

**West St. Props., LLC. v American States Ins. Co.**

2013 NY Slip Op 33870(U)

December 16, 2013

Supreme Court, Westchester County

Docket Number: 54513/2012

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X  
WEST STREET PROPERTIES, LLC.,

Plaintiff

-against-

AMERICAN STATES INSURANCE COMPANY,  
LIBERTY MUTUAL INSURANCE GROUP,  
SAFECO INSURANCE COMPANY of AMERICA and  
SCOTTSDALE INSURANCE COMPANY,

Defendants.  
-----X

LEFKOWITZ, J.

**DECISION and ORDER**  
**Index # 54513/2012**  
**Seq. No. 8**  
**Motion Date: Dec 16, 2013**

The following papers were read on this motion by plaintiff for an order compelling defendant Scottsdale Insurance Company to fully comply with its demand for discovery and inspection dated January 22, 2013 and precluding it from offering any evidence at trial, hearing or on a dispositive motion and for such other and further relief as this court deems just and proper.

- Order to Show Cause dated November 13, 2013
- Affirmation in Support
- Exhibits 1- 31
- Affirmation in Opposition

This declaratory judgment action arises out of damages allegedly caused by the release of home heating oil from an underground fuel storage tank at a residential property located at 57 Kenilworth Road in Harrison, New York on or about December 6, 2007. As a result, in July, 2009, plaintiff, as owner of the property, commenced an action against Anthony Casterella, Cast Construction LLC (a landscaping business operated by Casterella), as well as A & A Industries, LLC and Cast Construction & Son, Inc., alleging that these entities caused and/or contributed to the property damage. Plaintiff ultimately recovered a judgment against these entities. After the judgment debtors failed to satisfy the judgment, plaintiff commenced the present action against the insurance companies of the judgment debtors including defendant, Scottsdale Insurance Company (hereinafter to be referred to as Scottsdale), by way of motion for summary judgment in lieu of complaint, seeking to recover the amount of the judgment under the judgment debtors' liability policies. Scottsdale had issued a primary policy to Cast Construction, LLC., and a separate excess policy to A & A Industries, LLC. Plaintiff's earlier motion for

summary judgment was denied.

The basis for plaintiff's present motion is twofold: (1) Scottsdale's alleged failure to produce its entire file in response to plaintiff's document request; and (2) Scottsdale's delay in producing a witness for deposition and its failure to produce a representative for deposition with adequate knowledge of the issues involved in this matter.

Presently, plaintiff seeks an order compelling Scottsdale to produce its entire file pertaining to plaintiff and the oil spill of December, 2007. In its notice for discovery and inspection dated January 22, 2013, plaintiff seeks, in item no. 19, Scottsdale's entire file pertaining to plaintiff, Great American Development, New England Tank, Cast Construction LLC, Cast Construction & Son LLC, A & A Industries Inc., Anthony Casterella and the subject oil spill. In item no. 20, plaintiff seeks Scottsdale's entire file pertaining to plaintiff, Great American Development, New England Tank, Cast Construction LLC, Cast Construction & Son LLC, A & A Industries Inc., Anthony Casterella and the underlying litigation known as *West Street Properties, LLC v A & A Industries, LLC, et al.*, index no. 14364/2009. In item no. 21, plaintiff seeks Scottsdale's entire file pertaining to plaintiff, Great American Development, New England Tank, Cast Construction LLC, Cast Construction & Son, LLC, A & A Industries Inc., Anthony Casterella and the litigation known as *American States Insurance Company v A & A Industries, LLC, et al.*, index no. 10930/2011. Finally, in item no. 22, plaintiff seeks any and all documents, including but not limited to, interoffice memos and emails pertaining to plaintiff, Great American Development, New England Tank, Cast Construction LLC, Cast Construction & Son LLC, A & A Industries Inc., Anthony Casterella and the subject oil spill.

