National Compressor Exch., Inc. v Hanover Ins. Co., Inc.
2018 NY Slip Op 31341(U)
May 15, 2018
Supreme Court, Queens County
Docket Number: 703116/15
Judge: Janice A. Taylor

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

----------x

NATIONAL COMPRESSOR EXCHANGE, INC.,

Plaintiff(s),

Index No.:703116/15

Motion Date:12/11/17

- and -

Motion Cal. No.:106

Motion Seq. No: 3

HANOVER INSURANCE COMPANY, INC. and
USI INSURANCE SERVICES, LLC,

Defendant(s).

----------x

The following papers numbered 1 to 10 read on this motion by defendant Hanover Insurance Company, Inc. to renew and or reargue the court's Order dated September 7, 2017, which granted plaintiff's motion to compel, and upon renewal/reargument, to deny the motion to compel.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Exhibits-Service.....	5 - 7
Reply Affirmation-Exhibits-Service.....	8 - 10

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

Plaintiff in this breach of contract action, seeks damages for business income loss it allegedly incurred when it had no telephone service at its offices on certain days in June and July of 2013. Plaintiff presented a claim to defendant Hanover under a commercial property insurance policy Hanover had issued to plaintiff between December 22, 2012 and December 22, 2013 ("the Hanover Policy"), for lost business income, and defendant Hanover Insurance Company ("Hanover") compensated plaintiff in the amount of $12,069.88. Hanover contends that plaintiff was fully compensated accordance with the terms and conditions of the Hanover Policy. Plaintiff disagreed, and commenced the instant action alleging one count of breach of contract against Hanover, on count of breach of

contract against its broker, defendant USI Insurance Services, LLC ("USI"), and one count of negligence against USI.

In an Order dated September 7, 2017, the Court granted plaintiff's Motion to Compel and directed defendant to produce its underwriting file and an underwriting witness for examination before trial. By the instant motion, defendant moves to renew and reargue the Court's Order granting the motion to compel disclosure of defendant's underwriting file as well as the examination before trial of an underwriting witness. Plaintiff opposes the motion.

Discussion

A motion for leave to renew must be based upon new facts not offered on a prior motion that would change the prior determination, and set forth a reasonable justification for the failure to present such facts on the prior motion (see CPLR 2221 [e]; *Jordan v Yardeny*, 84 AD3d 1172, 1172-73 [2d Dept 2011]; *Swedish v Beizer*, 51 AD3d 1008, 1010 [2d Dept 2008]). While a court has discretion to entertain renewal based on facts known to the movant at the time of the original motion, the movant must set forth a reasonable justification for the failure to submit the information in the first instance *(see Deutsche Bank Trust Co. v. Ghaness*, 100 AD3d 585, 585-586 [2d Dept 2012]; *Yebo v Cuadra*, 98 AD3d 504, 506 [2d Dept 2012]). A motion for leave to renew "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" ((*Empire State Conglomerates v Mahbur*, 105 AD3d 898, 899 [2d Dept 2013]; *Matter of Catherine V.D. [Rachel G.]*, 100 AD3d 992, 993 [2d Dept 2012]; *Worrell v Parkway Estates, LLC*, 43 AD3d 436, 437 [2d Dept 2001]).

Here, defendant Hanover seeks leave to renew based upon evidence that was available at the time the moving defendant opposed plaintiff's Motion to Compel. While defendant Hanover points to the testimony of USI's Frank DeMartino, as "new evidence", Mr. DeMartino testified, in part, to information which was disclosed by USI on or around May 13, 2016, one year prior to defendant's underlying opposition, which is dated May 11, 2017. Frank DeMartino's testimony that was cited by defendant didn't provide any new information that wasn't previously available had defendant fully reviewed the application documents. For example, in the testimony cited to within paragraph 15 of defendant's Affirmation in Support, Mr. DeMartino merely confirmed the contents that were contained on the application and that the application was submitted to

defendant prior to the issuance of the policy proposal. Thus, Frank DeMartino's testimony doesn't reveal any "new" information; rather, it confirms the information that was written on the documents that were disclosed in May of 2016. Based on this, defendant had the evidence with regards to the Accord insurance application for a year and could have introduced said arguments within its underlying opposition but failed to do so.

Renewal should be denied where a party fails to offer a valid excuse for not submitting the additional facts upon the original application (*Healthworld Corporation v Gottlieb*, 12 AD3d 278 (1st Dept 2004); *Walmart Stores, Inc. v United States Fidelity and Guaranty Company*, 11 AD3d 300 (1st Dept.2004); *Linden v Moskowitz*, 294 AD2d 114 [1st Dept 2002]; *Louis L. Basset v Bando Sangsa*; 103 AD2d 728 [1st Dept 1984]; *Kadish v Gilbert M. Columbo*, 121 A.D.2d 722 [2d Dept1986]). Furthermore, renewal is a remedy to be used sparingly and granted only when there exists a valid excuse for failing to submit the newly proffered facts on the original application (*Beiny v Wynyard*, 132 AD2d 190 [1st Dept.1987].

Accordingly, as "the Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion" (*Cioffi v S.M. Foods, Inc.*, 142 AD3d 526, 529-30 [2d Dept 2016], citing *Jovanovic v Jovanovic*, 96 AD3d 1019, 1020 [2d Dept 2012]; *see Rowe v NYCPD*, 85 AD3d 1001, 1003 [2d Dept 2011]), the branch of the motion which is to renew the court's prior order granting the motion to compel is denied.

That branch of the motion which seeks to reargue the court's prior order, is also denied. The court did not mistakenly characterize the discovery in dispute as a claims file as the court clearly stated in its decision that plaintiff was seeking underwriting discovery on page two of its Order, and that it was granting plaintiff's motion for underwriting discovery on pages eight and nine of the said Order. Further, the court cited proper case law for the proposition that "underwriting and claims files are not prepared for litigation and are discoverable."

The remaining contentions which defendant assert in its argument to reargue were previously rejected by the court. The purpose of a motion for re-argument is "not to serve as a vehicle for an unsuccessful party to argue once again the very

question decided" (*see Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971, 971 [1st Dept 1984], *quoting Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]).

The court is vested with broad discretion in supervising the discovery process, and its determinations will not be disturbed absent an improvident exercise of that discretion (*see Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223 [2003]). Documents prepared in the ordinary course of an insurance company's investigation to determine whether to accept or reject coverage and to evaluate the extent of a claimant's loss are not privileged and are, therefore, discoverable (*Brooklyn Union Gas Co. v Am. Home Assur. Co.*, 23 AD3d 190, 190-91 [1st Dept 2005]).

Accordingly, the instant motion to renew and or reargue the court's prior order is denied.

Dated: May 15, 2018

JANICE A. TAYLOR, J.S.C.

H:\Decisions - Part 15\Decisions-2018\Reargue-Renew\703116-15_nationalcompressor_reargue_denied-LD_SFO.wpd

FILED
MAY 22 2018
COUNTY CLERK
QUEENS COUNTY