

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

2015 NY Slip Op 32818(U)

March 30, 2015

Supreme Court, Westchester County

Docket Number: 52306/13

Judge: Joan B. Lefkowitz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

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

Plaintiffs,

-against-

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,

Defendants.
-----X

LEFKOWITZ, J.

DECISION & ORDER

Index No. 52306/13

Motion Date: Mar. 30, 2015

Seq. No. 8 & 9

The following papers were read on (1) motion by plaintiffs for a protective order with respect to the deposition of Kathleen Austen, a representative of plaintiff Citizens Insurance Company of America (hereinafter Citizens Insurance), and rearguing this court's prior order dated December 22, 2014, which vacated the note of issue and directed the deposition of Kathleen Austen; and (2) motion by defendant Selective Insurance Company of America (hereinafter Selective) for an order dismissing plaintiffs' complaint pursuant to CPLR 3126 based upon plaintiffs' continued and willful failure to produce Kathleen Austen for a deposition in violation of court orders.

Order to Show Cause - Affirmation in Support of Plaintiffs' Motion

- Exhibits A-Q

Order to Show Cause - Affirmation in Opposition to Plaintiffs' Motion

and in Support of Selective's Motion - Exhibits A-C

Affirmation in Opposition to Selective Insurance's Motion

- Affidavit of Kathleen Austen - Exhibits A-I

Upon the foregoing papers, the motions are 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 (hereinafter "Yonkers Lodging") in the underlying personal injury action brought by Carlos Benitez against Mack-Cali,

which is pending in Supreme Court, Dutchess County (Index No. 4117/10), and that the “partial disclaimer” of coverage by Selective for claims against Yonkers Lodging for contractual indemnity is invalid. Plaintiffs also seek damages for breach of contract for Selective’s refusal to afford full coverage and improperly denying coverage. It is alleged that, in the underlying action, Mack-Cali impleaded Robert Martin Company and Yonkers Lodging as second third-party defendants seeking common law and contractual indemnification, as well as breach of contract.

Plaintiffs allege the following in the present action: Robert Martin Company, pursuant to a written agreement with Mack-Cali, assumed responsibility for construction of a new driveway at the premises where Carlos Benitez allegedly sustained personal injuries. In the written agreement, Robert Martin Company agreed to defend and indemnify Mack Cali and to procure insurance naming Mack-Cali as an additional insured. Robert Martin Company then retained plaintiff Yonkers Lodging. Plaintiff Yonkers Lodging then retained Tritec pursuant to a written agreement, wherein Tritec agreed to defend, indemnify and procure insurance naming Yonkers Lodging as an additional insured. CNA Insurance issued a commercial general liability policy to Tritec, naming Yonkers Lodging as an additional insured. Tritec then retained Lea Rome pursuant to a written agreement, wherein Lea Rome agreed to defend, indemnify and name Yonkers Lodging as an additional insured in its insurance policy. Selective issued a commercial general liability policy of insurance to Lea Rome, which named Yonkers Lodging as an additional insured. Citizens Insurance and Continental Casualty Company also issued commercial general liability insurance policies naming Yonkers Lodging as a named insured.

Selective in its answer alleged that it had agreed to withdraw its reservation of rights with regard to indemnifying Yonkers Lodging for its liability as to Benitez’s injuries that were caused by the ongoing operations of Lea-Rome, but it continued to deny indemnification for the claims against Yonkers Lodging by Mack-Cali in the underlying action for indemnification and breach of contract. Selective alleged in its answer that the policy issued to Lea-Rome only named Yonkers Lodging as an additional insured with respect to “bodily injury” and “property damage” caused in whole or part by Lea-Rome’s ongoing operations, and denied any duty under the policy to indemnify Yonkers Lodging with respect to claims against it by Mack-Cali for indemnification or breach of contract.

On October 17, 2014, this court issued a Trial Readiness Order finding that all discovery has been completed or was waived. Plaintiffs filed a note of issue on November 6, 2014.

Thereafter, defendant Selective moved to vacate the note of issue on the ground that discovery was not complete insofar as plaintiffs had not produced Kathleen Austen, a representative of Citizens Insurance, for a deposition. Plaintiffs opposed the motion on numerous grounds, including: (1) the Notice of Deposition served with respect to Kathleen Austen was improper; (2) her testimony would likely be privileged as it would necessarily involve matters addressed with counsel; and (3) her testimony as to whether Citizens Insurance had declined Selective’s partial offer of coverage was irrelevant to the issues in the present declaratory judgment action seeking an order declaring that Yonkers Lodging was entitled to a full defense and indemnification by Selective with respect to claims in the underlying action.

By decision and order entered December 24, 2014, this court granted Selective's motion to vacate the note of issue and directed Citizens Insurance to produce Kathleen Austen for a deposition on or before January 16, 2015. Therein, this court held that plaintiffs' counsel failed to demonstrate that he had provided potential dates for the deposition of Ms. Austen other than a date for which counsel for Selective was not available. This court further held therein that Selective would be prejudiced if it was required to proceed to trial without the opportunity to depose Ms. Austen.

Plaintiffs now seek a protective order with respect to Ms. Austen's deposition and to reargue the prior motion and order vacating the note of issue and directing the deposition of Ms. Austen. Selective moves for an order dismissing the complaint based upon plaintiffs' willful failure to produce Ms. Austen for a deposition in violation of court orders.

Plaintiffs contend that the filing of the motion to reargue and for a protective order suspended its obligation to produce Ms. Austen. Accordingly, plaintiffs contend that Selective's motion to dismiss the complaint should be dismissed. Plaintiffs further contend in support of their motion, inter alia, that the deposition seeks privileged information since discussion of settlement negotiations between attorney and client are subject to the attorney-client privilege. In support of the motion, plaintiffs submit the affidavit of Ms. Austen. Therein, Ms. Austen avers that upon Selective disclaiming coverage with respect to Mack-Cali's claims against Yonkers Lodging in the underlying action, she retained coverage counsel to evaluate whether Citizens Insurance should accept partial tender acceptance by Selective. Ms. Austen further avers that Citizens Insurance made its decision on Selective's offer based upon counsel's legal advice. Finally, plaintiffs assert that Citizens Insurance will not waive the attorney-client privilege.

Selective contends that plaintiffs seek to reargue facts that were clearly set forth on the prior motion, and the court did not overlook or misapprehend any facts. Selective asserts that plaintiffs' disagreement with this court's decision and order does not demonstrate that this court misapplied the facts. Selective also asserts that to the extent that plaintiffs now appear to argue that the court had "discretion" to deem the deposition waived and to issue the trial readiness order, but did not raise that argument on the prior motion, this new argument cannot serve as the basis for reargument. Moreover, Selective contends that plaintiffs failed to produce Ms. Austen for a deposition on or before January 16, 2015, as directed by this court's decision and order dated December 22, 2014. Selective asserts that Ms. Austen's testimony is necessary to probe the basis for Citizens Insurance's decision to reject Selective's acceptance of its partial tender of coverage to Yonkers Lodging in the underlying action. Selective also contends that Ms. Austen's testimony is necessary for it to fully respond to plaintiffs' motion for summary judgment.

At oral argument, plaintiffs counsel argued, inter alia, that Ms. Austen's deposition testimony would necessarily require her to testify as to advice provided by counsel regarding Citizens Insurance's decision to reject Selective's settlement offer, which is information protected by the attorney-client privilege. Plaintiffs' counsel also argued that Ms. Austen's deposition regarding the reasons Citizens Insurance rejected Selective's offer of partial coverage for Yonkers Lodging in the underlying action is irrelevant to the issue in this action, namely

whether Selective was required to provide Yonkers Lodging complete coverage in the underlying action. Both arguments were previously raised by plaintiffs on the prior motion.

Selective's counsel argued in response that Ms. Austen's deposition testimony was necessary to Selective's defense since there was co-insurance available to Yonkers Lodging.

A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court (*Weiss v Fire Extinguisher Svcs. Co.* 83 AD3d 822, 823 [2d Dept 2011]). On a motion seeking leave to reargue, a party must establish that "the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision" (*Carrillo v PM Realty Group*, 16 AD3d 611, 611 [2d Dept 2005]; see CPLR 2221 [d]; *Weiss v Fire Extinguisher Svcs. Co.* 83 AD3d at 823; *Ickes v Buist*, 68 AD3d 823 [2d Dept 2009]). A motion to reargue, however, shall not include any matters of fact not offered on the prior motion (CPLR 2221 [d] [2]).

On the present motion, plaintiffs have demonstrated entitlement to reargument insofar as this court did not address plaintiffs' contention on the prior motion that the deposition testimony of Ms. Austen was not relevant to the issues in the present declaratory judgment action. Upon reargument, this court agrees with plaintiffs that the deposition testimony of Ms. Austen sought by Selective regarding Citizens Insurance's rejection of Selective's tender of partial coverage and defense to Yonkers Lodging in the underlying action is not relevant to the issues in the present action. Notably, the only issue in controversy in the present declaratory judgment action is whether Selective improperly denied full and complete coverage to Yonkers Lodging in the underlying action. Accordingly, this court cannot find that the rejection by Citizens Insurance of Selective's tender of partial coverage and defense in the underlying action would lead to any information bearing on the issue in controversy in this action. Therefore, upon reargument, Selective's prior motion to vacate the note of issue and to compel the deposition of Ms. Austen is denied, and this court's decision and order entered on December 24, 2014 is vacated. This court, therefore, need not reach plaintiffs' remaining contentions with respect to reargument.

In view of the foregoing, that branch of plaintiffs' motion seeking a protective order with respect to the deposition of Ms. Austen is granted, and the branch of Selective's motion seeking an order dismissing plaintiffs' complaint is denied.

Accordingly, it is

ORDERED that the branch of plaintiffs' motion seeking reargument is granted and, upon reargument: (1) Selective's prior motion seeking an order vacating the note of issue and compelling the deposition of Kathleen Austen is denied; and (2) this court's decision and order dated December 22, 2014 and entered on December 24, 2014 is vacated; and it is further

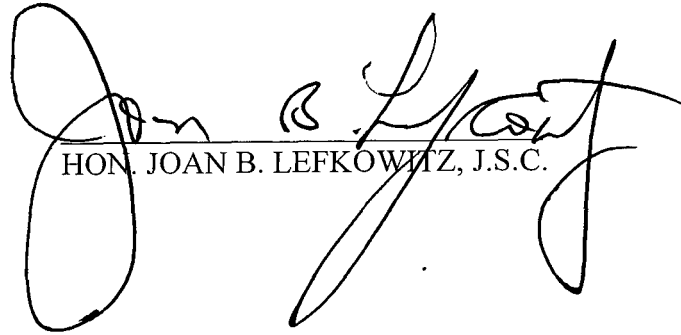
ORDERED that the branch of plaintiffs' motion seeking a protective order as to Kathleen Austen's deposition is granted; and it is further

ORDERED that Selective's motion seeking an order dismissing plaintiffs' complaint is denied; and it is further

ORDERED that counsel for plaintiffs 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
March 30, 2015

A handwritten signature in black ink, appearing to read 'Joan B. Lefkowitz', is written over a horizontal line.

HON. JOAN B. LEFKOWITZ, J.S.C.

TO: Baxter Smith & Shapiro, PC
Attorneys for Plaintiffs
200 Mamaroneck Ave., Suite 601
White Plains, New York 10601
BY NYSCEF

Hurwitz & Fine PC
Attorneys for Defendant
Selective Insurance Co. of America
1300 Liberty Building
Buffalo, New York 14202
BY NYSCEF

Wechsler & Cohen LLP
Attorneys for Defendant Mack-Cali
17 State Street, 15th Floor
New York, New York 10004
BY NYSCEF

Colliau Carluccio Kenner Morrow
Peterson & Parsons
Attorneys for Continental Casualty Co.
125 Broad Street, 7th Floor
New York, New York 10004
BY NYSCEF

Law Office of Lori D. Fishman
Attorneys for Tritec Hospitality LLC
120 White Plains Road, Suite 220
Tarrytown, New York 10591
BY NYSCEF

cc: Hon. Francesca E. Connolly
Compliance Part Clerk