

**US Pack Network Corp. v Travelers Property
Casualty**

2006 NY Slip Op 30455(U)

March 10, 2006

Supreme Court, New York County

Docket Number: 603875/2001

Judge: Richard B. Lowe

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

PRESENT: _____

PART 56

Index Number 600885/2001
RICHARD B. LOWE III
US PACK NETWORK

vs
TRAVELERS PROPERTY CASUALTY

Sequence Number : 004

REN

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

_____ were read on this motion to/for _____

PAPERS NUMBERED

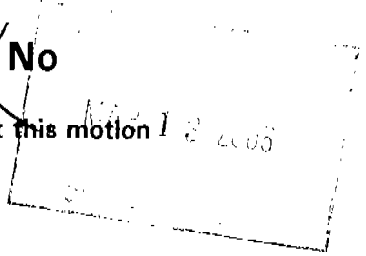
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion 12 2005



**MOTION IS DECIDED IN ACCORDANCE
WITH ACCORDING MEMORANDUM
DECISION**

FILED

MAR 14 2006

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3/10/2006

RICHARD B. LOWE III J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

M J W

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----X
US PACK NETWORK CORP. and US PACK
COURIER SERVICE CORP.,

Plaintiffs,

Index No. 603875/2001

-against-

TRAVELERS PROPERTY CASUALTY;
TANENBAUM-HARBER CO., INC., MICHAEL
KRAVITZ, and JOHN DOES,

**DECISION
AND ORDER**

Defendants.

-----X

RICHARD B. LOWE, III, J.:

Defendants Tanenbaum-Harber Co., Inc. (Tanenbaum) and Michael Kravitz (Kravitz) move the court for leave to reargue and to reconsider its November 14, 2005 decision (the "Decision"), which granted in part and denied in part the defendants' motion for summary judgment. The court dismissed the negligence cause of action against the defendants but upheld the breach of contract cause of action.

BACKGROUND

The facts and circumstances underlying this motion have been discussed at length in the court's Decision. Accordingly, these facts and circumstances will not be renewed here.

DISCUSSION

The defendants urge the court for leave to reargue its motion for summary judgment as it relates to the breach of contract claim which the court, in its Decision, denied summary judgment. The defendants argue that, as the agent and insurance broker, they "stand in the

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shoes” of the insurance company and may bring all defenses available to the insurance company. The defendants also argue that, because the plaintiff failed to read the insurance policies procured by the defendants, the plaintiff cannot now bring a cause of action for breach of contract. The court addresses the defendants’ “failure to read” defense prior to dealing with the defendants’ “stand in the shoes” defense.

A motion for reargument addressed to the discretion of the court is designed to afford a party an opportunity to establish that the court overlooked or misapprehended relevant facts or misapplied any controlling principle of law; its purpose is not to serve as a vehicle to permit the unsuccessful party to argue, once again, the questions previously decided (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992], *lv to app dismissed in part, den. in part*, 80 NY2d 1005 [1992]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]).

As to the defendants’ argument and defense that the plaintiff failed to read the policies, the court notes that an “insured has a right to look to the expertise of its broker with respect to insurance matters” (*Baseball Office of the Comm’r v Marsh & McLennan*, 295 AD2d 73, 82 [1st Dept 2002]). As the First Department has articulated, it is no defense for the broker to argue that the insured had an obligation to read the policies, since it is “precisely” the broker’s obligation “to perform this service as well as others that the insured pays a commission to the broker” (*id.*). Here, the defendants, as the securer of the insurance policies, had the duty to make sure that the policies they procured for the insured were correct. Accordingly, this prong of the defendants’ defense fails and the motion to renew and reargue is denied as to this aspect of the defendants’ defense.

The defendants also argue that because they stand in the shoes of the insurer and have the same defenses available to the insurer, summary judgment should have been granted because the

plaintiff failed to give notice within the requisite time period. The court disagrees. “[I]n a malpractice action against a broker for exposing the client to an uninsured loss, the broker ultimately ‘stands in the shoes of the insurer as concerns liability to the insured’” (*id.* at 80, quoting *Macon v Arnlie Realty Co.*, 207 AD2d 268, 270 [1st Dept 1994]). However, “an agent or broker may be held liable for neglect in failing to procure insurance, with liability limited to that which would have been borne by the insurer had the policy been in force” (*see American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 346 [1st Dept 1984]; *Soho Generation of New York, Inc. v Tri-City Ins. Brokers*, 256 AD2d 229, 231 [1st Dept 1998]). The plaintiff may bring the claim either in contract or in tort (*id.*).

As the broker, the defendants could be held liable on the promise to procure the plaintiff’s correct insurance policy (*see Kinns v Schulz*, 131 AD2d 957, 959 [3d Dept 1987], citing *Riedman Agency v Meaott Constr. Corp.*, 90 AD2d 963, 964 [4th Dept 1982]), and for their failure to do so if it can be shown that, at the time of the application, the plaintiffs were insurable and coverage could have been procured (*id.*, citing *Spiegel v Metropolitan Life Ins. Co.*, 6 NY2d 91 [1959]). Here, there is no dispute that the defendants were acting on behalf of the plaintiff in procuring the correct insurance policies. There is also no disagreement that, at the time of the application, the plaintiffs were insurable and the correct coverage *could have* been obtained. The action against the defendants here is not *on* the insurance policies themselves, but rather on *the agreement to procure* insurance policies particular to the plaintiffs’ situation (*id.*). That the court granted summary judgment to defendants Travelers Property Casualty due to the plaintiff’s failure to provide timely notice, while the law of this case, is irrelevant to defendants Tanenbaum and Kravitz. The plaintiffs are not seeking action against

the defendants as to the insurance policies themselves, but on the promises the defendants made to the plaintiffs to obtain and secure the correct policies in the first place.

Accordingly, the defendants' motion to renew and reargue is denied and the Decision stands.

CONCLUSION

For the reasons stated above, it is hereby

ORDERED that defendant Tanenbaum-Harber Co., Inc. and Michael Kravitz's motion for leave to renew and reargue is denied; and it is further

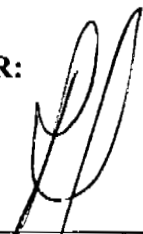
ORDERED that the court's November 14, 2005 Decision stands.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: March 10, 2006



ENTER:



RICHARD B. LOWE III, J.S.C.

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