

**Crestview Advisors, L.L.C. v St. Paul Fire & Marine
Ins. Co.**

2021 NY Slip Op 32548(U)

December 2, 2021

Supreme Court, New York County

Docket Number: Index No. 651386/2020

Judge: Andrew Borrok

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART 53

Justice

-----X

CRESTVIEW ADVISORS, L.L.C., CRESTVIEW-OXBOW
(ERISA) ACQUISITION, LLC, CRESTVIEW-OXBOW
ACQUISITION, LLC,

Plaintiff,

- v -

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
AXIS INSURANCE COMPANY, ARCH INSURANCE
COMPANY, ENDURANCE AMERICAN INSURANCE
COMPANY

Defendant.

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INDEX NO. 651386/2020

MOTION DATE _____

MOTION SEQ. NO. 007 008

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 184, 195, 196

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, St. Paul Fire and Marine Insurance Company (**Travelers**)’s motion to compel Crestview Advisors, LLC (**Crestview Advisors**), Crestview-Oxbow (ERISA) Acquisition, LLC (**Crestview-Oxbow (ERISA)**), and Crestview-Oxbow Acquisition, LLC (**Crestview-Oxbow**, and, together with Crestview Advisors and Crestview-Oxbow (ERISA), **Crestview**) to produce (i) engagement agreements or retainer agreements between Crestview and any law firm and/or service provider retained in connection with the Oxbow Litigation (hereinafter defined) and (ii) electronic copies of invoices (**Electronic Invoices**) is granted solely to the extent of requiring Crestview to produce Electronic Invoices that contain unprivileged comments or alterations not contained in the copies of invoices already produced. Crestview’s

motion to compel Travelers and Arch Insurance Company (**Arch**) to produce (i) the entire claim file for Claim No. F1703758, which Travelers has identified as the claim in which Travelers paid the cost for prosecuting counterclaims (the **Counterclaims File**), (ii) all documents and communications of Kaufman Borgeest and Ryan (**KBR**), Travelers' counsel, concerning Crestview's insurance claim created prior to June 28, 2017, (iii) all documents and communications in KBR's files concerning the allocation of defense costs incurred by Crestview between covered and uncovered claims, (iv) communications between employees in Travelers' claims department concerning Crestview's insurance claim which were redacted on the basis of attorney-client privilege and work product, and (v) notes made by David Wilson, Arch's claim handler, in preparation for his deposition and to refresh his recollection as to Crestview's claim must be granted solely to the extent set forth below.

Crestview filed this lawsuit against various insurance companies, including Travelers (the **Insurance Companies**), to, among other things, recover alleged damages based on the insurance companies' refusal to pay defense costs incurred by Crestview in defending two lawsuits in Delaware Chancery Court stemming from Crestview's attempt to divest its interest in Oxbow Carbon LLC (the **Oxbow Litigation**). The Oxbow Litigation went to trial in 2017 and was concluded by order of the Delaware Supreme Court in 2019. Crestview incurred in excess of \$40 million in the Oxbow Litigation and sought reimbursement from the Insurance Companies – i.e., from Travelers under its primary policy the (**Primary Policy**) and from the other Insurance Companies (the **Excess Insurance Companies**) under the Excess Insurance Companies' excess policies (the **Excess Policies**; the Excess Policies, together with the Primary Policy, hereinafter,

collectively, the **Insurance Policies**). Travelers paid only \$3.5 million to Crestview and reserved its right to recoup that payment.

