American Empire Surplus Lines Ins. Co. v Commerce & Indus. Ins. Co.
2022 NY Slip Op 33049(U)
September 1, 2022
Supreme Court, New York County
Docket Number: Index No. 651568/2021
Judge: Arlene P. Bluth

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,

Defendants.

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INDEX NO. 651568/2021

MOTION DATE 08/31/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 61, 68

were read on this motion to/for DISCOVERY.

The motion by defendants Commerce & Industry Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA (collectively, "Movants") to compel plaintiff to produce certain documents plaintiff withheld as privileged is granted.

Background

This is a declaratory judgment action that 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 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. 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.

Movants argue that plaintiff did not notify Movants about the underlying Bronx case until April 2020 (after a March 2020 summary judgment ruling in Mayorquin's favor). Movants point out that in February 2021, plaintiff's insureds each assigned their rights under Movants' insurance policies to plaintiff. They insist that the insurance policies they issued required that notice of a claim or suit be provided as soon as it "is reasonably likely to involve the policy." Movants contend that providing notice ***six years*** after the litigation commenced and after there was a liability determination against defendants in the underlying action is far too late and violates the terms of the policies. That is Movants' main defense to this action, where plaintiff seeks insurance coverage from Movants.

In this motion, Movants seek evaluations and reports from the defense counsel hired by plaintiff. They point out that plaintiff previously disclosed five such reports, including information about Mayorquin's demand, the jury verdict value, an assessment about plaintiff's chances of success, a settlement range, and details about an unsuccessful mediation. Movants explain that in order to defend against plaintiff's assertion that its notice to Movants was timely, it served document requests exploring, essentially, plaintiff's evaluations about the true value of the case. They observe that plaintiff objected to all of these requests on privilege grounds and that the privilege log presented suggests many documents were withheld.

Movants question how plaintiff could assert privilege when it already disclosed five reports to Movants and that, specifically, it wants to see the claim notes for the underlying

action. Movants argue that they have a substantial need for the documents because it directly relates to a condition precedent for coverage and that plaintiff waived privilege.

In opposition, plaintiff insists that Movants failed to articulate with any specificity the documents that plaintiff has failed to produce. Plaintiff argues that to the extent Movants are concerned with the five reports previously disclosed and the claims notes, those documents are privileged because Movants denied coverage.

Plaintiff argues that Movants should not be allowed to rely on the privileged reports and that they were provided (at least initially) to Movants on a good faith basis prior to Movants' denial of coverage. It maintains that Movants' subsequent denial of coverage creates the privilege and plaintiff denies that it waived privilege.

Plaintiff also denies that it put the privileged documents at issue in this case and that Movants could, if necessary, get information about the value of the underlying case based on its own evaluation of the injuries.

In reply, Movants assert that plaintiff failed to show it can withhold the documents at issue. They maintain that the complaint necessarily puts at issue whether or not plaintiff's insureds gave timely notice to Movants based on the true value of the case. Movants point out that they did, in fact, make a specific request for documents and argue that they seek the production of withheld documents pursuant to request numbers 2-7, 11 and 12 in the subject demand. They observe that they are not seeking the five documents they already have, but instead the documents that were withheld.

Discussion

"[T]hat a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself 'at

issue' in the lawsuit. Instead, 'at issue' waiver occurs when a party has asserted a claim or defense that he or she intends to prove by use of the privileged material" (*Veras Inv. Partners, LLC v Akin Gump Strauss Hauer & Feld LLP*, 52 AD3d 370, 372, 860 NYS2d 78 [1st Dept 2008] [internal quotations and citations omitted]).

The Court grants the motion and finds that "at issue" waiver requires plaintiff to disclose the requested documents. This case is about whether the notice to Movants seeking insurance coverage was timely. An evaluation of whether that notice was timely necessarily involves how plaintiff and its insureds viewed Mayorquin's case.

The mechanics of the insurance policies at play in the underlying action are a critical component of the Court's analysis. Movants provided excess insurance, meaning that Mayorquin's lawsuit would not automatically implicate these policies. In other words, if Mayorquin had suffered minor injuries, there may not have been a need to inform the excess carriers (here, in fact, Movants provided second excess coverage).

The primary CGL policy would be explored first, as it was in this case. Of course, however, plaintiff and its insureds (along with their attorney in the underlying action) likely would have made an assessment of Mayorquin's claims as they learned more and more about the case. As this motion makes clear, that evaluation included an assessment of the value of the case, plaintiff's demands, and settlement discussions. That would inevitably raise potential issues about any additional excess policies if the amounts discussed exceeded the coverage provided by the primary and first excess policies. And it follows that the notice provisions of those second excess policies would have to be considered.

In this case, Movants were not notified about Mayorquin's case until six years after it was filed and only *after* Mayorquin won summary judgment on liability. That significant passage of

time raises legitimate issues about whether the notice was timely. Movants should have the opportunity to explore the reasons for the delayed notice in support of their defense that the notice was not timely and it is unreasonable for plaintiff to claim otherwise. If the documents, particularly the claim notes, show that plaintiff's insureds' valuation of the case implicated Movants' second excess policies long before notice was actually given to Movants, then it will undercut plaintiff's theory that notice was timely. And, conversely, these documents could also show that plaintiff's insureds had no reason to inform Movants and the summary judgment decision took them by surprise. Or they could reveal a completely different justification for not informing Movants until April 2020.

Of course, a finding that something is "timely" or "reasonable" is an amorphous standard that involves an exploration of why notice was not provided to Movants under the specific circumstances of the underlying action. Plaintiff cannot simply assert that its notice was timely and then withhold documents within its possession that might aid in Movants' central defense in this case. In short, Movants are entitled to know why plaintiff waited so long to notify them of the claim; without that information, it is impossible to apply a reasonableness standard.

Although the Court finds that "at issue" waiver compels production of the documents that Movants seek, the Court does not find that plaintiff waived privilege by disclosing certain documents. Undoubtedly, the interplay of various insurance carriers and their insureds involves numerous privilege issues as the parties may, as was the case here, initially have similar interests that soon become competing interests. The Court declines to issue a ruling that would discourage cooperation between primary and excess insurance coverage providers.

Plaintiff must turn over the documents it withheld to Movants only in response to request numbers 2-7, 11 and 12 (these were the items identified by Movants) on or before September 29, 2022.

Accordingly, it is hereby

ORDERED that the motion by defendants Commerce & Industry Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA to compel is granted and plaintiff must turn over the documents it withheld in response to request numbers 2-7, 11 and 12.

Note of issue is due by October 17, 2022 per NYSCEF Doc. No. 78. The Court also observes that the parties engaged in a letter writing campaign (NYSCEF Doc. Nos. 83-87) about a subpoena. The Court declines to grant relief based on letters.

9/1/2022
DATE

ARLENE P. BLUTH, J.S.C.

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