Richard Avedon Found. v AXA Art Ins. Corp.
2015 NY Slip Op 32302(U)
December 4, 2015
Supreme Court, New York County
Docket Number: 151435/2014
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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THE RICHARD AVEDON FOUNDATION,

Petitioner/Plaintiff,

Index No. 151435/2014

- against -

Decision and Order

AXA ART INSURANCE CORPORATION,

Respondent/Defendant.

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JOAN B. LOBIS, J.S.C.:

This is an insurance-related dispute regarding photographer Richard Avedon's renowned work "The Chicago Seven, September 25, 1969" ("the Work"). Undisputedly, the Work sustained water damage and The Richard Avedon Foundation ("Avedon") filed an insurance claim with its insurer, AXA Art Insurance Corporation ("AXA"). After AXA provided a valuation that differs dramatically from Avedon's appraisal, Avedon initiated this proceeding, which it subsequently amended and converted to a hybrid Article 75 proceeding and plenary action.

Currently the Court has before it motion sequence number nine, in which Avedon seeks a protective order and an order quashing the nonparty subpoenas AXA served on employees of James D. Miller & Co. LLP (Miller) and Rubenstein Associates (Rubenstein), along with AXA's cross-motion to compel the disclosure; and motion sequence number ten, seeking for a protective order and order quashing the nonparty subpoena on Sarah Morthland, along with AXA's cross-motion to compel the disclosure. The Court consolidates the motions for disposition. It notes

that the parties have withdrawn motion sequence number nine and the accompanying cross-motion as they relate to Miller, leaving only the issue of Rubenstein's subpoena for determination.

In its February 4, 2015 decision, the Court thoroughly discussed the background of this matter, the claims Avedon asserts in its pleadings, and AXA's pre-answer objections to the lawsuit. The Court incorporates this background by reference, except to reiterate that the parties vehemently dispute the pre- and post-damage value of the Work, and proceeds to the motions at hand.

With respect to motion sequence number nine, Avedon explains that Rubenstein is the public relations firm that works with its law firm. Avedon contends that Rubenstein has no relevant information, and has absolutely no information relating to the valuation of the Work. Moreover, counsel states, she is willing to produce an affidavit to this effect. Nevertheless, Avedon says, AXA refuses to withdraw the subpoena. Avedon indicates that AXA wants the deposition to pursue its claim that Avedon deliberately misrepresented one of this Court's prior orders to the press, and states this is irrelevant to the lawsuit and protected by attorney-client privilege.

In response, AXA not only opposes the motion but cross-moves to compel the disclosure. It alleges that Avedon did not formally and timely object to the Rubenstein deposition. It states that Rubenstein issued press statements in order to force a more generous settlement. It states the discovery is relevant because it speaks to AXA's contention "that Avedon's claims about AXA's alleged lack of good faith are nothing more than a costly litigation and public relations

stunt to pressure AXA to pay more than double" Avedon's own valuation of the Work. This, it claims, is relevant to AXA's fourth affirmative defense, which is that Avedon breached its contractual duty to operate in good faith. It argues that Avedon's counsel's offer to swear that Rubenstein has no relevant information is not acceptable, and moreover is inconsistent with Avedon's claim of attorney-client privilege. In reply, Avedon rejects all of AXA's positions, stating its recitation is distorted and obscures the real issues in the parties' current dispute.

Motion sequence number ten and the accompanying cross-motion essentially argue whether the deposition of Sarah Morthland should be allowed or whether it is protected due to the pending litigation. The parties' arguments generally parallel those AXA asserted in motion number seven, which stated that those who conducted valuations for it were exempt from disclosure due to their association with this lawsuit. Rather than reiterate the arguments, the Court refers the parties to the discussion in the decision in motion sequence numbers five and seven. Here, Avedon argues that to the extent AXA's experts are not subject to disclosure, Ms. Morthland also should be protected. It notes that in addition to her initial appraisals of the Work, Ms. Morthland has been involved in this litigation, in particular in connection with the umpire selection process.

Under CPLR §§ 3101, "all matter material and necessary in the prosecution or defense of an action" shall be disclosed unless, inter alia, the matter is privileged. If a privilege exists, the burden is on the party seeking disclosure to demonstrate that records in question are material and necessary. See Carcana v. New York City Hous. Auth., 47 A.D.3d 523, 524 (1st Dep't 2008). The phrase "material and necessary" is "interpreted liberally" as meaning "relevant" or as

permitting "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 N.Y.2d 403, 406 (1968); see Ferolito v. Arizona Beverages USA, LLC, 119 A.D.3d 642, 643 (2nd Dep't 2014). The CPLR distinguishes between party discovery and demands on nonparties. Smile Train, Inc. v. Ferris Consulting Corp., 117 A.D.3d 629, 631 (1st Dep't 2014). Where the disclosure relates to a nonparty subpoena, the party seeking the disclosure must state "the circumstances or reasons such disclosure is sought or required." CPLR § 3101(a)(4). This requires the party to demonstrate that the discovery is material and necessary – that is, "relevant to the prosecution or defense of [the] action." Kapon v. Koch, 23 N.Y.3d 32, 37 (2014).

A party who objects to discovery on the ground that it was prepared in anticipation of litigation has the burden of establishing the privilege is applicable and must specify the particular material that allegedly is immune from discovery. Bombard v. Amica Mutual Ins. Co., 11 A.D.3d 647, 648 (2nd Dep't 2004). With respect to insurance claims, "documents prepared in an insurer's ordinary course of business in investigating whether to accept or reject coverage are discoverable." McClier Corp. v. United States Rebar, 66 A.D.3d 416, 416 (1st Dep't 2009). The payment or rejection of claims is part of an insurer's ordinary business. Valuation reports prepared before there is a decision to litigate a claim are not privileged, therefore, even if the insurer is in part motivated by the possibility of litigation. Bombard, 11 A.D.3d at 648. As AXA notes, however, any opinions and conclusions in the report may be redacted. Donohue v. Fokas, 112

A.D.3d 665, 667 (2nd Dep't 2013)(concluding that trial court should have conducted an in camera review of the documents).

After careful consideration, the Court grants motion number nine, for a protective order. Avedon has adequately alleged that Miller had no involvement in the valuation process, and that it has already provided AXA with any information Miller has, such as the price of the work Avedon has sold. AXA's argument that Avedon's publicity firm may have strategized to use bad press to shame AXA into increasing its settlement offer is speculative. Moreover, AXA's argument relates to Avedon's settlement strategy and not to disputes of substantive relevance. In addition, the Court grants motion number ten in part. Ms. Morthland's initial valuation and her appraisal of the work were not prepared in the course of this litigation. For the same reasons set forth in its decision resolving motions five and seven, she must appear for deposition and produce documents relating to her earlier valuation and appraisal. If Ms. Morthland works for Avedon in connection with this litigation, however, she need not answer questions or produce documents that relate to this subsequent work.

The Court notes that it has considered all of the arguments the parties have made in connection with these motions, including those relating to timeliness, and has found them to be unpersuasive. Therefore, it is

ORDERED that motion sequence number nine is granted and the cross-motion is denied; and it is further

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ORDERED that motion sequence number ten is granted to the extent discussed above and otherwise denied.

Dated: 12/4/15

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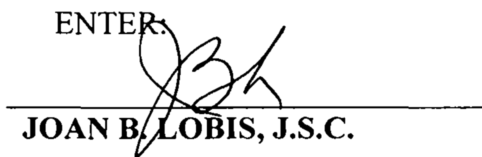

JOAN B. LOBIS, J.S.C.