Hankook Tire Am. Corp. v Samsung Fire & Mar. Ins. Co. Ltd.
2020 NY Slip Op 32451(U)
July 10, 2020
Supreme Court, New York County
Docket Number: 653948/15
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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HANKOOK TIRE AMERICA CORP.

Plaintiff,

DECISION AND ORDER

- v -

Index No. 653948/15

SAMSUNG FIRE & MARINE INSURANCE CO. LTD (U.S. BRANCH) and SAMSUNG FIRE & MARINE MANAGEMENT CORPORATION,

MOT SEQ 005

Defendant.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover under a policy of theft and casualty insurance, the plaintiff, Hankook Tire America Corp. (Hankook) moves (1) for an order holding the defendants in contempt for failure to comply with a discovery order dated June 21, 2018, (2) pursuant to CPLR 3126 to strike the defendants' answer, preclude the defendants from offering any documentary evidence in support of their defenses for failing to provide discovery or for an adverse inference charge concerning the withheld documents, and for attorney's fees.

The defendants, Samsung Fire & Marine Insurance Co., Ltd.(U.S. Branch) and Samsung Fire & Marine Management Corporation (Samsung) oppose the plaintiff's motion and purport to cross-move for the court to recuse from this case.

The motion is granted in part and the purported cross-motion is denied.

II. BACKGROUND

The plaintiff, a manufacturer and distributor of tires, commenced this action on 2015 claiming that the defendants improperly declined to pay a $1.35 million insurance claim under Hankook's all-risk policy issued by Samsung after the theft of approximately 5,353 tires that had been stored at Hankook's warehouse in Rancho Cucamonga, California. The plaintiff alleges that employees of its freight handling service provider, Kann Enterprises, Inc., committed the theft. The complaint, filed in November 2015, includes causes of action for a declaration that Hankook is entitled to full payment on its claim, breach of contract and breach of covenant of good faith and fair dealing.

After the court denied their motion to dismiss on *forum non conveniens* grounds, the defendants answered the complaint asserting nine affirmative defenses. According to the defendants, they properly denied the claim since the plaintiff has not established a "physical loss from an external cause" within the coverage period, as required by the subject policy. The defendants have alleged that the tire loss may have resulted from theft by the plaintiff's own employees over time and/or deficient bookkeeping and inventory tracking practices.

Protracted discovery ensued.

The preliminary conference was held on June 1, 2017, at which the court directed that document discovery was to be completed by June 15, 2017, and depositions were to be held by September 29, 2017. Document discovery was delayed and depositions were not conducted.

By a compliance conference order dated November 16, 2017, the court ordered document discovery to be completed by January 15, 2018, and depositions to be completed by April 30, 2018. That order stated that the plaintiff did not receive documents or demands for documents from the defendants as per the preliminary conference order. The reason provided by the defendants was that the attorney handling this case left the firm in the interim. The defendants, however, commenced a third-party action in August 2017 against Kann Enterprises, Inc.

A compliance conference was held six months later. The resulting order, dated May 3, 2018, states that document discovery was "substantially complete" but some remained outstanding due to the parties' disputes. The court directed that the remaining document discovery was to be completed by June 11, 2018, and depositions held by August 11, 2018. The court marked the dates "Final 2X", and referenced the prior orders.

An expedited compliance conference was held on June 21, 2018, at the plaintiff's request. The court issued an order stating that the defendants failed to produce any document discovery as per the previous order, without excuse, and directed the defendants to respond by June 28, 2018, and the parties to complete depositions by August 10, 2018. This order was marked "Final 3X – No Extension."

The plaintiff made this motion on August 21, 2018.

Two days later, on August 23, 2018, the court held a conference and issued an order stating that the defendants still owed discovery to both the plaintiff and the third-party defendant, without excuse. The court directed that the defendants were to "produce all outstanding document discovery to the extent not objected to within 5 days." The Note of Issue deadline remained September 28, 2019, and was again marked "Final 3X – No Extensions." On October 3, 2018, the return date of the motion, the court again directed the defendants to produce all outstanding discovery within five days.

By order dated December 7, 2018, the case was referred to the Alternative Dispute Resolution Program of the Commercial Division. That order provides that "counsel shall comply in full with all ADR Rules. Failure to do so may result in the imposition of sanctions or other appropriate action by the

court." The order further provides that the "proceedings in this action, including discovery and motion practice, shall not be stayed during the ADR process."

