

<b>Mancino v Fingar Ins. Agency</b>
2014 NY Slip Op 30005(U)
January 2, 2014
Supreme Court, New York County
Docket Number: 653754/2012
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: Hon. EILEEN A. RAKOWER PART 15  
*Justice*

JANET K. MANCINO and RICHARD MANCINO,

Plaintiffs,

- v -

FINGAR INSURANCE AGENCY and  
DOROTHY LABOUNTY,

Defendants.

INDEX NO. 653754/2012  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 4  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for/to

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answer — Affidavits — Exhibits _____	4, 5
Replying Affidavits _____	5, 7, 8, 9

Cross-Motion:  Yes  No

On or about October 26, 2012, Plaintiffs Janet K and Richard Mancino (“Plaintiffs”) commenced this action against Defendants Fingar Insurance Agency (“Defendant” or “Fingar”).

The Complaint alleges causes of action for breach of contract, negligent misrepresentation, and professional negligence. The Complaint alleges that Plaintiffs engaged Fingar as its insurance broker, that Fingar procured home insurance policies for Plaintiffs, that these policies proved to be inadequate and insufficient to cover a loss that they sustained after Plaintiffs’ home was burglarized, and that Plaintiffs suffered damages as a result.

More specifically, Plaintiffs allege that on July 2, 2012, Plaintiffs returned from a weekend trip to discover that someone had broken into their apartment and stolen jewelry, electronics and other valuables. Plaintiffs notified Fingar, their insurance broker, of the burglary and allege that they were shocked to learn that, contrary to Fingar’s representations and in contravention of their express instructions, the coverage that Fingar had placed for them with Travelers did not

come close to covering Plaintiffs' substantial loss. Plaintiffs allege that at various times prior to the burglary, Dorothy LaBounty, Fingar's representative, informed Plaintiffs that Fingar had procured insurance for Plaintiffs that provided "full replacement value" in coverage in the event that their personal items were lost or stolen.

In their responses to Fingar's interrogatories, Plaintiffs have alleged "quantifiable loss of \$158,000" of which Travelers agreed to pay \$44,000, and Plaintiffs seek the outstanding amount of \$114,000 in this lawsuit.

Plaintiffs now move pursuant to CPLR §3124 to compel Fingar to disclose the following: (1) documents responsive to Plaintiffs' document requests 1,2, and 5, including Fingar's certificates of incorporation, minutes, and employee policy manual(s); (2) unredacted version of FIN 0262; (3) unredacted version of FIN 0277; and (4) electronic version of Fingar's electronically stored information in native format and with TIFF images.

Fingar cross moves for an Order pursuant to CPLR §3103(a) (1) denying and/or limiting Plaintiffs' First Request for Production and Inspection by striking request nos. 1, 2, and 5, and directing that Fingar is not compelled to produce certificates of incorporation, minutes, and "employee policy manual(s)", (2) directing that Fingar is not compelled to produce unredacted versions of documents previously produced, bate-stamped FIN 0262 and FIN 0271, and (3) directing that Fingar is not compelled to produce electronically stored information (ESI) that has been produced in hard-copy form, or, in the alternative, conditioning Fingar's production of ESI on the shifting of the costs of such production to Plaintiffs.

CPLR §3101(a) generally provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and that "[t]he test is one of usefulness and reason" (*Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]). However, a party is not required to respond to discovery demands which are "palpably improper." A demand is palpably improper if it seeks information which is irrelevant or confidential, or is overbroad and unduly burdensome (*Gilman & Ciocia, Inc. v.*

*Walsh*, 2007 NY Slip Op 8410, \*1 [2nd Dept. 2007]).

However, CPLR §3103(a) provides that:

The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

Plaintiffs seek to compel responses to document requests 1, 2 and 5 of their demands, which seek documents concerning Finger's organizational structure (request no. 1); Articles of Incorporation, Operating Agreement(s), and all Annual Reports (request no. 2), and employee handbooks and/or manuals (request no. 5). Plaintiffs contend that Defendant's "employee handbooks are likely to shed light on standards and requirements that Finger has regarding the underwriting of its clients' insurance needs and the suitability of specific types of insurance or insurance companies for particular clients on their risk profiles" and "such materials could establish an internal standard of conduct the deviation from which provide proof of negligence."

