

**Dorchester, L.L.C. v Herzka Ins. Agency, Inc.**

2017 NY Slip Op 33340(U)

September 6, 2017

Supreme Court, Nassau County

Docket Number: Index No. 607478/16

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

DORCHESTER, L.L.C.,

TRIAL/IAS, PART 1  
NASSAU COUNTY

Plaintiff,

INDEX No. 607478/16

-against-

MOTION DATE: 8/17/17  
Motion Sequence 002-003

HERZKA INSURANCE AGENCY, INC.,

Defendant.

The following papers read on this motion:

- Notice of Motion.....XX
- Affirmation in Support.....XX
- Memorandum of Law in Support.....XX
- Memorandum of Law in Opposition.....X
- Affirmation in Opposition.....X

Motion by defendant Herzka Insurance Agency, Inc. for leave to reargue its prior motion to compel discovery is **denied**. Motion by plaintiff Dorchester, LLC for leave to reargue defendant's motion to compel discovery is **denied**.

This is an action against an insurance broker for damages allegedly caused by the insurer's disclaimer of coverage based upon a misrepresentation in the application for the insurance policy. Plaintiff Dorchester, LLC is the owner of a 78-unit apartment building located at 9-17 St. Paul's Road North in Hempstead. Bradford Mott is the sole member of Dorchester. Defendant Herzka Insurance Agency, Inc. was Dorchester's insurance broker.

Herzka prepared an application to Great American Insurance Company for a \$5 million umbrella and excess liability policy covering the apartment building on St. Paul's

**DORCHESTER v HERZKA INSURANCE**

**Index No.: 607478/16**

Road, as well as nine other buildings. The umbrella and excess liability policy was for the period September 1, 2011 through September 1, 2013. The policy was excess to a primary policy for \$1 million issued by Starr Indemnity & Liability Company.

The application for the Great American policy falsely stated that the electrical system in the St. Paul's building had been updated within the last 25 years, and there was no single room occupancy in the building. Dorchester alleges that Herzka submitted the application to Great American without giving the insured an opportunity to review it for accuracy.

On February 9, 2013, a fire occurred in the building, as a result of an unattended candle lit by one of the tenants. The fire caused two deaths and injuries to several tenants, which resulted in the filing of four wrongful death/personal injury actions.

On July 21, 2014, Great American commenced an action against Dorchester in the federal court for rescission of the umbrella and excess liability policy based upon misrepresentations in the insurance application. In the rescission action, Dorchester filed a third-party complaint against Herzka for negligence and breach of contract. On August 30, 2016, Judge Alvin Hellerstein granted Great American summary judgment, rescinding the policy. On August 31, 2016, Judge Hellerstein dismissed the third-party complaint for lack of pendent jurisdiction and tolled the statute of limitations for 30 days, to allow Dorchester to commence a state court action. Following Judge Hellerstein's decision, Dorchester and Great American settled the rescission action, with Great American paying Dorchester \$150,000. The rescission of the policy was not effected by the settlement.

The present action was commenced on September 28, 2016. Plaintiff asserts claims for negligence, breach of contract, and indemnification. Plaintiff seeks to recover its damages caused by its non-coverage in the underlying personal injury actions. According to defendant, plaintiff's damages should be offset by the \$1 million primary policy issued by Starr, as well as the \$150,000 settlement received from Great American.

On April 5, 2017, defendant served its second set of interrogatories and supplemental notice for discovery and inspection. Defendant seeks documents and information concerning the source and tax treatment of the settlement proceeds for two of the underlying personal injury actions, the Frias and Barillas actions. The Frias action was settled for \$1,750,000; the Barillas action was settled for \$150,000. Mott paid the settlement of the Frias action from his own personal funds.

By order dated June 26, 2017, the court denied defendant's motion to compel discovery of the source and tax treatment of the settlement proceeds in the Frias and Barillas actions. Defendant argued that the requested information was necessary to defend the action because, to the extent that the settlements were paid by Mott, Dorchester did not suffer any damages.

**DORCHESTER v HERZKA INSURANCE****Index No.: 607478/16**

In opposition, plaintiff argued that defendant was collaterally estopped by Judge Hellerstein's decision from denying that plaintiff sustained damages. Alternatively, plaintiff argued that a limited liability company and its sole member were "treated the same" for purposes of determining damages.

This court determined that defendant was not collaterally estopped from denying that plaintiff suffered damages. In granting summary judgment to Great American on its rescission claim, Judge Hellerstein held only that there had been a misrepresentation in the insurance application. Thus, Judge Hellerstein did not make any "necessary finding" upon the issue of damages in the underlying personal injury actions (**Launders v Steinberg**, 39 AD3d 57 [1<sup>st</sup> Dept. 2007]).

