

Vargas v City of New York

2016 NY Slip Op 30961(U)

May 25, 2016

Supreme Court, New York County

Docket Number: 154323/13

Judge: Michael D. Stallman

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

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ROBERT VARGAS and ELIZABETH VARGAS,

Plaintiffs,

-against-

THE CITY OF NEW YORK, NEW YORK CITY
TRANSIT AUTHORITY, METROPOLITAN
TRANSPORTATION AUTHORITY, E.E. CRUZ &
TULLY CONSTRUCTION CO., A JOINT
VENTURE, LLC, and L&L PAINTING CO., INC.,

Defendants.

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THE CITY OF NEW YORK, NEW YORK CITY
TRANSIT AUTHORITY, and METROPOLITAN
TRANSPORTATION AUTHORITY,

Index No. 154323/13

Third-Party Plaintiffs,

**DECISION, ORDER
AND JUDGMENT**

-against-

L&L PAINTING CO., INC., LIBERTY
INSURANCE UNDERWRITERS, THE
EVANSTON INSURANCE COMPANY, CAMABO
INDUSTRIES, INC., SCOTTSDALE INSURANCE
COMPANY and AMERICAN SAFETY
SERVICES, INC.,

Third-Party Defendants.

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HON. MICHAEL D. STALLMAN, J.:

In this motion, third-party defendant Liberty Insurance Underwriters Inc., s/h/a Liberty Insurance Underwriters (LIUI) seeks leave to renew, or, in the alternative, reargue, the parts of this Court's January 15, 2016 order as denied LIUI's motion for summary judgment, and declared that LIUI is obligated to defend and indemnify third-party plaintiffs the City of New York, New York Transit Authority and the Metropolitan Transportation Authority (together, City defendants) in the main action. Upon renewal or rearguement, LIUI requests that this Court dismiss the third-party action, together with any cross claims. The salient factual background is set forth in the Court's underlying opinion.

A motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" CPLR 2221 (e) (2); see *Gonzalez v County of Westchester*, 55 AD3d 873, 873 (2d Dept 2008). A motion to renew "is intended to direct the court's attention to new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore, not brought to the court's attention." *Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460, 461 (1st Dept 2007). However, a court can grant renewal "in

the interests of justice,” so as to not “defeat substantive fairness.” *Id.* at 462-461.

Reargument, on the other hand, “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include matters of fact not offered on the prior motion” CPLR 2221 (d) (2); *Ahmed v Pannone*, 116 AD3d 802, 984 (2d Dept 2014). It is “not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided” *McGill v Goldman*, 261 AD2d 593, 594 (2d Dept 1999). “Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application.” *Foley v Roche*, 68 AD2d 558, 567-568 (1st Dept 1979).

LIUI complains that this Court relied on “improper” sur-replies in coming to its decision that LIUI had failed to provide the City defendants with timely notice of disclaimer. LIUI memorandum of law at 4. However, the City defendants’ sur-replies were brought in response to an argument raised for the first time by LIUI in its response to the cross motions. Therefore, the sur-replies allowed the City defendants to respond to LIUI’s new, belated argument, and were not improper. Accordingly, reargument

is denied. However, because the issue has been clouded by these concerns, this Court grants renewal.

In its response to the cross motions, LIUI raised the argument that the City defendants had not made a claim under the LIUI policy until they brought the third-party action, so that LIUI's answer to the City defendants' pleading was a proper and timely notice of disclaimer under Insurance Law § 3420 (d). Relying on the City defendants opposition to this argument, this Court found that the service of LIUI's answer 45 days after it received the third-party complaint was untimely notice of disclaimer as a matter of law.

LIUI argues that the City defendants waived their right to receive timely notice of the disclaimer by failing to object to the answer when it was served outside of the CPLR time-frame for the responsive pleading, pointing to cases where the answer to a complaint seeking insurance coverage served as notice of disclaimer of the claim. *See e.g. City of New York v St. Paul Fire & Mar. Ins. Co.*, 21 AD3d 978, 982 (2d Dept 2005); *American Mfrs. Mut. Ins. Co. v CMA Enters.*, 246 AD2d 373, 373 (1st Dept 1998).

This Court does not find these cases to be persuasive. There is no

question that “retention of an answer without objection will be deemed a waiver of objection as to untimeliness” of the answer. *Wittlin v Schapiro’s Wine Co.*, 178 AD2d 160, 161 (1st Dept 1991). However, the issue is not the timeliness of the answer, but the timeliness of the notice of disclaimer. LIUI claims that the City defendants waived their right to object to the untimeliness of the disclaimer when they accepted the late answer.

A waiver is the “voluntary and intentional relinquishment of a known right” See *Provencal, LLC v Tower Ins. Co. of New York*, 138 AD3d 732, 732 (2d Dept 2016). Here, there is no evidence that the City defendants intentionally waived their right to a timely disclaimer by accepting a late answer. Acceptance of a late answer under the CPLR is a different issue than the right to receive timely notice under Insurance Law § 3420 (d). This Court does not believe that the CPLR trumps the Insurance Law in this situation, and does not believe that a defendant gives up its right to timely notice of disclaimer by bringing notice of its claim for the first time in a complaint or third-party complaint, or by failing to object to a late answer. The fact that LIUI might have required more time to corral all of its defenses to create the answer does not alter the fact that it knew the basis for a defense of late notice as soon as it got the third-party complaint, and

had time to respond to it, despite there being other defenses LIUI wanted to bring.

As a result, the Court finds that LIUI failed to disclaim against the City defendants in a timely manner. Consequently, LIUI is required to provide a defense and to indemnify the City defendants in the main action. Because this is an action seeking a declaration as to the respective rights of the parties, and because the motion seeks a declaration in LIUI's favor, it was and is proper for this Court, in light of LIUI's failure to convince the Court of its position, to make the declaration in favor of the City defendants. This Court's prior declaration in the City defendants' favor was not improperly made "sua sponte," as LIUI would have it.

However, because "a claimant cannot create coverage that did not otherwise exist by relying on the failure to provide timely notice of disclaimer" (*Meah v A. Aleem Constr., Inc.* 105 AD3d 1017, 1020 [2d Dept 2013]), this Court will resolve the issue of whether the City defendants are additional insureds under the Policy, which LIUI disputes.

The policy contains four endorsements of interest to this question. LIUI relies on "Endorsement No. 4" (Notice of Motion, exhibit 1), which states, in pertinent part, that "WHO IS AN INSURED . . . is amended to

[* 7]

include any person or organization *with whom you [L&L] have agreed to add as an additional insured by written contract . . . [emphasis added].* Because L&L contracted (“agreed”) only with Joint Venture, LIUI claims that, there being no contract between L&L and the City defendants to add them as additional insureds, there is no coverage afforded by LIUI by virtue of this endorsement.

However, LIUI overlooks three other additional insured endorsements: Endorsement Nos. 1, 2 and 3, which speak to this issue. These endorsements contain language which differs from that in Endorsement No. 4. Each of these endorsements states, in pertinent part, that “Section II - **Who is an insured** is amended to include as an additional insured the person(s) or organization(s) shown in the schedule” The Schedule addressed states that the “**Name of Additional Insured Person(s) Or Organization(s)** [a]s required by a written contract signed by both parties”

LIUI claims that “signed by both parties” necessarily means that the City defendants must be one of the signatories of such a contract, as in Endorsement 4. However, the language in the first three endorsements is significantly different from that in Endorsement No. 4. The Court notes that

the contract between the Joint Venture and L&L requires that the City defendants be named as additional insureds. Consequently, L&L and Joint Venture are the “both parties” to the contract, as required by the first three endorsements. There would be no reason to make the language different in the fourth endorsement if it was intended to mean the same thing as in the preceding three, and, in any event, any ambiguity in the policy must be construed against the insurer. *See Tirana v AXA Equit. Life Ins. Co.*, 136 AD3d 408, 409 (1st Dept 2016) (ambiguities “must be construed in favor of the insured and against the insurer [interior quotation marks and citation omitted]”). Thus, there is a valid contract requiring the City defendants to be named as additional insureds; they have demonstrated entitlement to that relief.

Because of these findings, LIUI’s additional affirmative defenses are without import, and need not be addressed.

Accordingly, it is

ORDERED that the motion brought by Liberty Insurance Underwriters Inc., s/h/a Liberty Insurance Underwriters to renew or reargue the order of this Court, dated January 15, 2016, is denied, in part, so as to deny reargument and granted, in part, so as to grant renewal; and upon


renewal it is

ORDERED that the Court adheres to the January 15, 2016 order;
and it is further

ADJUDGED and DECLARED that third-party defendant Liberty Insurance Underwriters is obligated to defend and indemnify third-party plaintiffs the City of New York, New York City Transit Authority and the Metropolitan Transportation Authority in the action *Vargas v City of New York*, Index No. 154323/13, pending in this Court.

Dated: May 26, 2016
New York, New York

ENTER:



J.S.C.

MICHAEL D. STALLMAN
J.S.C.