

**Time Warner Cable of N. Y. City v Hylan  
Datacom & Elec. Inc.**

2008 NY Slip Op 31207(U)

April 14, 2008

Supreme Court, New York County

Docket Number: 0107798/2005

Judge: Doris Ling-Cohan

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

PRESENT: HON. DORIS LING-COHAN

PART 36

*Justice*

Time Warner Cable of New York City

INDEX NO. 107798/05

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

- v -  
Hylan Datacom + Electrical Inc.,  
et al.

MOTION SEQ. NO. 003

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for argument

PAPERS NUMBERED

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

1,2

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

3,4

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

5,6

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion ~~is~~ to reargue by defendant

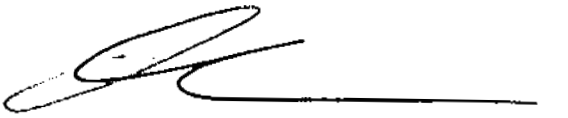
New Hampshire is granted in accordance with the attached memorandum decision.

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

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1413).

Dated: \_\_\_\_\_ 

  
**HON. DORIS LING-COHAN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  DEEDENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK IAS PART 36

-----X  
TIME WARNER CABLE OF NEW YORK CITY,  
a division of TIME WARNER ENTERTAINMENT  
COMPANY, L.P.

Plaintiff,

DECISION AND  
JUDGMENT

v.

Index. No. 107798/05

Motion Seq. No.: 003

HYLAN DATACOM & ELECTRICAL INC.,  
individually and as successor in interest to  
TRINITY COMMUNICATIONS CORP.,  
and TRINITY COMMUNICATIONS CORP.  
individually, DIAMOND STATE  
INSURANCE COMPANY and NEW  
HAMPSHIRE INSURANCE COMPANY,  
(Pertaining to an underlying action entitled  
*Concord Village Owners v. Trinity  
Communications Corp. et al*),

Defendants.

**UNFILED JUDGMENT**  
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obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
1410).*

-----X  
**LING-COHAN, DORIS, J.S.C.**

Defendant New Hampshire Insurance Company ("New Hampshire") moves to reargue this court's decision filed April 26, 2007 that denied its cross motion for a declaratory judgment that it had no duty to defend or indemnify Time Warner Cable Company of New York City ("Time Warner") in the underlying Concord Village action. New Hampshire claims that the court erred in determining that there was a question of fact as to whether plaintiff Time Warner was prejudiced by New Hampshire's delay in disclaiming coverage. For the reasons stated below, New Hampshire's motion for reargument is granted, and upon reargument the court grants New Hampshire's cross motion for a declaratory judgment that it has no duty to defend or

[\* 3 ]  
indemnify Time Warner in the underlying Concord Village action.<sup>1</sup>

### BACKGROUND

In 1996, Time Warner, a cable television provider, entered into a "Cable Television System Construction Agreement" (the "agreement") with defendant, Trinity Communications Corp. ("Trinity") wherein Trinity agreed to perform cable television construction services on behalf of Time Warner and to procure comprehensive general liability insurance naming Time Warner as an additional insured.

Pursuant to the agreement, Trinity purchased a general liability policy from New Hampshire and an umbrella liability policy, providing excess coverage, from Diamond State. Both policies were in effect at the time of the accident and both policies named Time Warner as an additional insured. Time Warner is the named insured under a general commercial liability insurance policy issued by St. Paul Travelers Insurance Company.

On May 6, 2004 Concord Village Owners filed a complaint against Trinity and Time Warner alleging that on November 19, 2002, it sustained property damage to its building at 225 Adams Street in Brooklyn when Trinity punctured a natural gas pipeline while digging a trench to install cable in the area. Time Warner answered the Concord Village complaint on May 21, 2004, and, in that answer, Time Warner asserted cross claims against Trinity.

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<sup>1</sup> Defendant Diamond State Insurance Company ("Diamond State") submits an "affirmation in limited support of reargument" in which it states that if the court grants the relief that New Hampshire requests on reargument, then the court should also issue a ruling that Diamond State has no duty to defend or indemnify Time Warner. Time Warner has submitted an affirmation in response to Diamond State's "de facto" request for reargument of its prior motion for summary judgment that objects to Diamond State's procedural shortcuts. Because Diamond State has not moved for the relief it seeks and because Diamond State has not served all of the parties with its informal request for relief, the court declines to consider the request.

In June, 2005, Time Warner commenced this declaratory judgment action seeking additional insured status under the New Hampshire and Diamond State policies. New Hampshire answered on August 1, 2005 and in affirmative defenses 5, 6 and 7 it specifically disclaimed coverage on the ground that Time Warner had not provided New Hampshire with timely notice of the Concord Village action. Diamond State answered on July 7, 2005 and generally disclaimed liability under the excess policy.

Thereafter, Time Warner moved for a declaratory judgment that New Hampshire and Diamond State are obligated to defend and indemnify it in the underlying Concord Village action. Diamond State and New Hampshire filed separate cross motions for declaratory judgments that they are not obligated to defend and indemnify Time Warner in that action.