Nevertheless, Mott's payments were not a "collateral source," to be offset against Dorchester's damages in the present action. (**Inchaustegui v 666 5<sup>th</sup> Ave**, 96 NY2d 111, 114-16 [2001]; **Applehead Pictures v Perelman**, 80 AD3d 181, 191 [1<sup>st</sup> Dept. 2010])). The court reasoned that, as Dorchester's sole member, Mott was not independent of the company. Because Dorchester would have had to pay the settlements in the underlying actions if Mott failed to do so, Mott's payments were not gratuitous. Moreover, because the payments were made after the underlying actions were settled, there was no danger of the victims receiving a double recovery. Thus, documents surrounding Mott's payments, including tax treatment, were not discoverable.

By notice of motion dated July 27, 2017, defendant moves for leave to reargue its motion to compel discovery. Herzka argues that Dorchester and Mott are independent and, because Mott's settlement payments were gratuitous, they should be set off against plaintiff's damages in the present action. Defendant relies upon an affidavit which Mott submitted in support of a motion for summary judgment in another of the underlying actions, the Ramirez action, in which Mott was sued personally. In his affidavit, Mott denied exercising control over the building and denied commingling funds which would have permitted a piercing of Dorchester's corporate veil (def.'s ex C). Mott's motion for summary judgment dismissing the Ramirez complaint was granted by Justice Iannacci on September 20, 2016 (def't's ex D). Defendant argues that Mott is judicially estopped from taking a position that Dorchester and Mott are not independent because of the position which he took before Justice Iannacci in the Ramirez action.

The doctrine of judicial estoppel prevents a party who assumed a certain position in a prior proceeding and secured a ruling in his favor from advancing a contrary position in another action, simply because his interests have changed (**Becerril v Dept. of Health**, 110 AD3d 517, 519 [1<sup>st</sup> Dept. 2013]).

**DORCHESTER v HERZKA INSURANCE**

**Index No.: 607478/16**

Mott relied upon Dorchester’s “corporate shield” to defend himself in the underlying personal injury action. Had Dorchester been found liable to Ramirez, Mott would have been required to pay additional capital into Dorchester, if the company did not have sufficient liquid assets to satisfy Ramirez’ claim. Although Mott was not liable to Ramirez directly, it is not a “change of position” for Mott to argue that his settlement payments on behalf of Dorchester were not voluntary. Thus, Mott’s settlement payments on behalf of Dorchester may not be offset against its damages and are not discoverable.

Tax benefits are not an offset against plaintiff’s out-of-pocket damages (**BRSW v W.R Grace**, 156 AD2d 249 [1<sup>st</sup> Dept 1989]). Thus, even if Mott’s settlement payments were a collateral source, the tax treatment of those settlement payments would not be discoverable. Defendant has not established that the court overlooked or misapprehended any matter of fact or law in deciding the prior motion (CPLR 2221[d]). Defendant’s motion for leave to reargue its motion to compel discovery is **denied**.

By notice of cross-motion dated August 9, 2017, plaintiff moves for leave to reargue defendant’s motion to compel discovery to the extent that the court failed to deny the motion on the ground of collateral estoppel. Dorchester notes that Judge Hellerstein found that, “The fire resulted in four wrongful death/personal injury/property damage lawsuits against Dorchester...and against its principal, Bradford P. Mott.” Plaintiff argues that, under the federal Declaratory Judgment Act, an insured’s claim against its excess carrier is not ripe, unless the insured can show that it suffered a loss that will reach the level of an excess policy.

However, the action before Judge Hellerstein was not an action by the insured for a declaratory judgment, but rather an action by the insurer for rescission of the policy. As this court noted in its prior decision, Judge Hellerstein addressed only the issue of misrepresentation and did not make any necessary finding as to damages. In his separate order dismissing Dorchester’s third-party complaint against Herzka for lack of supplemental jurisdiction, Judge Hellerstein noted that “dispositive briefing” had not been commenced in the third-party action. Thus, Judge Hellerstein clearly did not reach the merits of Dorchester’s claim against Herzka. Finally, because plaintiff was not aggrieved by this court’s order denying defendant’s motion to compel discovery, plaintiff is without standing to seek to reargue the motion (See, **Wehringer v Douglas Gibbons**, 49 AD2d 109 [1<sup>st</sup> Dept. 1975]). Plaintiff’s motion for leave to reargue defendant’s motion to compel discovery is **denied**.

**ENTERED**

So ordered.

Date: **SEP 06 2017**

SEP 12 2017

NASSAU COUNTY  
COUNTY CLERK’S OFFICE

*Stephen A. Bucaria*  
J.S.C.