Susseles v Nationwide Mut. Ins. Co.
2018 NY Slip Op 33677(U)
October 9, 2018
Supreme Court, Westchester County
Docket Number: 51000/2017
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

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MAXINE SUSSELES,

Plaintiff,

-against-

DECISION & ORDER
Index No. 51000/2017
Motion Date: Oct. 9, 2018
Seq. Nos. 2 & 3

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant.

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LEFKOWITZ, J.

The following papers were read on plaintiff's motion (Seq. No. 2) for an order pursuant to CPLR 3124 compelling defendant insurance company to produce its claims guidelines and/or manual and its examination under oath summary report ("EUO"), and granting such other and further relief as may be just and proper.

Order to Show Cause - Affirmation in Support - Exhibits A-I
Affirmation in Opposition - Exhibits A-F
Affidavits of Service
NYSCEF File

The following papers were read on defendant's motion (Seq. No. 3) for an order pursuant to CPLR 3124 compelling plaintiff to respond to defendant's interrogatories numbers 2 and 3, and to respond to defendant's discovery demand number 33, and for such other and further relief as the court deems just and proper.

Order to Show Cause - Affirmation in Support - Exhibits A-P
Affirmation in Opposition - Exhibits 1-3
Affidavits of Service
NYSCEF File

Upon the foregoing papers and the proceedings held on October 9, 2018, these motions are determined as follows:

Factual and Procedural Background

On or about January 24, 2017 plaintiff commenced this insurance coverage action by filing a summons and complaint. Plaintiff alleges that defendant breached its contract with plaintiff when defendant wrongfully denied coverage for damages that plaintiff alleges occurred when a pipe froze and broke in the basement of her home located at 179 Caterson Terrace, Hartsdale, New York (the "premises"). Plaintiff retained a public adjuster, Gary Schwartz ("Schwartz") of GS Adjustment Company who submitted the claim to defendant.

Defendant ultimately denied the loss for, among other things, fraud. In its denial letter dated November 3, 2016 (the "denial letter"), defendant cites several inconsistencies which occurred during the course of the investigation. Defendant states that on February 29, 2016 Schwartz provided a piece of the broken pipe to defendant's inspector, Jason Metzger ("Metzger"), during his onsite inspection of the premises. Defendant states that the pipe was photographed, logged into evidence and presented to defendant's Senior Metallurgical Engineer, Michael Cooney ("Cooney") of LGI Forensics. The denial letter provides that Cooney completed an Optical Stereomicroscopy and Scanning Electron Microscopy exam on the pipe and determined that the pipe did not break as a result of freezing and bursting, but rather from an external force that was applied to the pipe. Additionally, the denial letter states that during the onsite inspection Schwartz had visually indicated to Metzger that the pipe in question was a horizontal pipe located in the ceiling above the bathtub which contradicts plaintiff's testimony provided during the EUO on September 13, 2016, when she stated that the broken pipe was located in the bathroom wall. Additionally, the denial letter states that during plaintiff's EUO she stated that the pipe in the photos taken during the February 29, 2016 inspection was not the same pipe in question and that plaintiff did not recognize the pipe in those photos. Defendant states that during a recorded interview by defendant's adjuster Simcha Shaiman ("Shaiman"), Schwartz confirmed that the pipe in the photos was the broken pipe. Defendant's denial letter further states that the investigation determined that the pipe had been intentionally struck by an outside force damaging the pipe and resulting in water loss. The denial letter concluded that even though plaintiff denied having any work performed in the bathroom prior to the loss, the pipe could not have been struck in that manner unless the drywall had been removed. The denial letter states that the language of the insurance policy specifically excludes coverage for intentional acts.

In addition to the breach of contract claim, plaintiff alleges that defendant breached its duty of good faith and fair dealing by, inter alia, subjecting plaintiff to two recorded statements and an EUO "notwithstanding the fact it was aware she suffers from traumatic brain injury." Plaintiff also asserted claims for unspecified consequential damages and for attorney's fees.

Plaintiff served her discovery demands dated May 16, 2017. In those demands plaintiff sought, inter alia, copies of all of defendant's claims manuals and/or guidelines in effect at the time of loss with respect to the adjustment of first party property damage claims ("demand number 5").

On or about June 15, 2017, defendant served its objections and responses to plaintiff's discovery demands wherein defendant objected to plaintiff's demand number 5 on the grounds, inter alia, that it sought "disclosure of documents and/or information which are not relevant to the subject matter of this action or reasonably calculated to lead to the discovery of admissible evidence."

The decision and order of this court (Giacomo J.) entered July 19, 2017 dismissed that part of the complaint which sought consequential damages and attorney's fees (the "July 19, 2017 Order").

