Vassar Coll. v Marshall & Sterling, Inc.
2016 NY Slip Op 32829(U)
October 3, 2016
Supreme Court, Dutchess County
Docket Number: 5644/2013
Judge: James V. Brands
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SUPREME COURT- STATE OF NEW YORK
DUTCHESS COUNTY

Present:
Hon. JAMES V. BRANDS
Justice.

SUPREME COURT: DUTCHESS COUNTY

VASSAR COLLEGE and UNITED EDUCATORS,
Plaintiffs,

-against-

MARSHALL & STERLING, INC.,
Defendant.

DECISION AND ORDER
ON TWO MOTIONS
Index No: 5644/2013

The following papers were read and considered on defendant Marshall & Sterling's motion for reargument (Motion No. 1) and plaintiffs' motion to strike portions of said motion for reargument (Motion No. 2).

NOTICE OF MOTION NO. 1/ AFFIRMATION / EXHIBITS A-C / MEMORANDUM
AFFIRMATION IN OPPOSITION / EXHIBIT 1 / MEMORANDUM OF LAW IN OPPOSITION
REPLY AFFIRMATION / EXHIBITS A-H / REPLY MEMORANDUM OF LAW

NOTICE OF MOTION NO. 2 / AFFIRMATION / EXHIBITS A-B / MEMORANDUM
AFFIRMATION IN OPPOSITION / EXHIBITS A-D / MEMORANDUM OF LAW

BACKGROUND FACTS:

In an underlying personal injury action, an employee of Kirshhoff Construction Company sued Vassar College for injuries sustained while performing work for Kirshhoff at Vassar College. In the course of that action, Kirshhoff's excess insurance carriers were not timely notified of the action by its and Vassar's broker, Marshall & Sterling, Inc. (M&S). The underlying action settled for $7 million dollars which Vassar paid for from its primary ($1 million) and excess insurance carriers ($5 million). Kirshhoff's primary insurance company (ACE) accepted coverage and paid $1 million. Despite the late notice, Kirshhoff's excess carrier Diamond State nevertheless agreed to pay the full policy ($1 million) and excess carrier Scottsdale agreed to pay $2.5 million of its $4 million policy.

Vassar and United Educators (UE) commenced this action against M&S, claiming that it was negligent in failing to provide timely notice to, as relevant here, Scottsdale. Asserting a subrogation claim, plaintiffs sought $1.5 million dollars and attorneys's fees incurred in a prior litigation to determine coverage (*Vassar College and United Educators Ins. Co v Diamond State Ins. Co, Scottsdale Ins. Co., Marshall & Sterling, Inc. and Kirshhoff Constr. Mgt., Inc.*, Index No. 7778/2008 [Sproat, J]).

M&S moved to dismiss the complaint which was denied. The court found that the complaint sufficiently stated a cause of action for negligence against M&S. In addition, the court found that the complaint stated a cause of action for subrogation on behalf of UE as the settlement in the underlying personal injury action "result[ed] in damages in the amount of the $1.5 million settlement shortfall for which UE indemnified Vassar and $800,000 in attorneys' fees" (moving papers, Ex B pp 828-829). M&S did not move to reargue this order.

Vassar and UE moved for summary judgment, and M&S separately moved for summary judgment dismissing the complaint. This court's decision and order dated May 17, 2016 granted plaintiffs' summary judgment motion and denied defendant's motion for summary judgment. The court found that UE could properly bring a subrogation claim on behalf of its insured, Vassar, and that M&S committed negligence when it failed to provide timely notice of a claim against Vassar which caused the excess insurance carriers to deny coverage for the claim. The court also found that plaintiffs were entitled to recover attorneys' fees incurred in an earlier action and referred that issue to a hearing.

MOTION No. 1:

M&S moves for leave to reargue the aforementioned determination. A motion to reargue "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 any matters of fact not offered on the prior motion" (CPLR §2212[d][2]). The determination to grant leave to reargue lies within the sound discretion of the court (*see Barnett v Smith*, 64 AD3d 669, 670-671 [2d Dep't 2009]). However, a motion for leave to reargue "is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*McGill v Goldman*, 261 AD2d 593, 594 [2d Dep't 1999]; accord *V. Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874 [2d Dep't 2010]). M&S claims that the court overlooked facts and misapprehended the law in the foregoing respects.

Attorneys' Fees

This court found that plaintiffs were entitled to attorneys' fees incurred in an earlier action in which plaintiffs sued, inter alia, Diamond State Insurance Company and Scottsdale Insurance Company for excess insurance coverage. M&S argues that the court overlooked *Chase Manhattan Bank, NA v Each Individual Underwriter Bound to Lloyd's Policy* (258 AD2d 1 [1st Dep't 1999]). In that regard, M&S claims that because Vassar and UE affirmatively sued Diamond State and Scottsdale, and that Vassar and UE were not defendants in an action brought by Diamond State and Scottsdale, they cannot recover attorney's fees. However, in *Shindler v Lamb* (25 Misc.2d 810, 812 [Sup. Ct. New York County 1959], *aff'd* 10 AD2d 826 [1st Dep't 1960]; *aff'd* 9 NY2d 621 [1961]), the court stated: "if, through the wrongful act of his present adversary, a person is involved in earlier litigation with a third person **in bringing** or defending an action to protect his interests, he is entitled to recover the reasonable value of attorneys' fees and other expenses [emphasis added]). In addition, M&S' claim that Vassar and UE cannot recover attorneys' fees because it was a party (and not a third-party) to the earlier action overlooks the fact that Diamond State and Scottsdale, also sued in the earlier action, were third parties. Contrary to M&S' contention, the court did not cite either *Kvest v Cohen* (86 AD3d 481 [1st Dep't 2011) or *Martini v Lafayette*

