

**2-10 Jerisalem Ave. Realty, LLC v Utica First
Ins. Co.**

2008 NY Slip Op 30942(U)

March 31, 2008

Supreme Court, New York County

Docket Number: 0111924/2007

Judge: Walter Tolub

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

PRESENT: WALTER B. TOLUB

PART _____

Index Number : 111924/2007
2-10 JERISALEM AVE. RLTY, LLC
vs
UTICA FIRST INS. CO.
Sequence Number : 001
DISMISS ACTION

DEX NO. _____
OTION DATE _____
OTION SEQ. NO. _____
OTION CAL. NO. _____
otion 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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
APR 02 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3/21/08

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
2-10 JERISALEM AVENUE REALTY, LLC

Plaintiff,

-against-

UTICA FIRST INSURANCE COMPANY and
RADO RESTAURANT, INC., d/b/a BOTTOMS UP PUB

Defendants.
-----x

Index No. 111924/07
Mtn Seq. 001

FILED
APR 02 2008
COUNTY CLERK'S OFFICE
NEW YORK

WALTER B. TOLUB, J.:

By this motion Defendant Utica First Insurance Company (Utica) seeks an order dismissing all claims and cross-claims against it. (CPLR 3211[a][1],[7] and 3211[c]). Plaintiff cross-moves for summary judgment.

Facts

The facts of this case are largely undisputed. Utica seeks an order granting summary judgment and a declaration that Utica has no obligation to defend or indemnify 2-10 Jerisalem Avenue Realty LLC (Jerisalem) and Rado Restaurant Inc. d/b/a Bottoms Up Pub in the underlying lawsuit commenced in Supreme Court, New York county entitled *Juan C. Brizuela v. 2-10 Jerisalem Avenue Realty LLC, Kalan Minuskin and Mordechai Minuskin*, Index: 111606/06 (underlying lawsuit).

The underlying lawsuit was brought by Juan C. Brizuela and seeks damages from Jerisalem for injuries Brizuela claims he sustained sometime after 12:01 a.m. on or about February 24, 2006

while working for a company named Ubuildit. Brizuela claims that he tripped and fell while he was performing construction work at Bottom's Up which is located at 10 Jerisalem Avenue, Hicksville New York. Jerisalem then brought this action seeking a declaration that Utica is obligated to defend and indemnify it in the underlying lawsuit based upon its status and a purported additional insured under an insurance policy issued by Utica to Bottoms Up.

Utica claims that the policy issued to Bottoms Up was cancelled at the Bottom's Up request and that said cancellation took effect at 12:01 a.m. on February 24, 2006. Jerisalem argues that the policy was cancelled not when the letter states it was cancelled, but rather when Utica received the notice of cancellation.

Utica claims that it was first notified of the accident on October 2, 2006 when it received a letter from Jerisalem's counsel demanding that Utica defend and indemnify Jerisalem based on its status as an additional insured under the Utica policy. By letter dated October 13, 2006, Utica declined to afford coverage or to defend Jerisalem. Utica's reason for declining the coverage and not defending the action was that the policy had been cancelled by Bottom's Up prior to the time of the accident.

Discussion

At the heart of this lawsuit is when the cancellation of the

[* 4]

Utica policy took effect. Under the "Common Policy Conditions", paragraph two deals with cancellations and states that: "You may cancel this policy by returning this policy to us or by giving us written notice and stating at what future date coverage is to stop." (Utica Ex. 1). The documents produced by Utica show that sometime during business hours on September 24, 2006, someone associated with Rado Restaurant and Bottoms Up Pub met with someone from the Pinkham Agency and signed a cancellation request because the Restaurant was going out of business. (Utica Ex. 2) The Pinkham Agency then sent Utica a letter dated March 1, 2006 requesting that the policy be cancelled, effective February 24, 2006 (Utica Ex. 2).

In Savino v. Merchants Mutual Ins. Co., 44 NY2d 625 [1978], the Court of Appeals held that: (1) a request for cancellation of a policy is not effective, irrespective of the intention of the insured, until actual receipt by the insurance company or its agent and (2) that in the absence of an express agreement to do so, the law does not recognize fractions of a day. (Savino v. Merchants Mutual Inn. Co., 44 NY2d 625 [1978] *internal cites omitted*). The burden of proving that an agent was authorized to receive and accept a cancellation notice on its behalf is the Insurer. (Traux v. State Farm Ins. Co., 101 Misc.2d 1031 [Sup Ct. Onondaga County 1979]). Here, there are two affidavits, one by the Senior Vice President of Utica and the other by a Pinkham

