notes an investigation occurred and also lists the insured's non-cooperation as a reason for the disclaimer. Accordingly, GEICO's submissions raise a factual issue whether its disclaimer was timely made, warranting a framed-issue hearing (*see Matter of Victoria Select Ins. Co. v Munar*, 80 AD3d 707, 708 [2d Dept 2011]; *Matter of New York Cent. Mut. Ins. Co. v Davalos*, 39 AD3d 654, 656 [2d Dept 2007]; *Matter of AutoOne Ins. Co. v Hutchinson*, 71 AD3d 1011, 1013 [2d Dept 2010]).

In order to clarify the issues of timeliness for the purposes of the framed issue hearing, petitioner deposed a representative of GEICO pursuant to a September 10, 2012 request which, *inter alia*, requested that such representative "produce their claim file". The deposition took place on November 19, 2012, with the representative, Yasim Arbel, in possession of the claim file. The record reflects that the representative repeatedly referred to the claim file in an effort to refresh her recollection when responding to various questions posed by petitioner's counsel. However, counsel for GEICO refused to allow petitioner's counsel to review the contents of the claim file due to the "proprietary and confidential" nature of its contents. In response, at the conclusion of the deposition, petitioner's counsel requested GEICO's counsel to "review it first, redact[] what he thinks is appropriate, and to just give me a privilege log with regard to that". This request was followed up by written demand on November 26, 2012. In response, GEICO by letter dated December 14, 2012 objected to the demand "based on, but not limited to, the files

and notes are protected by federal and state privacy laws, and are prepared in anticipation of litigation, and therefore protected by attorney client privilege and/or work product doctrine."

Petitioner now moves for production of the claim file, arguing that it is now discoverable as the witness referred to the claim file for her responses. Respondent GEICO objects, arguing that "neither the entire claim file, nor all the claim activity notes were referred to at deposition", and further echoing its objections that it raised in its December 14, 2012 letter. In reply, petitioner argues that the representative referred to the file throughout the deposition on key issues, and privacy issues "cannot be a concern as all the parties (Geico, Brown-Fort and the Alkebulans) are parties to this litigation."

DISCUSSION

The law is clear that "[a] party is deemed to have waived the privilege that applies to materials prepared for litigation if that material is reviewed by a witness to refresh his or her recollection prior to a trial or deposition and the testimony is based, at least in part, on that material" (*Fernekes v Catskill Regional Medical Center*, 75 AD3d 959, 960 [3d Dept 2010]; *see also Stern v Aetna Cas. & Sur. Co.*, 159 AD2d 1013 [4th Dept 1990]). This is so because when used in such a manner by the witness, "they become material affirmatively used in litigation and thus removed from the protection afforded under discovery practice." (*Doxtator v Swarthout*, 38 AD2d 782 [4th Dept 1972]). Further, "the burden of establishing that the documents sought are covered by a certain privilege rests on the party asserting the privilege" (*Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 377 [1991]).

Here, GEICO "failed to assert anything more than boilerplate claims of privilege, which are insufficient as a matter of law" (*Anonymous v High School for Environmental Studies*, 32

AD3d 353, 359 [1st Dept 2006]). Indeed, GEICO has not provided a detailed privilege log in accordance with CPLR 3122, either in response to petitioner's demand for the claims file, petitioner's invitation to GEICO at the deposition to provide such a log for review, or in opposition to the instant motion. Nor has GEICO requested *in camera* inspection of its claim file to test its claim of privilege. And the Court rejects GEICO's contention that the burden falls to Mercury to identify the specific portions of the claims file which the insurer's representative relied upon during the course of the deposition. It is apparent from the deposition transcript that the GEICO representative referred to the file numerous times . Finally, given these repeated references to the claims file during the deposition, GEICO's relevance-based argument is unavailing.

Accordingly, it is

ORDERED that petitioner's motion is granted, and GEICO shall produce the requested claim file within twenty days from service of this Decision & Order upon it with notice of entry.

This constitutes the Decision & Order of the Court. The original of this Decision & Order is being transmitted to petitioner's counsel, all other papers are being transmitted to the Albany County Clerk. The signing of this Decision & Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: May 1, 2013
Albany, New York

RICHARD M. PLATKIN, A.J.S.C.

Albany County Clerk
Document Number 11389046
Rcvd 05/03/2013 8:57:03 AM