McPherson v Cross County Sav. Bank
2019 NY Slip Op 31502(U)
May 17, 2019
Supreme Court, Kings County
Docket Number: 506746/13
Judge: Wayne P. Saitta
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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of May, 2019.

PRESENT:

HON. WAYNE P. SAITTA,

Justice.

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TARA MCPHERSON, KRISTIN OLSON, MIN SOO KIM JONATHAN ROGERS, ANTON BARANENKO, UTICA FIRST MUTUAL INSURANCE COMPANY AS SUBROGEE OF ORGANIC HOMESTEAD INC., D/B/B ELLA CAFÉ, AND PUBLIC SERVICE MUTUAL INSURANCE COMPANY AS SUBROGEE OF JAN MATLAK AND WIESLAWA MATLAK,

Plaintiffs,

- against -

Index No. 506746/13

CROSS COUNTY SAVINGS BANK, EWA JAKUBEK, AS ADMINISTARATOR OF THE ESTATE OF DECEDENT, EDWARD JAKUBEK, STANLEY SECURITY & STANLEY CONVERGENT SECURITY SOLUTIONS INC.,

Defendants.

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EWA JAKUBEK, AS ADMINISTRATOR OF THE ESTATE OF DECEDENT, EDWARD JAKUBEK,

Third-Party Plaintiff,

- against -

CROSS COUNTY SAVINGS BANK, STANLEY SECURITY & STANLEY CONVERGENT SECURITY SOLUTIONS INC.,

Third-Party Defendant.

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CROSS COUNTY SAVINGS BANK,

Second Third-Party Plaintiff,

- against -

STERLING BUILDING GROUP, INC. AND BLASKO ELECTRICAL CONTRACTORS, INC.,

Second Third-Party Defendant.
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The following e-filed papers read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	128-133
Opposing Affidavits (Affirmations)	136
Reply Affidavits (Affirmations)	138

Upon the foregoing papers, defendant/third-party plaintiff Ewa Jakubek (Jakubek), as the administrator of the estate of decedent Edward Jakubek (Mr. Jakubek), moves, under motion sequence number nine, for an order: (1) pursuant to CPLR 2221, granting reargument of her motion for an order dismissing the complaints and cross claims[1] of plaintiff Utica First Insurance Company (Utica), as the subrogee of Organic Homestead Inc., d/b/a Ella Café (Organic), and plaintiff Public Service Mutual Insurance Company (Public), as the subrogee of Jan Matlak and Wieslawa Matlak (the Matlaks), based upon 40 Pa Cons Stat § 991.1817, and (2) upon the granting of such reargument, granting her motion to

[1]While Jakubek, in her notice of motion, states that she seeks dismissal of Utica and Public's cross claims, there do not appear to be any cross claims asserted by Utica or Public.

dismiss Utica and Public's complaints as against her, as the administrator of Mr. Jakubek's estate.

Facts and Procedural Background

On January 22, 2013, there was a fire originating at property located at 175 Bedford Avenue, in Brooklyn, New York, which was owned by Mr. Jakubek. The fire spread to nearby property. Organic claimed that its property was damaged by the fire, and the Matlaks claimed that their property was damaged by the fire. Organic was insured by Utica, and Utica paid Organic, as its insured, in excess of $220,000 for the damages sustained by it in the fire. The Matlaks were insured by Public, and Public paid the Matlaks, as its insureds, the sums of $259,076.17 for the loss to their property's structure and $70,000 for the loss of the use of their property.

Utica brought a subrogation action against Mr. Jakubek, and Public also brought a subrogation action against Mr. Jakubek. These two actions were ultimately consolidated. Utica and Public claimed that the fire was caused by the negligence of Mr. Jakubek, and they sought a judgment against Mr. Jakubek in the amount that they paid their insureds.

