

**George Campbell Painting v National Union Fire Ins.  
Co. of Pittsburgh, Pa.**

2011 NY Slip Op 30699(U)

March 22, 2011

Sup Ct, NY County

Docket Number: 116389/2008

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA

PART 19

Index Number : 116389/2008

GEORGE CAMPBELL PAINTING

vs

NATIONAL UNION FIRE INSURANCE

Sequence Number : 003

REARGUMENT/ RECONSIDERATION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

FILED

Upon the foregoing papers, It is ordered that this motion

MAR 24 2011

NEW YORK COUNTY CLERK'S OFFICE

*17*  
motion and ~~cross-motion~~ are decided in accordance with accompanying memorandum decision.

*This constitutes the decision and order of the Court.*

Dated: 3/22/11

*Saliann Scarpulla*  
SALIANN SCARPULLA J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X  
GEORGE CAMPBELL PAINTING AND ,  
TRIBOROUGH BRIDGE AND TUNNEL

Index No.: 116389/2008  
Submission Date: 12/8/2010  
Mot. Seq. No.: 003  
**DECISION AND ORDER**

Plaintiffs,

- against-

NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA,

Defendant.

**FILED**

**MAR 24 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

----- X  
**For Plaintiffs:**

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**For Defendant:**

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Papers considered in review of this motion for leave to renew:

Notice of Motion and Affirm. in Supp.....	1
Aff in Opp.....	2
Memo of Law in Opp.....	3
Reply Memo in Further Supp.....	4

HON. SALIANN SCARPULLA, J.:

In this action for declaratory judgment, defendant National Union Fire Insurance Company of Pittsburgh, PA (“National”) moves for leave to renew this Court’s Decision and Order, dated May 7, 2009. In that decision, the Court (Justice Tolub) granted plaintiffs’ motion for summary judgment, rejecting National’s disclaimer of coverage under Insurance Law § 3420(d) and declaring National obligated to make the last

remaining pro rata payment under a settlement agreement reached in the underlying personal injury action. National timely appealed the grant of summary judgment on June 22, 2009, and this appeal is still pending.

The settlement agreement in the underlying personal injury action provides, in part, that non-party Westchester Fire Insurance Company (“Westchester”), which had issued an umbrella policy to the injured plaintiff’s employer, would pay a portion of the settlement amount: “a final payment in the amount of \$1,000,000.00 (from Insurer, Westchester Fire) shall be made payable to Sacks and Sacks and James Conklin and said payment shall be due and payable no later than July 1, 2009.” (National Mot. Ex. D., ¶ 2.2). A copy of the settlement agreement was annexed to the complaint in this action.

In support of the motion for leave to renew, National alleges that it has discovered new evidence that the non-party insurance carrier, Westchester, is the “real party in interest” in this action as the term is defined in *Excelsior Ins. Co. v Antretter Contr. Corp.*, 262 A.D.2d 124 (1<sup>st</sup> Dep’t 1999). Specifically, National alleges that after plaintiffs in this action obtained judgment against National on May 7, 2009 requiring National to make the last payment due in the settlement agreement, Westchester instead made the last payment on July 1, 2009. National further alleges that it had no knowledge of Westchester’s having made the payment until September 8, 2010, when plaintiffs mentioned it in their brief filed on appeal with the First Department.

National argues that as the real party in interest in this action, Westchester may not assert an Insurance Law § 3420(d) defense to late disclaimer against another insurance company, citing in support *Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 A.D.3d 84, 87 (1<sup>st</sup> Dep't 2005).

“An application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court. Renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application.” *Mangine v Keller*, 182 A.D.2d 476, 477 (1<sup>st</sup> Dep't 1992) (citations omitted).

Here, National has not established sufficient justification for omitting the argument of inapplicability of Insurance Law § 3420(d) in its opposition on prior summary judgment motion. During the pendency of this action, National had full knowledge that under the terms of the underlying settlement agreement, Westchester was required to make the last payment by July 1, 2009. (Winn Affirm. ¶ 6). National also admitted that it periodically checked the Court's file to see whether Westchester had actually made the payment. (Winn Affirm. ¶ 9). Westchester's payment of the last installment on July 1, 2009 was not a surprise, but was a result of National's own non-payment of the May 7, 2009 judgment by July 1, 2009. Therefore, the Court denies National's motion for leave to renew and vacate the grant of summary judgment.

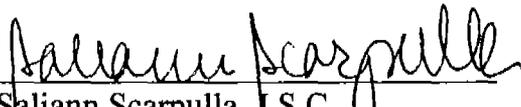
In accordance with the foregoing, it is

ORDERED that motion by defendant National Union Fire Insurance Company of Pittsburgh, PA for leave pursuant to CPLR 2221(e) and 5015(a)(2) to renew and vacate this Court's grant of summary judgment, dated May 7, 2009 is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York  
March 20, 2011

ENTER:

  
Saliann Scarpulla, J.S.C.

**FILED**

MAR 24 2011

NEW YORK  
COUNTY CLERK'S OFFICE