In its response to plaintiff's discovery notice, dated May 23, 2013, Scottsdale objected to the abovementioned requests. Scottsdale objected to item no. 19 on the basis of it being overly broad and unduly burdensome, vague and ambiguous, exceeding the permissible scope of discovery and irrelevant, seeking information that was generated by Scottsdale after this action was commenced or in anticipation of it, seeking information and/or documents relating to insurance policies other than the insurance policies at issue in this matter, and seeking confidential commercial information. Item nos. 20 and 22 were objected to on these same grounds and additionally that these requests were duplicative. Item no. 21 was objected to on the basis of it being overly broad and unduly burdensome, vague and ambiguous, exceeding the permissible scope of discovery and irrelevant, seeking information that was generated by Scottsdale after this action was commenced or in anticipation of it, seeking confidential commercial information and seeking documents and/or information that is within plaintiff's possession.

Plaintiff concedes that Scottsdale did provide the insurance policy including common policy declarations, schedule of forms and endorsements, schedule of locations, endorsements, commercial general liability coverage form, notice of cancellation, nonrenewal, conditional renewal of change in terms, conditions or rates, and the certificate of insurance.

Plaintiff states that Scottsdale produced a witness for deposition on October 7,

2013. According to plaintiff, this witness was produced after a lengthy delay caused by Scottsdale. Plaintiff asserts that during her deposition, the witness identified several documents in Scottsdale's files that were not provided to plaintiff. Plaintiff states that during her deposition it learned that Scottsdale had not provided to it certain documents and that at the deposition it called for their production. The documents requested are: copies of the claim notes in connection with this claim; copies of documents in the underwriting file; copies of documents pertaining to any audit or audits; copies of any correspondence contained within the underwriting; copies of the audit file; copies of notes pertaining to the audit and the reason the notice of cancellation was not generated between February 14, 2007 and November, 2007; a copy of the entire underwriting file in connection with this matter; a copy of the entire claim file subject to whatever documents counsel claims privilege on; a copy of the underwriting file and any claim file with regard to the excess policy issued to A & A Industries, LLC; a copy of the claim in connection with the oil spill for the excess policy; and, copies of any and all claim files that Scottsdale has in connection with the subject oil spill at Kenilworth Road made to Scottsdale on behalf of anyone.

Plaintiff states that Scottsdale never provided it with a privilege log and that, but for the witness' identification of these documents during her deposition, plaintiff would have been unaware that these documents existed. Plaintiff asserts that Scottsdale has failed to provide its entire file pertaining to plaintiff as requested in its notice dated January 22, 2013 and asserts that Scottsdale should be compelled to provide the documents identified at the deposition.

Plaintiff also asserts that Scottsdale repeatedly delayed in producing a witness for deposition and that when it finally did produce a witness, she was unfamiliar with this matter. Plaintiff notes that this court issued four compliance conference orders directing Scottsdale to produce a witness to be deposed: an order dated May 9, 2013; an order dated June 20, 2013; an order dated August 6, 2013; and, an order dated September 16, 2013. Plaintiff asserts that this willful and contumacious conduct in delaying the deposition warrants precluding Scottsdale from offering evidence in this matter.

This motion is opposed by Scottsdale. Scottsdale's position in this matter is that coverage for plaintiff's judgment in the underlying action is not available because: Scottsdale cancelled the coverage prior to the date of the alleged property damage; any potential coverage for the spill is precluded by a policy exclusion; and, any potential coverage is further vitiated due to the failure of the insured (Cast Construction, LLC) and plaintiff to provide timely notice.

Scottsdale notes that according to plaintiff, the term entire file means the specific underwriting documentation. Scottsdale contends that this intention is not clear from the wording in the January 22, 2013 demand and its failure to earlier provide underwriting documents cannot serve as a basis for a motion pursuant to CPLR 3126 or 3124. Scottsdale notes that it has now provided relevant and unprivileged portions of its underwriting files for the primary commercial general liability policy covering the period February 14, 2007 to February 14, 2008 (policy # CLS 1348568), cancelled on November 18, 2007, for non payment, and also for the preceding primary policy. Scottsdale notes that it previously produced the relevant certificate of insurance.

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Scottsdale further asserts that plaintiff is not entitled to discovery regarding the 2008-2009 excess policy issued to A & A Industries LLC. Scottsdale notes that this policy was not in place at the time the December, 2007 oil spill at issue occurred. Scottsdale states that the excess liability policy (XLS0050741) was in effect from April 15, 2008 to June 9, 2008. Scottsdale further notes that plaintiff has not sought recovery under the primary and excess policies issued to A & A Industries LLC by defendant American States Insurance Company and by it, respectively, for the 2008-2009 policy period. Scottsdale asserts that it should not be compelled to produce any documentation relating to the excess policy issued to A & A Industries LLC, much less any underwriting documentation, as that policy bears no relevance to the claims at issue.

Scottsdale asserts that its entire claim file is privileged. Scottsdale states that its first notice of the facts and circumstances relating to this claim came in the form of a judgment served on it in February, 2012. The instant action was commenced in March, 2012. Scottsdale notes that service of an unsatisfied judgment on the judgment debtor and its insurer is a prerequisite to the commencement of a direct action under the Insurance Law § 3420 (a)(2). Accordingly, any and all correspondence or documentation generated or received by Scottsdale in this matter is shielded from discovery. Scottsdale has provided a privilege log regarding its claim file for this matter.

Scottsdale also asserts that plaintiff is not entitled to a preclusion order. Scottsdale notes that it reasonably and properly produced a claims professional, as opposed to an underwriting professional, for deposition in this matter. Scottsdale also states that its "delay" in producing a witness for deposition was due in part to the complications arising from family commitments of the deponent it initially intended to produce. Scottsdale also notes that some potential deposition dates were ruled out due to plaintiff's commitments.

CPLR 3101 (a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action regardless of the burden of proof." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Foster*, 74 AD3d at 1140; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The Court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

On this motion, plaintiff claims Scottsdale failed to provide to it the entire file it requested in January, 2013, providing to it only the policy but not the underwriting documents. Plaintiff asserts that entire file includes an underwriting file. However, the court finds that it is not unequivocally clear that the entire file includes the underwriting file. Moreover, plaintiff has not demonstrated that production of the underwriting file will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims of this action, mainly that defendants are obligated to pay the judgment obtained by plaintiff against their insureds pursuant to the Insurance Law § 3420 (b)(1). In any event, as plaintiff conceded at the oral argument of this motion, Scottsdale has now provided to plaintiff relevant and unprivileged portions of the underwriting file.

The Court notes that at her deposition, Scottsdale's witness testified that the excess policy was issued after the underlying accident occurred. In its papers in opposition to this motion Scottsdale has attached a copy of the excess liability policy issued to A & A Industries, LLC. The policy covers the period from April 15, 2008 to May 15, 2009. Additionally, counsel for defendant American States earlier conceded ( in an affirmation in opposition to plaintiff's motion for summary judgment in lieu of complaint) that American States issued the commercial general liability policy of insurance to A & A Industries, LLC. Accordingly, the court finds that plaintiff has not demonstrated that production of the underwriting file in reference to this excess liability policy will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims of this action.

In response to plaintiff's request for the claim file, Scottsdale explains that the entire claim file is privileged and has provided a privilege log regarding its claim file for this matter.

Finally, pursuant to CPLR 3126 a court may impose discovery sanctions including preclusion of evidence where a party refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed. To invoke the drastic remedy of preclusion a court must determine that the offending party's lack of cooperation with disclosure was willful, deliberate and contumacious (*Aha Sales, Inc. v Creative Bath Prods., Inc.*, 110 Ad3d 1020 [2d Dept 2013]). Here, it cannot be said that Scottsdale's conduct in the discovery process, including delays in scheduling the deposition of Scottsdale's witness, was in any way willful or contumacious. The court further finds that under the circumstances of this case, including the equivocalness of plaintiff's requests regarding what was intended by entire file, it was not improper for defendant to produce as its witness for deposition, a (claims) technical consultant whose job it was to assist in coverage matters and whose expertise was in answering technical questions about a file. Accordingly, an order of preclusion is improper.

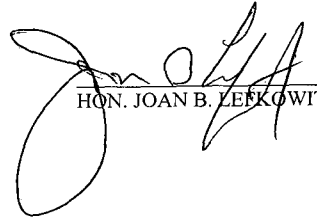
In light of the foregoing, it is:

ORDERED that plaintiff's motion is denied in its entirety; and it is further,

ORDERED that all parties appear for a conference in the Compliance Part, Room 800, on January 21, 2014, at 9:30 A.M.; and it is further,

ORDERED that plaintiff serve a copy of this order with notice of entry upon all counsel within 10 (ten) days of entry.

Dated: White Plains, New York  
December 16, 2013

  
HON. JOAN B. LEFKOWITZ, JSC

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