

Ling v Kemper Independence Co.
2015 NY Slip Op 31049(U)
June 18, 2015
Supreme Court, New York County
Docket Number: 650092/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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THOMAS LING,

Plaintiff,

- v -

Defendant.
-----X

Index No.
650092/2014

**DECISION AND
ORDER**

Mot. Seq. 4, 5, 6

KEMPER INDEPENDENCE CO.,

HON. EILEEN A. RAKOWER, J.S.C.

This is an action for breach of an insurance contract and false and deceptive business practices based on, *inter alia*, a homeowner insurance policy that defendant, Kemper Independence Co. ("Defendant" or "Kemper"), issued to Plaintiff Thomas Ling ("Plaintiff" or "Ling"). Plaintiff alleges that Kemper wrongfully denied coverage for the property damage and theft that Ling's contractor, Kellam Clark ("Clark"), purportedly caused in Ling's home, in connection with certain construction work.

As alleged in the Complaint, the policy issued by Kemper is a homeowner insurance policy which covers "all risk of direct loss to property." In 2013, Plaintiff requested that Kemper cover damage to his home arising from Clark's negligence, trespass, and conversion of property. Plaintiff alleges that in the course of Clark's renovations to Plaintiff's home, Clark caused a flood, holes in the walls, and blocked windows, among other damage. Plaintiff further alleges that to coerce additional payments, Clark stole Plaintiff's property, including his dishwasher, cabinets, shelves, and closets. By letter dated November 13, 2013, Kemper denied coverage on the grounds that "the current condition of your home is a result of a contract and payment dispute between you and your contractors ... Based on this information there is a question as to whether the contractor was recovering their work product to minimize losses on an unpaid bill."

Plaintiff argues that while Kemper relies on its basic policy form, the Policy at issue here is Kemper's "Ultimate" level of coverage. Plaintiff contends that the "Ultimate Endorsement" of the "Ultimate" Policy deletes the stated risk section of the basic policy and provides coverage for "all perils." Furthermore, Plaintiff contends that both the police and Kemper's adjustor concluded that the contractors' conduct constituted theft, a covered risk even under the basic policy.

An Order was entered on December 9, 2014 on the parties' discovery motions.

Mot. Seq. 004:

Kemper now moves for an Order, pursuant to CPLR § 2221, clarifying this Court's decision dated December 9, 2014, respecting Plaintiff's and Defendant's previous motions to compel discovery and for the issuance of a protective order, and to reargue to the extent necessary. Kemper specifically seeks clarification as to the document that Kemper was directed to produce. This Order provides clarification of the Court's previous Order, and specifies the categories of documents which Kemper is to produce.

Additionally, Kemper moves for an Order, pursuant to CPLR § 603, severing Ling's second cause of action. Kemper's request for a severance of Plaintiff's second cause of action is denied.

Mot. Seq. 005:

Plaintiff moves for an Order, pursuant to CPLR § 3126 and 22 NYCRR § 130-1.1, imposing sanctions including dismissal of Defendant's pleadings, costs, and attorney's fees for Defendant's willful and contumacious refusal to comply with court-ordered discovery and other frivolous conduct; and, pursuant to CPLR § 3124, compelling Defendant to produce documents in response to Plaintiff's Third Request for Documents and respond to Plaintiff's Second Set of Interrogatories, including the use of specified search term, and suspending any further stay of disclosure. Plaintiff's request for sanctions is denied.

Mot. Seq. 006:

Kemper moves for an Order, pursuant to CPLR § 3126 and 22 NYCRR § 130-1.1, imposing sanctions and placing Ling in contempt of court pursuant to CPLR § 753. Kemper's motion for sanctions and contempt is denied.

Oral argument was held. This Order resolves the above motions, and clarifies the Court's Prior Order.

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]). In addition, CPLR § 3130 and 3131 permit a party to serve interrogatories that “relate to any matters embraced in the disclosure requirements of [CPLR §3101]”. 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 [2d Dep’t 2007]).