Crestview filed the complaint, dated February 28, 2020, in this action alleging causes of action for (i) a declaratory judgment that the insurance policies cover Crestview's counterclaims in the Oxbow Litigation (first cause of action), (ii) for a declaratory judgment that Crestview-Oxbow and Crestview-Oxbow (ERISA) are "Companies" as defined by the Primary Policy and thereby covered by the Insurance Policies (second cause of action), (iii) for a declaratory judgment that the Primary Policy does not exclude coverage for costs incurred defending claims for tortious interference with contract (third cause of action), (iv) for a declaratory judgment that the Insurance Companies have a duty to reimburse Crestview for costs covered by the Outside Position Liability Coverage of the Primary Policy (fourth cause of action), (v) for a declaratory judgment that, to the extent any costs not covered by the Insurance Policies are susceptible to allocation between covered and non-covered claims, the Insurance Companies must prove what percentage of costs are solely attributable to the defense of non-covered claims (fifth cause of action), (vi) for breach of the implied covenant of good faith and fair dealing (sixth cause of action), and (vii) for tortious interference with contract as against Arch (seventh cause of action) (Complaint, NYSCEF Doc. No. 2, ¶¶ 103-145).

CPLR 3101 requires full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof. The standard is liberally interpreted requiring disclosure of any facts bearing on the controversy (*In re Stam Pipe Explosion at 41st Street*, 127 AD3d 554, 555 [1st Dept 2015], quoting *Allen v Crowell-Collier Pub. Co.*, 21 NY2d

403, 406 [1968]). This standard requires “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” (*Rahman v Pollari*, 107 AD3d 452, 454 [1st Dept 2013]).

Travelers’ Motion to Compel (Mot. Seq. No. 007)

The branch of Travelers’ motion to compel the production of engagement agreements or retainer agreements must be denied. These agreements are simply not relevant to any issue before the court in this action. As discussed above, this case concerns Crestview’s coverage in the Oxbow Litigation and the costs incurred in defending that litigation. This necessarily includes Crestview’s counterclaims because they were an essential component of Crestview’s defense in the Oxbow Litigation (*see Jenel Mgt. Corp. v Pacific Ins. Co.*, 55 AD3d 313 [1st Dept 2008]). Travelers’ argument that it needs the retainer agreements to determine whether Crestview considered filing litigation before they were sued in the Oxbow Litigation fails. It is undisputed that such litigation was not commenced and there is no basis to conclude that this was even contemplated. The Quinn Emanuel Urquhart & Sullivan (lead counsel in the Oxbow Litigation) retainer letter was produced and Travelers does not dispute that it does not suggest anything to the contrary. Therefore, the engagement agreements and the retainer agreements need not be produced

The branch of Travelers’ motion to compel the production of the Electronic Invoices must be granted in part. To the extent that Electronic Invoices contain comments or alterations that were not included in the PDF invoices previously produced, Crestview must produce them. If the comments or alterations on the Electronic Invoices indicated questions as to the propriety of

certain of the bills, this is relevant to whether the invoices were in fact reasonable. The fact that the invoices were paid does not mean that they are *per se* reasonable. *Arbor Hill Concerned Citizens Neighborhood Ass'n v Cty. of Albany and Albany Cty. Bd. of Elections*, 522 F3d 182, 190 (2d Cir 2008) which concerned guidance as to lodestar calculations does not suggest a different result. Nor can it be said that such production is duplicative because the Electronic Invoices contain additional material previously not provided. For the avoidance of doubt, Crestview need not produce any Electronic Invoices previously provided that do not contain comments or alterations. Crestview may redact any notes subject to privilege and produce a privilege log of the same. Travelers has not waived the right to seek these documents by delay because it was not made aware of the existence of the Electronic Invoices until the deposition of Crestview's Chief Financial Officer, Evelyn Pellicone, which was conducted on August 19, 2021.

Crestview's Motion to Compel (Mot. Seq. No. 008)

The branch of Crestview's motion to compel Travelers to produce the entirety of its Counterclaims File must be granted. Previously (May 24, 2021), the Court granted production of the Counterclaims File because if Travelers paid the litigation costs for other counterclaims pursuant to the policy form that is at issue in this case, it would be relevant to their position that there is no coverage for the claim in this case. However, at that hearing, in an abundance of caution based on the potential burden to Travelers, the court limited the production of documents from the Counterclaims File to a 15-month period. It would seem that the court's concern was unfounded as this limitation resulted in the production of a mere two documents. Travelers shall repeat the search using the same search terms and produce documents from the entire

Counterclaims File. Additionally, the parties dispute whether the two documents produced from the Counterclaims File were properly redacted because Crestview indicates that so much of the letters have been redacted that they cannot understand the basis for the agreement to pay 20% of the costs of the Cross-Claim at issue and whether the redactions made based on certain alleged privacy laws in California were appropriate. Travelers will provide an unredacted copy of each of the two letters to Part 53 via email together with a highlighted copy of the California statute at issue for *in camera*.

