UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

ORDER

IN RE HURRICANE SANDY CASES

14 MC 41

----------X

THIS DOCUMENT APPLIES TO:

ALL RELATED CASES

----------X

CASE MANAGEMENT ORDER NO. 10

I. Subpoenas to Canopy Claims and SE2 Engineering

In Case Management Order No. 1 ("C.M.O 1"), dated February 21, 2014, the Committee set forth a uniform, automatic discovery procedure to be used for claims against insurers arising out of Hurricane Sandy. The procedure established certain automatic disclosures to be made by plaintiffs and defendants in such cases. These automatic disclosures were to serve as the first phase of discovery in lieu of the initial disclosures required by Federal Rule of Civil Procedure 26 and "in the absence of a showing to the contrary . . . document requests and interrogatories."

In a letter dated August 18, 2014, Liaison Counsel for plaintiffs informed the Committee that defendants in four cases[1] had issued non-party subpoenas to Canopy Claims and SE2

[1]These cases are Seeman v. Wright National Flood Ins. Co., No. 2:14 CV 468, Tarisa v. Wright National Flood Ins. Co., No. 2:14 CV 471, Harvey v. Hartford Ins. Co. of the Midwest, 2:14 CV 175, and LaConti v. Wright National Flood Ins. Co., 2:14 CV 450.

Engineering, seeking all documents in their files relating to the properties at issue in those four cases. The plaintiffs objected to the subpoenas on the grounds that they were inconsistent with the Case Management Orders, and because the sheer number of files would impede the progress of mediation. On August 26, 2014, Magistrate Judge Pollak held a conference with the parties to discuss the subpoenas in the four cases and the plaintiffs' objections. At the conference, defendants' counsel explained that they had served the subpoenas because they believed that Canopy Claims and SE2 Engineering were in possession of documents relating to repair costs and estimates that plaintiffs had not provided in response to CMOs 1 and 8. After consideration of the circumstances in those four cases, the Court Ordered the defendants to modify their subpoenas so as to limit them to documents concerning repair costs and estimates. During the conference, defense counsel indicated that they would seek to issue similar subpoenas in other cases.

IT IS HEREBY ORDERED that, absent prior approval from the Committee, defendants may not issue subpoenas to Canopy Claims or SE2 Engineering unless they demonstrate why, in each case, they believe the subpoena is necessary in light of the plaintiff's production or lack of production of documents pursuant to CMO 1 and 8, including why they believe that either Canopy Claims or SE2 Engineering is actually in possession of relevant materials that have not been produced. Plaintiffs will be given an opportunity to respond, but plaintiffs' counsel are urged to make an effort to obtain all repair records in the files of any non-party adjustors or engineers so as to eliminate the need for subpoenas.

II. Impediments to Settlement

On September 9, 2014, defendants' Liaison Counsel filed a letter informing the

Committee of various issues they contended were impeding settlements in cases that have been sent to mediation ("Defs.' Letter"). Defendants' counsel advised that the WYO insurance carriers had received "[a] new written guidance" from FEMA, which requires that the carriers inform FEMA (1) of whether an adjuster has verified damages, (2) whether the damages to the property have been repaired, and (3) whether the amount of any additional claim payment is justified by documentation of repairs. (Defs.' Letter at 1-2). Defendants contend that "the only way" they can obtain this information is by conducting "a new site inspection" in every case. (Id. at 2). Further, defendants requested that the Court adopt a "pre-mediation check list," to be used by mediators that would include "items such as the three questions in [FEMA's written] guidance," and "to make clear that the NFIP cases should not be mediated until the information and documentation requested is provided." Defendants also advised the Committee that, in many cases,[2] they had not received adequate documentation of plaintiffs' repairs, and that plaintiffs or their experts were arriving at mediations with evidence that defendants had not seen previously. (Id. at 3-4).

On September 15, 2014, plaintiffs' Liaison Counsel responded in a letter to the Committee ("Pls.' Letter"), contending that new site inspections were unnecessary (id. at 1-2), that plaintiffs had supplied sufficient information concerning repairs for defendants to evaluate the claims (id. at 2), and that any additional information provided at mediations should not have prevented resolution of those claims. (Id. at 3). Plaintiffs also requested that they be allowed to conduct mediations in Metairie, Louisiana. (Id. at 4).

On September 16, 2015, the Court conducted a telephone conference with Liaison

[2]Defense Counsel attached a chart to their letter identifying 280 cases that were being handled by Nielsen, Carter & Treas in which they claimed not to have received adequate repair information.

Counsel, as well as representatives from FEMA and the U.S. Attorney's Office to discuss the issues raised in the parties' letters. Based on the parties' arguments, the Committee Orders as follows:

1) Plaintiffs are reminded that in CMO 1, the Committe specifically held that "[a]ny information not exchanged [during the time period set out by the Committee] cannot be used in the mediation/arbitration process." (CMO 1 at 9). The Court reiterates that to the extent that plaintiffs fail to comply with the discovery schedule established pursuant to CMOs 1 and 8, any documents first produced at the time of mediation will not be considered and the mediators will be so advised. Plaintiffs should exercise due diligence in obtaining repair receipts, invoices, photographs, videos, and other evidence supporting their damage claims, and should provide this information to defendants at least ***two weeks*** prior to the mediation.

2) Defendants' request to conduct new site inspections is GRANTED, subject to the following conditions:

a) Defendants shall pay all costs associated with the new inspections.

b) If defendants seek to conduct an inspection prior to mediation, they must arrange to conduct the inspection in a timely fashion so that they are able to provide plaintiffs' counsel with any reports that result from the inspection at least ***one week*** prior to the scheduled mediation. Plaintiffs are Ordered to cooperate with defendants in scheduling inspections.

c) Defendants' failure to conduct a new inspection prior to the scheduled date for mediation shall not be a valid excuse for failing to proceed with the mediation.

d) If defendants are unable to conduct an inspection prior to a mediation, and the parties settle, defendants shall have the opportunity to conduct an inspection after the mediation, in order to verify the necessary information underlying the settlement.

3) Defendants' request that the Court adopt a "pre-mediation checklist" is DENIED.

4) Plaintiffs' request to conduct mediations in Louisiana is GRANTED, provided all the parties consent. Liaison Counsel is ORDERED to provide the Committee with a report on or before December 1, 2014 setting forth the number of mediations that have occurred in Louisiana, the number of cases that have not settled, and whether the absence of the homeowner at the mediation was a factor in the success or lack of success of the mediation.

The Clerk is directed to send copies of this Order to the parties either electronically through the Electronic Case Filing (ECF) system or by mail.

SO ORDERED.

Dated: Brooklyn, New York
September 26, 2014

/S/ CHERYL L. POLLAK
Cheryl L. Pollak
United States Magistrate Judge

/S/ GARY BROWN
Gary Brown
United States Magistrate Judge

/S/ RAMON E. REYES, JR.
Ramon E. Reyes, Jr.
United States Magistrate Judge