

City of New York v Nova Cas. Co.

2012 NY Slip Op 31050(U)

April 16, 2012

Sup Ct, NY County

Docket Number: 402711/10

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE
J.S.C.
Justice

PART 5

Index Number : 402711/2010
CITY OF NEW YORK
vs.
NOVA CASUALTY CO.
SEQUENCE NUMBER : 004 CAL # 33
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1, 2, 3</u>
Answering Affidavits — Exhibits _____	No(s). <u>4</u>
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**
CASE TO BE RESTORED TO ACTIVE STATUS.

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 141B).

Dated: 4/16/12
APR 16 2012

BJ, J.S.C.
BARBARA JAFFE
J.S.C.

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----x
THE CITY OF NEW YORK,

Plaintiff,

-against-

Index No. 402711/10

Argued: 1/24/12
Motion Seq. No.: 004

DECISION & ORDER

NOVA CASUALTY COMPANY, TOWER
INSURANCE COMPANY OF NEW YORK, and
CASTLEPOINT INSURANCE COMPANY,

Defendants.

-----x
NOVA CASUALTY COMPANY,

Third-Party Plaintiff,

Third-Party Index No. 591094/10

-against-

HARLEYSVILLE WORCHESTER INSURANCE
COMPANY,

Third-Party Defendant.

-----x
BARBARA JAFFE, JSC:

For Nova:
Michael F. Panayotou, Esq.
Melito & Adolfsen P.C.
233 Broadway
New York, NY 10279-0118
212-238-8900

For Harleystville:
Daniel P. Mevorach, Esq.
Gallo Vitucci & Klar LLP
90 Broad St., 3rd Fl.
New York, New York 10004
212-683-7100

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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

By decision and order dated September 7, 2011, I ruled on the following motions, as
pertinent here:

- (1) I granted plaintiff's motion for summary judgment against defendant Nova Casualty Company (Nova) to the extent of declaring that defendant Nova Casualty Company is obligated to defend, as a co-insurer with Harleystville Worcester Insurance Company (Harleystville), the City of New York as an additional insured in the personal injury action entitled *Regno et al. v The City of New York, et al.*,

pending in the Supreme Court, New York County, under Index No. 109524/09, and to reimburse plaintiff for defense costs incurred in defending the action from May 6, 2010 to the date on which Nova assumes the defense of City in that action; and

- (2) granted defendant Nova Casualty Company's motion for summary judgment against third-party defendant Harleystown Worchester Insurance Company to the extent of declaring that Harleystown Worchester Insurance Company is obligated to defend, as a co-insurer with Nova Casualty Company, the City of New York as an additional insured in the personal injury action entitled *Regno et al. v The City of New York, et al.*, pending in the Supreme Court, New York County, under Index No. 109524/09.

By notice of motion dated October 3, 2011, Nova moves pursuant to CPLR 2221(d) for an order granting it leave to reargue the September decision and upon re-argument, modifying the decision to declare that Harleystown owes a duty to defend plaintiff in the *Regno* action pursuant to two separate insurance policies. Harleystown opposes and, by notice of cross motion dated October 18, 2011, moves for leave to reargue the September 2011 and upon re-argument, modifying the decision to declare that Harleystown owes no duty to defend plaintiff or, in the alternative, denying Nova's motion. Nova opposes the cross motion.

I. PERTINENT BACKGROUND

Nova argues that I overlooked an insurance policy related to a subcontract entered into between Dart Mechanical Corp. (Dart) and Coastal Sheet Metal Corp. (Coastal), by which Coastal agrees to perform certain work on the project at issue in the *Regno* action. (Affirmation of Michael F. Panayotou, Esq., dated Oct. 3, 2011 [Panayotou Aff.], Exh. C). The subcontract specifically incorporates the prime contract between Dart and plaintiff, and Coastal agrees to be bound by the prime contract and assume all of Dart's obligations thereunder. (*Id.*).

Harleystown issued a commercial general liability insurance policy to Coastal, effective

from June 15, 2008 to June 15, 2009, containing the same relevant language as in the policy issued by Harleysville to Bruno Grgas, Inc. (Grgas). (*Id.*, Exh. N).

II. CONTENTIONS

Nova argues that based on the same reasoning in the September 2011 decision, and as the two policies issued by Harleysville contain identical language and Regno has alleged in the main action that Coastal negligently contributed to or caused his accident, Harleysville has a duty to defend plaintiff in the Regno action under the Coastal policy as well as the Grgas policy. (*Id.*).

Harleysville contends that I erred in determining that it is obligated to defend City pursuant to the terms of the Grgas policy as plaintiff does not qualify as an additional insured under that policy as Grgas did not contract directly with plaintiff. Harleysville also asserts that Nova failed to establish that Regno's accident arose out of Grgas's or Coastal's acts or omission, that Regno's pleadings are insufficient to establish a duty to defend, and that Nova did not submit a copy of its insurance policy. (Affirmation of Daniel P. Mevorach, Esq., dated Oct. 18, 2011).

In reply, Nova maintains that Regno's allegations against Grgas and Coastal sufficiently create a duty to defend plaintiff by Harleysville, and that plaintiff qualifies as an additional insured as the contracts between Dart and Grgas and Coastal specifically incorporates the terms of the prime contract between Dart and plaintiff. It observes that it previously submitted its insurance policy. (Reply Affirmation, dated Dec. 14, 2011).

III. ANALYSIS

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." (CPLR 2221[d][2]).

As Nova previously submitted the Harleysville - Coastal policy and I failed to address it, leave to reargue is granted. Upon re-argument, I find that based on the same analysis set forth in the September 2011 decision, plaintiff qualifies as an additional insured under the Coastal policy. Harleysville thus has a duty to defend plaintiff in the Regno action pursuant to both the Grgas and Coastal policies.

The case relied on by Harleysville, *Linarello v City Univ. of New York*, 6 AD3d 192 (1st Dept 2004), is inapplicable absent any evidence that the subcontract at issue there specifically incorporated the terms of the prime contract. Moreover, Harleysville fails to establish that I misapprehended or overlooked any matters of fact or law in finding that it owes a duty to defend plaintiff based on the allegations set forth in Regno's pleadings.

IV. CONCLUSION

Accordingly, it is hereby


ORDERED, that defendant/third-party plaintiff Nova Casualty Company's motion for leave to reargue is granted, and upon re-argument, it is

ORDERED, ADJUDGED and DECLARED, that defendant Nova Casualty Company's motion for summary judgment against third-party defendant Harleysville Worcester Insurance Company is granted to the extent of declaring that Harleysville Worcester Insurance Company is obligated to defend, as a co-insurer with Nova Casualty Company, the City of New York as an additional insured in the personal injury action entitled *Regno et al. v The City of New York, et al.*, pending in the Supreme Court, New York County, under Index No. 109524/09, pursuant to the policies issued by it to Bruno Grgas, Inc. and Coastal Sheet Metal Corp.; and it is further

ORDERED, that third-party defendant Harleysville Worcester Insurance Company's

motion for leave to reargue is denied. *Case To Be Restored To Active Status.*

ENTER:


Barbara Jaffe, J.S.C.
BARBARA JAFFE
J.S.C.

DATED: April 16, 2012
New York, New York

APR 16 2012

.c.

UNFILED JUDGMENT

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