On April 3, 2019, just prior to the scheduled mediation, the court held another conference. The order states that the defendants had produced unredacted documents but continue to object to some demands on the basis of attorney-client privilege and that the depositions of non-parties and the further depositions of the defendant were not completed. Counsel represented that the further depositions were occasioned in part by the defendants' failure to timely provide requested document discovery prior to the initial deposition.

The court was notified that the mediation was not completed, and the matter was being referred back to the court for further proceedings.

The court then issued an order dated April 16, 2019, directing the parties to appear in court to demonstrate why sanctions should not be imposed. By an order dated April 25, 2019, the parties were given the opportunity to supplement their papers on this motion to address the issue, and the plaintiffs were permitted to submit an affirmation in support of their request for attorney's fees for attending the mediation and the

court appearance on April 24, 2019. Both sides submitted supplemental papers.

In the plaintiffs' supplemental papers, it represents that the defendants' reinsurer, Catalina, acquired the claim and had been steering the litigation since May 2018. The plaintiff further alleged that it deposed the defendants' former Director of Claims, Daniel Valinoti on September 18, 2018, but the defendants failed to disclose documents identified in that deposition, despite several demands. The plaintiff had demanded emails from Valinoti to the defendants' counsel and a "Claims Reporting and Authority Guideline." The plaintiff further alleges that the defendants refused to produce documents and information concerning its transfer of "a runoff portfolio legacy liabilities" to Catalina, and that when the defendant raised a privilege argument, refused to provide the information and documents even with a privilege log.

The defendants filed an affirmation of counsel on May 15, 2019, in which he generally attempts to deflect blame for the delays to the plaintiff and the defendants' prior counsel, argues that much of the delayed discovery was recently provided to the plaintiff, and seemingly attempts to argue the merits of the action as one would on a summary judgment motion. In his affirmation, defense counsel, who had represented the defendants

since June 2018, a year prior, states that "our predecessor defense counsel had created significant document discovery problems" and argues that he was "trying to schedule and complete depositions while also "trying at the same time to remedy the document issues."

The parties completed several more depositions in July and August of 2019. In November 2019, the defendants again changed attorneys.

III. DISCUSSION

A. Motion for Contempt

To prevail on a motion to punish a party for civil contempt, a party must establish that the party to be held in contempt violated a clear and unequivocal court order, known to the parties. See Judiciary Law § 753(A)(3); see also McCormick v Axelrod, 59 NY2d 574 (1983), amended 60 NY2d 652 (1983). The movant must also establish that the party to be held in contempt engaged in conduct that was calculated to and actually did defeat, impair, impede, and prejudice the rights of the movant. See 450 West 14th St. Corp. v 40-56 Tenth Avenue, LLC, 15 AD3d 166 (1st Dept. 2005); Lipstick, Ltd. v Grupo Tribasa, S.A. de C.V., 304 AD2d 482 (1st Dept. 2003). "Contempt is a drastic remedy which should not be granted absent a clear right to such relief." Pinto v Pinto, 120 AD2d

337, 338 (1st Dept. 1986). The court declines to impose this relief.

The plaintiffs initially argued that the defendants' failure to comply with this court's order dated June 21, 2018, warrants an order of contempt. In its supplemental papers, the plaintiff expands the factual basis and argues that the defendants' non-compliance throughout the discovery process and the mediation, warrants sanctions, and expands their request for relief under CPLR 3126 to include striking the answer.

It is beyond dispute that this court's order dated June 21, 2018, and all other discovery orders issued in this case are clear and unequivocal and were known to the defendants. It should be noted that, as set forth above, several more discovery orders were issued before and after June 21, 2018, including orders dated June 1, 2017, November 16, 2017, August 28, 2018, October 4, 2018, April 4, 2019. Thus, the defendants' non-compliance goes beyond the order dated June 21, 2018, and they have offered little or no excuse for their repeated non-compliance. Notably, while the defendants asserted the argument that certain demanded discovery was privileged, they never moved for a protective order on that ground or any other ground.

As previously noted, in the supplemental affirmation filed on May 15, 2019, defendants' counsel generally attempts to deflect blame for the delays and argue that much of the delayed discovery was recently provided to the plaintiff and that constitutes sufficient compliance. However, counsel fails to recognize that any failures, as well as successes, of predecessor counsel are inherited by incoming counsel. Attempting to remedy discovery issues caused by prior counsel is new counsel's professional obligation but does not excuse the delay caused by prior counsel and certainly does not create an excuse for the additional and unexplained delays during the tenure of new counsel.

