

**Admiral Indem. Co. v Kent**

2008 NY Slip Op 30364(U)

January 1, 2008

Supreme Court, New York County

Docket Number: 0106491/2006

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

*Justice*

Index Number : 106491/2006  
ADMIRAL INDEMNITY CO.  
vs  
KENT, ADELAIDE  
Sequence Number : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for 83212 +  
Sanchez  
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

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

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**  
FEB 07 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: JAN 31 2008

[Signature]  
HON. JUDITH J. GISCHE *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

DO NOT POST  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----X  
Admiral Indemnity Company a/s/o  
233 East 69<sup>th</sup> Street Owners Corp.,

Plaintiffs,

-against-

Adelaide Kent,

Defendant.

**Decision/Order**

Index No.: 106491/06

Seq. No. : 002

Present:

Hon. Judith J. Gische

J.S.C.

-----X  
Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Def's n/m 3212 and sanctions w/ CAM affirm, exhs .....	1
Plt's opp w/CJS affirm, exh .....	2
Def's reply w/CAM affirm .....	3

*Upon the foregoing papers the court's decision is as follows:*

*GISCHE, J.;*

This is a subrogation action by Admiral Indemnity Company ("Admiral") as subrogor of the claims by 233 East 69<sup>th</sup> Street Owners Corp ("condo") against defendant Adelaide Kent, a coop unit owner ("unit owner"). The unit owner now moves for summary judgment, based upon documentary evidence that she claims is dispositive of plaintiffs' claims against her. Defendant also seeks an order awarding her sanctions against plaintiff for bringing this action which she contends is frivolous. CPLR § 8303-a; 22 NYCRR § 130-1.1

Issue has been joined and the note of issue was filed. This motion is timely

[\* 3 ]  
under CPLR § 3212 having been brought not more than 120 after the filing of the note of issue. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

The decision and order of the court is as follows:

### **Arguments**

The underlying dispute is whether the unit owner is responsible to the plaintiff for damages arising from a flood in her apartment caused by an overflowed toilet. The condo tendered a claim to its insurance company (Admiral), which Admiral paid. Admiral contends that it has the right to recover its payment from defendant/unit owner because she improperly maintained her apartment. The defendant contends that this action is without merit because Admiral waived its right of recovery against her in the insurance policy, as did the condo in the proprietary lease appurtenant to her unit. The following provision in the Admiral policy is of particular relevance to this dispute:

**"9. Waiver of Rights of Recovery.**

We waive our rights to recover payment from any unit owner of the condominium that is shown in the declarations. (Exhibit "I")."

The "declarations" page of the policy identifies the named insured as "233 East 69<sup>th</sup> Street Condo & 233 East 69<sup>th</sup> Street Owners Corp. c/o Charles H. Greenthal Management." The business is described in the policy as being a "condop."

In relevant part, the proprietary lease for defendant's unit provides as follows:

**"Waiver of subrogation**

(d) Lessor [233 East 69<sup>th</sup> Street Owners Corp.] agrees to use its best efforts to cause the Condominium to obtain, if there is no increase in premium therefor, in all physical damage policies carried by the Condominium, and in all insurance policies carried by the Lessor, a provision waiving the right of subrogation against the Lessee [unit owners]; and to the extent that any such loss or damage is covered by the

[\*4 ]

Condominium or the Lessor by any insurance policies which contain such waiver of subrogation, the Lessor releases the Lessee and will use its best efforts to have the Condominium release the Lessee from any liability with respect to such loss or damage. . . "

Defendant contends that she is a "unit owner" in the "condominium" named in the insurance policy on the declarations page, therefore within the protective language of the waiver in that document. She contends further that the policy effectuates the language in the proprietary lease, which also contains a waiver of subrogation.

The plaintiffs, however, interpret the waiver in the policy entirely differently, primarily by putting a different emphasis on certain words in that provision. They contend that defendant's name must appear on the declarations page of the policy in order for that waiver to be effective. Plaintiffs further contend that the proprietary lease provision relied upon by the defendant is not a waiver at all, but only a "best efforts" clause. Finally, plaintiffs contend that even if the waiver clause is found applicable, they would still have the right to recover the policy deductible of \$2,500. Plaintiffs deny sanctions are warranted and contend they have a meritorious, not frivolous, cause of action.

**Law applicable to a motion for summary judgment (CPLR § 3212)**

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557

[\* 5 ]  
(1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, supra at 563-64.

