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

2008 NY Slip Op 32227(U)

August 7, 2008

Supreme Court, New York County

Docket Number: 0111924/2007

Judge: Walter B. Tolub

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[* 1]
SCANNED ON 8/8/2008

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

PRESENT: WALTER B. TOLUB
Justice

PART 15

2-10 Jerusalem Avenue Realty, LLC

- v -

Utica First Ins. Co., Et Al.

INDEX NO. 111924/07

MOTION DATE

MOTION SEQ. NO. 2

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
AUG 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/7/08

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 JERUSALEM 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. 002

FILED
AUG 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

WALTER B. TOLUB, J.:

This is a motion by Defendant to reargue this court's decision, dated March 31, 2008, pursuant to CPLR § 2221. Plaintiff cross-moves to reargue its motion for summary judgment.

FACTS

As stated in the March 31, 2008 decision, the facts are largely undisputed. Utica First Insurance Company (hereafter "Utica First") moved for summary judgment and a declaration that no obligation existed to defend or indemnify 2-10 Jerusalem Avenue Realty LLC (hereafter "2-10 Jerusalem") or Rado Restaurant Inc. d/b/a Bottoms Up Pub (hereafter "Bottoms Up") in a lawsuit commenced in Supreme Court, New York County and entitled *Juan C. Brizuela v. 2-10 Jerusalem Avenue Realty LLC, Kalan Minuskin and Mordechai Minuskin*, Index: 111606/06 (hereafter "underlying action").

Juan C. Brizuela commenced the underlying action, seeking damages from 2-10 Jerusalem for injuries he sustained when he

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tripped and fell sometime after 12:01 a.m. on February 24, 2006, while performing work at the Bottoms Up location for Ubuildit, a construction company. 2-10 Jerusalem then commenced this action, seeking a declaration that Utica First is obligated to defend and indemnify 2-10 Jerusalem because it enjoys "additional insured" status under the insurance policy issued to Bottoms Up.

In its motion for summary judgment, Utica First claimed that the insurance policy was cancelled as of 12:01 a.m. on February 24, 2006, based on the cancellation request submitted to the Pinkham Agency by Bottoms Up on that same date. 2-10 Jerusalem argued that the insurance policy was still in effect until midnight of the date Utica First *received* notice of the cancellation.

Utica First argued that it did not have notice of the accident until October 2, 2006, when counsel for 2-10 Jerusalem sent a letter demanding Utica First defend and indemnify 2-10 Jerusalem in the underlying action. On October 13, 2006, Utica First declined to afford coverage or defend 2-10 Jerusalem, because Bottoms Up had canceled the insurance policy in question as of 12:01 a.m. on February 24, 2006, prior to the time the accident occurred.

By order dated March 31, 2008, this court denied Utica First's motion for summary judgment, stating that the insurance policy was in effect until midnight of February 24, 2006, and

that therefore an obligation existed to defend and indemnify 2-10 Jerusalem. Plaintiff's cross-motion for summary judgment was denied because a question of fact remained regarding 2-10 Jerusalem's status as an additional insured under the insurance policy.

By these motions, both defendant and plaintiff seek to reargue their respective motions for summary judgment, which were decided by this court on March 31, 2008.

DISCUSSION

On a motion to reargue, the movant must establish that the court overlooked or misapprehended facts or law, or "misapplied any controlling principle of law," in an earlier decision. (CPLR § 2221(d)(2); Foley v. Roche, 68 AD2d 558 [1st Dep 1979]; *See also* 300 W. Realty Co. v. City of New York, 99 AD2d 708, 709 [1 Dept 1984]). Reargument is not meant to provide the parties with an opportunity to reargue previously decided issues or to advance new arguments. (William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, 27 [1 Dept. 1992], *citing* Pro Brokerage, Inc. v. Home Insurance Co., 99 AD2d 971 [1st dept 1984], Foley v. Roche, 68 AD2d 558 [1st Dept 1979]).

Defendant's Motion to Reargue

Defendant argues that the court misapprehended the law, specifically the holding of Savino v. Merchants Mutual Insurance Co., 44 NY2d 625 (1978), and its applicability to the facts at

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hand.

Savino stands for two propositions: (1) actual receipt of cancellation by the insurance company is required for a cancellation to be effective; and (2) the "law does not recognize fractions of a day" without an express agreement to do so (Def. Ex. 5). It follows that a cancellation request without a specific time expressly designated would be deemed effective until midnight on the date the insurance company received notice of the cancellation.

Defendant argues that Bottoms Up did expressly request a specific time to cancel the policy, namely 12:01 a.m. on February 24, 2006, constituting an express agreement to recognize a fraction of a day and that therefore the midnight rule established in Savino does not apply. New York courts recognize the right of parties to establish a specific time of day for the cancellation of an insurance policy to take effect. (Savino at 630, *citations omitted*). When a particular time is determined, the court can avoid the evidentiary problems inherent when attempting to ascertain when a policy is cancelled. (Id.) However, in Savino, as well as other similar cases, the courts dealt with situations involving requests for cancellation of a policy at a *future* date (*See* Savino, *see e.g.*, Sullivan v. Zerwick Food Corp., 97 AD2d 584 [3d Dept 1983]; Joseph v. Calvert Ins. Co., 183 Misc2d 192 [NYSup 1999]). At issue was the date a

cancellation was deemed effective when requested earlier than received by the insurance company and the injury occurred sometime on, or between, those dates.

In the instant action, the cancellation request was made on the same date the defendant claims cancellation was effective. However, the insured's attempt to designate 12:01 a.m. as the effective time of cancellation constitutes an attempt to pre-date cancellation. As the Court of Appeals stated in Nobile v. Travelers Indem. Co., 4 NY2d 536, 541 (1958), a "policyholder may not select a cancellation date prior to the date on which he sends in the notice." (Id.) The Pinkham Agency received notice of the cancellation request after 12:01 a.m. on February 24, 2006. The insured's attempt to select 12:01 a.m. on that same day as the time cancellation was effective improperly pre-dates notice to the insurer. To make cancellation effective on the same date it is requested, the insured must chose a later time or the midnight rule in Savino, will apply. It follows that this court adheres to its prior decision and summary judgment is denied.

Plaintiff's Motion to Reargue

Plaintiff claims that the court misapprehended facts regarding its additional insured status. In the order dated March 31, 2008, this court denied plaintiff's cross-motion for summary judgment because of the existence of an issue of fact regarding

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the additional insured status. Plaintiff argues that no issue of fact exists because the policy makes clear that 2-10 Jerusalem was an additional insured. After reviewing the record, this court agrees with plaintiff. On the page marked "POLICY INTEREST SCHEDULE" in the insurance policy, plaintiff is clearly identified as an additional insured. Plaintiff is also identified as an additional insured on the page entitled "ADDITIONAL INSURED." (Def. Ex. 1) The affidavit of the owner of 2-10 Jerusalem, which includes the lease and rider between the plaintiff and insured, confirms that the area where Mr. Brizuela was injured is a part of the leased premises, and thus insured. (Def. Ex. 4) As such, 2-10 Jerusalem is an additional insured with respect to the policy and the claimed injury in the underlying action and plaintiff's cross-motion for summary judgment is granted.

Accordingly, it is

ORDERED that Defendant Utica's motion to reargue is granted and the court adheres to its prior decision; and it is further

ORDERED that Plaintiff's cross-motion to reargue is granted and the cross-motion for summary judgment is granted; and it is further

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ORDERED that the Clerk of the Court enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/7/08

HON. WALTER B. TOLUB, J.S.C.