

<b>Nicotra Group, LLC v American Safety Indem. Co.</b>
2007 NY Slip Op 31271(U)
May 16, 2007
Supreme Court, New York County
Docket Number: 0700195/2003
Judge: Rosalyn H. Richter
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. ROSALYN RICHTER  
*Justice*

PART 24

Nicola

INDEX NO. 722195/03

- v -

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

American

MOTION SEQ. NO. 04

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 ...

PAPERS NUMBERED

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
MAY 18 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION**

Dated: 5/16/07

[Signature]

HON. ROSALYN RICHTER

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: PART 24

-----X  
NICOTRA GROUP, LLC and HILTON HOTELS  
CORPORATION,

Plaintiffs,

-against-

AMERICAN SAFETY INDEMNITY COMPANY,  
MARKEL INSURANCE COMPANY,  
HANOVER INSURANCE COMPANY,  
ZURICH-AMERICA INSURANCE COMPANY  
and RUSSO PICCIURRO MALOY, LLC,

Defendants.  
-----X

DECISION AND ORDER  
Index No. 722195-2003  
Motion Sequence Nos 3, 4

-----X  
RUSSO PICCIURRO MALOY, LLC,

Third-Party Plaintiff,

-against-

BUCKINGHAM BADLER ASSOCIATES, INC. and  
BROOKS INSURANCE AGENCY OF N.Y., LTD.,

Third-Party Defendants.  
-----X

Rosalyn Richter, J.:

**FILED**  
MAY 18 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Nicotra Group, LLC (“Nicotra”) brought this action seeking insurance coverage for an underlying personal injury action brought by Michael Savarese, who was allegedly injured while performing construction work at the Hilton Garden Inn on Staten Island. In its complaint, Nicotra sought a declaratory judgment against the four insurance company defendants. In addition, Nicotra brought negligence and other claims against defendant Russo Picciurro Maloy, LLC. (“RPM”), who was Nicotra’s insurance broker. Nicotra claimed that RPM breached its duty to secure insurance coverage for Nicotra when it erroneously canceled an additional endorsement relating to a part of

the construction project where Savarese was injured. Because of the cancellation, the insurer disclaimed coverage leaving Nicotra uninsured for Savarese's personal injury action. RPM subsequently brought a third-party action for indemnification against Buckingham Badler Associates, Inc. ("BBA") and Brooks Insurance Agency of N.Y., Ltd. ("Brooks") alleging that those parties were responsible for leaving Nicotra with no coverage.

The insurance company defendants sought summary judgment dismissing Nicotra's declaratory judgment claims against them. RPM cross-moved for summary judgment dismissing Nicotra's claims against it and Nicotra cross-moved for summary judgment in its favor. In addition, BBA sought summary judgment dismissing RPM's claim against BBA for indemnification. In a decision dated September 29, 2006, the Court granted the insurance company defendants' motions for summary judgment and dismissed Nicotra's claims against them. The Court also granted BBA summary judgment dismissing RPM's claims. The Court, however, denied both Nicotra's and RPM's cross-motions for summary judgment against each other.

In this motion, Nicotra seeks leave to reargue this Court's denial of Nicotra's cross-motion for summary judgment against RPM. The Court grants leave to reargue and upon reargument, grants Nicotra's summary judgment motion with respect to its negligence claim against RPM. In its decision, the Court appropriately found that RPM was negligent in requesting a "flat cancellation" of the endorsement that left Nicotra uninsured. The Court also concluded that RPM failed to establish any negligence on the part of BBA finding that BBA merely carried out RPM's request to cancel the endorsement. The Court found that it was RPM's duty to obtain insurance coverage for Nicotra and that RPM was solely responsible for canceling the necessary coverage. In light of these findings, there was no basis for denying Nicotra's motion for summary judgment against RPM on

the negligence cause of action.

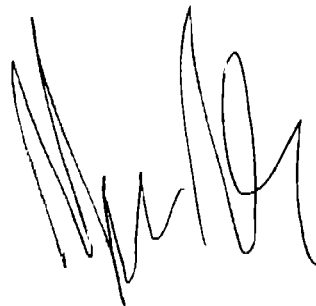
RPM argues that summary judgment should be denied because Nicotra was somehow “involved with insurance decisions”. To begin, RPM did not make this argument in its original cross-motion papers and is precluded from asserting it now. *See Frisenda v. X Large Enterprises*, 280 A.D.2d 514 (2d Dept. 2001), *citing Foley v. Roche*, 68 A.D.2d 558, 567-68 (1<sup>st</sup> Dept. 1979)(reargument not designed “to provide a party an opportunity to advance arguments different from those tendered on the original application”). Furthermore, RPM does not explain this conclusory statement, nor does it point to anything in the record to support this allegation. Although RPM now states that the cancellation notice was “supposedly” sent to Nicotra, its papers in opposition to this motion do not point to any proof in the record supporting that claim. Nor did RPM’s original cross-motion identify any such proof. Indeed, those papers stated just the opposite – that the cancellation notice was neither provided to nor received by Nicotra. *See* May 19, 2006 Affidavit of Ellen Nimaroff, ¶¶ 22, 45; July 24, 2006 Reply Affidavit of Ellen Nimaroff, ¶ 11. Thus, RPM’s original motion papers never suggested that Nicotra bore any responsibility for the insurance coverage being canceled but rather sought to shift the blame to other defendants in this case. Accordingly, summary judgment should have been granted to Nicotra on its negligence claim against RPM.

Nicotra’s motion for leave permitting late service of the Notice of Appeal on RPM is granted. Due to a typographical error on an envelope, Nicotra’s timely service of its Notice of Appeal on RPM was returned by the post office. There is no dispute that the other parties in this litigation were timely served on November 14, 2006, the same day service was attempted upon RPM. Upon learning of the error, Nicotra immediately made service again upon RPM, two days after the thirty-

day deadline. Under these circumstances, Nicotra has convinced the Court that its failure to have timely served RPM was due to “mistake or excusable neglect”. C.P.L.R. § 5520[a]; *see Matter of Delila M.*, 238 A.D.2d 342 (2d Dept. 1997); *Leonard v. Regan*, 167 A.D.2d 790 (3d Dept. 1990). Thus, the Court deems the Notice of Appeal to have been served upon RPM *nunc pro tunc* November 14, 2006. Although Nicotra’s motion to reargue was served on RPM two days beyond the statutory deadline, the Court exercises its discretion to entertain the motion it because it was made after the filing of Nicotra’s Notice of Appeal but prior to the perfection of the appeal. *See Garcia v. The Jesuits of Fordham*, 6 A.D.3d 163 (1<sup>st</sup> Dept. 2004); *Leist v. Goldstein*, 305 A.D.2d 468 (2d Dept. 2003).

This constitutes the decision and order of the Court

May 16, 2007



Justice Rosalyn Richter

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