

DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202	DATE FILED: April 12, 2024 1:32 PM CASE NUMBER: 2023CV31492
<b>Plaintiff:</b> HILL HOTEL OWNER, LLC, a Colorado limited liability company  <b>v.</b>  <b>Defendants:</b> HANOVER INSURANCE COMPANY, a New Hampshire corporation	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p> Case No.: 23CV31492  Div.: 203
<b>ORDER RE: MARCH 21, 2024 DISCOVERY DISPUTE</b>	

THIS MATTER came before the Court regarding a discovery dispute. The Court held a hearing on March 21, 2024. The Court, having reviewed the Notice submitted by the Parties, relevant case law, and the record before the Court, enters its findings as follows:

1. Plaintiff Hill Hotel Owner, LLC claims Defendant Hanover Insurance Company is improperly withholding emails based on work-product and attorney-client privilege. Specifically, one set of documents are emails and communications sent to or by Kelly Huff, a third-party structural engineer. The second set of documents are related to communications by Peter Marxhausen, another third-party structural engineer hired by Hanover prior to the filing of the case. Hanover claims that the report was prepared by Marxhausen as a litigation expert, in anticipation of litigation.

With respect to both the communications made by Kelly Huff to Hanover’s outside counsel and Peter Marxhausen’s report and communication, the Court finds that those documents are not protected by either work-product or attorney-client privilege. Based on the Court’s review of the letters from the parties’ counsel, the Court finds that the reports and communications are not protected by attorney-client privilege or work-product privilege since they were not prepared in anticipation of litigation. Hanover engaged Huff as an expert to respond to the technical claims or responses from Plaintiff. Similarly, Marxhausen was retained as a second opinion in light of Plaintiff’s complaints relating to Huff’s statements. As such, Hanover shall produce the emails, communications, and documents within 14 days of this Order.

2. Plaintiff claims that Hanover failed to perform a search for all relevant and responsive documents in violation of Rule 26(a)(1)(B). Defendant Hanover responds that it performed a reasonable search and an additional sweep of the 4 individuals were done above and beyond the materials previously provided.

Having heard the statements of the parties, the Court finds that Hanover has complied with the Rule; no additional searches are required by Hanover.

3. Plaintiff claims it is entitled to the draft expert reports from the retained litigation experts and draft correspondence as relevant to their bad faith and statutory claims. Defendant contends that the draft reports are not relevant to the claims and defenses because they are not final documents and have no impact on the outcome of the claim. The Court finds that Plaintiff is entitled to the draft expert reports from Marxhausen. However, any draft expert reports from other retained experts that are prepared in anticipation of litigation or for trial are privileged and need not be disclosed.

With respect to draft documents, such as claims handling documents, prepared by the insurance company, the Court finds those documents must be disclosed. There is no legitimate need to protect the documents as they were prepared in the ordinary course of business and Plaintiff has a legitimate need for their disclosure in assessing their bad faith claim against Defendant. The Court orders the internal draft documents disclosed within 14 days of this Order.

4. Plaintiff claims Defendant withheld and/or redacted documents that contain reserves information which are not privileged. Defendant argues that reserve figures are not discoverable under Plaintiff's argument. The Court agrees. Colorado law is clear that they generally are not subject to discovery because they do not accurately reflect the insurer's valuation of a particular claim, they are not admissions of liability, and they are prepared to satisfy an insurance company's statutory obligation and to inform bargaining tactics. The Court finds *Sunahara v. State Farm Mutual Auto. Ins. Co.*, 280 P.3d 649 (Colo. 2012), and *Silva v. Basin W.*, 47 P.3d 1184 (Colo. 2002), instructive. Plaintiff's request is denied.
5. Plaintiff requested certain claims-handling policies, procedures, guidelines, and manuals during the period of Defendant's investigation. Defendant objected to providing such policies, guidelines, etc. for "property insurance policies," even though builder's risk policies are a subset of property policies. Defendant states that they have provided all claims-handling policies, procedures, guidelines, and manuals during

the period of Defendant's investigation with the exception of residential homeowners and commercial property policies as irrelevant.

The Court finds that the claims-handling policies, procedures, guidelines, and manuals during the period of Defendant's investigation are reasonably calculated to lead to the discovery of admissible evidence and that such evidence would be important to the resolution of the case. Handbooks, manuals, and training materials are relevant not only for establishing industry standards and best practices, but also for establishing whether an insurer complied with those standards and practices. Having considered all of the relevant factors, the Court finds that the internal policies and procedures sought by Plaintiff are discoverable as they relate to builder's risk insurance policies and procedures.

Defendant claims they have previously produced the information and have not produced irrelevant material. The Court agrees that residential homeowners and commercial property insurance policies, procedures, guidelines, and manuals are not relevant.

6. Hanover contends that Plaintiff has failed to comply with their written discovery responses. First, as it relates to their failure to identify documents relevant to the categories for damages, Hanover claims that Plaintiff did not identify which pages were responsive to which discovery request. Hill Hotel responds that the requests for production were broad, and it responded with documents that can be organized by date, sender, recipient, title, subject and other parameters.

The Court finds that with respect to the requests for production Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, Plaintiff shall produce the documents identifying the category of damages related to such request. In the event that a particular document relates to various categories, Plaintiff shall identify such damage categories.

7. Second, Hanover claims Plaintiff failed to produce documents and information that substantiate its claims or are relevant to Hanover's defenses. Hill Hotel argues that it has produced all responsive, non-privileged information. With respect to ROG Nos. 5, 6, 9, 11, and 15, the Court orders Plaintiff adequately submit responses. Plaintiff shall identify any witness with knowledge of the losses, describe the loss and when it discovered the waterproofing membrane was compromised (No. 5); identify the date on which it contends the payment of insurance benefits should have been made and "the basis for the contention that each such payment was owed" (No. 6); identify any communications and

other pertinent documentation about the subject property and claim (No. 9, 11). With respect to ROG 13, the Court denied Defendant's request to have Plaintiff identify every witness who had access to the property from July 1, 2022, to August 5, 2022, nor does the Court find that information related to persons or entities with a financial interest in the lawsuit to be relevant at this time. The request to compel responses to ROG 12, 13, and 15 is denied.

IT IS SO ORDERED on this 12<sup>th</sup> day of April 2024.

BY THE COURT:



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JILL D. DORANCY  
Denver District Court Judge