14 Misc.3d 1232(A)
Unreported Disposition
(The decision of the Court is referenced in a table in the New York Supplement.)
Supreme Court, New York County, New York.

NYP HOLDINGS, INC., Plaintiff,
v.
McCLIER CORPORATION, Leonard J. Skiba and Francis N. Cavalier, Defendants.

No. 601404/04. | Jan. 10, 2007.

Opinion

HERMAN CAHN, J.

***1** Motion sequences No.008 and # 009 are consolidated for disposition.

Following the settlement of the claims in the complaint, the defendant/third-party plaintiff seeks indemnification from the third-party defendants.

The Motions:
In separate motions, two of the third-party defendants seek discovery of documents created in connection with the settlement proceedings and seek to compel compliance with prior discovery orders issued against the defendant/third-party plaintiff. Defendant/third-party plaintiff opposes such discovery and cross-moves for a protective order.

Third-party defendant Bass Mechanical Corporation (Bass) seeks to compel defendant McClier Corporation's (McClier) compliance with discovery orders dated March 22, 2006 and June 15, 2006, and with its demands for discovery and inspection and interrogatories dated July 27, 2005 and January 6, 2006. Bass also seeks to compel discovery of documents prepared by defendant and its attorneys and insurers relevant to: damages; the allocation of liability and settlement and mediation negotiations; the reasons behind the settlement; and defendant McClier's strategy and tactics in settling with the plaintiff. Bass further seeks that defendant be compelled to submit some of its personnel, and the personnel of its attorneys and insurance company who are familiar with the settlement, to depositions.

Third-party defendant Ruttura & Sons Construction Company, Inc. (Ruttura) seeks to compel: the production of all documents relating to the mediation; responses to Bass's interrogatories and to documents relating to apportionment of the settlement amount; disclosure by the third-party plaintiff of documents exchanged with its insurers containing information regarding damages, the allocation of liability among the third-party defendants, and settlement and mediation negotiations relating to plaintiff's claims.

The matter was previously referred to JHO Beverly S. Cohen, to supervise disclosure. On March 22, 2006, she entered an order directing McClier as follows:

> 1.... to ID all non-privileged, relevant documents ... to the extent not already identified
>
> 2.... to respond to Bass Mechanical's Notice for D & I dated 7/27/05; demand for interrogatories dated 7/27/05 ... and 1/6/06
>
> 3.... shall make available all non-privileged relevant documents responsive to 3rd PT's demands within 60 days to the extent not already made available to 3rd PTs
>
> 4.... shall produce to 3rd PT all insurance information and the actual insurance policy(ies) within 60 days to the extent not already produced....

Tagliagambe Aff, Aug 2, 2006, Exh. G.

The order further directed McClier to particularize each document responsive to each demand, interrogatory or demand for a bill of particulars, on a "demand by demand" basis, and to provide a privilege log for any documents withheld.

At a subsequent compliance conference, held on June 15, 2006, McClier was ordered to comply with paragraph # 1 of the March 2006 order within 30 days of that order. Decision on the issue of whether mediation information was to be provided to the third-party defendants was reserved, pending submissions by counsel.

***2** Bass and Ruturra claim that they require this discovery to know how the settlement amount was arrived at and apportioned, and to determine whether McClier and others made admissions or statements inconsistent with the claims being asserted against these third-party defendants. At a minimum, the moving parties ask the court for an in camera inspection to determine materiality, citing *Masterwear Corp. v. Bernard,* 309 A.D.2d 510 [1st

Dept 2003].*See also, Masterwear,* 298 A.D.2d 249 [1st Dept 2002] and 3 AD3d 305 [1st Dept 2004].

The claims in the main action arise out of alleged design and construction defects in a building built for plaintiff, and were asserted by plaintiff NYP Holdings, Inc. (N.Y.P) against McClier. NYP is the owner of the *New York Post,* and the owner of the property where the construction took place. McClier is alleged to have been retained by NYP as the architect and engineer to design, etc., a new printing plant for the *Post,* to be located at 132nd Street and East River, Bronx, New York (the project).

The complaint alleged, in relevant part, that McClier was to coordinate the project so that it would meet plaintiff's needs and, to that end, was given complete and sole responsibility for the design and construction of the project, as set forth in the parties' agreement.

Various third-parties were alleged to have been retained by McClier to perform necessary services, including architectural and engineering services.

McClier was alleged to have failed to perform architectural design and engineering services, and to have failed to prepare contract documents for the project in accordance with professional standards.

The complaint alleged defects in concrete slabs and steel beams and trusses resulting in inadequate support for the specified loads and excessive cracking and fissures throughout the project, as well as inadequate humidification, electrical, and plumbing systems.

McClier commenced a third-party action against many of the subcontractors and testing laboratories alleged to have been retained to work at the project, including Ruturra and Bass. The third-party complaint alleges claims based on contractual and common-law indemnification, negligence, strict liability and breach of contract. In the third-party action, McClier seeks to recover the entire $25 million sum it paid to NYP.

The third-party defendants argue that the claim puts the reasonableness of the settlement amount in issue and entitles them to the sought-after discovery.

Bass claims that McClier is seeking indemnification for the $25 million settlement while refusing to provide any documents concerning the settlement, how the amount was arrived at and/or any allocation among the defendants."Without appropriate discovery, it is virtually impossible for the indemnitor to investigate the reasonableness of the indemnitee's actions, the settlement amount, and/or the decision to settle."Tagliagambe, Aff, ¶ 24.

