Discover Prop. & Cas. Co., St. v National Football League
2019 NY Slip Op 32930(U)
October 4, 2019
Supreme Court, New York County
Docket Number: 652933/2012
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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DISCOVER PROPERTY & CASUALTY COMPANY, ST. PAUL PROTECTIVE INSURANCE COMPANY, TRAVELERS CASUALTY & SURETY COMPANY, TRAVELERS INDEMNITY COMPANY, and TRAVELERS PROPERTY CASUALTY COMPANY,

Plaintiff,

- v -

NATIONAL FOOTBALL LEAGUE, NFL PROPERTIES LLC, ALTERRA AMERICA INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, TIG INSURANCE COMPANY, CENTURY INDEMNITY COMPANY, FEDERAL INSURANCE COMPANY, GREAT NORTHERN INSURANCE COMPANY, GURANTEE INSURANCE COMPANY, HARTFFORD ACCIDENT & INDEMNITY COMPANY, NORTH RIVER INSURANCE COMPANY, U.S. FIRE INSURANCE COMPANY, ACE AMERICAN INSURANCE COMPANY, ILLINOIS UNION INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, ARROWOOD INDEMNITY COMPANY, CHARTIS SPECIALTY INSURANCE COMPANY, CHARTIS PROPERTY CASUALTY COMPANY, CONTINENTAL CASUALTY COMPANY, CONTINENTAL INSURANCE COMPANY, ILLINOIS NATIONAL INSURANCE COMPANY, MUNICH REINSURANCE AMERICA INC., NATIONAL UNION FIRE INSURANCE CO OF PITTSBURGH, PA, NEW ENGLAND REINSURANCE CORPORATION, ONEBEACON AMERICA INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, WESTCHESTER FIRE INSURANCE COMPANY, XL INSURANCE AMERICA, INC., DOE DEFENDANTS 1-100, CHARTIS SELECT INSURANCE COMPANY (3RD PARTY DEFT.), CHARTIS EXCESS LTD. (3RD PARTY DEFT.), PACIFIC INDEMNITY COMPANY, and XL SELECT INSURANCE COMPANY, WESTPORT INSURANCE COMPANY,

Defendants.

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INDEX NO. 652933/2012

MOTION DATE _____

MOTION SEQ. NO. 020 021 022

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 020) 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 524, 525, 526, 527, 528, 529, 530, 534

were read on this motion to/for REVIEW ORDER REFEREE/DISCLOSURE

The following e-filed documents, listed by NYSCEF document number (Motion 021) 505, 506, 507, 508, 509, 510, 511, 512, 513, 531, 535

were read on this motion to/for REVIEW ORDER REFEREE/DISCLOSUR

The following e-filed documents, listed by NYSCEF document number (Motion 022) 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 519, 520, 521, 522, 523, 536

were read on this motion to/for REVIEW ORDER REFEREE/DISCLOSUR

Upon the foregoing documents, motions 20, 21, and 22 are DENIED.

Insurers[1] seek review of the Special Referee's February 26, 2019 order which (1) denied their motion to compel underlying litigation and settlement materials; (2) directed Insurers to produce reinsurance and reserve information; and (3) compelled the NFL to use of 32 of 46 additional search terms for electronic discovery materials; and (4) denied that an issue existed with regard to indemnity agreements among the clubs and the NFL. (NYSCEF Doc. No. [NYSCEF] 510, Order of the Special Referee).[2]

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[1] Insurers include: TIG Insurance Company, The North River Insurance Company, United States Fire Insurance Company, Discover Property & Casualty Insurance Company, St. Paul Protective Insurance Company, Travelers Casualty & Surety Company, Travelers Indemnity Company, Travelers Property Casualty Company of America, Continental Insurance Company, Continental Casualty Company, Allstate Insurance Company, solely as successor in interest to Northbrook Excess and Surplus Insurance Company, formerly Northbrook Insurance Company, Bedivere Insurance Company, ACE American Insurance Company, Century Indemnity Company, Indemnity Insurance Company of North America, California Union Insurance Company, Illinois Union Insurance Company, Westchester Fire Insurance Company, Federal Insurance Company, Great Northern Insurance Company, Vigilant Insurance Company, Munich Reinsurance America, Inc., XL Insurance America Inc., XL Select Insurance Company, American Guarantee and Liability Insurance Company, and Arrowood Indemnity Company. (NYSCEF 513, Insurers' Memorandum of Law). Claims by and between Westport Insurance Company were discontinued on September 11, 2019. (NYSCEF 573).

