

Ling v Kemper Independence Co.

2016 NY Slip Op 30231(U)

February 10, 2016

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 -

KEMPER INDEPENDENCE CO.,

Defendant.
-----X

Index No.
650092/2014

**DECISION AND
ORDER**

Mot. Seq. 8, 9

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.

The parties have made discovery motions with respect to their respective discovery demands. Orders were entered on December 9, 2014 and June 18, 2015 on the parties’ discovery motions. The Court’s June 18, 2015 clarifies the Court’s Prior Order and was rendered after the oral argument by the parties.

The parties now move again to compel each other to respond to their discovery demands (Mot. Seq. 8 and 9).

In Motion Seq. 8, Plaintiff moves, pursuant to CPLR 3126 and 22 NYCRR 13-1.1 for imposing sanctions including dismissal of Defendants’ pleadings.

In Motion Seq. 9, Defendant moves, pursuant to CPLR 3126 and Judiciary Law 753 placing Ling in contempt in court for his failure to comply with the Court’s decisions.

Mot. Seq. 8: Ling’s Motion Seeking Sanctions Against Kemper

In the June 2015 Order, the Court directed Kemper “to 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.”

As for Plaintiff’s Revised Set of Interrogatories dated July 28, 2014, and a Second Set of Interrogatories, dated December 26, 2014, the June 2015 Order found that the “majority of Kemper’s responses are blanket objections” and directed Kemper “to supplement its responses to both sets of interrogatories with specific, proper, complete, and verified responses.”

In the June 2015 Order, the Court also went through each of Plaintiff’s document requests. Those demands sought 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.

As for those demands that Kemper's counsel stated on the record that Kemper had no responsive documents, the Court directed Kemper to produce an affidavit from a person with knowledge attesting to Kemper's counsel's representation that Kemper did not have responsive documents for certain categories or that no similar claims were made against Kemper. As for other demands, Kemper was directed to either produce responsive documents or "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." Additionally, Kemper was directed to employ the search terms suggested by Ling.¹

Notwithstanding the previous Court Orders, Ling now moves for sanctions against Kemper. Ling states to date, Kemper has refused to "employ specified search terms; verify interrogatory responses; answer the vast majority of interrogatories apart from blanket objections and false denials of information; provide an affidavit regarding the nonexistence of specific documents ordered disclosed; or provide an affidavit regarding the scope and method of its search apart from the conclusory assertion that there was "a thorough search of all Kemper's emails related to the Ling action."

¹ Plaintiff had suggested 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 lossed 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

Additionally, Ling claims that Kemper “has made repeated false statements to Plaintiff and the Court regarding the existence of responsive documents and information” that are material. Ling states, “For example, Kemper represents:

falsely that “Kemper provided everything Ling requests” whilst having undertaken no significant search for documents or information;

falsely that Kemper has no documents relating to the meaning of its Policy, notwithstanding the existence of documents such as its Underwriting Guidelines that categorically contradict Kemper’s defense in this action;

falsely that there are no similar claims have been submitted, no cases of bad faith filed, and no punitive damages entered against it notwithstanding reported court decisions to the contrary; and

falsely that individuals were not involved in the claim processing, it has no parents or affiliates, has no reinsurance policies notwithstanding its internal correspondence and publically filed documents to the contrary.”

In response and in purported compliance with the Court’s June 2015 Order directing Kemper to provide a detailed affidavit concerning the means and methods Kemper used to conduct a search for the requested documents and conducting a search using the terms suggested by Ling, Kemper provided Ling with an affidavit of John G. Houlihan. Houlihan, a “claim supervisor,” asserts that “after a thorough search of all of Kemper’s emails related to the Ling action, several dozen documents were located, which were produced in its September 4, 2014 discovery responses.”²

Ling claims that the Houlihan affidavit does not comply with the Court’s June 2015 Order. Ling contends that the affidavit does not attest that Kemper employed the ordered search terms to identify electronic documents or otherwise describe the means methods employed; the affidavit does state that Houlihan was involved in the search or otherwise has first-hand knowledge of the search; and the affidavit does

² Ling contends, “Notwithstanding Kemper’s numerous protestations that it had previously produced every responsive document, Kemper [sic] most recent production includes a formal three-page “Home Memorandum” addressed to Houlihan and providing detailed analysis of Plaintiff’s claim, as well as a three-page email from Houlihan, marked “Importance: High” providing a “summary of the our investigation in the claim submitted by our insured, Thomas Ling.”

not identify the search for other sources of documents (outside of emails) requested by Plaintiff and specifically addressed in the Court's June 2015 Order.

Kemper opposes Ling's motion, contending that Kemper has fully complied with its discovery requirements and the Court's Orders. As for Plaintiff's documents requests, Kemper contends, "The Court required Kemper to produce various documents and to the extent those documents do not exist, Kemper was to provide an affidavit to that effect. That is exactly what Kemper did. It produced all documents not previously provided and an affidavit as to the documents that do not exist."

Kemper has failed to provide a detailed statement concerning the means and methods that Kemper used to conduct a search for the requested documents and to demonstrate that they employed the search terms suggested by Ling. Kemper is ordered to again comply with the Court's June 2015 Order.

As for Plaintiff's demand for interrogatories, Kemper contends that in compliance with CPLR 3122, Kemper has "answered all the interrogatories and objected to the unreasonable ones and stated that the reasons for the objections with 'reasonable particularity.'" However, in the June 2015 Order, the Court, having reviewed Kemper's objections to the Ling's interrogatories, directed Kemper to supplement its responses to both sets of interrogatories with specific, proper, complete, *and* verified responses." Kemper has failed to comply with the portion of this Court's Order and is directed again to comply with the same.

As for Ling's claim that Kemper withheld documents from Ling regarding "similar claims" against Kemper, Kemper says that "any alleged deceptive conduct by Kemper in any other state is irrelevant [to a cause of action under General Business Law 349], has no bearing on Ling's claim, is unduly burdensome, and therefore not discoverable." Kemper is directed again to provide documents relating to any "Similar Claims" – within New York and outside.

Mot. Seq. 9: Kemper's Motion Seeking Sanctions against Ling

In Motion Seq. 9, Kemper moves, pursuant to CPLR 3126 and Judiciary Law 753 placing Ling in contempt in court for his failure to comply with the Court's decisions.

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. In its previous discovery motion, Kemper claimed that while Ling provided some documents, Ling failed to respond to most of them and that approximately 33 items were not provided or addressed. The June 2015 Order directed Ling "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. The June 2015 Order directed Ling to respond to the Supplement Notice.

In its pending motion, Kemper states that Ling has failed to produce: copies of all contracts and other documents related to Ling's renovation work; copies of all permits, inspections and safety reports regarding the renovation work; copies of blueprints, plans and surveys for the renovation work; and all documents relating to Ling's settlement and discontinuance of the matter entitled *Ling v. Kellam Clark, et al.*

While Ling contends that he has complied with the June 2015 inasmuch as he has produced all responsive documents and provided the appropriate affidavit, the Court finds that with at least one category of documents – copies of permits- Ling has neither produced the responsive documents nor provided an affidavit stating that none exist. Accordingly, Ling is directed to comply with this Court's June 2015 Order.

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 (with answers to be verified) and First, Second, and Third Document Requests or provide an affidavit if no responsive documents exist as directed in the June 18, 2015 Order 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: FEBRUARY 10, 2016

FEB 10 2016



EILEEN A. RAKOWER, J.S.C.