Studios Corp. (273 AD2d 112 [1st Dep't 2000]), both relied on by plaintiffs, in rendering its decision.

The Subrogation Claim in Favor of UE

The court also granted summary judgment to UE on its subrogation claim. However, M&S insists that UE is not entitled to subrogation because Vassar's rights, as against M&S, were "collateral" to the loss for which UE was contractually obligated to indemnify Vassar.

Subrogation entitles an insurer to stand in the shoes of its insured for the purpose of seeking indemnification from one or more third parties whose wrongdoing caused the loss for which the insurer was obligated to pay (*see ELRAC, Inc. v Ward*, 96 NY2d 58, 75 [2001]). Here UE, the insurer, seeks to stand in the shoes of Vassar, for the purpose of seeking indemnification from M&S, whose wrongdoing caused the loss for which UE was obligated to pay. Had Kirshhoff's excess insurer Scottsdale been timely notified, it would have paid the balance of the loss instead of UE, Vassar's insurer.

M&S' reliance on *Federal Ins. Co. v Spectrum Ins. Brokerage Servs.* (304 AD2d 316 [1st Dep't 2003]) is misplaced since UE is suing for its own loss which is thus not collateral. M&S also claims that the court mistakenly relied on *Granite State Ins. Co v Diversified Edwards Agency* (304 AD2d 304 [1st Dep't 2003]). There, the broker's mistake left the injured laborer's employer uninsured, and the insurers contributions toward the settlement of the underlying action therefore entitled them to be equitably subrogated to the employer's rights against the broker. Here, the broker's failure to timely notify the excess insurers of Kirshhoff, the employer of the injured plaintiff in the underlying personal injury action, left Kirshhoff underinsured. The court sees no meaningful difference between being uninsured and underinsured.

Privity

The court also found that the issue of privity was irrelevant to UE's subrogation claim against M&S. Contrary to M&S' claim, the court did not "conflate" UE's subrogation claim with Vassar's separate claim that M&S failed to give timely notice to Kirshhoff's insurers.

None of the cases on which M&S rely support its position that M&S must be in privity with UE for a subrogation claim to lie. Again, M&S relies on *Federal Ins. Co. v Spectrum, supra.*, which is distinguishable from this case since Vassar, UE's insured, does possess a viable claim against M&S, the broker defendant. M&S also relies on *Denzer Properties II, LLC v Kaye Ins. Assoc.* (38 AD3d 213 [1st Dep't 2007]), in which the Appellate Division found that there was no basis for a subrogation claim as the insurer defended its insured, provided coverage, and indemnified its insured for the judgment. Here, in contrast, as a result of the broker's failure to timely notify, Scottsdale did not pay the full excess policy, causing damage to UE. The remainder of cases on which M&S relies (*see* memorandum of law, point IV, page 23) do not involve subrogation claims.

Special Relationship and Negligence

M&S further argues that the court erred in finding a special relationship between M&S and Vassar and that M&S was negligent in failing to provide timely notice on behalf of Vassar to the excess carriers. M&S merely makes the same arguments it did on summary judgment which were

previously rejected (*see McGill v Goldman, supra.*; accord *V. Veeraswamy Realty v Yenom Corp., supra.).*

Damages

In the event that M & S is liable, M & S contends for the first time that UE is entitled to recover only $500,000 and not $1.5 million. However, a party cannot raise issues for the first time on reargument (*see* CPLR 2221[d][2]; *Simpson v Lochmann*, 21 NY2d 990 [1968]). Indeed, the shortfall, based on the excessive policy coverage, is $1.5 million ($5 million paid out of Vassar's umbrella policy minus $3.5 million paid out of Kirshhoff's excessive policies).

MOTION No. 2:

Plaintiff separately moves to strike those portions of the motion to reargue which refer to the claim of M&S that UE would only be entitled to recover $500,000, and not $1.5 million. This motion is academic in light of the court's determination.

Based on the foregoing, it is hereby

ORDERED that the motion by M&S to reargue is denied; and it is further

ORDERED that plaintiffs' motion to strike is denied as academic; and it is further

ORDERED that the parties appear for a status conference on **November 4, 2016 at 9:15a.m.** at which time a hearing will be scheduled on the remaining issue of attorneys' fees.

This constitutes the decision and order of the court.

Dated: October 3, 2016
Poughkeepsie, NY

ENTER:

HON. JAMES V. BRANDS
SUPREME COURT JUSTICE

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