[2] NYSCEF 510 is a placeholder which is not permitted under the Part 48 rules. Accordingly, the parties are directed to move to seal in accordance with Part 48 Rule 13 or file the redacted documents unredacted within 30 days. A failure to comply will result in the court filing the documents unredacted. Likewise, parties shall follow Part 48 rules by identifying documents by NYSCEF numbers.

The issue in this case is whether the National Football League and NFL Properties LLC (collectively the NFL) are entitled to insurance coverage for their defense costs and settlement payments in connection with the underlying litigation (the MDL Action).[3] The background of this case is set forth in prior court decisions, with which familiarity is assumed, and which will not be repeated here except as relevant to this decision. (*See e.g.* NYSCEF 77, decision on motion 013 to stay).

After the class settlement of the MDL Action took effect in January 2017,[4] the NFL amended its counterclaims and cross claims, and asserted the following causes of action against the Insurers: (1) breach of contract as to the duty to defend; (2) declaratory relief as to the duty to defend; (3) breach of the duty to indemnify for the settlement; (4) declaratory relief as to the duty to indemnify; and (5) declaratory relief as to certain insurers' bad faith refusal to consent to the settlement. (NYSCEF 328, Feb. 15, 2017, Second Amended Counterclaims and Cross Claims). Also relevant to these discovery motions are the Insureds' defenses which include for example: reasonableness of the settlement; consent to the settlement; failure to disclose; lack of information; known loss; expected injury; purported athletic participant exclusions; and allocation across insurance policies. (*See e.g.* NYSCEF 280, Amended Complaint in 652933/2012;[5] NYSCEF 366, Chubb April 11, 2017 Answer to Second Amended

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[3] In 2011, hundreds of former professional football players filed legal actions against the NFL, claiming that the NFL negligently failed to protect players from brain injuries allegedly caused by concussive head impacts. (*See In re Nat'l Football League Players' Concussion Injury Litig.*, 307 FRD 351, 361 [ED Pa 2015]).

[4] *See In re Nat'l Football League Players' Concussion Injury Litig.*, 821 F3d 410 [3d Cir 2016], certiorari denied *Armstrong v Nat'l Football League*, 137 S Ct 607 [2016]).

[5] NYSCEF 4, Amended Complaint in the 652813/2012 action.

Counterclaims and Cross Claims by NFL, p. 13-21; NYSCEF 363, Travelers Parties, April 11, 2017 Answer to Second amended Counterclaims and Cross Claims by NFL, p. 27-31).

On April 27, 2018, the parties entered into a Stipulation for Appointment of Referee to Supervise Disclosure Pursuant to CPLR 3104, which designated Hon. Michael H. Dolinger as Special Referee (Referee) and which the Court entered as an Order on April 30, 2018. (NYSCEF 489).

On August 21, 2018, the parties submitted five discovery motions to the Referee. (NYSCEF 481, Insurers' Memo of Law on Motion 22, p. 6).[6] The parties briefed the motions and the Referee heard a full day of oral argument. (*Id.*). The parties supplemented the record on certain issues that were addressed during the Referee's oral argument. (*Id.*).

The Referee issued a Memorandum and Order dated February 26, 2019 resolving the discovery motions (Order). (NYSCEF 510, the Order). He denied the Insurers' motion to compel the underlying defense and settlement files, concluding that the cooperation clauses of the insurance contracts are "not a basis for setting aside either privilege or work-product immunity" and that "on the current record the common-interest doctrine does not justify invasion of the attorney client privilege of the League or

[6] With these motions, the court received five boxes of redacted and unredacted documents, including the documents submitted to the Referee. This decision was delayed because it is impossible to identify or locate some of the underlying documents to which the parties refer but failed to file in NYSCEF. As a result, the record for this motion is incomplete. Moreover, the parties failed to tab many unredacted volumes of documents while other volumes are submitted with tabs, but without any identification as to what is tabbed or which affirmation to which it belongs as an exhibit. The court implores the parties to follow Part 48 rules and identify documents by NYSCEF number and use the court's redacting and sealing procedures.