When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. See: Hindes v. Weisz, 303 A.D.2d 459 (2<sup>nd</sup> Dept 2003).

### **Discussion**

As with any contract, the unambiguous terms of an insurance policy, must be accorded their plain and ordinary meaning. West 56<sup>th</sup> Street Assoc. v. Greater N.Y. Mutual Ins. Co., 250 A.D.2d 109, 112 (1<sup>st</sup> Dept 1998) (*specifically applying to insurance policies*); Also: W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157 (1990) (*general contract interpretation*). Therefore, unless there is some ambiguity, the terms of the contract itself dictates the rights of the parties, and such a determination is expected to be made without resorting to extrinsic evidence.

The interpretation of the insurance policy that the plaintiffs urge the court to adopt either impermissibly adds in words not contained within the four corners of the document, or place undue emphasis on certain words that disregards their plain meaning. Thus, plaintiffs contend that section 9 of the policy should be read as follows, and with the following emphasis: "[w]e waive our rights to recover payment from **any unit owner of the condominium that is shown in the declarations . . .**" Thus, it is their contention that unless the unit owner's name is contained on the declarations page, the condo can pursue a subrogated claim against that owner.

In examining the provision however, the word "that" in the waiver refers to the condo, not the unit owner. Since this is a policy issued to the condominium, and not to

any individual unit owner, a unit owner's name would never be included on the declarations page. Thus, the provision simply provides that the insurance company waives any right to recover payment from a unit owner owning a unit in the condominium named in the declaration. This interpretation is also consistent with and effectuates the provision (*supra*) in the proprietary lease that the condo and the unit owner agreed to.

Defendant has proved her defenses and her entitlement to summary judgment dismissing the complaint. In opposition, plaintiffs have failed to present any factual disputes for trial. The interpretation of the insurance policy that they urge the court to accept does not raise any factual dispute for trial because it is contrary to the express terms of the policy. Having waived their right to recover payment from any unit owner of the condominium, Admiral has no cause of action against this defendant who owns a unit in the condo. Therefore the complaint is hereby dismissed, in all respects.

### **Sanctions**

Defendant argues that the plaintiffs should be sanctioned under CPLR 8303-a and/or Part 130 of the Rules of the Chief Administrator. The Rules of the Chief Administrator provide that costs and sanctions may be imposed upon an attorney and the client for frivolous conduct, which is defined as 1) being completely without merit in law and cannot be supported by a reasonable argument for extension, modification or reversal of existing law; 2) is undertaken primarily to delay or prolong litigation or to harass or maliciously injure another; or 3) the assertion of material factual statements that are false. 22 NYCRR 130-1.1. CPLR § 8303-a is similar, but it specifically allows for the recovery of costs upon frivolous claims and counterclaims in actions to recover

[\* 7 ]

damages for personal injury, injury to property or wrongful death if the action was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation. Neither the court rule nor the statute, however, is intended to address discovery abuses. Testa ex rel. Testa v. Koerner Ford of Syracuse, Inc., 261 A.D.2d 866 (4<sup>th</sup> dept 1999). Moreover, it is not enough that the action is meritless. It must be brought or continued in bad faith and the party seeks sanction must show that plaintiff and counsel knew or should have known that action lacked merit. McGill v. Parker, 179 A.D.2d 98 (1<sup>st</sup> Dept. 1992).

This case lacks merit and because of the delay in providing a full copy of the policy, defendants were prevented from moving to have it dismissed sooner. However, there is no showing of bad faith, or indication that plaintiffs pursued the case for any sanctionable reason. Though the complaint was supported by a poorly conceived legal argument, it cannot be said that this case is frivolous, within the meaning of either the court rules or CPLR § 8303. Therefore, the motion for the imposition of sanctions is denied.

### **Conclusion**

Defendant's motion for summary judgment is granted, however, the motion for the imposition of sanctions on the plaintiffs is denied.

In accordance with the foregoing,

*It is hereby*

**ORDERED** that the Clerk shall enter judgment in favor of defendant Adelaide Kent, against plaintiffs Admiral Indemnity Company a/s/o 233 East 69<sup>th</sup> Street Owners Corp.; and it is further

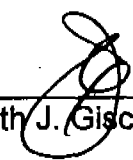
ORDERED that defendant's motion for the imposition of sanctions is denied; and it is further

ORDERED that any relief requested but not addressed is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York  
January 31, 2008

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
FEB 07 2008  
NEW YORK  
COUNTY CLERK'S OFFICE