

**Patti & Johnny's, Inc. v United States Liab.  
Ins. Group**

2008 NY Slip Op 31203(U)

March 27, 2008

Supreme Court, Nassau County

Docket Number: 3704-06/

Judge: James P. McCormack

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 51 NASSAU COUNTY**

**PRESENT:**

***Honorable James P. McCormack***  
**Acting Justice of the Supreme Court**

\_\_\_\_\_  
**PATTI & JOHNNY'S, INC.,**

**Plaintiff,**

**Index No. 13704/06**

**-against-**

**UNITED STATES LIABILITY INSURANCE  
GROUP d/b/a/ UNITED STATES LIABILITY  
INSURANCE COMPANY,**

**Motion Submitted: 11/17/07  
Motion Sequence: 002**

*XXX*

**Defendant.**

\_\_\_\_\_x

The following papers read on this motion:

- Notice of Motion and Memorandum of Law.....X
- Answering Papers and Memorandum of Law.....X
- Reply and Memorandum of Law.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's Respondent's.....

Defendant moves this court pursuant to CPLR § 222(2)(e) for leave to renew and reargue this court's decision of February 12, 2007 decided under motion sequence one.

The pre-answer motion to dismiss pursuant to CPLR 3211(a)(1) & (7) and Summary Judgment Motion under CPLR 3212, sought a declaration that USLI had no duty to defend or indemnify Patti & Johnny's, Inc., in connection with a lawsuit commenced by Joseph LaBianca for monetary damages as a result of bodily injuries that he received as a result of an altercation that took place on December 22, 2004 while LaBianca was a

patron at the bar, due to the fact that Patti & Johnny's breached the notification provisions of the USLI policy.

In support of the motion pursuant to CPLR § 2221 (2) (e), defendant asserts that this court was not in possession of additional facts which, although in existence at the time of the prior motion, were not made known to the party seeking renewal, and therefore, were not known to the court. (*see Orange and Rockland Utilities, Inc., v. Assessor of Town of Haverstraw*, 304 A.D.2d 668). Specifically, in response to a FOIL request, the Nassau County Police Department produced witness statements and two surveillance videos evidencing that an altercation took place inside Patti & Johnny's on the December 22, 2004. The evidence contained in the police file, which was previously unavailable to the defendant in this coverage lawsuit, could only be released pursuant to the FOIL request once the prosecution of Brian Hahn, the defendant in the criminal case, had come to a conclusion.

A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the facts or the law on the prior motion or for some reason mistakenly arrived at its earlier decision (*see* CPLR 2221[d][2]; *Collins v Stone*, 8 AD3d 321; *Pryor v Commonwealth Land Title Ins. Co.*, 1 AD3d 494; *Wechsler v First Unum Life Ins. Co.*, 295 AD2d 340; *McGill v Goldman*, 261 AD2d 593). Further, reargument should not be used as a device to permit the unsuccessful party to argue once again the same issues previously decided or a vehicle to advance arguments different from those offered on the original motion (*Amato v Lord*

*& Taylor, Inc.*, 10 AD3d 374; *McGill v Goldman, supra*; *William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, *lv to app disp.* 80 NY2d 1005, *rearg den.* 81 NY2d 782).

Defendant's motion for leave to renew appears to be based on evidence that could not have been discovered earlier with due diligence. (*see Yarde v. New York City Transit Authority*, 4 A.D.3d 352) However, the requirement that motion for renewal be based upon newly-discovered facts is a flexible one, and the court, in its discretion, may grant renewal upon facts known to moving party at time of original motion (*Daniel Perla Associates v. Ginsberg*, 256 A.D.2d 303). The respondent's motion to renew pursuant to CPLR § 2221(e)(2) is granted.

The defendant's present motion contains new information that was obtained as a result of a FOIL request. The information obtained as a result of the Foil request, could not have been obtained until the prosecution of the criminal defendant, Brian Hahn, had come to a conclusion. Defendant Brian Hahn pled guilty to Assault in the Second Degree, a D Violent Felony, on February 8, 2006 and was sentenced on June 20, 2007. The sensitive information contained in the District Attorney's file and or the Police Department file could not have been obtained while the prosecution of Mr. Hahn was ongoing. Once the prosecution of Mr. Hahn was complete, in June of 2007, the Police Department was then able to had over the confidential contents of its file. The contents of that file including witness statements and the surveillance videos, which were provided to the court as exhibits to the defendant's present motion, directly contradicts Patti & Johnny's belief that they had no reason to suspect liability as a result of the events that

transpired that evening.

The fact that the response to the FOIL request could not be turned over due to the ongoing prosecution of Mr. Hahn left the defendant unable to gather facts that were crucial to the previous motion. If the court had been in possession of those facts the decision regarding the prior motion would have been different. The court must now analyze the defendant's request in light of the new information provided in the present motion.

The statement of Matthew Schomburg, the bartender on duty the night of the incident, states that Mr. LaBianca and Mr. Hahn had a scuffle inside the bar during which the Mr. Hahn grabbed Mr. LaBianca by the side of the head and pushed him to the ground. That statement also indicates that Mr. Schomburg observed Mr. LaBianca leave the bar earlier that evening and that he had, "returned at 11:00 p.m. possibly under the influence of drugs". Additionally, the statement of Mr. Schomburg makes it clear that Mr. Schomburg, asked Bryan Hahn to help remove Mr. LaBianca from the bar and that Mr. Hahn in fact carried Mr. LaBianca out of the bar.

The statement of Shane Zarzycki, seems to confirm many of the facts contained in the statement of Mr. Schomburg. He too observed the scuffle between the two men earlier and saw "the old guy on the floor with Brian over him" and he had heard someone say, "Oh he threw him on the floor." He also observed Mr. LaBianca fall asleep at the bar and he observed Brian Hahn pick up Mr. LaBianca and carry him towards the door. Mr. Zarzycki went on to say he; "instinctively followed the two of them outside to make

sure nothing happened” and then “witnessed the altercation” and afterwards saw LaBianca, “whose nose was bleeding profusely”, walk back towards the bar.

Finally the statement of Steve Hanover, another patron of the bar that evening, indicates he observed; “a disturbance in the middle of the bar...between an older guy and a young big guy with dark hair.” He observed, “the young guy put his foot out to trip the old guy and put him to the ground in the middle of the bar. The old guy really hit the ground hard. A bunch of people in the bar stepped between them to break it up.”

Hanover later observed Mr. Hahn carrying LaBianca out of the bar, Hanover went outside a few minutes later and found his friend Shane Zarzycki holding Mr. Hahn back in an effort to calm him down. Mr. Hanover observed Brian Hahn’s hand was bloody and his T-shirt had blood on it.

The statement of the final witness, Brian Sexton, corroborates a number of facts found in the statements of the other witnesses. Most importantly he observed the altercation in the bar between LaBianca and Hahn and states; “I observed the bigger guy Brian take the older guy’s [sic] Joseph’s head in his hand and push him to the ground. In addition, as Mr. Sexton left the bar that evening he witnesses Hahn had blood all over his arm and walked into the bar as the police pulled up.

By far the most important and damning pieces of evidence that have been provided to the court are the two DVDs of the surveillance camera footage from both inside and outside the bar that evening. After viewing the footage contained on the DVD’s provided as exhibits to defendant’s motion, there is no doubt that the bar

management was aware of the incident and either knew or should have known a claim could arise as a result of the altercation that began inside the bar.

It is also worth noting that the bartender continued to serve both patrons who had participated in the earlier altercation, even allowing them to buy each other drinks. Moreover, it was the bartender who observed that LaBianca had left earlier that evening and came back “possibly under the influence of drugs”, and yet he continued to serve this patron alcohol. Not surprisingly a drunk and possibly high LaBianca gets into a physical altercation with a much younger, stronger man and is thrown to the floor by his head. Other patrons who observe the altercation came to the aid of Mr. LaBianca, and rather than call a cab for the now inebriated man or the police to have one or both of them removed, the bartender continues to serve both of them more alcohol. Finally, after LaBianca is saturated with alcohol and falls asleep at the bar, it is the bartender, Mr. Schomburg, who asks Mr. Hahn, the man who previously had thrown Mr. LaBianca to the floor, to carry him outside. That decision seems inexplicable given the events that transpired that evening. An argument could be made that Mr. Schomburg not only knew or should have known that the events of the evening could lead to liability, but perhaps, his ill advised actions in asking Mr. Hahn to carry LaBianca out of the bar led to the assault outside the bar.

