

**Yonkers Lodging Partners, LLC v Selective Ins. Co.  
of Am.**

2014 NY Slip Op 33955(U)

December 22, 2014

Supreme Court, Westchester County

Docket Number: 52306/13

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER - COMPLIANCE PART

YONKERS LODGING PARTNERS, LLC, and  
CITIZENS INSURANCE COMPANY OF AMERICA,

Plaintiffs,

-against-

**DECISION & ORDER**  
Index No. 52306/13 ✓  
Motion Date: Dec. 22, 2014

SELECTIVE INSURANCE COMPANY OF  
AMERICA, LEA ROME, INC., MACK-CALI SOUTH  
WEST REALTY ASSOCIATES, LLC, ROBERT  
MARTIN COMPANY, LLC, CONTINENTAL  
CASUALTY COMPANY, TRITEC HOSPITALITY,  
LLC, CARLOS BENITEZ and LUZ BENITEZ,

Seq. No. 5

Defendants.

LEFKOWITZ, J.

The following papers were read on this motion by defendant Selective Insurance Company of America (hereinafter Selective Insurance) for an order vacating the trial readiness order and the note of issue, striking the matter from the trial calendar, and compelling the deposition of Kathleen Austen, a representative of plaintiff Citizens Insurance Company of America.

- Order to Show Cause - Affirmation in Support - Exhibits
- Affirmation in Opposition - Exhibits

Upon the foregoing papers, this motion is determined as follows:

In this declaratory judgment action, plaintiffs seek a declaration that Selective Insurance is required to defend and indemnify Yonkers Lodging Partners, LLC in the underlying personal injury action brought by Carlos Benitez against Mack-Cali (Supreme Ct, Dutchess County, 4117/2010). It is alleged Mack-Cali imploded Robert Martin Company and Yonkers Lodging Partners as second third-party defendants seeking common law and contractual indemnification. Plaintiffs allege Selective Insurance issued a commercial general liability policy and Yonkers Lodging Partners was named as an additional insured on the policy. It is alleged defendants Continental Casualty Company and Citizens Insurance Company also issued commercial general liability policies of insurance and Yonkers Lodging Partners was named as an additional insured on those policies (Defendant's Exhibit C, Amended Summons and Complaint).

On December 3, 2013, the Court issued a preliminary conference stipulation and order providing that plaintiffs shall appear for a deposition on February 6, 2014 and the depositions of all parties shall be completed on or before March 27, 2014 (Defendant's Exhibit F). An April 11, 2014 compliance conference referee report and order provides that party depositions shall be held on June 10, 2014 (Defendant's Exhibit H). In a July 17, 2014, compliance conference referee report and order, the Court directed that party depositions shall be held on September 3, 2014 (Defendant's Exhibit I). In emails dated August 20, 2014, August 23, 2014, and August 25, 2014, counsel for Selective Insurance requested to confirm the availability of Kathleen Austen for a deposition on September 3, 2014. Plaintiffs' counsel's response states he may require additional discovery from Selective Insurance and he is not available on September 3, 2014. In an email response, defense counsel noted his concern in complying with the Court's September 3, 2014 deadline for party depositions (Defendant's Exhibit J). In a September 5, 2014 email, counsel for Selective Insurance noted "I am very concerned that we have not yet been provided with proposed dates for the depositions... I was prepared to move forward with depositions on 9/3." In a September 8, 2014 email, counsel for Selective Insurance stated he had not received a response regarding the potential deposition dates. Plaintiffs' counsel's email response on the same date stated Ms. Austen is available on October 6, 2014. Counsel for Selective Insurance was not available on that date and plaintiffs' counsel indicated he would provide other potential dates (Defendant's Exhibit K).

The Court issued a September 10, 2014 compliance conference referee report and order, directing that party depositions be completed on or before October 20, 2014 (Defendant's Exhibit L). In an October 7, 2014 compliance conference referee report and order, the Court directed that party depositions of a witness for Citizens Insurance and a witness for Selective Insurance shall be completed on or before October 31, 2014, if discovery responses had been timely served (Defendant's Exhibit M). In an October 15, 2014 email, counsel for Selective Insurance provided eight potential deposition dates. Plaintiffs' counsel responded in an email stating he would contact his client and respond on Monday. It was his position that the deposition of a witness from Citizens Insurance would serve no purpose in this action and counsel should consider waiving it (Defendant's Exhibit N).

The parties appeared for a compliance conference on October 27, 2014 and the Court issued a trial readiness order on the same date. The trial readiness order states it appears all discovery has been completed or waived and the matter is ready for trial. Plaintiffs were directed to file a note of issue and certificate of readiness within twenty days (Defendant's Exhibit O). A note of issue was filed in this matter on November 6, 2014. On November 7, 2014, counsel for Selective Insurance served a notice to take the deposition of Kathleen Austen, as a representative of Citizens Insurance (Plaintiffs' Exhibit C). In response, plaintiffs' counsel served a November 18, 2014 letter stating the notice of deposition is a nullity since the Court issued a trial readiness order and the note of issue was filed (Defendant's Exhibit D).

Defendant Selective Insurance argues it has repeatedly requested dates to conduct the deposition of Ms. Austen in compliance with court orders and every date proposed by defense counsel was rejected. Selective insurance argues the note of issue was filed despite Selective's

repeated requests for the deposition of Ms. Austen. Defendant argues the court directed in several orders that the deposition go forward, defense counsel attempted to schedule the deposition, and the only reason the deposition did not proceed was plaintiffs' counsel's failure to schedule the deposition. Selective Insurance argues it will be prejudiced if it does not have the opportunity to depose Ms. Austen prior to trial.

In opposition, plaintiffs argue at the October 27, 2014 compliance conference Selective Insurance argued that it was entitled to conduct the deposition of Ms. Austen and plaintiffs argued that it had been waived by prior counsel for Selective Insurance. On October 27, 2014, the Court issued a trial readiness order and directed that a note of issue be filed. Plaintiffs argue counsel for Selective Insurance has repeatedly delayed and adjourned the deposition and weeks went by with no contact from counsel for Selective Insurance, even when there were short deadlines set by the Court. Counsel for Selective Insurance reportedly unilaterally adjourned the deposition of the plaintiff scheduled for October 3, 2014, incorrectly claiming that it was stayed by a pending motion for summary judgment.<sup>1</sup> Plaintiffs contend that the notice of deposition for Ms. Austen was not timely served and it is defective, as it failed to set forth the date, time and place where the deposition would take place and the address of the witnesses to be deposed (CPLR §3107). Plaintiffs argue the deposition is not relevant to the allegations in the case.

Once the note of issue has been filed and discovery presumably completed, the applicable standard for allowing additional discovery is governed by 22 NYCRR 202.21[d][e]. Within twenty days after service of a note of issue, a party may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial and the Court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect (22 NYCRR 202.21[e]). On November 6, 2014, plaintiffs filed a note of issue, and a certificate of readiness, indicating discovery proceedings known to be necessary were completed, there are no outstanding requests for discovery, and the case is ready for trial.

It appears there have been delays by both plaintiffs' counsel and counsel for Selective Insurance in scheduling the deposition of a witness for Citizens Insurance. On July 11, 2014, a consent to change attorney was filed indicating Hurwitz & Fine, P.C. was substituted as counsel for Selective Insurance. It appears Hurwitz & Fine took a different position than prior counsel in seeking to conduct the deposition of a witness for Citizens Insurance. However, counsel identified Ms. Austen as a witness in an August 2014 email and repeatedly attempted to confirm

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<sup>1</sup> The preliminary conference stipulation and order dated December 3, 2013 provides no adjournments of any time directive in the order shall be permitted without the permission of the Court. "This stipulation supercedes the statutory stay in CPLR 3214 for dispositive motions made pursuant to CPLR 3211, 3212, or 3213." The Westchester Supreme Court Differentiated Case Management Protocol provides "discovery shall not be stayed or otherwise extended due to the pendency of motions." The protocol provides that the statutory stay in CPLR 3214 for dispositive motions made pursuant to CPLR 3211, 3212, or 3213 is superceded by this protocol.

the availability of the witness in August 2014, September 2014, and October 2014. Plaintiffs' counsel fails to submit information or documentation demonstrating he provided potential deposition dates to produce Ms. Austen, other than October 6, 2014. Counsel for Selective Insurance was not available to go forward with the deposition on October 6, 2014. While plaintiff's counsel indicated in September and October 2014 emails that he would find out his clients availability, there is no showing on this motion that plaintiff's counsel notified defense counsel of the witnesses' availability (Defendant's Exhibits K, N). It would be prejudicial to the defense to permit this case to proceed to trial without allowing counsel for Selective Insurance the opportunity to depose Ms. Austen, the designated witness for Citizens Insurance. Selective Insurance demonstrates it is entitled to conduct Ms. Austen's deposition and vacatur of the note of issue is warranted.

In view of the foregoing, it is

ORDERED that defendant Selective Insurance Company of America's motion is granted and the note of issue is vacated; and it is further

ORDERED that plaintiff Citizens Insurance Company of America shall produce Kathleen Austen for a deposition on or before January 16, 2015; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on January 29, 2015 at 9:30 a.m.; and it is further

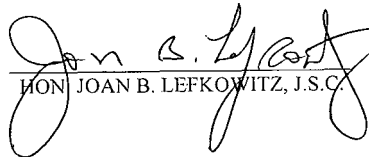
JAM  
JSC

ORDERED that plaintiffs' counsel's request for costs incurred in opposing this motion is denied; and it is further

ORDERED that counsel for Selective Insurance Company of America shall serve a copy of this order with notice of entry on all parties within ten days of entry.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York  
December 22, 2014

  
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cc: Hon. Francesca E. Connolly  
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