

**Rutgers Cas. Ins. Co. v Arbat, Inc.**

2008 NY Slip Op 30806(U)

March 12, 2008

Supreme Court, New York County

Docket Number: 0604355/2006

Judge: Judith J. Gische

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

**JUDITH J. GISCHE, J.S.C.**

PRESENT:

PART 10

Index Number : 604355/2006

RUTGERS CASUALTY INSURANCE CO

vs

ARBAT INC

Sequence Number : 004

REARGUMENT/RECONSIDERATION

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

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

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

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

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

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

**FILED**

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NEW YORK  
COUNTY CLERKS OFFICE

Dated: 3/12/08

**JUDITH J. GISCHE, J.S.C.** *J.S.C.*

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 10

-----x  
RUTGERS CASUALTY INSURANCE  
COMPANY,

Plaintiff,

-against-

ARBAT, INC. d/b/a ARBAT CAFE, VERA  
FIRSOVA and OVERLAND SOLUTIONS, INC.,

Defendants.  
-----x

**Decision/Order**

Index No.: 604355/06

Seq. No. : 004

Present:

Hon. Judith J. Gische

J.S.C.

**FILED**

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NEW YORK  
COUNTY CLERK'S OFFICE

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

**Papers**

**Numbered**

Pltf's motion [dj/mt] w/DF affirm in support, exhs ..... 1  
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*Upon the foregoing papers, the decision and order of the court is as follows:*

In this action, plaintiff seeks a declaration that Arbat Inc. d/b/a Arbat Cafe ("Arbat") made certain material misrepresentations in its application for insurance, justifying rescission of the commercial general liability insurance policy it issued to Arbat, and vitiating any coverage for any action commenced by Vera Firsova ("Firsova") for the alleged incident which occurred on March 28, 2006 at the insured premises at 306 Brighton Beach Avenue, Brooklyn, New York (the "premises").

Plaintiff previously moved, pursuant to CPLR § 3215, for entry of a default judgment (sequence number 002) in its favor and against Arbat and Firsova. The prior motion was denied, by order dated July 10, 2007, because plaintiff failed to provide a copy of the policy as well as an affidavit of someone with personal knowledge attesting to

plaintiff's allegations. Since the denial was without prejudice, permission to renew is granted. CPLR 2221(d)(2), Foley v. Roche, 68 A.D.2d 558, 567 (1<sup>st</sup> Dept. 1979).<sup>1</sup>

Plaintiff again moves, pursuant to CPLR § 3215, for entry of a default judgment in its favor and against Arbat and Firsova. The court noted in its prior decision that plaintiff properly served the summons and verified complaint on Arbat and Firsova. In addition, the instant motion has been properly served on Arbat and Firsova. Therefore the motion is submitted to the court on default.

In the sole cause of action against Arbat, plaintiff claims that Arbat made certain misrepresentations in its application for insurance with plaintiff regarding the premises to be insured and the operation thereof.

Arbat allegedly represented that the premises to be insured did not have a dance floor and that the premises did not offer live entertainment. Plaintiff now factually claims that Arbat did have a dance floor at the subject premises and did offer live entertainment. Plaintiff also claims that Firsova "slipped and fell on a dance floor at the subject premises while dancing to live musical entertainment."

To support its contention that Arbat made a misrepresentation of fact, plaintiff has provided a copy of a letter dated November 7, 2006, which plaintiff received from Siegel & Associates indicating that "[w]hile a dining patron at your insured's Erbate Café in Brighton Beach on March 28, 2006, Vera Firsova slipped and fell on liquid on the dance floor." Plaintiff has also provided an investigation report by Michael J. Seckendorf ("Sekendorf"), an employee of plaintiff, wherein Seckendorf states that on

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<sup>1</sup> The court notes that plaintiff moved to renew its prior motion (sequence number 003), however that motion was inadvertently marked moot in error.

November 16, 2006, he interviewed Mark Braun, an alleged manager of Arbat.

According to Seckendorf, and a signed statement by Braun, on March 29, 2006, there was a birthday party at the Arbat Café for a woman named Natalie” and that “[t]here were six people at the party including the person who fell down.” Seckendorf also notes that: [1] Braun “was not at the café on the day of the incident, but an employee named Nina Bragarnik told him that she had witnessed this incident”; and [2] “the statement [which Braun signed] was read to him by Josh Shapin, an employee, before he signed it because he cannot read English.”

Seckendorf also states in his report that he spoke to Nina Bragarnik (“Bragarnik”), a part-time waitress at Arbat, who corroborated Braun’s story. Bragarnik also provided a signed statement.

Plaintiff has also provided the report of Overland Solutions, Inc. (“Overland”), dated May 20, 2005. Plaintiff claims that Overland’s report is “based on the representations provided by Arbat in connection with the issuance of the insurance policy.” Overland’s report states as follows: “No live entertainment. Does not contract with outside groups or individuals for meetings, banquets or similar functions... no dance floor.”

Plaintiff has also provided a copy of the policy of insurance it issued to Arbat.

### **Discussion**

Plaintiff is entitled to a default judgment against Arbat, provided it otherwise demonstrates that it has a prima facie cause of action. Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd dept. 2001). Arbat’s default in answering the complaint constitutes an admission of the factual allegations therein and the reasonable

inferences which may be made therefrom. Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 (1984).

In this action, plaintiff must demonstrate that Arbat “made a false statement of fact as an inducement to making the contract and the misrepresentation was material.” Federal Ins. Co. v Kozlowski, 18 AD3d 33, 39 (1<sup>st</sup> Dept 2005), quoting Curanovic v New York Cent. Mut. Fire Ins. Co., 307 AD2d 435, 436 (1st Dept. 2003). Insurance Law § 3105 (a) provides that a representation is a “statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof.” A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented. Insurance Law § 3105 (b); Zilkha v Mutual Life Ins. Co. of New York, 287 AD2d 713 [2d Dept. 2001).

None of the evidence adduced on this motion has established that Arbat made a false representation on its application for insurance because plaintiff has failed to provide a copy of Arbat’s application for insurance and has failed to explain its failure to do so.

Moreover, plaintiff has failed to establish that the alleged misrepresentation was material.<sup>2</sup> Materiality of the misrepresentation is typically a question of fact unless “the evidence of the materiality is clear and substantially uncontradicted, at which point the issue becomes one of law for the court to decide. A court, in finding a material misrepresentation as a matter of law, generally relies upon two categories of evidence,

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<sup>2</sup> Plaintiff makes reference to an affidavit of Vivalde Couto, the vice president of underwriting for plaintiff, however, the affidavit has not been annexed to plaintiff’s moving papers.

an affidavit from the insurer's underwriter and the insurer's underwriting manual."


Feldman v. Friedman, 241 A.D.2d 433 (1<sup>st</sup> Dept. 1997) (internal citations omitted); see also Carpinone v. Mutual of Omaha Ins. Co., 265 A.D.2d 752 (3d Dept. 1999).

Accordingly, the instant motion is denied in its entirety without prejudice to renew upon proper papers. Pursuant to CPLR § 3216, plaintiffs have ninety (90) days to either resume prosecution of this action, serve and file a note of issue or notify the court that it is abandoning this action. Plaintiff's failure to comply with this order will result in immediate dismissal of this matter for unreasonably neglecting to proceed.

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
March 12, 2007

So Ordered:  
  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
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NEW YORK  
COUNTY CLERK'S OFFICE