On July 31 2017 defendant served discovery demands on plaintiff including, inter alia, interrogatories and a notice for discovery and inspection.

The so-ordered (Lefkowitz, J.) preliminary conference stipulation directed, inter alia, for discovery responses to be served no later than October 2, 2017.

Defendant served its answer with affirmative defenses on October 6, 2017.

On or about January 12, 2018 plaintiff served a response to defendant's notice for discovery and inspection wherein she objected to request No. 33 which sought authorizations for records and medical providers concerning plaintiff's traumatic brain injury ("TBI") as alleged in the complaint. Plaintiff objected to this demand on the grounds, inter alia, that pursuant to the July 19, 2017 Order that information was not material or necessary to this action.

On January 31, 2018 plaintiff served her objections and responses to defendant's interrogatories wherein she objected, inter alia, to interrogatory number 2, which asked plaintiff to state the date that she sustained the TBI as referenced in the complaint, and to identify the medical professionals who diagnosed plaintiff with a TBI. Plaintiff objected to this interrogatory on the grounds, inter alia, that pursuant to the July 19, 2017 Order such information was not material or necessary to the action. Interrogatory number 3 asks plaintiff to state whether she was practicing law in any capacity at the time of the loss and if so to identify her employer, alternatively, if plaintiff was not practicing law at the time of the loss, she was asked to state the date she stopped practicing law. Plaintiff objected to this interrogatory on the ground, inter alia, that she is not claiming lost wages in this action.

By correspondence dated March 16, 2018 defendant requested that plaintiff provide responses to interrogatories 2 and 3, as well as to demand number 33.

The compliance conference order entered on March 26, 2018 directed plaintiff to serve her deficiency letter on or before March 30, 2018 and directed both parties to serve responses to any deficiency letters on or before April 11, 2018. Plaintiff served her deficiency letter dated March 20, 2018. In a response dated April 11, 2018, defendant further objected to demand number 5 stating "[P]laintiff has not identified how any [claims manuals and guidelines] are

relevant to plaintiff's claim for breach of contract. Indeed, given that plaintiff's claim for consequential damages was dismissed by the court, defendant's investigation and claims handling practices are not at issue and there is no dispute between the parties regarding the interpretation of the Policy's language, the documents sought are irrelevant and immaterial to this litigation."

In plaintiff's third notice for discovery and inspection dated May 30, 2018, plaintiff sought, inter alia, the "[c]omplete copy of the EUO summary report with photographs, diagrams and other attachments if any referenced by Simcha Shaiman in the Defendant's claims/SIU log at page NW000682." On July 17, 2018 defendant served its objections and responses to plaintiff's third discovery notice. With respect to the EUO summary defendant responded "the EUO report was withheld from Nationwide's Supplemental Production dated 4/11/18 and is included on Nationwide's Privilege Log Re: 4/11/18 Supplemental Production."

On July 23, 2018, the parties were provided briefing schedules for their respective motions.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require 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" (*see Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Foster*, 74 AD3d at 1140; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

Motion Seq. 2.

Discovery of Defendant's Claims Guidelines and/or Manual:

Plaintiff contends that defendant's claims guidelines and/or manuals are material and necessary because of the inordinate amount of time defendant took to deny plaintiff's claim and the unreasonable and unfounded basis for its denial of the claim. Plaintiff argues these documents will enable her to establish whether defendant followed protocol in adjusting and investigating plaintiff's claim and whether the lengthy investigation was appropriate under the circumstances.

Defendant contends that its claims guidelines and/or manuals are not relevant to plaintiff's claims in this action. Defendant further argues that disclosure of an insurer's claims guidelines and/or manuals is inappropriate in the absence of allegations that the insurer engaged in a bad faith corporate policy. Defendant argues that since plaintiff has not alleged bad faith with respect to defendant's corporate policy and in light of the July 19, 2017 Order dismissing plaintiff's claims for breach of the covenant of good faith and fair dealing, discovery related to general corporate policies are not material and necessary to plaintiff's claims for breach of contract.

Here, plaintiff claims that defendant breached its duty of good faith and fair dealing owed to plaintiff by, inter alia, failing to properly and timely investigate plaintiff's claim. The manner in which defendant typically determines its claims is relevant to plaintiff's allegations. Presumably, defendant's claims guidelines and/or manuals set forth the criteria and procedures for defendant's evaluation and determination of claims. Accordingly, defendant's claims guidelines and/or manuals are relevant to plaintiff's allegations and are discoverable.

Discovery Of Defendant's Post-EUO Summary Report

Plaintiff states that following the EUO, Shaiman, who was present at the examination, made a note in defendant's file in which he references the EUO summary report. Although, defendant produced Shaiman's note, it has refused to produce the summary report. Plaintiff argues the summary report is material and necessary to plaintiff's case as it will shed light on the basis for defendant's denial of plaintiff's claim. Plaintiff further argues she is entitled to discovery of this summary report as it was material prepared during the course of defendant's investigation and prior to defendant's determination to deny coverage.

Defendant states that the EUO summary report was prepared for defendant by outside counsel, Paul Cohen, Esq. ("Cohen") of the law firm of Gialleonardo, McDonald & Turchetti. Defendant states that it retained Cohen on or about June 20, 2016 after receiving an email on June 17, 2016 from Schwartz indicating that plaintiff would "probably want to initiate litigation" at this time. Defendant asserts that it retained Cohen to provide his legal opinion and advice regarding plaintiff's claim. By letters dated July 19, 2016, July 20, 2016, and August 9, 2016, Cohen and plaintiff's counsel agreed that plaintiff would appear for an EUO on August 11, 2016. Cohen conducted the EUO and thereafter prepared a summary report which defendant contends contains Cohen's legal analysis of plaintiff's EUO testimony as well as Cohen's legal opinion and advice regarding plaintiff's claim and litigation strategy. Defendant states that it withheld production of the EUO summary report, Bates numbered NW000405-NW000408, on the grounds that it is attorney work product and protected by the attorney-client privilege, and noted this on the privilege log dated April 11, 2018. Defendant argues that the report prepared by Cohen was rendered within the confines of the attorney-client relationship with the purpose of rendering legal advice with respect to plaintiff's claims. Additionally defendant contends that the EUO summary report is absolutely immune from discovery as attorney work product.

Of the three categories of materials protected from disclosure by the CPLR privileged materials and attorney work product are the two which enjoy absolute immunity. The attorney client privilege, codified in CPLR 4503(a), is intended to foster an open dialogue between lawyer and client and is essential to effective representation. However, as the privilege is an obstacle to the truth-finding process, it is narrowly construed. The scope of the privilege is determined on a case by case basis and the burden of proving each element of the privilege rests on the party asserting it (*Willis v Willis*, 79 AD3d 1029 [2d Dept 2010]). The party asserting the attorney client privilege must show that the communications at issue were "made for the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship and have been primarily or predominantly of a legal... nature" (*Hyatt v State of Cal. Franchise Tax Bd.*, 105 AD3d 186 [2d Dept 2013]; *North State Autobahn, Inc. v Progressive Ins. Group*, 84 AD3d 1329 [2d Dept 2011]). A lawyer's communication is not cloaked with privilege when the lawyer is hired to provide business advice or to do the work of a nonlawyer *(Spectrum Systems Intern. Corp. v Chemical Bank*, 78 NY 2d 371 [1991]). Whether a particular document is or is not protected is necessarily a fact-specific determination most often requiring an in camera review (*Spectrum Systems Intern. Corp. v Chemical Bank*, at 378). The attorney work product exemption applies only to those materials that are prepared by an attorney who is acting as an attorney, and which contain the attorney's analysis and trial strategy (*Doe v Poe*, 244 AD2d 450, 451 [2d Dept 1997], affd, 92 NY2d 864 [1998])(internal citations omitted). In view of the circumstances of this case, an in camera review is appropriate in order to determine whether either privilege attaches to the EUO summary report.

Motion Seq. 3

Defendant seeks to compel plaintiff to respond to defendant's interrogatories numbers 2 and 3 and to defendant's discovery request number 33. Interrogatory number 2 and discovery request number 33 seek information concerning plaintiff's TBI. Defendant argues that it is entitled to this discovery because plaintiff has affirmatively put her physical condition in issue thereby waiving the physician-patient privilege. Defendant contends that plaintiff placed her medical condition in controversy when she alleged that defendant breached a duty to plaintiff when it subjected her to multiple recorded interviews and an EUO despite knowing that she suffered from a TBI. Since one of defendant's affirmative defenses is that it denied coverage as a result of material misrepresentations that plaintiff made during the claim investigation, defendant argues that discovery concerning her TBI, including the impact it may have had on her mental capacity is material and necessary to defendant's affirmative defenses. Defendant states that to the extent that plaintiff intends to take the position that her TBI caused her to become confused during the recorded interviews and/or at the examination under oath, and to make inconsistent statements, information and medical records regarding her diagnosis and the impact of her TBI are directly relevant to defendant's defense.

