American Empire Surplus Lines Ins. Co. v Commerce & Indus. Ins. Co.
2022 NY Slip Op 32638(U)
August 3, 2022
Supreme Court, New York County
Docket Number: Index No. 651568/2021
Judge: Arlene Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY,

Plaintiff,

- v -

COMMERCE & INDUSTRY INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, CARLOS MAYORQUIN,

Defendant.

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INDEX NO. 651568/2021

MOTION DATE 08/02/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 54, 55, 56, 57, 58, 59, 69, 70, 71, 72, 73, 77, 79

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The motion by non-party Eileen Fullerton, Esq. to quash a subpoena served by defendants on her is denied.

Background

This is a declaratory judgment action, primarily between the plaintiff (the primary insurer) and defendant insurers (which issued excess policies); the excess carriers have refused plaintiff's tender on the ground that it was untimely. The coverage relates to an underlying Labor Law action pending in the Bronx since 2014. In that action, defendant Mayorquin (the plaintiff in the Bronx case) contends he was injured while working at a construction site in Yonkers. The owner of the premises was Carriage House Owner's Corp. ("Carriage"), which hired Advanced Carpentry Construction, Inc. ("Advanced") to do work at the site. Advanced

subcontracted with M&A Projects ("M&A") for masonry work, and M&A then hired Mr. Mayorquin's employer ("Modu") to assist with the masonry tasks.

Plaintiff issued a primary CGL policy with a $1 million per occurrence limit and an excess CGL policy with a $1 million per occurrence limit to Advanced. Plaintiff also issued primary and excess policies to M&A. Defendant Commerce issued a second excess policy to Advanced while defendant National Union issued a second excess policy to M&A. Plaintiff seeks a declaration that these defendants have a duty to provide excess insurance coverage to the defendants in the underlying action.

Non-Party Fullerton ("Movant") and her law firm are counsel for M&A in the Bronx case. Movant argues that the subpoena served on her by defendants should be quashed because it seeks information protected by the attorney-client privilege, the common interest doctrine and would require her to reveal attorney work product. She points out that plaintiff hired her firm to defend its insured (M&A) in the underlying action and that until about May or June 2020 Movant's firm represented all the defendants in the Bronx case.

Movant argues that although she is not counsel in this case, she remains defense counsel for M&A and the subpoena demands that she testify about her communications with the defendants in the Bronx case (all of whom she represented at one point). She argues that any communications between her firm and plaintiff about this case are also privileged and any reports about the Bronx case are protected by the attorney work product doctrine. Movant insists that M&A and plaintiff have a common interest as plaintiff hired Fullerton Beck LLP (Movant's firm) to represent M&A.

In opposition, defendants Commerce & Industry Insurance Company and National Union Fire Insurance Company (hereinafter, "defendants") maintain that Movant's testimony is critical

because it would directly relate to the key issue in this case: whether plaintiff's tender to defendants was made well after it knew or should have known that defendants' policies would be implicated. In other words, defendants argue that plaintiff's tender to them was untimely and they want to explore when plaintiff should have known it was time to seek coverage under defendants' excess policies. Defendants question why plaintiff had no awareness prior to March 2020 that the Bronx case could have resulted in a claim under the excess policies, both of which purportedly attached at $2 million. They claim they need to explore Movant's discussions about the true value of the underlying case.

They claim that any heightened scrutiny applied to subpoenas served on opposing counsel does not apply here because Movant is not an attorney for plaintiff and that plaintiff has waived all applicable privileges by plaintiff's voluntary disclosure of privileged materials to defendants. Apparently, defendants received some of Movant's reports about the underlying case.

In reply, Movant insists that her evaluations of the underlying action are protected by the attorney-client privilege. She also argues that there is no evidence presented that plaintiff waived any privilege. Movant argues that because defendants have refused to provide coverage for the claims in the underlying action, it should not be afforded the right to rely on privileged reports from Fullerton Beck LLP.

Movant admits that although certain of these reports were provided to defendants on a good faith basis prior to defendants' denials of coverage, the subsequent denials created the privilege. She disputes the fact that a confidentiality agreement between the parties can adequately protect the testimony because she is not a party to the agreement.

Plaintiff also submits an affirmation in support of the motion in which it explains that there was a tripartite relationship between plaintiff, its insureds (M&A and Carriage) as well as Fullerton Beck LLP. It argues that they all communicated about the status of the Bronx case and provided their assessment about that case. Plaintiff argues that defendants cannot share in that relationship because they denied coverage under the policies at issue here.

