

SCA

SHORT FORM ORDER

SUPREME COURT-STATE OF NEW YORK

PRESENT:

HON. BRUCE D. ALPERT

Justice

TRIAL/IAS, PART 9

MAXI-AIDS, INC., MITCHEL ZARETSKY,
HAROLD ZARETSKY, ELLIOT ZARETSKY
and PAMELA ZARETSKY STEIN,

MOTION SEQUENCE #6

Plaintiff,

INDEX NO. 193/1997

-against-

MOTION DATE:
December 22, 2001

GENERAL ACCIDENT INSURANCE
COMPANY OF AMERICA, COUNTRY
BROKERAGE SERVICES, INC., GERALD M.
LEVY and AETNA COMMERCIAL
INSURANCE COMPANY,

Defendants,

The following papers read on this motion to dismiss or compel:

Notice of Motion	X
Answering Affirmations	XX
Memorandum of Law	X

Upon the foregoing papers it is ordered that this motion by defendants County Brokerage Services, Inc. ("County") and Levy for an order pursuant to CPLR 3126 dismissing plaintiffs' complaint for their willful obstruction of discovery, or, in the alternative, compelling certain

discovery from non-parties Mark Mulholland Esq. and Ruskin Moscou is granted in part and denied in part.

In the underlying action in federal court, plaintiff Maxi-Aids herein was sued for, **inter alia**, trademark infringement and deceptive trade practices. A judgment well in excess of two million dollars was obtained. Maxi-Aids' insurers denied insurance coverage. One of the bases for the denial was untimely notice. Maxi-Aids was represented by Mark Mulholland, Esq. of Ruskin Moscou in the underlying federal action.

Thereafter, plaintiffs commenced this action against Maxi-Aids' insurers, and their insurance broker, seeking various forms of relief including a declaration of the insurers' obligation to defend and indemnify Maxi-Aids in the underlying action. Plaintiffs herein also commenced an action against Ruskin Moscou, in Nassau Supreme Court, under index 320145/99, alleging malpractice in Ruskin Moscou's failure to present the claims in the underlying federal action to the respective insurance carriers in a timely and proper manner.

County and Levy seek discovery from Ruskin Moscou and Mark Mulholland. At Mulholland's deposition, the attorney for plaintiffs herein objected to various questions on the grounds of the attorney-client privilege. On this motion County and Levy challenge plaintiffs' exercise of the privilege.

Plaintiffs argue that they do not object to questions regarding plaintiffs' notification to defendants of their claim for insurance coverage, and they further do not object to an exploration of the nature and quality of the legal services performed by Mulholland and Ruskin

Moscou in defending the underlying action. However, plaintiffs vigorously oppose disclosure of any communications whatsoever regarding the present lawsuit, including any communications after the present lawsuit was commenced.

As the movants have challenged specific objections at the Mulholland deposition, each will be addressed **seriatim**.

First, in two instances after initially exercising the attorney-client privilege, plaintiffs refrained from exercising the privilege once questions were clarified. (Mulholland transcript 53-55, and 87-89). Consequently, no ruling is necessary with regard to the steps taken by Ruskin Moscou concerning insurance coverage in the underlying action and insurance coverage analysis.

Plaintiffs objected to the questions seeking from Mulholland the personal opinions of two of the individual plaintiffs as to insurance coverage for Maxi-Aids in the underlying action. (Mulholland transcript p. 81). As the issue herein is defendants' legal duty, if any, to defend and indemnify Maxi-Aids, the relevance of personal opinions of the individual plaintiffs is questionable. Moreover, the inquiry calls for speculation by Mulholland. Thus, plaintiffs' objections on point are sustained.

Next, the movants request production of the notes taken by Mulholland of conversations with the individual plaintiffs regarding insurance coverage in the underlying action. (Mulholland transcript p. 71). Plaintiffs object on the grounds that such notes were written after

defendants issued their disclaimer letters and, therefore, concern plaintiffs' representation in this action, which was transferred from Ruskin Moscou to Shayne Dachs after its commencement.

As the requested notes contain communications between an attorney and client in the course of professional employment for the purpose of obtaining legal advice, same fall within the ambit of the attorney/client privilege.(see, CPLR 4503 [a]; **Spectrum Systems International Corporation v Chemical Bank**, 78 NY2d 371, 377-378) However, the issue presented is whether the privilege has been waived by plaintiffs.

A client who testifies about a privileged matter (see, **Erljur Associates v Weissman**, 134 AD2d 321, app den 71 NY2d 802) or places the subject matter of the communications in issue (see, **Schulte Roth & Zabel, L.L.P. v Chammah**, 251 AD2d 132 [1st Dept.]; **Orco Bank, N.V. v Proteinas Del Pacifico, S.A.**, 179 AD2d 390 [1st Dept.]; **Paruch v Paruch**, 140 AD2d 418, 421) waives the privilege. Selective disclosure is not permitted. (see, **Orco Bank, N.V. v Proteinas Del Pacifico, S.A.**, supra; **Village Board of the Village of Pleasantville v Rattner**, 130 AD2d 654)

Here, plaintiff Elliot Zaretsky plainly testified as to conversations with Mulholland regarding insurance coverage in the underlying action. (E. Zaretsky transcript 112 et seq.) Furthermore, plaintiffs have commenced a malpractice action against Ruskin Moscou on the precise issue of timely notice to plaintiffs' insurers of the underlying action. Under these circumstances, the attorney/client privilege on the issue of discussions of insurance coverage for the underlying action has been waived.

Finally, Mulholland was questioned as to what the Zaretskys told him about the make and

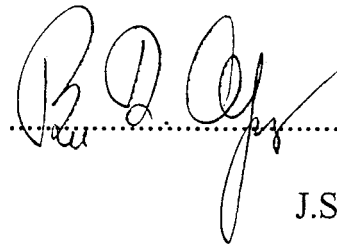
model of defendant Levy's car, into which the summons and complaint in the underlying action was allegedly placed. (Mulholland transcript p. 100-103). Plaintiffs objected because, according to Mulholland, the conversation took place during the course of the current action. Nevertheless, plaintiffs have submitted evidence of this precise matter in their Amended Supplemental Bill of Particulars at pages 2-3. Under these circumstances any privilege as to conversations with Mulholland regarding this information has been waived.

Based on the foregoing, the movants are entitled to discovery of testimony and notes, if any, of Mulholland's conversations about insurance coverage in the underlying action and the alleged service of the pleadings in the underlying action by the Zaretskys on Levy.

Mr. Mulholland is directed to appear for the completion of his deposition on March 29, 2001, at 9:30 a.m., at room 05 lower level of this Court. The permissible scope of inquiry shall be circumscribed by the terms of this Order, and the documentary production required shall be made at that juncture.

The remainder of the disclosure sought is denied.

DATED: February 27, 2001


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J.S.C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERKS OFFICE**