the work-product immunity that it currently asserts." (*Id.* at 11; 16). In addition, the Referee found that the Insurers' argument based upon the "at issue" waiver doctrine "cannot prevail in the current state of this lawsuit, although future development might conceivably alter that outcome." (*Id.* at 16). The Referee also denied the Insurers' motion to compel any indemnity agreements (and related correspondence) between either NFL and the Member Clubs or any manufacturing entities on the basis that there is "no litigable dispute." (*Id.* at 56). The Referee based this conclusion upon the representations of the NFL Parties at oral argument that any indemnity agreements with Riddell (and related correspondence) would be produced, but that there were no indemnity agreements with the Member Clubs that would be pertinent to the current case. (*Id.*). Finally, the Referee granted in part and denied in part the NFL's motion to compel. (*Id.* at 73). The Referee concluded that "reserve information is relevant, for discovery purposes, to League claims of bad faith and any other claims or defenses pertaining to the reasonableness of the MDL settlement." (*Id.* at 73). In addition, the Referee held that "[t]he production of reinsurance policies themselves is seemingly mandated by section 3101(f)" and that reinsurance communications are "discoverable to the extent that a carrier has asserted 'failure to disclose' defenses or is targeted by [a] bad-faith claim." (*Id.* at 75-76).

Here, the Insurers seek review of the Order and modification. These motions include: (1) the Insurers' motion to compel underlying litigation and settlement materials (NYSCEF 479, Notice of Motion 22); (2) the NFL's motion to compel reserves and reinsurance information from the Insurers (among several other issues)(NYSCEF 491, Notice of Motion 20); (3) the Insurers' motion to compel the use of certain search terms

for electronic discovery materials (NYSCEF 505, Notice of Motion 21); and (4) the Insurer's motion to compel production of indemnification agreements. (*Id.*).

CPLR 3104(d) allows for review of an order made by a referee or special master as to whether it is "clearly erroneous or contrary to law." (*CIT Project Fin. v Credit Suisse First Boston LLC*, 7 Misc 3d 1002(A) [Sup Ct, NY County 2005]). The Referee's decision will be upheld if it is both supported by evidence in the record and a proper application of the law. (*Those Certain Underwriters at Lloyd's, London v Occidental Gems, Inc.*, 11 NY3d 843 [2008]; *Surgical Design Corp. v Correa*, 21 AD3d 409, 411 [2d Dept 2005]).

1. **NFL Production of Class Action Litigation and Settlement Materials**

The Insurers maintain that substantive evaluations and documents created by defense counsel in the course of the MDL Action and the settlement process are critical to the Insurers' ability to fairly litigate numerous defenses that could serve to preclude coverage or defeat the NFL's claims here, including: (i) whether the alleged injuries compensated under the Settlement occurred during the Insurers' policy periods; (ii) whether the NFL was in possession of information reflecting historical knowledge of any risks of head trauma or efforts to conceal such risks from players and the public, as relates to defenses based upon known loss, the expected or intended injury exclusion, misrepresentation in policy applications or late notice; (iii) whether the NFL violated the voluntary payment, consent-to-settle or other policy provisions by entering into the Settlement without prior consent; and (iv) whether certain Insurers acted in bad faith by declining consent to the Settlement. The Insurers insist that the fact that there was no

documentary discovery nor depositions in the MDL Action multiplies the critical nature of the documents to the Insurers' defenses.

The Referee agreed with the Insurers that some of the requested materials would be relevant to issues in the coverage action, including "the extent of the [NFL Parties'] early knowledge (or lack thereof) of the risks of serious brain injuries from forceful contact on the football field and what steps the [NFL Parties] took to address or conceal the risk." (NYSCEF 510, the Order at 10). However, in his detailed, 80-page decision, the Referee correctly denied production after careful consideration of the cooperation provisions, the common interest principle, and at-issue waiver. The Referee explained that New York law unambiguously holds that: (1) insurance policy "cooperation" clauses do not override an insured's attorney-client privilege or work product protection (*Id.* at 11-12); (2) the "common interest" doctrine does not require the production of protected documents in any setting, much less in a lawsuit such as this where insurers are seeking to avoid coverage and are adverse to their policyholders (*Id.* at 12-16); and (3) a party does not put its privileged and protected information "at issue" by filing a coverage lawsuit and arguing that a settlement for which it seeks coverage was reasonable. (*Id.* at 16-22).

The Insurers argue that the Referee overlooked that the interplay between the contractual duty to cooperate under the policies (which requires the NFL to provide the Insurers with all documents necessary to evaluate the underlying claims and the Settlement) and the common interest doctrine (which permits the sharing of privileged materials from underlying claims without risk of waiving privilege) operate to invalidate the NFL's reliance on privilege as a basis for withholding relevant documents from the

Insurers in the Coverage Action. The Insurers' reliance on *Waste Mgt., Inc. v Intl. Surplus Lines Ins. Co.*, 144 Ill 2d 178 [Ill 1991], a decision of the Supreme Court Illinois, for their interplay argument is misplaced and not the law of New York. (See *JP Morgan Chase & Co. v Indian Harbor Ins. Co.*, 98 AD3d 18 [1st Dept 2012]). As to whether the NFL put privileged advice at issue, the Referee correctly invited the Insurers back for reconsideration if the NFL places legal advice at issue, implicitly answering the question in the negative. The Insurers presented the Referee with three theories to support their motion to compel the NFL's production of their underlying defense and settlement materials. The Referee correctly denied the Insurers' request for production of the MDL litigation and settlement materials; a decision which is both supported by evidence in the record and the law. Accordingly, the court declines the Insurers' invitation to exercise its discretion to reverse and vacate the Order.