Plaintiffs contend that the Finger's "*corporate minutes are likely to contain information about Mancinos' account and their claim*, as well as the financial incentives Finger obtained for placing insurance with companies that may have not been suitable insurers for the Mancinos." (emphasis added). Plaintiffs further contend that their request for "[d]ocuments sufficient to show the organization structure of Finger from 2000 to the present, including but not limited to the senior management and/or offices of Finger" and "Defendant's Articles of Incorporation, Operating Agreement(s), and all Annual Reports" is "designed to help Plaintiffs gain an understanding of the organization and management of Finger, the relationship and reporting relationship among the individuals involved with Finger, the manner in which decisions are made at Finger, and the parties that make those decisions.

Defendant opposes and cross-moves for a protective order with respect to the same.

Here, Plaintiffs' requests 1, 2, and 5, as written, are overly broad and unduly burdensome. Plaintiffs fail to specifically and narrowly identify the information sought. While discovery is liberal, it is not unfettered and cannot be used as a fishing expedition.

Plaintiffs also seek unredacted versions of two documents produced by Fingar in discovery. Fingar opposes and seeks a protective order with respect to the same.

FIN 0262 is a 63 page document entitled "Activity Report" produced by Defendant which documents Fingar's insurance brokerage activities undertaken on behalf of Plaintiffs. Fingar redacted a portion of the last page of the document, which Fingar asserts is an entry dated July 3, 2012 that contains material prepared in anticipation of litigation. The entry was made a day after Plaintiffs discovered their home had been burglarized. Defendant contends that Mr. Mancino threatened litigation to Ms. LaBounty, Defendant's employee, on the same day that he advised Fingar of the loss. Plaintiffs further contend that the Activity Report is a document prepared as part of normal business routine, and that even if the redacted portion was prepared in anticipation of litigation, Plaintiffs are entitled to the redacted materials based on a substantial need and inability to obtain the equivalent of the materials by other means.

Here, Fingar has not established a privilege with respect to the redacted entry and therefore is compelled to produce the entry in unredacted form.

FIN 0271 is Traveler's "Schedule of Personal Insurance Commissions: New York Effective January 1, 2013" produced by Defendant. Fingar redacted commission rates on the basis that the information redacted was Travelers' proprietary information and that the issue of the production of that document might be resolved by the Subpoena served on Travelers by Plaintiffs. Plaintiffs have now obtained an unredacted version of FIN 0271 from Travelers, and their request for the same from Fingar is now moot.

Plaintiffs also seek to compel the production of electronically stored information ("ESI") in native form with TIFF images at Fingar's expense in order to view document metadata, which includes information regarding the author(s), dates of creation, and dates of edits to determine whether the Activity Report entries were edited after their date of initial creation or commencement of litigation. Fingar opposes, contending that Plaintiffs are not entitled to such a production as issues

concerning metadata are not involved in this lawsuit and electronic document production is therefore not necessary. Furthermore, Defendant contends the cost should be borne by Plaintiffs in any event. Defendant states that the cost of producing the documents in “native format” would be \$3,500 and the production of the documents in “TIFF” format would be a “laborious task.”

Generally, the producing party bears the costs of production, even with respect to electronically stored information such as emails. However, costs may be shifted in the court’s discretion upon evaluating the following seven factors:

“1. [t]he extent to which the request is specifically tailored to discover relevant information; 2. [t]he availability of such information from other sources; 3. [t]he total cost of production, compared to the amount in controversy; 4. [t]he total cost of production, compared to the resources available to each party; 5. [t]he relative ability of each party to control costs and its incentive to do so; 6. [t]he importance of the issues at stake in the litigation; and 7. [t]he relative benefits to the parties of obtaining the information.”

*U.S. Bank Nat. Ass’n v. GreenPoint Mortgage Funding, Inc.*, 94 A.D. 3d 58, 63-64 [1<sup>st</sup> Dept 2012](citing *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 317-18 [S.D.N.Y. 2003]).

Here, Plaintiffs are entitled to the production of the documents in native format with TIFF images. Furthermore, Fingar, the producing party, is to bear the costs of production and there is no basis to shift costs.

Wherefore, it is hereby,

ORDERED that Plaintiffs’ motion is granted only to the extent that Defendant is directed to produce documents requested in native format with TIFF images at Defendant’s expense and to produce an unredacted version of FIN 0262; and it is further

ORDERED that Defendant’s cross motion is granted only to the extent that requests nos. 1, 2, and 5 of Plaintiffs’ First Request for Production and Plaintiffs’ request for an unredacted version of FIN 0271 from Defendant are stricken and Defendant is not compelled to respond to the same.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: JANUARY 2, 2014

  
HON. EILEEN A. RAKOVER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE