

**The Insurance Corp. of N.Y. v Smith, Mazure,
Director, Wilkens, Young & Yagerman, P.C.**

2014 NY Slip Op 30494(U)

March 3, 2014

Supreme Court, New York County

Docket Number: 102485/2008

Judge: Saliann Scarpulla

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

PRESENT: SALIANI SCARPULLA
Justice

PART 19

Index Number : 102485/2008
INSURANCE CORP., OF NEW YORK
vs.
SMITH, MAZURE
SEQUENCE NUMBER : 003
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). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

*decided in accordance with the
accompanying Memorandum decision.*

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


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MAR 05 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/3/14


_____, J.S.C.
SALIANI SCARPULLA
 NON-FINAL DISPOSITION

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 : IAS PART 39

FILED

MAR 05 2014

-----X
THE INSURANCE CORPORATION OF NEW YORK,

Plaintiff,

COUNTY CLERK'S OFFICE
NEW YORK

-against-

Index No. 102485/2008

SMITH, MAZURE, DIRECTOR, WILKENS, YOUNG
& YAGERMAN, P.C.,

Defendant.

-----X
HON. SALIANN SCARPULLA, J.:

Defendant Smith, Mazure, Director, Wilkens, Young & Yagerman, P.C. (Smith Mazure) moves, pursuant to CPLR 2221 (d), for an order granting reargument of its prior summary judgment motion and, upon reargument, granting summary judgment in its favor and dismissing the complaint in its entirety.

The relevant substantive and procedural history of this action has been fully set forth in this court's decision and order in this action dated January 23, 2013 (the prior order), and will not be repeated here, except as is necessary for clarification.

Briefly, in this legal malpractice action, plaintiff The Insurance Corporation of New York (Inscorp) alleges that a Smith Mazure member, Joel Simon, Esq., provided negligent legal advice to Inscorp in late 2004 and early 2005 regarding the coverage available under a general liability policy issued by Inscorp to G.B. Construction LLC (the policy). Inscorp alleges that Simon negligently advised Inscorp's third-party claims

administrator, Ward North America (Ward), that Inscorp was contractually obligated to provide a defense and indemnification to both G.B. Construction and West Perry, LLC in an underlying Labor Law action, captioned *Soto v. West Perry, LLC, et al.* (Sup Ct, NY County, index No. 114283/2001) (the *Soto* action). Inscorp further alleges that Smith Mazure improperly advised it to rescind as invalid and untimely two valid late-notice-of-claim disclaimers issued by Inscorp to G.B. Construction, a subcontractor, and to West Perry, the construction site owner. Inscorp alleges that the disclaimers were, in fact, enforceable because West Perry was not an additional insured under the policy, and because neither G.B. Construction nor West Perry had satisfied the policy's notice-of-claim requirements.

In the prior order, this court denied Smith Mazure's summary judgment motion, holding that the parties raised triable issues regarding, among other things, whether Smith Mazure improperly simultaneously represented Inscorp and United National Insurance Group (UNG) on the relevant dates in November 2004 through February 2005 with respect to available insurance coverage for West Perry and G.B. Construction in the *Soto* action. In the prior order, the court also found that triable issues existed regarding whether the alleged negligent legal advice was a proximate cause of Inscorp's damages, and held that the damages alleged were sufficiently ascertainable to sustain a legal malpractice claim.

Smith Mazure now seeks to reargue the prior motion on the ground that this court overlooked or misapplied relevant facts in Ward's claims notes and the relevant deposition testimony. Smith Mazure also contends that this court overlooked or misapplied the relevant law set forth by Smith Mazure regarding Inscorp's failure to demonstrate that: there existed an attorney-client relationship between Inscorp and Smith Mazure regarding coverage at the relevant time; Smith Mazure had rendered improper legal advice regarding rescission of the G.B. Construction disclaimer; and Smith Mazure's conduct was the proximate cause of Inscorp's alleged damages.

In opposition, Inscorp contends that the motion to reargue is merely an improper attempt to rehash the factual and legal issues presented in the prior motion, and determined in the prior order, and an improper attempt to advance legal arguments not advanced in the prior motion.

Discussion

Pursuant to CPLR § 2221(d)(2), a motion to reargue must be “based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion.” *Mangine v. Keller*, 182 A.D.2d 476, 477 (1st Dep’t 1992). Absent mistake on the Court’s part, the Court must adhere to its original decision. *William P. Pahl Equipment Corp. v Henry Kassis*, 182 A.D.2d 22, 27-28 (1st Dep’t 1992). “Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided.” *Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dept

1979); *see* CPLR 2221 (d). “Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application. It may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion.” *Foley v. Roche*, 68 A.D.2d at 567-568; *Simpson v. Loehmann*, 21 N.Y.2d 990 (1968). Leave to reargue is denied.

On the underlying motion for summary judgment, the court considered the arguments now made by Smith Mazure, and found them to be unpersuasive.

For example, Smith Mazure contends that the court misconstrued the factual record when it determined that triable issues of fact existed regarding whether an attorney-client relationship existed between Smith Mazure and Inscorp at the time that the alleged advice was rendered. It further contends that the court's determination that such a relationship may have existed is categorically refuted by the undisputed evidence. However, in the prior order, the court noted a number of facts appearing in the record, including that Michael Weiss, an Inscorp/Ward claims adjuster, referred to Simon as "our defense counsel" with regard to the West Perry coverage issue and that Weiss noted that Simon had advised him that Smith Mazure would not accept an assignment from UNG to obtain additional coverage for West Perry because Smith Mazure does defense work for Inscorp. The court then held that deposition testimony and affidavits by Weiss and Simon raised triable issues regarding whether an attorney-client relationship regarding coverage existed at the relevant time.

6

Next, Smith Mazure once again argues that the record is devoid of evidence linking its alleged advice to Inscorp's decision to rescind its disclaimer to G.B. Construction. In the prior order, this court held that "Weiss' claims handling notes . . . indicate that Simon advised Weiss regarding the enforceability of disclaimers of the *Soto* action claim, without particularizing whether they discussed these issues with respect to G.B. Construction or West Perry or both."

Smith Mazure contends for a second time that Inscorp cannot demonstrate the damages element of a cognizable legal malpractice claim because it cannot distinguish between the money that it expended in defending and indemnifying West Perry from the money that it expended in defending and indemnifying G.B. Construction, inasmuch as the defense and indemnification of both companies were handled simultaneously by a single law firm, Smith Mazure. In the prior order, this court considered this argument, and held that Inscorp's allegations that it incurred "\$563,173.13 in defending and settling the underlying *Soto* action on behalf of G.B. Construction and West Perry directly as a result of Simon's allegedly negligent coverage advice to Weiss [were] sufficiently actual and ascertainable to sustain a cause of action for legal malpractice."

Last, Smith Mazure argues for the first time that Inscorp cannot prove damages as a result of Smith Mazure's conduct because Inscorp was aware that West Perry was not an additional insured under the policy, prior to its settlement of the *Soto* action on behalf of

West Perry. Inasmuch as Smith Mazure admittedly makes this argument for the first time, the argument cannot form a basis for reargument.

The court has considered Smith Mazure's remaining contentions, and finds them to be without merit.

In accordance with the foregoing, it is hereby

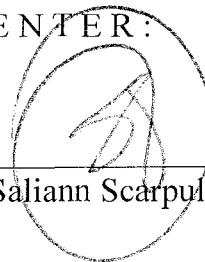
ORDERED that the motion by defendant Smith, Mazure, Director, Wilkens, Young & Yagerman, P.C. to reargue is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
February, 2014

March 3

ENTER:



Saliann Scarpulla, J.S.C.

FILED

MAR 05 2014

COUNTY CLERK'S OFFICE
NEW YORK