2. **Reinsurance and Reserve Information**

The Insurers challenge the Referee's ruling directing them to produce reinsurance information. (NYSCEF 510, Order at 74-77). They contend that such confidential and proprietary information is not relevant to this action. Based on the plain language of CPLR 3102(f), the court agrees with the Referee that the reinsurance agreements should be produced. This is an insurance coverage case; the insurers communications with their reinsurers is reasonably calculated to lead to information relevant to (1) whether the Insurers have handled the NFL parties claims in good faith and (2) whether the Insurers lacked material information regarding the insured risks. The Referee's reliance on *Imperial Trading Co v Travelers Prop. Cas. Co.*, 2009 Westlaw 1247122 (ED La 2009) is appropriate since the NFL here, like the insureds in

Imperial, allege bad faith against the Insurers by refusing to consent to the class settlement.

The Referee directed those insurers against whom the NFL has asserted a bad faith claim to produce reserve information. (NYSCEF 510, Order at 72-74). He found reserve information "could be material and necessary to the action as an admission against interest as to defendant's knowledge and evaluation of the case." (*Id.*). "Negligent investigation and uninformed evaluation of the worth of the [underlying] claims [against the insured] . . . can be indicative of bad faith." (*Groben v Travelers Indem. Co.*, 49 Misc 2d 14, 17 [Sup Ct, Oneida County 1965], *aff'd* 28 AD2d 650 [4th Dept 1967]; *see also Fireman's Fund Ins. Co. v Great Am. Ins. Co.*, 284 FRD 132, 138–39 [SDNY 2012] ["[R]eserves show 'what [the insurer] actually knew and thought, and what motives animated its conduct.'"]). The court agrees that with that limitation, the Referee's order is both supported by evidence in the record and a proper application of the law for the reasons stated by the Referee. Repetition of the Insurers' unsuccessful arguments does not improve them.

3. **Search Terms for Electronic Discovery**

The Insurers moved to compel production of more documents using 46 new search terms and 25 new custodians following the NFL's production of 710,000 documents. (NYSCEF 510, Order at 47-48). The Referee found that 32 of the proposed 46 were likely to yield additional relevant information and granted the Insurers' motion. (*Id.* at 48-49). Nevertheless, the Insurers insist that 5 of the 14 remaining terms are essential, and with regard to two named doctors on the NFL's MTBI Committee, the Referee mistakenly omitted them. While the Referee did not catalogue a reason for

rejecting each of the 14 terms, implicit in his failure to list them is that he did not find them likely to yield additional relevant information. Nonetheless, review of each rejected term is appropriate.

A party is entitled to discovery under CPLR 3101(a) so long as its request is "reasonably calculated to lead to the discovery of relevant information" and is not unduly burdensome. (*O'Halloran v Metro. Transp. Auth.*, 169 AD3d 556, 557 [1st Dept 2019]). "[T]he burden of proving that an item should not be produced during discovery is placed upon the party seeking to avoid such discovery." (*New York State Elec. & Gas Corp. v Lexington Ins. Co.*, 160 AD2d 261, 262 [1st Dept 1990]).

The Insurers request a search of the names "Berger" and "Feuer." Dr. Mitchell Berger and Dr. Henry Feuer are members of the NFL's MTBI Committee. The names of some of the other members of the MTBI Committee are on the list of search terms. (NYSCEF 484, Insurers' various letters concerning ESI). Since the Insurers also requested all documents concerning the MTBI, the names of all the members of the MTBI Committee would be redundant. (NYSCEF 484, Insurers' Second Omnibus Demand for Discovery and Inspection to the NFL, Feb. 1, 2017, ¶¶ 50, 52, 53, 54). Indeed, it is not clear that searching for any of the names of the members of the MTBI Committee would meaningfully add to the anticipated robust response that simply searching "MTBI" would yield. (*See* NYSCEF 484, Insurers' May 31, 2017 letter enclosing search term list). Accordingly, the court rejects the Insurers' argument that the Referee was mistaken.