“Compliance with disclosure requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully. When the response to a discovery request is, in effect, that there are no responsive documents within the party’s custody, possession, or control, that party must provide a detailed statement setting forth the past and present status of the relevant documents; where they were kept; what efforts, if any, were made to preserve them; the circumstances surrounding their disappearance or destruction; and the means and methods used to conduct a search for them. In short, the affidavit submitted must provide the court with a basis to find that the search conducted was a thorough one or that it was conducted in a good faith effort to provide the necessary records to the plaintiff” (*In re Bernfield*, 990 N.Y.S 2d 436 [N.Y. Surr. 2014]). “Bald and conclusory assertions by [respondents] that they have no documents in their possession responsive to the plaintiff’s demands are clearly insufficient.” (*Id.*).

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.

The party moving for a protective order bears the burden of demonstrating that the disclosure sought is improper, and must offer more than conclusory assertions that the requested disclosure is overbroad or unduly burdensome. (*see Sage Realty Corp. v. Proskauer Rose, L.L.P.*, 251 A.D.2d 35, 40 [1st Dept. 1998]).

Pursuant to CPLR § 3126, a court may impose sanctions when a party willfully fails to disclose information which the court finds ought to have been disclosed. The sanction of striking a party's answer is warranted when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court. (*Yoon v. Costello*, 29 A.D.3d 407 [1st Dep't 2006]).

A. Plaintiff's Document Demands

Plaintiff's First Request for Documents to Kemper ("First Request") sought four categories of documents: (1) documents addressing Plaintiff's request for coverage and Kemper's denial of the same; (2) all communications concerning the claim including those sent to or from Kevin Frey, Jill Kutsch, Robert Cashier, or Greg Houlihan; (3) any claims manual or guidelines relevant to your review or denial of the Claim; and (4) documents upon which Kemper intends to rely at trial. Plaintiff served his First Request on January 15, 2014.

Plaintiff served his Second Request for Documents ("Second Request") and Revised First Set of Interrogatories (Interrogatory) seeking documents and information related to the following Kemper's review of Plaintiff's claim, Kemper's treatment of similar claims; Kemper's alleged unfair practices; Kemper's insurance and reinsurance; and the factual basis of Kemper's contentions. The Second Request includes those requests made in the First Request. Accordingly, a separate analysis of Kemper's response to Plaintiff's First Request is not needed.

Plaintiff also requests that Kemper employ, at the least, the following in the search for responsive electronic as well as any additional search terms or custodians as may be necessary to identify all responsive documents:

- a. Search terms: documents: Ling; Clark; Neale; "Notjusthandymen" or "not Just handymen" or "notjusthandymen.com" or "service junction"; 220 /3 (5th or fifth or 5); 2013-009-05556; UG 53945; "All risk" or All-risk; "physical loss to property"; HO 0006 (ed. 04 91); VS 2132 (04

10); Theft; (Loss or lost or loss or impaired) /3 (use or enjoyment); “bad faith” or “good faith” or unjust or improper; Goodovitch; jandslaw.com; “Paul G.”; plrb.org; Houlihan;

b. Custodians: everyone person involved in the evaluation of Plaintiff claim under the Policy, including, at the least, Kevin Frey, Jill Kutsch, Robert Cashier, Greg Houlihan, Albert Chan, Shannon Cini, Secundra Parker, Yolanda, Schneiderman, Rhonda Gentry, Misty Zerkel, Doug Chu, Gary Leone

The Second Request requested the following documents:¹

1. Any documents contained in or related to any claim file for the Claim, including but not limited to notes, documents, or memoranda from each and every person involved in the investigation, review, or rejection of the Claim.

At oral argument, Plaintiff stated that Defendant has produced documents in response to this demand.

2. Any documents contained in or related to any claim for any Similar Claim, including but not limited to notes, documents, or memoranda from each and every person involved in the investigation, review, or rejection of the Claim.

At oral argument, Plaintiff stated that Defendant *has not* produced documents in response to this demand. At oral argument, Kemper’s counsel stated that there have been no similar claims made against Kemper. Kemper is directed to produce an affidavit from a person with knowledge attesting to Kemper’s counsel’s representation that no similar claims were made against Kemper.

