

Olszewski v Park Terrace Gardens, Inc.

2004 NY Slip Op 30144(U)

May 27, 2004

Supreme Court, New York County

Docket Number: 0101783/1999

Judge: Nicholas Figueroa

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

PRESENT: Justice

PART 46

0101783/1999

OLSZEWSKI, TALEUSZ
VS
PARK TERRACE GARDENS

INDEX NO. 101783/1999
MO ION DATE 5/27/04
MO ION SEQ. NO. 006
MOTION CAL. NO. _____

SEQ 006

See Ans.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ..	_____
Answering Affidavits -- Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is granted with costs.

FILED

JUN - 3 2004

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/27/04

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

TADEUSZ OLSZEWSKI, ZOFIA OLSZEWSKA
and JERRY GIELDOWSKI,

Index No. 101783/99

Plaintiffs,

- against -

**DECISION
AND ORDER**

PARK TERRACE GARDENS, INC., INSIGNIA
RESIDENTIAL GROUP, INC. and DJM
CONTRACTING CORP.,

Defendants.

PARK TERRACE GARDENS, INC., INSIGNIA
RESIDENTIAL GROUP, INC. and DJM
CONTRACTING CORP.,

Index Nos. 100393/99
591671/99

Third-Party Plaintiffs,

- against -

PLAZA RESTORATION, INC.,

Third-party Defendants.

Nicholas Figueroa, Justice:

Defendants Park Terrace Gardens, Inc., and Insignia Residential Group, Inc. (Park Terrace/Insignia), move, post-trial, to strike the answer of third-party defendant, Plaza Restoration, Inc. (Plaza), on the ground that it failed to comply with a preliminary conference order and two stipulations directing Plaza to provide information regarding insurance coverage for the underlying action. Park/Insignia alleges that the failure to disclose was wilful and continuous, and that it prejudiced their rights by impeding a settlement of this matter.

Third-party defendant DJM Contracting Corp. cross moves for the same relief, making similar allegations.

Plaza, in opposition, asserts that it “never ignored” the orders obligating it to disclose insurance information. Rather, it complied with the orders by “disclosing the information then known to exist.” It notes that Nationwide’s (the insurer’s) computer system did not contain information that would allow a claims representative to learn that Nationwide provided the undisclosed umbrella coverage. Moreover, when it learned of the coverage in October, 1993, it disclosed it to all parties.

Additionally, Plaza argues that the failure to settle this case was due in part to the amount of plaintiffs demand and the fact that defendant DJM’s carrier, Reliance Insurance Company, went into rehabilitation, and, because of its insolvency, could not make substantial payments on claims.

Plaza submits an affidavit from Michael Stoop, a Nationwide agent. Stoop alleges that in October, 2000, he made a diligent computer search of Nationwide’s records. He did not review paper files because they were in storage and access to them was limited. His computer search did not reveal the umbrella coverage. Stoop asserts that his search was careful and diligent, and that he was unaware of the umbrella coverage.

Plaza also submits an affidavit from Susan Blevens, a Nationwide Home Office Claim Consultant. Blevens states that she obtained the paper file relating to this matter on September 17, 2003. She learned that there was a \$2,000,000 umbrella policy that was cancelled on May 5, 2000. However, on further investigation, she learned, on September 24, 2003, that the policy was in effect on the 1998 accident date. She apparently conveyed the information to Plaza’s attorneys shortly after she learned of the coverage.

Blevens asserts that “Nationwide acted in good faith and with due diligence with respect to insurance coverage disclosure”

Plaintiff's attorney submits an affidavit in which he neither opposes nor supports the motion. However, he asserts that settlement negotiations had been futile, and that Park Terrace Gardens's insurance carrier would have authorized an amount sufficient to settle the case.

There is no showing that Plaza wilfully or continuously withheld the umbrella insurance information. Therefore, there is no basis to strike Plaza's answer (see *Bermuda v. Laiminates Unlimited, Inc.*, 134 A.D.2d 314).

Any failure to produce the information resulted from an insurance company worker's failure to locate the information, because of his reliance on the company's computer system instead of its paper files. At most, this was negligent, but not deliberate. There is no showing that either Plaza or its attorney was responsible for Nationwide's omission. Moreover, Plaza's attorneys disclosed the information upon obtaining it.

The facts in this case do not warrant the extraordinary sanction of striking a pleading after a trial has been completed. This is particularly true in this case, as the movants have not demonstrated any prejudice. The court is aware of settlement negotiations now in progress in the Appellate Division, and, has offered its own assistance in current settlement negotiations.


Accordingly, it is

ORDERED that the motion and cross motion are denied.

This constitutes the decision and order of the court.

Dated: May 27, 2004

ENTER



J.S.C.

FILED

JUN - 3 2004

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COUNTY CLERK'S OFFICE