***3** In opposition to the motions to compel discovery, and in support of a cross motion for a protective order, McClier claims that NYP and McClier engaged in several months of settlement negotiations, ultimately agreeing to mediate their dispute. The mediation agreement provided that the proceedings were confidential and that all "offers, promises, conduct and statements" would be privileged, would not be disclosed to third parties and would be inadmissible for any purpose, and that the parties' attorneys prepared presentations that were exchanged during the mediation session.

Discussion:
The discoverability of compromises and offers to compromise, as well as statements made and conduct during compromise negotiations, is governed by CPLR 4547. That section sets out the general rule that such evidence is inadmissible as proof of liability or invalidity of a claim, or the amount of damages. To the extent that such evidence is otherwise discoverable, it may be admitted at trial for any purpose that is not otherwise impermissible. *Id.*

In *Masterwear,* the Appellate Division directed an "in camera" inspection of the subpoenaed settlement agreement that had been entered into between plaintiffs and a co-defendant, discovery of which was sought to resolve any doubt as to relevance. The term "settlement agreement" was defined to include all affidavits and "confidential documents" pertaining to the settlement agreement. *Masterwear Corp. v. Bernard,* 309 A.D.2d at 510 and 3 AD3d at 307.The settling parties' interest in confidentiality would be subject to a protective order, if appropriate.

McClier claims that *Masterwear* is distinguishable since there it was "undisputed" that the settlement agreement contained admissions by the movant's co-defendant. Here, McClier has already turned its settlement agreement over to Bass, and there are neither admissions nor allocations of liability contained in the agreement. Citing *Lynbrook Glass & Architectural Metals Corp. v. Elite Associates, Inc.* (238 A.D.2d 319 [2nd Dept 1997]) and *Crow–Crimmins–Wolff & Munier v. County of Westchester* (126 A.D.2d 696 [2nd Dept 1987]), McClier argues that its confidentiality agreement with NYP precludes any further discovery relating to the settlement negotiations.

McClier also claims that the documents produced in connection with the mediation proceedings are privileged, based on attorney-client and attorney work-product privileges.

The general rule is that an indemnitee is not required to give notice of claims to its indemnitor, but that if it fails to give notice, or to accept proffered assistance in defending against an action, it does so at its peril. In order for the indemnitee to recover reimbursement of a judgment or settlement in these circumstances, the indemnitee must establish that in the absence of the settlement it would have been liable, that there was no good defense to liability and that the amount paid was reasonable. *Feuer v. Menkes Feuer, Inc.*, 8 A.D.2d 294 (1st Dept 1959).The reasonableness test applies to the amount paid by way of settlement, and not to the fact of liability. *Id.* Good faith alone will not suffice:

> ***4** the indemnitee must establish his case against the indemnitor in the same way that the claimant against him would have been obligated to establish its case, namely, by a preponderance of the evidence or other appropriate level of proof required to sustain recovery in favor of the claimant.

Id. at 299.

The indemnitee's burden of proof stems from the fact that the settlement of the claims in the main action is entirely free from control of the indemnitor.*Id.*"Since under such circumstances, the indemnitee knows or believes that any financial responsibility he undertakes is likely to fall ultimately on the indemnitor, he is not inhibited, except by the barest self-restraint ."*Id.* at 300.

McClier claims that it conducted the settlement negotiations with NYP without the third-party defendants' participation since they either had not answered or appeared in the action when the negotiations started. Regardless of McClier's reason for proceeding to negotiate a settlement without such participation, it will have to prove the reasonableness of the settlement at the trial of the indemnification claims. Therefore, third-party defendants are entitled to discovery on this issue.

McClier does not explain why it had not previously sought protection from the orders of JHO Cohen, or why it waited until the third-party defendants made these motions to compel before moving for a protective order. In essence, McClier has engaged in self-help by passively refusing to comply with JHO Cohen's orders, without seeking court intervention. Such conduct will not be countenanced.

McClier is precluded from offering any of the sought-after evidence to prove its case in chief upon trial, unless it produces the documents and discovery directed by JHO Cohen's March 22, 2006 order. As to documents as to which a privilege is claimed, a privilege log is to be submitted to all counsel appearing herein, within 30 days of service of a copy of this order with notice of entry on McClier's attorneys.

Documents Submitted During The Course Of Mediation:

As to the documents submitted to the mediator in the mediation, and any drafts of such documents, a privilege log shall be prepared, but need not be served or filed until the further order of the court. It should, however, be immediately available if the court later directs its production.

It is the policy of this court, and specifically of the Commercial Division to maintain the confidentiality of submissions and statements made during mediation proceedings. *See* ADR Program, Comm Div, Sup Ct, N.Y. County, Rule 5. One of the reasons for this is to encourage the parties to be completely open with the mediation and each other during mediation proceedings. Such openness makes resolution of actions and compromise of disputes possible. The policy assures the parties that what they submit or say to the mediator will not be introduced at the trial in the event the action is not settled, and will not be disclosed to the trier of facts, including the presiding judge.

***5** In view of this policy, the court has not now directed disclosure or even production for in camera review of the mediation documents.

In the event that documents were submitted to the mediator, but would be required to be produced by another provision of JHO Cohen's order, they shall be so produced. The partial protective order relating to mediation shall be strictly construed.

All documents and logs, etc. shall be served on JHO Cohen as well as on all counsel who have appeared, within thirty days of service of a copy of this order on McClier's counsel.

McClier's letter request to place that portion of the motion papers which contains an unredacted copy of the

settlement agreement under seal is granted.

The foregoing constitutes the decision and order of the court.

All Citations

14 Misc.3d 1232(A), 836 N.Y.S.2d 494 (Table), 2007 WL 519272, 2007 N.Y. Slip Op. 50275(U)

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