¹Ling’s Second Request defined “policy” as “policy number UG 53945 or any other policy issued by you to Ling.” “Similar Claims” was defined as “claims by and person or entity insured by You and relating to loss caused by contractors, including property damage, trespass, conversion, theft or any other claims similar to the Claim.” The terms “You” and “Yours” referred to “Kemper Independent Insurance Co. as well as any parent, subsidiary, affiliate, employees or agents.”

3. Any documents related to any claim audit for the Claim. At oral argument, Plaintiff stated that Defendant has responded to this request; Kemper states that they do not have any responsive documents. Kemper is directed to produce an affidavit to that effect as directed above.
4. Any documents related to any claim audit for any Similar Claim. At oral argument, Kemper's counsel stated that there have been no similar claims made against Kemper. Kemper is directed to produce an affidavit to that effect as directed above.
5. Any documents related to Your reserve amount for the Claim, including but not limited to, documents related to the original reserves and all changes, and methods and criteria for setting reserves. Kemper is directed to produce responsive documents to this request.
6. Any documents related to Your reserve amount for any Similar Claim, including but not limited to, documents related to the original reserves and all changes, and methods and criteria for setting reserves. At oral argument, Kemper's counsel stated that there have been no similar claims made against Kemper. Kemper is directed to produce an affidavit to that effect as directed above.
7. Any document related to your valuation of loss suffered by Ling in connection with the Claim. At oral argument, Plaintiff stated that Kemper has failed to produce any documents in response to this demand. Kemper is directed to produce all responsive documents to this demand. If there are no responsive documents within Kemper's custody, possession, or control, Kemper must provide a detailed statement concerning the means and methods that Kemper used to conduct a search for the requested documents. Kemper must employ the search terms suggested by Ling.
8. Any communications concerning the Claim, including, but not limited to, those sent to or from Kevin Frey, Jill Kutsch, Robert Cashier, Greg Houlihan, or any reinsurer, and any documents relating to such Communications.

At oral argument, Plaintiff stated that he is specifically requesting documents, including emails, between those decision makers and individuals who were involved in the determining his claim. Plaintiff

stated that to date, Kemper has provided eight documents in response to this request, which includes two emails. Kemper is directed to provide supplemental documents in response to this request. If there are no additional documents within Kemper's custody, possession, or control, Kemper must provide a detailed statement concerning the means and methods that Kemper used to conduct a search for the requested documents as directed above. Kemper must employ the search terms suggested by Ling.

9. Any document relating to Your handling of the Claim and Similar Claims. The requests include, but is not limited to, any claims manual, policy statements, claim procedure guide, claim reference guide, claim supervision manual, claim settlement policies, supervisor's and manager's manuals.

At oral argument, Plaintiff specified that this request seeks claims manuals and policies that relates to how Kemper deals with an open peril policy in conjunction with the basic policy. Kemper is directed to provide documents in response to this request, or if none exists, provide an affidavit stating to that effect.

10. Copies of the personnel records for any person involved in the investigation, review, or rejection of the Claim, including, but not limited to, CVs, resumes, performance evaluations, letters of recommendation or complaint.

The Court stands by the previous Order in which it stated that Plaintiff had failed to make a sufficient showing of necessity respecting Plaintiff's request for Kemper's personnel records, and had granted Kemper's protective order with respect to the same.

11. Any documents relating to the meaning, interpretation, application, or revision of forms HO 0006 (ed. 04 91), VS 2132 (04 10), or VS 2132 (05 12).

Kemper is directed to provide documents in response to this request, or if none exists, provide an affidavit to that effect as directed above.

12. Any document hold notice issued in connection with the Claims.

Kemper is directed to provide documents in response to this request, or if none exists, provide an affidavit to that effect as directed above.

13. Any Documents upon which you rely in answering any of Plaintiff's interrogatories. Kemper is directed to provide documents in response to this request.
14. A copy of any insurance or reinsurance policy that may apply to satisfy any judgment in these proceedings.

At oral argument, Plaintiff stated that Kemper has failed to produce a copy. Kemper is directed to produce a copy of the policy, or if none exists, provide an affidavit to that effect as directed above.

15. Copies of any decision, order, or judgment entered against You by any court or administrative agency and relating to bad faith denial of coverage, breach of the covenant of good faith and fair dealing, or unfair claim settlement practices.