Beginning in October 2013, when this litigation was commenced, Mr. Jakubek was defended under his commercial general liability insurance policy issued by Tower National Insurance (Tower). In 2009, Tower was acquired by Castlepoint National Insurance Company (Castlepoint). On August 31, 2016, Mr. Jakubek, who resided in Pennsylvania, died, and on September 14, 2016, his wife, Jakubek, who also resided in Pennsylvania, was

appointed as the administrator of Mr. Jakubek's estate. On March 30, 2017, Castlepoint was declared insolvent and was ordered liquidated by an order of liquidation issued by the Superior Court of the State of California. By a letter dated August 7, 2018, the Pennsylvania Property and Casualty Insurance Guaranty Association (PPCIGA) informed Jakubek that it was authorized to administer Castlepoint's claims and that it had assigned counsel to her.[2]

On October 3, 2018, Jakubek, filed a motion, under motion sequence number eight, to dismiss the complaints of Utica, as the subrogee of Organic, and Public, as the subrogee of the Matlaks, based upon 40 Pa Cons Stat § 991.1817. Utica opposed Jakubek's motion. Public did not submit any opposition papers. By an order dated January 10, 2019, the court denied Jakubek's motion on the basis that the subrogation claims survive regardless of whether PPCIGA coverage applies to the claims under 40 Pa Cons Stat § 991.1817. On January 31, 2019, Jakubek filed its instant motion for reargument. Utica opposes Jakubek's motion.

The court, upon reconsideration of the arguments raised, grants reargument (*see* CPLR 2221 [d] [2]). Upon such reargument, the court recalls and vacates its January 10, 2018 order denying Jakubek's motion, and the following decision and order is substituted therefor.

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[2]40 Pa Cons Stat § 991.1817 (b) provides that a person must "exhaust first his [or her] right of recovery from the association of the place of residence of the insured" (*see also* 40 Pa Stat Ann § 991.1802 (1) (i) [providing that to be a "covered claim," the insured must be "a resident of this Commonwealth at the time of the insured event]." Thus, Jakubek, as a Pennsylvania resident, was required to seek coverage from PPCIGA, rather than from New York's property/casualty insurance security fund (*see* Insurance Law § 7603).

Discussion

40 Pa Cons Stat § 991.1817, entitled "Non-Duplication of Recovery," in subdivision (a), provides, as follows:

> "Any person having a claim under an insurance policy *shall be required to exhaust first his [or her] right under such policy*. For purposes of this section, a claim under an insurance policy shall include a claim under any kind of insurance, whether it is a first-party or third-party claim, and shall include, without limitation, accident and health insurance, worker's compensation, Blue Cross and Blue Shield and all other coverages except for policies of an insolvent insurer. *Any amount payable on a covered claim under this act shall be reduced by the amount of any recovery under other insurance*" (emphasis added).

40 Pa Cons Stat § 991.1802 (2) expressly provides that the term "covered claim" "shall not include any amount . . . due any . . . insurer . . . as subrogation recoveries or otherwise." Both Ella Café and the Matlaks were made whole by the payments issued to them by their respective insurance companies, Utica and Public. Thus, pursuant to 40 Pa Cons Stat § 991.1817 and 40 Pa Cons Stat § 991.1802, Utica and Public are precluded from asserting a claim for subrogation against PPCIGA.

This preclusion of the assertion of a claim for subrogation has been extended to the insured of the insolvent insurance company (*see Bell v Slezak* (571 Pa 333, 347, 812 A2d 566, 574 [2002]). This is consistent with the purposes of the Property and Casualty Insurance Guaranty Association Act (the PPCIGA Act) (Act of December 12, 1994, P.L.

1005, No. 137 § 1, as amended, 40 Pa Stat Ann §§ 991.1801-991.1820). 40 Pa Stat Ann § 991.1801 (1) sets forth that the purposes of article XVIII of the PPCIGA Act are:

> "To provide a means for the payment of covered claims under certain property and casualty insurance policies, to avoid excessive delay in the payment of such claims and *to avoid financial loss to* claimants or *policyholders as a result of the insolvency of an insurer*" (emphasis added).

In *Bell* (571 Pa at 341, 812 A2d at 570), the Pennsylvania Supreme Court explained that "PPCIGA is a statutory unincorporated association vested with remedial obligations in circumstances in which licensed property and casualty insurers are deemed insolvent." It further pointed out that "PPCIGA obtains funding to satisfy claims obligations of insolvent insurers by collecting monies from all insurance companies that write property and casualty insurance in the Commonwealth" (*Bell*, 571 Pa at 341, 812 A2d at 571 [2002] *see also* 40 Pa Cons Stat § 991.1803 [b] [3]; § 991.1808). In affirming the Superior Court decision in that case, the Pennsylvania Supreme Court quoted the Superior Court's language that the PPCIGA Act "clearly attempts to protect both policyholders and those with claims against policyholders from the consequences of the insolvency of the insurer by establishing an association, the sole purpose of which is to compensate those who have claims which have not been paid because the insurance company is insolvent" (*Bell*, 571 Pa at 347, 812 A2d at 574). It held that since the claimants' only source of funding for a settlement entered with the insured of the insolvent insurance company was by way of the PPCIGA Act and, as PPCIGA's obligation in this regard was extinguished by application of the non-duplication

of recovery provision found in the PPCIGA Act, recovery could not be sought as against the insured of the insolvent insurance company (*Bell*, 571 Pa at 347, 812 A2d at 574)