Discussion

"CPLR 3101(a) requires full disclosure of all matter material and necessary in the prosecution or defense of an action. While trial courts undoubtedly possess a wide discretion to decide whether information sought is 'material and necessary' to the prosecution or defense of an action, such discretion is not unlimited and disclosure is required where it will assist preparation for trial by sharpening the issues and reducing delay and prolixity. At the same time, the CPLR protects from discovery attorney work product, and, when affirmatively raised as it is here, privileged communications and permits a court to issue a protective order denying, limiting, conditioning or regulating the use of any disclosure device where necessary to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

An individual or entity who seeks a protective order bears the initial burden to show either that the discovery sought is irrelevant or that it is obvious the process will not lead to legitimate discovery. Once this burden is met, the subpoenaing party must establish that the discovery sought is 'material and necessary' to the prosecution or defense of an action, i.e., that it is relevant. When the individual seeking a protective order asserts attorney work product and/or privilege, the burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the

purposes underlying the immunity" (*Liberty Petroleum Realty, LLC v Gulf Oil, L.P.*, 164 AD3d 401, 403-04, 84 NYS3d 82 [1st Dept 2018] [internal quotations and citations omitted]).

The Court's analysis must begin with the precise issue presented here: whether the notice to defendants seeking coverage (which was sent after the plaintiff in the underlying action won a summary judgment motion) was timely. The Court denies the motion and finds that Movant must appear for a deposition. A review of the complaint in this action reveals that plaintiff alleges that the "true value of the Underlying Action was not in excess of the limits of [plaintiff's] policies and, as such, notice to the [defendants' policies] was not necessary" (NYSCEF Doc. No. 1, ¶ 26]) Defendants are entitled to explore whether that determination was reasonable, which necessarily involves questioning the attorney for defendants in the underlying action.

While the Court recognizes that depositions of attorneys are generally disfavored (although the Court finds that the heightened scrutiny that applies to taking the deposition of opposing counsel does not apply here because Movant is not opposing counsel), the Court is persuaded that the information defendants seek is material and necessary. The undisputed facts are that the underlying action started in *2014* and defendants were not notified until April 7, 2020 and April 9, 2020 (*id*. ¶ 27). That length of time raises a self-evident issue about the timeliness of the tender. Clearly plaintiff believed that the case was not going to require coverage under the excess policies issued by defendants. The issue in this case is whether that belief was reasonable and the deposition of Movant will shed light on that key issue. It may be that plaintiff and Movant's view about the underlying action was justified (the complaint insists there are many facts that suggest that the defendants in that case have no liability [*id*. ¶¶ 15-18]). Plaintiff seems

to suggest that the granting of the summary judgment motion was a surprise. Defendants are entitled to explore the basis for that belief.

In other words, the Court finds that plaintiff has placed the issue of the valuation of the underlying case at issue by bringing this litigation. "At issue waiver of [the attorney-client] privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information" (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 62 AD3d 581, 582, 880 NYS2d 617 [1st Dept 2009] [internal quotations and citation omitted]). That is precisely the case here; plaintiff cannot offer a conclusory assertion that the notice to defendants was timely and simultaneously insist that defendants cannot seek evidence supporting plaintiff's theory. In other words, at trial, Ms. Fullerton would be a key witness to testify about why she thought it was not reasonable to tender to the defendants earlier (assuming, of course, that this was her position). The trial should not be the first time that defendants hear that testimony. They are entitled to a full examination of Ms. Fullerton.

The Court finds that the confidentiality agreement signed by the parties is enough to ensure that there is adequate protection to defendants in the underlying case. Of course, any injured plaintiff would want to see how defendants value his or her case; accessing that information would certainly influence settlement negotiations. But that information is critical to this case and so the Court denies the motion on the ground that it would reveal confidential information.

Moreover, the Court finds that the second subpoena gave Movant sufficient notice about what the subpoena seeks; there is no basis to grant the motion to quash on this ground. And Movant's self-serving assertion that someone in her office who received the second subpoena did not have authorization to accept it on her behalf is without merit. Defendants served the subpoena on someone at her office; Movant clearly got notice of the subpoena.

Accordingly, it is hereby

ORDERED that the motion by non-party Eileen Fullerton to quash defendants' subpoena is denied and she must appear for a deposition on or before September 8, 2022.

The note of issue in this matter is due on October 17, 2022 (NYSCEF Doc. No. 78).

8/3/2022
DATE

ARLENE BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE