

**Dezer Properties II, LLC v Kaye Insurance  
Associates, Inc.**

2005 NY Slip Op 30170(U)

December 16, 2005

Supreme Court, New York County

Docket Number: 0601627/2000

Judge: Barbara Kapnick

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

PRESENT: Hon. **BARBARA R. KAPNICK** PART 12  
Justice

DEZER  
- v -  
KAYE INSURANCE

INDEX NO. 601627/00  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
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

Upon the foregoing papers, it is ordered that this motion and cross-motion are granted in accordance with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED: \_\_\_\_\_ J.S.C.

**FILED**  
DEC 21 2005  
NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/16/05

[Signature]  
**BARBARA R. KAPNICK**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

\* 2 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 12

-----X  
DEZER PROPERTIES II, LLC,

Plaintiff,

- against -

KAYE INSURANCE ASSOCIATES, INC. and  
STATE INSURANCE FUND,

Defendants.  
-----X

BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 601627/00

Motion Seq. No. 001

**FILED**

DEC 21 2005

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Dezer Properties II, LLC ("Dezer") commenced this action against its general liability insurance broker, defendant Kaye Insurance Associates, Inc. ("Kaye"), and against its workers' compensation carrier, State Insurance Fund ("SIF"), seeking to recover damages for "negligence, carelessness, recklessness, malpractice, bad faith, breach of fiduciary duty and breach of contract" in permitting a default judgment to be entered against it in the underlying personal injury action, Melvin Palmer v. Dezer Properties II, LLC, Supreme Court, Bronx County, Index No. 8957/97.

Plaintiff now moves for summary judgment against both defendants. Defendant SIF opposes the motion and cross-moves to dismiss plaintiff's Complaint against it. Defendant Kaye also opposes the motion and requests that this Court grant summary

judgment dismissing plaintiff's Complaint against it based on the record in this case.<sup>1</sup>

There is no dispute that prior to the commencement of the underlying action, Dezer notified its general liability carrier, Hartford Insurance Company ("Hartford"), of a possible claim arising out of a construction accident which occurred at premises owned by Dezer on October 26, 1995. By letter dated November 11, 1996, Hartford reserved its right to disclaim coverage based on its finding, after an initial investigation, that Palmer may have been employed by Dezer and thus subject to an employee exclusion in Hartford's general liability policy.

One day after Dezer was served with the underlying Summons and Complaint, Matthew Mark, Dezer's General Manager, forwarded the papers to Steve Schafer, a broker with defendant Kaye, along with a letter dated April 15, 1997 asking him to forward the documents "to the appropriate party to protect our mutual interest". Kaye allegedly failed to forward the Summons and Complaint to Hartford, but instead forwarded them to SIF on or about April 29, 1997. SIF allegedly proceeded to misfile the Complaint and no Answer was ever served.

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<sup>1</sup> Although defendant Kaye did not seek summary judgment by formal cross-motion, the matter was fully briefed and orally argued before this Court, and thus the relief requested shall be considered herein.

Counsel for plaintiff in the underlying action then made a motion for a default judgment which was granted on default by the Hon. Bertram Katz in a decision dated January 14, 1998. The decision further directed an inquest and assessment of damages against Dezer. Palmer's attorney was directed to settle an order by regular and certified mail, return receipt requested.

Dezer was served with the order on February 9, 1998 and forwarded it along with a letter dated February 10, 1998 to Kaye once again with the request that the document be forwarded "to the appropriate party to protect our mutual interest." Kaye apparently again failed to forward it to plaintiff's general liability carrier but sent it instead to SIF on or about February 20, 1998.

Dezer subsequently received a copy of the proposed Order with the default decision and forwarded it to Kaye by letter dated February 23, 1998 with the same request that it be forwarded "to the appropriate party". Kaye forwarded the document only to SIF on or about March 10, 1998, who admits that they misfiled the documents in the workers' compensation claim file and took no further action.

An Inquest was then held and a judgment in the sum of \$700,000.00, plus interest, costs and disbursements was granted and served upon Dezer. Dezer sent a copy of the judgment directly to

Hartford with a letter dated December 15, 1998, asking for an explanation as to what had happened.

Hartford then retained counsel on Dezer's behalf who brought on an order to show cause seeking to vacate and set aside the judgment.

By Decision/Order dated February 2, 1999, the Court (Katz, J.) denied the motion, stating that even if Dezer's contentions were to be substantiated,

through a first hand showing of neglect by the broker, and not by hearsay, the Court finds that movant has not demonstrated a reasonable excuse for its default, which constitutes a 20 month neglect in responding to the complaint, and a delay in moving to vacate a default order which exceeded nine months. The conduct of the defendant in ignoring the substantial proceedings which resulted in an inquest was simply unreasonable,...

The Decision was affirmed by the Appellate Division, First Department who found that "[t]he motion was properly denied since defendant failed to offer a reasonable explanation for its failure to answer or respond to the motions for a default judgment and for its delay in moving to vacate the default judgment." (270 A.D.2d 207). The Court further found that Dezer failed to show a meritorious defense since the injury fell within the purview of Labor Law § 240(1).

\* 6 ]  
The Appellate Division also found that the defense that the action was barred by the exclusivity provisions of the Workers' Compensation Law lacked merit, since the employer and the owner of the premises where plaintiff was injured were "distinct legal entities". (Id.).<sup>2</sup>

A motion for leave to appeal to the Court of Appeals was dismissed on November 16, 2000 (95 N.Y.2d 931), and Hartford ultimately satisfied the judgment entered against Dezer.

Plaintiff now moves for summary judgment against defendant Kaye based on Kaye's failure to forward the pleadings and other documents to the appropriate insurance carrier. Plaintiff also moves for summary judgment against SIF based on its 'mishandling' of the claim, and argues that SIF should be estopped from denying coverage since it failed to contact either Kaye or Dezer to disclaim coverage or to otherwise inform plaintiff that SIF would not be taking any action.

Defendant SIF opposes the motion and cross-moves for an order pursuant to CPLR §§ 3211 and 3212 dismissing plaintiff's complaint against it on the grounds that:

(1) this Court lacks jurisdiction over SIF since SIF, a state agency, may only be sued in the Court of Claims (see, Court of Claims Act, Section 9);

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<sup>2</sup> Thus, it appears that Hartford's initial finding that Mr. Palmer was employed by the plaintiff herein may not have been accurate.

(2) plaintiff has failed to join a necessary party, i.e., Hartford; and

(3) SIF had no duty to disclaim where, as here, there was no coverage (see, Zappone v. Home Insurance Co., 55 N.Y.2d 131 [1982]).<sup>3</sup>

Plaintiff argues that SIF's cross-motion to dismiss this action on jurisdictional grounds should be denied since this Court has general equitable jurisdiction over SIF.

However, it is well settled that

[t]he State Insurance Fund is a state agency which the Legislature vested with certain sovereign powers and "the mantle of the State's sovereign immunities" (citations omitted). As such, it is immune from suit in any forum other than the Court of Claims (citations omitted).

Commissioner of the State Insurance Fund v. M. Mathews & Sons Co., Inc., 131 A.D.2d 301, 301-302 (1st Dep't 1987). See also, Commissioners of the State Insurance Fund v. Trio Asbestos Removal Corp., 9 A.D.3d 343 (2nd Dep't 2004); Commissioners of the State Insurance Fund v. Netti Wholesale Beverage Co., Inc., 245 A.D.2d 48 (1st Dep't 1997).

Accordingly, the cross-motion by defendant SIF to dismiss plaintiff's Complaint against it is granted, and plaintiff's motion

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<sup>3</sup> SIF claims that while it had insured Michael Dezertov and Neomi Dezertov d/b/a Dezer Properties Co. since December 17, 1988, the plaintiff herein - i.e., Dezer Properties II, LLC - was not insured by SIF until January 1, 1997.

for summary judgment against defendant SIF is denied. The Clerk may enter judgment dismissing plaintiff's Complaint against defendant SIF without costs or disbursements.

Defendant Kaye opposes that portion of plaintiff's motion seeking summary judgment against it and argues that it is entitled to summary judgment on the grounds, inter alia, that the anti-subrogation rule bars Hartford from maintaining this 'subrogation lawsuit' against its insured's broker/agent. See, Maheu v. Long Island Railroad, 188 Misc.2d 414 (Sup. Ct., Nassau Co. 2001).

Although the Summons and Complaint were brought solely in the name of Dezer and contain no reference to a claim for subrogation, plaintiff concedes that this action was brought by Hartford in the name of Dezer. However, plaintiff argues that the anti-subrogation doctrine has no application to this case since Hartford did not bring this action against its own insured, i.e., Dezer, which admittedly did not provide timely notice of the underlying lawsuit, as required by its policy. Rather Hartford seeks to recover damages against the alleged wrongdoer, i.e., Kaye.

However, there has been no showing that Dezer suffered any damages since the underlying judgment was satisfied by Hartford. Thus, Hartford, standing in Dezer's shoes, has no claim for damages against the broker. See, Federal Ins. Co. v. Spectrum Insurance Brokerage Services, 304 A.D.2d 316, 317 (1st Dep't 2003); see also, Maheu v. Long Island Railroad, supra at 419, which noted that "it

\*9]  
was a matter of indifference" to the insured "which of the two insurance policies it had purchased provided the defense and paid the judgment."

To the extent that Hartford seeks to recover damages against the broker for damages that Hartford itself, as opposed to Dezer, sustained as a result of the broker's alleged negligence, said claim must also fail since Kaye was never in privity with and thus owed no duty to Hartford.

Accordingly, this Court finds that defendant Kaye is entitled to summary judgment. Plaintiff's motion for summary judgment against defendant Kaye must, therefore, be denied.

The Clerk may enter judgment dismissing plaintiff's Complaint against defendant Kaye with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Dated: December 16 2005

  
Barbara R. Kapnick

**BARBARA R. KAPNICK**  
J.S.C.

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