However, while under the circumstances, the court declines to hold the defendants in contempt, their conduct clearly warrants a remedy under CPLR 3126.

B. Motion for Sanctions Pursuant to CPLR 3126

The plaintiffs ask the court to sanction the defendants for their repeated failures to comply with discovery demands and court orders. Specifically, the plaintiffs seek an order pursuant to CPLR 3126 striking the defendants' answer, precluding evidence or granting an adverse inference charge in regard to the missing discovery. They also seek attorney's fees

resulting from the delay and the additional litigation and mediation, which is addressed separately.

More specifically, the plaintiff claims that as of August 2018, the defendants still refused to provide unredacted documents and counsel was still engaging in delay tactics. For example, the plaintiff alleges it sought the deposition of Carlton Clarke, the defendants' senior analyst who investigated the plaintiff's claim, in May 2017. That deposition did not occur due to the defendants' delay in producing documents. The defendants then terminated Clarke on March 31, 2018, but failed to notify the plaintiff and, when the plaintiff requested Clarke's address for purposes of a subpoena, the defendants provided the wrong address. The plaintiff alleges that following the June 21, 2018, conference, it sent the defendants' then counsel a specific list of outstanding documents, including full copies of improperly redacted documents, claims handling manuals and guidelines and documents specific to Carleton Clarke. The plaintiff also demanded the name of the person the defendants would be designating as their corporate representative for deposition, and a response as to whether current counsel would be representing three more witnesses, unidentified by name - the defendants' claims investigator, the defendants' consultant, and the defendants' forensic accountant, who would be called for depositions. According to the plaintiff, the defendants failed

to provide this information. The defendants also failed to notify the plaintiff who, among the employees the plaintiff offered for deposition, they would seek to depose, and refused to confirm deposition dates and locations.

The plaintiff further claims that the defendants delayed the mediation for several weeks in bad faith and then "effectively" failed to attend by refusing to participate in good faith when they did appear. The plaintiff alleges that this resulted in the ADR Coordinator being notified by the mediator of the defendants' conduct and non-compliance and the case being returned to the court for further proceedings.

The defendants have not provided persuasive support for their position that no sanctions are warranted for their repeated non-compliance with discovery orders and the ADR order. In counsel's affirmation filed May 15, 2019, he simply represents that the defendants have now provided all required discovery, and blames prior counsel for the previous extensive delays and the failure of mediation, but without providing necessary details. Counsel does not specifically deny plaintiff's specific allegations of delay but claims that he prepared for the mediation and eventually "showed up" but that he did not further participate because the plaintiff

unreasonably refused to "come down off its demand for reimbursement of its entire loss plus fees."

CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" and that "a failure to comply with discovery, particularly after a court order has been issued, may constitute the "dilatory and obstructive, and thus contumacious, conduct warranting the striking of the [answer]." Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1st Dept. 1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1st Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1st Dept. 2004). The court can infer willfulness from repeated failures to comply with court orders or discovery demands without a reasonable excuse. See LaSalle Talman Bank, F.S.B. v Weisblum & Felice, 99 AD3d 543 (1st Dept. 2012); Perez v City of New York, 95 AD3d 675 (1st Dept. 2012); Figiel v Met Food, 48 AD3d 330 (1st Dept. 2008); Ciao Europa, Inc. v Silver Autumn Hotel Corp., Ltd., 270 AD2d 2 (1st Dept. 2000). Furthermore, CPLR 3101(a) provides that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" and this language is "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." Osowski v AMEC Constr. Mgt., Inc., 69 AD3d 99, 106 (1st Dept. 2009) quoting Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406-407 (1968).

Applying these standards, and in view of the procedural history of this case and the court's prior orders, the court declines to strike the defendants' answer. However, the plaintiffs' motion is granted to the extent that the defendants shall be precluded from offering evidence at trial or in a dispositive motion, in support of any defense, that relates to or concerns the same subject matter as the discovery that was demanded or ordered and not timely produced by the defendants. This would include any discovery not provided prior to April 16, 2019.The plaintiff is also entitled to attorney's fees, as discussed below.

This breach of contract action, commenced five years ago, was indisputably delayed more than two years by the defendants' unexplained delays and recalcitrance in the discovery process. The defendants repeatedly, and over the course of representation by three sets of attorneys, ignored the plaintiff's discovery demands and consistently flauted the discovery deadlines imposed by the court. This discovery was "material and necessary" in the prosecution of the action and certainly bore on the controversy presented, whether the defendants wrongfully denied the

plaintiff's insurance claim. Clearly, this discovery, if provided in a timely and thorough manner, would have served to sharpen the issues and reduce delay and prolixity. See Osowski v AMEC Constr. Mgt., Inc., supra. The court infers willfulness from the defendants' repeated failures to comply with court orders or discovery demands without a reasonable excuse. See LaSalle Talman Bank, F.S.B. v Weisblum & Felice, supra; Perez v City of New York, supra; Figiel v Met Food, supra.

C. Plaintiffs' Application for Attorney's Fees

The plaintiffs also seek to recover the costs occasioned by the defendants' discovery delays, including additional court appearances at discovery compliance conferences, and the failed mediation. Specifically, they seek $101,418.50 in attorney's fees plus $1,456.48 in costs. The attorney's fees request consists of $52,519.50 for the sanctions motion, $26,352.50 for the mediation, $7,083.50 for the April 25, 2019, court appearance, $10,935.00 for the supplemental affirmation and $4,528.00 for the document production deficiencies. In support of the application, the plaintiffs submit counsel's billing records and invoices and an affirmation of counsel.

The defendants do not address the particulars of the plaintiff's submissions but merely re-assert their position that

that no sanction is warranted for their discovery delays and that they sufficiently cooperated with the ADR process.

The factors used to determine the reasonableness of legal fees "include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount involved, the customary fee charged for such services, and the results obtained (citations omitted)." Matter of Barich, 91 AD3d 769, 770 (2nd Dept 2012); see Matter of Freeman, 34 NY2d 1, 9 (1974). An award of reasonable counsel fees is within the sound discretion of the court. See Diakrousis v Maganga, 61 AD3d 469 (1st Dept. 2009); Ebrahimian v Long Island Railroad, 269 AD2d 488 (2nd Dept. 2000).

Based on the plaintiffs' submissions and the history of this case, including the additional compliance conferences and the motion practice occasioned by the defendants' conduct, the court finds that some attorney's fees are warranted. However, after reviewing the submitted billing records and invoices and considering the history of this case, the court finds the request of $101,418.50 is excessive, particularly in light of the imposition of the additional sanction of preclusion, as discussed above. Thus, the court grants the motion to the extent

of awarding the plaintiff one-half of that sum, or $50,709.25, in attorney's fees and costs.

D. Application for Recusal

In their opposition papers, the defendants ask the court to recuse from this case on the basis of bias based on its knowledge that the mediation failed. The application is denied as both procedurally improper and without merit.

The defendants have not cross-moved for that or any affirmative relief. See CPLR 2211; 2214; 2215; Lee v Colley Group McMontebello LLC, 90 AD3d 1000 (2nd Dept. 2011). Furthermore, since a recusal motion is not against a moving party, it would require a separate motion, not a cross-motion. See Rubino v 330 Madison Co., LLC, 150 AD3d 603 (1st Dept. 2017). In any event, the gravamen of the application is that, when the parties were sent back to the IAS part for further proceedings by the Mediation Coordinator, the court became aware of the defendants' non-compliance with the ADR rules. Contrary to the defendants' contention, a parties' non-compliance with a court order or any ADR order or rule is reported to the court in each case sent to ADR, and the defendants offer no cogent explanation as to why this procedure would not be applicable to them.

IV. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion is granted to the extent that the defendants shall be precluded from offering evidence at trial or on any dispositive motion that relates to or concerns the same subject matter as the discovery that was demanded or ordered and not timely produced by the defendants, including any discovery provided after April 16, 2019, and the plaintiff is awarded $50,709.25, in attorneys fees and costs, and the motion is otherwise denied, and it is further

ORDERED that the defendants' purported cross-motion for recusal is denied, and it is further

ORDERED that the Note of Issue deadline is extended to October 30, 2020, and it is further

ORDERED that the parties shall contact the court on or before September 30, 2020, to schedule a telephonic status conference.

This constitutes the Decision and Order of the court.

Dated: July 10, 2020

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON