

**Varon v Country-Wide Ins. Co.**

2015 NY Slip Op 30980(U)

June 8, 2015

Supreme Court, New York County

Docket Number: 154592/2013

Judge: Peter H. Moulton

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 50

-----X  
CHRISTIAN VARON

Plaintiff,

Index No. 154592/2013

-against-

COUNTRY-WIDE INSURANCE COMPANY

Defendant.

-----X  
**Peter H. Moulton, J.S.C.:**

In this action, by motion dated January 14, 2014, plaintiff sought a declaratory judgment stating that defendant was obligated to tender the full payment of two separate \$25,000.00 automobile liability insurance policies issued to Orlo Kolenovic ("Kolenovic") and Adris Reckovic ("Reckovic"), the insured owner and driver, respectively, in an underlying action before plaintiff could pursue a claim against his own automobile insurance company ("High Point Safety and Insurance Company" hereinafter "High Point") for first-party supplemental under-insured motorist benefits. Defendant cross-moved, pursuant to CPLR § 3212, for an order granting defendant summary judgment and declaring that defendant did not have to tender the \$25,000.00 insurance policy issued to driver Reckovic in settlement of the underlying action in order to trigger plaintiff's right to recover under-insured motorist benefits from High Point.

For the reasons outlined in its Decision and Order dated August 29, 2014, the court denied plaintiff's motion and granted

defendant's cross-motion. By motion dated October 14, 2014, plaintiff now seeks reargument of this court's Decision and Order dated August 29, 2014.

CPLR § 2221(d) provides, in relevant part, that a motion to reargue "shall be based on 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" (see William P. Pahl Equip. Corp. v. Kassis, 182 AD2d 22, 27 [1st Dept. 1992] ["A motion for leave to reargue pursuant to CPLR § 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision"]); accord McGill v. Goldman, 261 AD2d 593, 594 [2d Dep't 1999]).

Reargument of a motion is not available where a party seeks to advance new arguments which it failed to previously raise (see DeSoignies v. Cornasesk House Tenants' Corp., 21 AD3d 715, 800 [1st Dept. 2005]). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented (see Amato v. Lord & Taylor, Inc., 10 AD3d 374 [2d Dept. 2004]; see also William P. Pahl Equip. Corp., supra ("Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided")).

Here, plaintiff has failed to meet his burden of demonstrating

that the court, in its decision, misapprehended the facts or misapplied controlling law in granting defendant's cross-motion and denying his motion. In its decision, supported by relevant case law discussed therein, the court reasoned that since Kolenovic's vehicle was involved in the accident, Kolenovic's policy was the primary policy implicated. The court also found additional support for the proposition that although defendant issued an unrelated policy to the driver of the vehicle, Reckovic , that policy "need not be tendered, since it is 'excess' to the Kolenovic policy as well as to 'other collectible insurance' (i.e. plaintiffs High Point insurance), and does not constitute a 'primary' insurance policy within the meaning and interpretation of Insurance Law § 3420."

Additionally, contrary to plaintiff's contention, the court properly distinguished the instant action from State Farm Fire and Cas. Co. v. LiMauro. 65 NY2d 369[1985], as well as from Sport Rock Intl., Inc., v. American Cas. Co. Of Reading, Pa., 65 AD3d 12[1st Dept. 2009]. Plaintiff has failed to demonstrate that the court incorrectly concluded that the Reckovic policy is not a primary policy in view of its excess "other insurance" clause and the absence of an excess "other insurance" clause in plaintiff's High Point's policy.

Contrary to plaintiff's assertions, the Kolenovic policy and Reckovic policy were entirely separate and distinct policies which insured two different vehicles (only one of which was involved in

the accident at issue). Moreover, it is undisputed that the "other insurance" clause in the Reckovic policy states that "any insurance we provide for a vehicle you do not own, including any vehicle while used as a temporary substitute for 'your covered auto', shall be excess over any other collectible insurance"; the High Point policy constitutes "other collectible insurance"; and High Point's policy does not contain an "other insurance" clause which would make High Point's policy "excess" to other valid and collectible insurance.

As defendant points out in opposition to plaintiff's instant motion, plaintiff also does not dispute that under the First Department's decision in National Continental Ins. Co. v. Countrywide Ins. Co., 112 A.D.3d 416 [1st Dept. 2013], the language in the Reckovic policy controls here. Thus, plaintiff's continued reliance on Astuto v. State Farm Mut. Auto. Ins. Co., 198 A.D.2d 503, 504 [2d Dept. 1993] is inapposite.

Plaintiff's contention on the instant motion that the Reckovic policy must be tendered and exhausted by defendant before plaintiff may seek to recover benefits under his own first-party under-insured motorist coverage, was previously raised on the initial motion, and was rejected by the court.

In sum, plaintiff has failed to demonstrate that this court "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (Foley v. Roche, 68 AD2d 558, 567 [1979]). Accordingly, plaintiff has failed to state grounds for

the instant motion, including any grounds based upon new facts unknown to him when the initial motion was made (see William P. Pahl Equip. Corp., supra; see also Forteau v. Westchester County, 227 AD2d 245 [1st Dept. 1996]). The court did not overlook any controlling law when rendering its decision. Plaintiff's motion merely seeks to revisit arguments previously raised and rejected in the court's prior Decision and Order dated August 29, 2014. Additionally, as noted, to the extent that plaintiff raises new arguments, including reference to subrogation provisions and cases not raised in its initial papers, such arguments are improper on a motion for leave to reargue.


Accordingly, it is hereby

ORDERED that plaintiff's motion to reargue is denied.

**This Constitutes the Decision and Order of the Court.**

Dated: June 8, 2015

ENTER:

  
**HON. PETER H. MOULTON**  
J.S.C.  
J.S.C.