The branch of Crestview's motion for all documents and communications in KBR's files concerning Crestview's insurance claim created prior to June 28, 2017 (*i.e.* the date of the letter denying coverage) is granted to the extent of requiring the production of communications and documents sent between Travelers and KBR. As this court held on the May 24, 2021 hearing, "factual information about investigations or matters generally related to the handling of claims do not become privilege by virtue of the fact that a lawyer did that investigation" (May 24, 2021 Tr., NYSCEF Doc. No. 131, at 13:20-24). This holding, however, does not require a finding that all of KBR's internal documents relating to the Crestview insurance claim cannot be work product. Crestview specifically seeks an analysis mentioned by Travelers' claim adjuster, George Kimmel, at his deposition that he testified formed at least part of the basis for Travelers' denial of coverage. To the extent such an analysis exists, that must be produced.

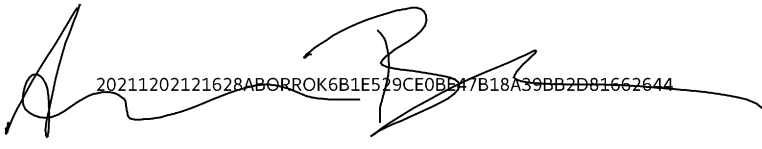
The branches of Crestview's motion for all KBR files concerning allocation of costs and for Mr. Wilson's notes taken in advance of his deposition must both be denied because the documents sought are privileged. The documents sought from the KBR files concerning the allocation of

costs were prepared after Crestview's claims were denied, and therefore are protected as documents made for the purposes of litigation. *Cf. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v TransCanada Energy USA, Inc.*, 119 AD3d 492, 493 [1st Dept 2014] (documents prepared in the ordinary course of business in determining whether to pay or deny a claim are not privileged). Mr. Wilson's notes are also not discoverable. Mr. Wilson testified at his deposition that he took notes at his deposition preparation. This is plainly insufficient to conclude that the notes he took were used to refresh his recollection in advance of his deposition testimony. Arch's counsel and Mr. Wilson have both represented that the notes Mr. Wilson took were notes of advice from counsel, including the rules of depositions. Crestview's pure speculation that the notes contain something different is insufficient to warrant the production of Mr. Wilson's notes.

The final branch of the motion seeking to compel production of communications between employees in Travelers' claims department, specifically between Travelers' claim adjuster George Kimmel and his supervisors Kathryn Walker and David Benfield or between Ms. Walker and Mr. Benfield must be granted. The documents were not between legal counsel for Travelers, or communications seeking legal advice. These were merely internal communications amongst management. As such, they are not privileged and must be produced.

It is hereby ORDERED that Travelers' motion to compel is granted solely to the extent of requiring Crestview to produce Electronic Invoices that contain comments or alterations that are not protected by privilege; and it is further

ORDERED that Crestview’s motion to compel is granted solely to the extent of requiring Travelers to produce documents in its Counterclaims Files using the same, previously agreed upon search terms, communications and documents sent between Travelers and KBR prior to June 28, 2017, including the analysis that formed the basis for Travelers’ denial of coverage, and communications between employees of Travelers’ claims department.

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| <u>12/2/2021</u> DATE |  20211202121628ABORROK6B1E579CE0BE47B18A39BB2D81662644 _____ ANDREW BORROK, JSC | | | |
| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION | <input type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> GRANTED | <input type="checkbox"/> SETTLE ORDER | <input checked="" type="checkbox"/> GRANTED IN PART | <input type="checkbox"/> REFERENCE |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> SUBMIT ORDER | <input type="checkbox"/> REFERENCE |