At oral argument, Plaintiff stated that he has done his own search and not all of the decisions have been published. Kemper is directed to provide documents in response to this request, or if none exists, provide an affidavit to that effect as directed above.

16. Copies of your tax returns for 2011 through 2014.

The Court stands by the previous Order in which it stated that Plaintiff had failed to make a sufficient showing of necessity respecting Plaintiff's request for Kemper's tax returns, and had granted Kemper's protective order with respect to the same.

17. Copies of your annual audited financial statements prepared for 2011 through 2014. Plaintiff has failed to make a sufficient showing of necessity respecting Plaintiff's request for Kemper's financial statements.
18. All documents upon which You intend to rely at trial. Kemper is directed to provide documents in response to this request.

Plaintiff served a Third Request for Documents (“Third Request”), dated December 26, 2014. The Third Request requested the following documents: (1) any documents relating to “the meaning, interpretation, application, or revision of Your forms VS 2132, VS 1743, VS 2133, or VS 2146,” (2) copies of each version of those forms; (3) any documents upon which Kemper relied in answering Plaintiff’s interrogatories; and (4) copies of any decision, order or judgment entered against Kemper by any court or administrative agency “relating to bad faith denial of coverage, breach of the covenant of good faith and fair dealing, or unfair claim settlement practices.” These requests overlap with Plaintiff’s previous discovery demands. Again, Kemper is to provide responsive documents or affidavits as set forth above.

Plaintiff’s Interrogatories

Plaintiff also served a Revised Set of Interrogatories dated July 28, 2014, and a Second Set of Interrogatories, dated December 26, 2014. Kemper responded to Plaintiff’s Revised Set and Second Set of Interrogatories. The majority of Kemper’s responses are blanket objections. Kemper is directed to supplement its responses to both sets of interrogatories with specific, proper, complete, and verified responses.

Kemper’s Discovery Demands

Kemper served a Notice for Discovery and Inspection, dated April 30, 2014 (“Document Demand”), upon Ling, which requested various categories of documents, which is annexed as to Kemper’s motion papers. Ling responded to Kemper’s Notice on May 9, 2013. Kemper argues that while Ling provided some documents, Ling failed to respond to most of them and that approximately 33 items were not provided or addressed. Kemper also argues that the documents produced where in “utter disarray without any order,” contained “duplicates and irrelevant documents, such as pictures of an individual standing in front of the White House and another by a bonfire”, and “ignored Kemper’s notice that printed copies were not included” and that Kemper rejected services of documents in electronic form.”

Kemper requests that Ling supplement his production, identify the documents that correspond to Kemper’s requests, and produce the documents in hard copy. Pursuant to CPLR 3122 (c), “[w]henever a person is required ... to produce documents for inspection, that person shall produce them as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request.”

Ling is directed to supplement its responses, produce all items of discovery that remain outstanding, provide hard copies, and to provide a written response to Kemper's document demands identifying which documents correspond to each of Kemper's numbered requests. If they do not exist, Ling is to produce an affidavit to that effect.

Kemper served a Supplemental Notice for Discovery and Inspection ("Supplemental Notice"), dated August 27, 2014, requesting copies of any Stipulations of Discontinuance, Stipulations of Settlement, Releases, Settlement Agreements, Confidentiality Agreements, and Settlement and/or Discontinuance with regard to any aspect or claim in the matter of *Thomas Ling v. Kellam Clark, Ed Neal, and Service Junction, LLC*, bearing index No. 151691/2013, venued in Supreme Court, New York County. Ling is directed to respond to the Supplemental Notice.

Wherefore, it is hereby

ORDERED that Kemper shall produce all documents and information responsive to Plaintiff's Revised First Set and Second Set of Interrogatories and First, Second, and Third Document Requests or provide an affidavit if no responsive documents exist as directed above within 30 days of service of this order with notice of entry; and it is further

ORDERED that Ling shall produce all documents and information responsive to Kemper's Document Demand and Supplemental Notice or provide an affidavit if no responsive documents exist within 30 days of service of this order with notice of entry; and it is further

ORDERED that the parties' respective motions for sanctions against each other are denied.

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

DATED: JUNE 18, 2015

JUN 18 2015


EILEEN A. RAKOWER, J.S.C.