By decision filed April 26, 2007<sup>7</sup> this court denied the motion and cross motions for declaratory judgments finding that although New Hampshire failed to provide Time Warner with prompt written notice of disclaimer, there was a question of fact as to whether Time Warner had been prejudiced by New Hampshire's delay. (See, *Fairmont Funding, Ltd. v. Utica Mut. Ins. Co.*, 264 A.D.2d 581 [1<sup>st</sup> Dept 1999]) In opposition to New Hampshire's cross motion, Time Warner had argued that it was prejudiced because the St. Paul/Travelers policy had a \$1,000,000 deductible. ✓

On reargument, New Hampshire argues that Time Warner did not show that it was prejudiced by New Hampshire's delay in disclaiming coverage because Time Warner did not demonstrate reliance or a change of position resulting from the delay.

In opposition to reargument, Time Warner now asserts that it was prejudiced by New Hampshire's refusal, before this action was commenced, to assist in the settlement of the

[\* 5 ]

underlying action because New Hampshire failed to respond to Concord Village's July 29, 2003 letter requesting that the parties participate in alternate dispute resolution.

### DISCUSSION

It is well settled that a motion for reargument may be granted where the court overlooked or misapprehended the relevant facts or law. (CPLR 2221[d][2]); *Pro Brokerage Ins. v. Home Ins. Co.*, 99 A.D.2d 971 [1<sup>st</sup> Dept 1984]) The grant of leave to reargue is a matter committed to the sound discretion of the court. (*McDonald v. Stroh*, 44 A.D.3d 720 [2<sup>nd</sup> Dept 2007])

The notice of disclaimer provisions set forth in Insurance Law Section 3420(d) are not applicable to this matter as the underlying claim is not for bodily injury or death. (*See, Fairmont Funding, Ltd. v. Utica Mutual Ins. Co.*, 264 A.D.2d 581 91<sup>st</sup> Dept 1999)[statute requiring liability insurers to give written notice of disclaimer of coverage as soon as reasonably possible is inapplicable to claims not based on death or bodily injury.] Accordingly, “[u]nder the common law rule, delay in giving notice of disclaimer of coverage, even if unreasonable, will not estop the insurer to disclaim unless the insured has suffered prejudice from the delay.” (*Id* at 581; *O’Dowd v. Am. Sur. Co. Of New York*, 3 N.Y.2d 347, 355 [1957]) In order to show prejudice, the insured must show reliance and a change of position resulting from the delay. (*William Crawford, Inc. v. Travelers Ins. Co.*, 838 F. Supp; 157, 160 [S.D.N.Y. 1993], *aff’d* 23 F.3d 663 [2<sup>nd</sup> Cir. 1994]; *Chester v. Mutual. Life Ins. Co. of N.Y.*, 290 A.D.2d 317 [1<sup>st</sup> Dept 2002])

On reargument, this court finds that Time Warner has failed to demonstrate reliance and a change of position as a result of the New Hampshire's delay in disclaiming coverage. Mere speculation as to prejudice is insufficient to estop an insurer based on delay in issuing a disclaimer. (*Topliffe v. U.S. Art Co., Inc.*, 40 A.D.3d 967 [2<sup>nd</sup> Dept 2007]). First, it is undisputed

that immediately after receiving the summons in the underlying action, St. Paul/Travelers, Time Warner's liability insurer, retained a law firm to represent Time Warner in that action. (*See, Sedgwick Avenue Associates v. Ins. Co. of the State of PA*, 203 A.D.2d 93, 94 [1<sup>st</sup> Dept 1994]) Moreover, Time Warner's previous assertion that it was prejudiced because it had a \$1 million deductible under the St. Paul/Travelers policy does not demonstrate reliance or a change in position caused by New Hampshire's delay in disclaiming coverage. Time Warner made its decision to purchase the St. Paul/Travelers insurance policy with that deductible well before the underlying lawsuit was commenced.

Finally, Time Warner's claim that it was prejudiced by New Hampshire's refusal to participate in settlement negotiations on its behalf<sup>2</sup>, is speculative (*See, Topliffe v. U.S. Art Co., Inc.*, 40 A.D.3d at 969 [U.S. Art can only speculate that a favorable settlement could have been secured if (the insurer) immediately assumed the defense of the action]) and, it also ignores the fact that Concord Village's letter regarding alternate dispute resolution was addressed to Time Warner and its insurer, St. Paul Travelers, as well as Trinity and its insurer New Hampshire. (Altman Aff. in Opp., Ex. C). Time Warner does not claim that it participated in the alternate dispute resolution and that it did not reach a settlement because New Hampshire did not participate. Rather, it appears that Time Warner and St. Paul/Travelers made their own decision not to attempt to settle the claim.

Accordingly, it is

ORDERED that New Hampshire's motion for reargument is granted and upon

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<sup>2</sup> Time Warner's alleged prejudice as a result of its "inability to settle" was raised for the first time on reargument.

reargument New Hampshire's cross motion for a declaratory judgment that it has no duty to defend or indemnify Time Warner in the underlying Concord Village action is granted and the complaint is dismissed as against it; it is further

ORDERED that within 30 days of entry of this order, New Hampshire shall serve a copy upon all parties with notice of entry.

This decision constitutes the judgment of the court.

Dated: 4/14/08

  
Hon. Doris Ling-Cohan, J.S.C.

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