An insured’s failure to satisfy the notice requirement in a liability policy constitutes a failure to comply with a condition precedent, which, as a matter of law, vitiates the contract (*Modern Continental Construction Co., Inc. v Gianola*, 27 AD3d

[\* 7 ]  
431).

The failure to satisfy the notification requirements of an insurance policy allows an insurer to avoid coverage without demonstrating any prejudice by the untimely notice (*Argo Corp. v Greater New York Mutual Ins. Co.*, 4 NY3d 332; *Matter of Arbitration between Allcity Insurance Co. and Jiminez*, 78 NY2d 1054).

The requirement that an insured notify its liability carrier of a potential claim as soon as practicable operates as a condition precedent to coverage (*Morris Park Contracting Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 33 AD3d 763; *Fischer v Centurion Insurance Company*, 9 AD3d 381).

The duty to give an insurer notice arises when, from the information available relative to the accident, the insured would glean the reasonable possibility of the insurance policy's involvement (*Figueroa v Utica National Insurance Group*, 16 AD3d 616). Thus, an insured's good faith belief in nonliability for a potential claim, when reasonable under the circumstances, may excuse a delay in notifying the insurer of the potential claim (*Spa Steel Products Company, Inc. v Royal Insurance*, 282 AD2d 864).

An insured's reasonable belief in nonliability will excuse the delay in giving notice to an insurer in compliance with the notice provision of an insurance policy, but the insured has the burden of showing the reasonableness of such excuse (*White v City of New York*, 81 NY2d 955; *Rondale Building Corp. v Nationwide Property and Casualty Insurance Co.*, 1 AD3d 584) and it may be relevant on the issue of reasonableness, whether and to what extent, the insured has inquired into the circumstances of the

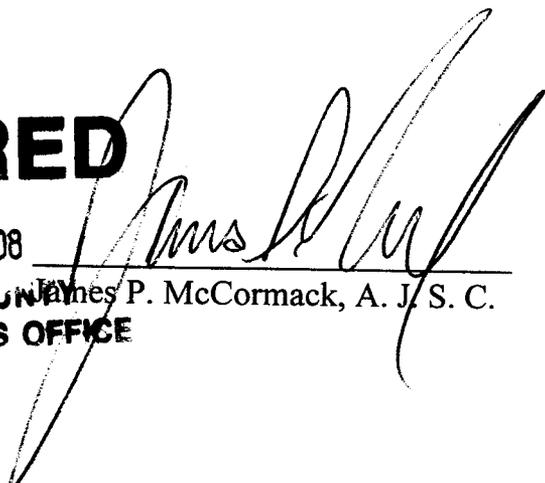
[\* 8 ]  
occurrence (*Felix v Pinewood Builders, Inc.*, 30 AD3d 459).

It is clear to this court that the management of Patti & Johnny's delay in notifying USLI of the incident and that Mr. LaBianca's injuries may result in a claim was a breach of the notification provision of the USLI Policy. The overwhelming evidence that a brutal assault on Mr. Labianca occurred both inside and outside the establishment and that the employee of Patti and Johnny's not only stood by silently, but in fact, participated to the extent that he asked Mr. Hahn to carry the victim outside the bar where he proceeded to continue the assault, renders the belief of non-liability on the part of Patti and Johnny's nonsensical and absurd. Therefore, USLI is entitled to a declaration that it is not obligated to defend or indemnify Patti & Johnny's in the LaBianca lawsuit. The defendant's motion to dismiss under CPLR 3211 (a) (1) and (7) is granted.

Dated: March 27, 2008  
Mineola, N. Y.

**ENTERED**

APR 18 2008

  
NASSAU COUNTY James P. McCormack, A. J. S. C.  
COUNTY CLERK'S OFFICE