As to Dr. Bennet Omalu, the Insurers request a search of Dr. Omalu's first name – "Bennet." According to the Insurers, Dr. Omalu is credited with discovering the

alleged link between concussions and traumatic brain injury. The doctor's last name is a search term and the Insurers provide no explanation for the proposition that anyone would reference Dr. Omalu by his first name. Similarly, the Insurers did not request a search of the first names of Berger and Feuer or any other such person. The Insurers are welcome to question witnesses about whether they referenced the doctor by his first name, and if so, renew this request.

The Insurers seek to add search terms for the 2013 book "League of Denial" and a movie, its producer and star: "Sony or Will Smith/10 (movie or concussion)." According to the Insurers, the book chronicles the football players' allegations against the NFL. In the movie "Concussion," Will Smith portrays Dr. Bennet Omalu, and the movie depicts his discovery of the link between head trauma and brain diseases. The name of the author of the 2013 book League of Denial was used as an initial search term. The Insurers concede that both the book and the movie post-date the filing of the underlying litigation but argue that there may be communications discussing whether the book is accurate or affected the NFL's decision to settle. While this request is speculative, the Insurers can certainly inquire and renew their request if appropriate.

The Insurers seek to search for the name "Kelso," because Mark Kelso was a football player for nine years and wore a specially designed helmet called ProCap which was intended to reduce the risk of concussions. As ProCap was an initial search term, it would appear that "Kelso" is redundant and not likely to lead to new or different relevant information. Indeed, the Insurers do not mention whether any documents were identified using the term "ProCap," which would be a logical place to begin its argument.

The Insurers seek to add "Lorillard" to the search term list. (NYSCEF 507 and 509, Insurers' Notice of Motion, memo of law and reply concerning search terms). The Insurers explain that Lorillard is a U.S. tobacco company formerly owned in part by Preston R. Tisch, a co-owner of the NY Giants football team. The factual basis for the Insurers' request is that the NFL and Lorillard shared lobbyists, lawyers, and consultants. They also rely on a New York Times article in which it is reported that Tisch communicated with Lorillard's general counsel. The NFL's objection that searching the term "Lorillard" would result in many irrelevant hits, such as news reports because it is a multinational company, is without any factual basis. The databases to be searched belong to the custodians, not Lexis, Westlaw or Google. This request is not speculative. Rather, a document that connects big tobacco's response to the medical conditions caused by smoking and brain diseases caused by concussions would be far from tangential, as the NFL asserts. Given the factual predicate here and the significance of a positive result, adding "Lorillard" as a search term is anything but a fishing expedition.

In sum, the court finds a factual and legal basis to support the Referee's unexplained decision to reject six search terms proposed by the Insurers. As to "Lorillard," however, the court finds that the Insurers' request is "reasonably calculated to lead to the discovery of relevant information" and it is not unduly burdensome. The Insurers are welcome to continue to investigate the rejected terms and renew this request is appropriate.

4. Indemnity Agreements

According to the Insurers, as to the Insurers' request for indemnification agreements with member clubs, the Referee considered the corporate governance documents between the NFL and the clubs and heard the parties' debate of the meaning of "indemnity." He concluded that there was no litigable issue, but noted the Insurers are free to investigate the issue with the clubs. (NYSCEF 510, Order at 56). The court rejects the insurers' request because the Order is supported by evidence in the record and the Referee's application of the law.

The NFL agreed to produce indemnity agreements and communications with one helmet manufacturer. Here, the Insurers seek indemnity agreements and communications with other manufacturers. It does not appear that the Insurers raised this issue with the Referee. Having agreed to supervision of discovery by the Referee, the Insurers shall comply with their agreement.

Accordingly, it is

ORDERED, that the Insurers' motion to modify the Order is denied without prejudice except as to the term "Lorillard," which may be added to the list of search terms; and it is further

ORDERED, that the parties are directed to comply with this court's current part rules regarding redaction, sealing and placeholders. As to the placeholders filed in connection with these motions, the parties are directed to correct the electronic record in NYSCEF within 30 days.

Motion Seq. No. 20

10/4/19
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

APPLICATION: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER

CHECK IF APPROPRIATE: ☐ INCLUDES TRANSFER/REASSIGN ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Motion Seq. No. 21

10/4/19
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

APPLICATION: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER

CHECK IF APPROPRIATE: ☐ INCLUDES TRANSFER/REASSIGN ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Motion Seq. No. 22

10/4/19
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

APPLICATION: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER

CHECK IF APPROPRIATE: ☐ INCLUDES TRANSFER/REASSIGN ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE