

**Payson v 50 Sutton Place S. Owners, Inc.**

2012 NY Slip Op 33209(U)

December 13, 2012

Sup Ct, New York County

Docket Number: 114357/09

Judge: Cynthia S. Kern

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

PRESENT: \_\_\_\_\_  
*Justice*

PART \_\_\_\_\_

Index Number : 114357/2009  
PAYSON, JOANNE  
vs.  
50 SUTTON PLACE SOUTH  
SEQUENCE NUMBER : 007  
RENEWAL

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). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

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

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NEW YORK

is decided in accordance with the annexed decision.

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

RECEIVED  
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Dated: 12/13/12

OK, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
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 55

-----X  
JOANNE PAYSON

Plaintiff,

Index No. 114357/09

-against-

DECISION/ORDER

50 SUTTON PLACE SOUTH OWNERS, INC. AND  
BROWN HARRIS STEVENS RESIDENTIAL  
MANAGEMENT, LLC

Defendant.

**FILED**  
DEC 14 2012  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	_____
Answering Affidavits to Cross-Motion.....	_____
Replying Affidavits.....	3
Exhibits.....	_____

Plaintiff, who owns a cooperative apartment in the building located at 50 Sutton Place, has commenced this action against the cooperative and building manager to recover damages based on alleged water damage and mold contamination in her apartment. She has brought the present motion for reargument and renewal of the portion of this court's prior decision which found a waiver of subrogation rights as against the defendants in this action, the cooperative and the managing agent.

The motion for reargument is denied as plaintiff has failed to establish that this court

overlooked or misapprehended the law. However, this court, in conjunction with the present decision, is issuing an amended decision and order on the previous motion deleting the following sentence on page 4 of the prior motion: “Moreover, to the extent that the waiver of subrogation provision is ambiguous, the ambiguity should be construed as against the insurance company which drafted the policy.” This statement in the previous decision is dicta as the court’s finding was that the policy was not ambiguous on its face when read in its entirety and that no parol evidence was required to interpret the policy. As the court stated in the previous decision, the only way that all of the language in the policy can be interpreted consistently is to find that the waiver of subrogation clause applies to the apartment in question even though it is a cooperative. Since the court found that the policy is not ambiguous, there is no need to determine the issue of how an ambiguity should be construed.

The motion for renewal is also denied for the same reason—that no parol evidence is admissible to interpret the unambiguous provisions of the policy. The new evidence that the plaintiff is seeking to introduce in support of her renewal motion is the affidavit of plaintiff explaining her understanding of the meaning of the policy. However, since the court finds that the policy is not ambiguous, no parol evidence is admissible to vary the terms of the policy.

Finally, the plaintiff now argues for the very first time that the court erred in finding that the waiver of subrogation clause applied to the managing agent as well as to the cooperative because the waiver clause only refers to the cooperative and not to the managing agent. This issue cannot be brought up as part of a reargument motion as the argument was never presented to the court in the original motion. *See DeSoignes v Cornasesk House Tenant’s Corp.*, 21 A.D.3d 715 (1<sup>st</sup> Dept 2005); *Bishop v Maurer*, 83 A.D.3d 483 (1<sup>st</sup> Dept 2011).

Based on the foregoing, the motion for reargument and renewal is denied. This constitutes the decision and order of the court.

Dated: 12/13/12

  
\_\_\_\_\_

J.S.C.

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