Plaintiff states that she only referenced her TBI in her effort to collect consequential damages, and since that portion of the complaint was dismissed by the July 19, 2017 Order, plaintiff's reference to her TBI has been rendered moot. Plaintiff's counsel states that plaintiff

has communicated her intent to abandon the reference to the TBI on several occasions and has provided a stipulation to defendant's counsel agreeing to remove all references to her TBI from the complaint. Plaintiff contends that such information is highly sensitive and has no bearing on plaintiff's remaining claim for breach of contract.

When a party affirmatively places his or her mental or physical health into controversy that party waives the privilege which attaches to a person's medical records (*Koump v Smith,* 25 NY 2d 287 [1968]). Although plaintiff concedes that she originally asserted the existence of her TBI in order to establish her cause of action for consequential damages, plaintiff states that once that cause of action was dismissed, plaintiff's TBI became irrelevant. Additionally, plaintiff annexes to the motion papers an email dated May 17, 2018 with a draft stipulation attached thereto withdrawing any reference to her TBI. Plaintiff states that defendant refused to execute the stipulation. While plaintiff has offered to withdraw any references to her TBI (e.g. paragraphs 11(f) and 22 (f) of the complaint), defendant is understandably wary of waiving its rights to such discovery in the event plaintiff attempts to utilize the existence of a TBI as a defense or explanation for her behavior during the course of the claim investigation. Accordingly, based on the facts of this case, the court finds it appropriate to preclude plaintiff from introducing evidence at trial or otherwise during the course of this matter of the existence of plaintiff's TBI.

With respect to interrogatory number 3 which seeks discovery concerning plaintiff's practice of law, defendant states that even though plaintiff is not seeking lost wages, this discovery is still material and necessary. Defendant states that on February 7, 2018 plaintiff's counsel produced a breakdown of damages, including damages for personal property. Defendant contends that the list includes items related to plaintiff's practice of law which defendant asserts plaintiff operated from her basement, including "office furniture" and an "office copy machine." Defendant also argues that plaintiff's employment status bears on her credibility as during the course of the investigation of this claim, plaintiff made several inconsistent statements regarding whether she was practicing law at the time of the loss. Defendant states that plaintiff's statements made during recorded interviews on March 4, 2016 and June 8, 2016 as well as statements made during the EUO concerning plaintiff's work status were inconsistent and ranged from "semi-retired," "worked on occasion," to "retired." Additionally defendant states that should it ultimately be held liable for coverage of the claim, any personal items which related to plaintiff's practice of law would be subject to the Special Limits of Liability provision of the policy which limits liability coverage to $500 for "business property on the residence premises."

In opposition, plaintiff states that she is willing to identify those business items that were damaged and will limit her claim in accordance with the policy's $500 limit. Furthermore, plaintiff states that defendant's assertions that she provided inconsistent statements with respect to her work status is not supported by the record. Plaintiff states that her testimony that she was semi-retired, not working the way she used to, and that she occasionally provided consulting work are all consistent with each other. Additionally plaintiff states that defendant has made bald assertions that this information is material and necessary but has failed to provide a basis for that statement. Plaintiff's counsel also notes that defendant had the opportunity to depose plaintiff at which time her employment status could have been confirmed, but that defense counsel canceled the deposition the day before it was scheduled.

The court does not find that plaintiff's responses concerning her employment were inconsistent. Additionally, insofar as plaintiff has asserted that she is willing to limit any claims with respect to her business items to $500, further discovery concerning her employment history or status is not warranted.

All other arguments raised and evidence submitted by the parties have been considered by this court notwithstanding the specific absence of reference thereto.

In light of the foregoing it is hereby:

ORDERED that plaintiff's motion (Seq. No. 2) is granted to the extent that defendant shall produce to plaintiff a copy of its claims guidelines and/or manuals so as to be received in hand by October 23, 2018, and further that defendant shall provide to the court for in camera review a copy of its examination under oath summary report ("EUO") dated September 13, 2017 to the Compliance Part Clerk, room 800 by October 16, 2018; and it is further

ORDERED that defendant's motion (Seq. No. 3) is granted only to the limited extent that plaintiff is precluded from adducing evidence at trial or otherwise during the course of this action concerning her traumatic brain injury; and it is further

ORDERED that defendant's motion is otherwise denied; and it is further,

ORDERED that the parties shall appear for a conference in the Compliance Part, Courtroom 800, on October 30, 2018 at 10:30 a.m.; and it is further;

ORDERED that plaintiff shall serve a copy of this Decision & Order, with notice of entry, upon defendant within five days of entry.

The foregoing constitutes the Decision & Order of this court.

Dated: White Plains, New York
October 9, 2018

HON. JOAN B. LEFKOWITZ, J.S.C.

To:

Service upon all counsel via NYSCEF

cc: Compliance Part Clerk