The Pennsylvania Supreme Court agreed with the Superior Court's determination that in light of the application of the non-duplication of recovery provision of 40 Pa Cons Stat § 991.1817(a), "the insured of the insolvent insurer may not be held personally responsible for the amount of the offset" since "the legislative intent of the [PPCIGA] Act precludes such an anomalous result" (*Bell*, 571 Pa at 340, 812 A2d at 570 [internal quotation marks omitted]). It noted that to find the insured of the insolvent insurance company personally liable for the offset amount would contravene one of the stated purposes of the [PPCIGA] Act, which is 'to avoid financial loss to . . . policyholders as a result of the insolvency of an insurer" (*Bell*, 571 Pa at 340, 812 A2d at 570, quoting 40 Pa Cons Stat § 991.1801 [1]).

As stated by the Superior Court, "[t]he purpose of the Act was to protect people who had paid for insurance but who did not have the protection for which they paid due to their insurer's insolvency" (*Panea v Isdaner*, 2001 PA Super 108, ¶ 19, 773 A2d 782, 792 [Pa Super Ct 2001], *affd sub nom. Bell v Slezak*, 571 Pa 333, 812 A2d 566 [2002]). "Any other result would subvert the intention of the non-duplication of recovery provision of [40 Pa Cons Stat] § 991.1817(a)" (*Panea*, 2001 PA Super at ¶ 15, 773 A2d at 791). "The [PPCIGA] Act clearly attempts to protect both policyholders and those with claims against policyholders from the consequences of the insolvency of the insurer by establishing an association, the sole purpose of which is to compensate those who have claims which have not been paid

because the insurance company is insolvent" (*Storms v O'Malley*, 2001 PA Super 184, ¶ 41, 779 A2d 548, 564 [2001]).

In opposition to Jakubek's motion, Utica contends that Pennsylvania law does not apply. Utica argues that the antisubrogation rule of the PPCIGA Act is in direct conflict with New York law and public policy.

New York's choice of law analysis governs the present dispute. New York uses the "center of gravity" or "grouping of contacts" choice of law theory to resolve choice of law questions in contract cases (*see Matter of Allstate Ins. Co. [Stolarz--New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 226 [1993]). The "'center of gravity' or 'grouping of contacts' inquiry . . . permits consideration of the 'spectrum of significant contacts' in order to determine which state has the most significant contacts to the particular contract dispute" (*Matter of Eagle Ins. Co. v Singletary*, 279 AD2d 56, 58-59 [2d Dept 2000], quoting *Matter of Allstate Ins. Co. [Stolarz--New Jersey Mfrs. Ins. Co.]*, 81 NY2d at 226; *see also Matter of Midland Ins. Co.*, 16 NY3d 536, 543 [2011]). "In the context of liability insurance contracts, the jurisdiction with the most 'significant relationship to the transaction and the parties' will generally be the jurisdiction 'which the parties understood was to be the principal location of the insured risk . . . unless with respect to the particular issue, some other [jurisdiction] has a more significant relationship' " (*Matter of Midland Ins. Co.*, 16 NY3d at 544, quoting *Zurich Ins. Co. v. Shearson Lehman Hutton*, 84 NY2d 309, 318 [1994]). "The court considers significant contacts such as the place of contracting, the place of negotiation and

performance, the location of the subject matter of the contract, and the domicile or place of business of the contracting parties" (*Jimenez v Monadnock Constr., Inc.*, 109 AD3d 514, 516 [2d Dept 2013]; *see also Matter of Allstate Ins. Co. [Stolarz--New Jersey Mfrs. Ins. Co.]*, 81 NY2d at 227; *Matter of Integon Ins. Co. v Garcia*, 281 AD2d 480, 481 [2d Dept 2001]; *Matter of Eagle Ins. Co.*, 279 AD2d at 58-59).

Utica asserts that the center of gravity in this case is in New York, and that, therefore, New York law must apply. It relies on the fact that the fire originated at property located in New York, the fire extended to New York property, and the insurance policy covered New York real property. In addition, Utica and Public are New York insurance companies. However, Mr. Jakubek was a Pennsylvania resident, Jakubek is a Pennsylvania resident, and since Mr. Jakubek was the insured of an insolvent insurance company, PPCIGA is the guaranty association which is authorized to administer insurance claims made under Mr. Jakubek's policy.

"Under New York's conflict of laws approach, the Court of Appeals has held that "[t]he first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved" (*Matter of Allstate Ins. Co. [Stolarz--New Jersey Mfrs. Ins. Co.]*, 81 NY2d at 223). Thus, the court must determine whether New York's law regarding collection by insurers from the insured of insolvent insurers differs from that of Pennsylvania.

In *Merchants Ins. Group v Mitsubishi Motor Credit Assn.* (732 F Supp 2d 146, 149 [ED NY 2010]), the United States District Court for the Eastern District of New York addressed the issue of whether New York or California law applied in determining if an insurer could recover against the insured of a liquidated insurer. California law, similarly to Pennsylvania law, precluded such a lawsuit by statute (*see* Cal Ins Code § 1063.1 [c] [5] [expressly providing that an insurer is not permitted to maintain a lawsuit "against the insured of the insolvent insurer for . . . subrogation, except insofar as, and to the extent only, that the claim exceeds the policy limits of the insolvent insurer's policy"]). The Federal District Court, in *Merchants Ins. Group* (732 F Supp 2d at 153), found that while New York law[3] was far less explicit than California law on this point, "in light of the purpose and structure of New York's insurance law, . . . New York would not permit a solvent insurer . . . to sue directly the insured of an insolvent insurer."

Utica argues that the application of Pennsylvania law offends New York policy. However, Utica only cites to the general principle that "an insurer has a right of subrogation

[3]The security fund at issue in *Merchants Ins. Group* (732 F Supp 2d at 149) was the public motor vehicle liability security fund (Insurance Law § 7604), whereas here, the fund at issue is the property/casualty insurance security fund (Insurance Law § 7603 [a] [1] [B] [setting forth the kinds of insurance policies for which the property/casualty insurance security fund may "be used in the payment of allowed claims remaining unpaid, in whole or in part, by reason of the inability due to insolvency of an authorized insurer to meet its insurance obligations"]; Insurance Law § 1113 [a] [4] [defining "fire insurance," which is one of the permissible kinds of insurance policies]). Both funds fall under Insurance Law article 76, entitled "Property/Casualty Insurance Security Funds." The security fund under Insurance Law article 76 "was initially enacted as a special benefit to protect New York insureds from the insolvency of companies underwriting automobile liability insurance," and this protection "was then extended to other forms of casualty property insurance" (*Matter of Union Indem. Ins. Co. of N.Y.*, 92 NY2d 107, 113 [1998]).

. . . to seek repayment from a third party whose wrongdoing caused the loss to the insured which the insurer was obligated to cover" (*Jefferson Ins. Co. of N.Y. v Travelers Indem. Co.*, 92 NY2d 363, 373 [1998]). Utica also cites to *Millennium Holdings LLC v Glidden Co.* (27 NY3d 406, 417 [2016], *rearg denied* 28 NY3d 944 [2016]), a case which discussed the inapplicability of the antisubrogation rule where no conflict of interest exists, but which did not involve, in any way, a guaranty association or a security fund created for claims made against an insolvent insurance company. There is no New York policy which protects solvent insurance companies seeking subrogation at the expense of an individual insured whose insurance company has become insolvent and who would be forced to personally fund claims by such solvent insurance companies out of pocket.

Statutes of other states pertaining to guaranty associations that are created to guarantee insolvent insurers generally exclude from their definition of "covered claim" any amount due any insurer as a subrogation recovery (*see* 1 Steven Plitt et al., Couch on Insurance 3d § 6:30 [Dec 2018 Update] [collecting cases from numerous states]). It has been generally recognized that "[t]he coverage afforded by a statutory insurance guaranty association or insolvency fund does not include a claim by an insurer," and "[a] subrogation claim by . . . an insurance company is not covered" (44 CJS, Insurance § 240 [collecting cases from numerous states]). Cases from other jurisdictions have widely held that "[w]hen a subrogation claim does not exceed the insolvent liability insurer's policy limits, the subrogee cannot recoup its payments from either the guaranty association or the guaranty association's

insured" (1 Steven Plitt et al., Couch on Insurance 3d § 6:30 [Dec. 2018 Update] [citing cases]). "[I]n such circumstances the burden of the liability insurer's insolvency is placed on other solvent insurers and not on the insured policyholder" (*id.*).

Similarly to Pennsylvania, New York has established a security fund that is designed to collect payments from solvent insurers to use to make payments on behalf of insolvent insurers (*see* Insurance Law § 7603). Insurance Law § 7601 (c) provides that the property/casualty insurance security fund consists "of all payments made to it by insurers and of securities acquired by and through the use of moneys belonging to it," along with interest and accretions earned upon such payments or investments earned prior to January 1, 1974. Insurance Law § 7603 (a) (1) provides that "[t]he property/casualty insurance security fund shall be used in the payment of allowed claims remaining unpaid, in whole or in part, by reason of the inability due to insolvency of an authorized insurer to meet its insurance obligations under policies." The property/casualty insurance security fund "is not insurance, but a pool of money contributed by insurers doing business in New York for the payment of allowed claims of *policyholders and injured parties*" (68 NY Jur 2d, Insurance § 282 [emphasis added]). Insurance Law § 7602 defines injured party claims and policyholder claims in the context of claims against the security fund under article 76, and does not speak to the claims of other solvent insurance companies, who themselves are contributors to the security fund.

Since the property/casualty insurance security fund "was initially created so that solvent insurers would fund the claims of insureds of insolvent insurers who purchased their policies in good faith," permitting claims for subrogation by such solvent insurers against the insured of an insolvent insurer "would turn this purpose on its head" (*Merchants Ins. Group*, 732 F Supp 2d at 154). It would result in one of two unacceptable outcomes. "One possible outcome of permitting suits by insurers against the insured of insolvent insurers is that the insured might be forced to pay the solvent insurer, but then could turn to the [security fund] to repay this claim" (*id.*). "This outcome would be antithetical to the structure of the [property/casualty insurance security fund], which was designed to require solvent insurers to pay into the fund, not draw out of it" (*id.* at 154-155). Under the second outcome, if, under New York law, insurers were permitted, by way of subrogation, to collect from the insured of insolvent insurers, and the property/casualty insurance security fund refused to reimburse such claims, the insured of the insolvent insurer would be forced to pay, out of pocket, for a claim that such insured thought he or she purchased insurance to avoid (*id.* at 155; *see also Matter of Reliance Ins. Co.*, 35 AD3d 191, 191 [1st Dept 2006] [explaining that New York's security funds were designed to protect against "the potentially devastating effects of insurance company failures"]).

"[C]ourts in New York have recognized that several other states bar these suits on similar policy grounds" (*Merchants Ins. Group*, 732 F Supp 2d at 155). In *Aetna Cas. & Sur. v Ohio Ins. Guar. Assn.* (175 AD2d 621, 622 [4th Dept 1991]), the Appellate Division,

Fourth Department, noted that Ohio statutory law bars insurers from maintaining subrogation claims against either the insured of an insolvent insurer or against the Ohio Insurance Guaranty Association (OIGA), on the ground that OIGA was intended "to create a limited fund for the protection of the insureds of insolvent insurers and claimants against those insureds, *but not to protect other insurers*" (emphasis added). In *Travelers Indemnity Co. v. Gosline* (2003 WL 21230376, *2 [ND NY May 27, 2003, No. 01-CV-794 (NAM/RFT)]), the United States District Court for the Northern District of New York noted that the insurance law in Illinois bars contribution and indemnity claims against insureds of insolvent insurers since "it is evidently clear that the Illinois legislature did not want solvent insurers to be reimbursed from the proceeds of the Guaranty Fund." In *Ferrante v Wold* (36 AD3d 585, 587 [2d Dept 2007]), the Appellate Division, Second Department, in enforcing a settlement agreement, emphasized the importance of not permitting Allstate Insurance Company (Allstate) "to bypass the nonsubrogation provisions of former NJ Stat Ann 17:30A-5 (d)," noting that such a bypass would not occur there since Allstate had sought recovery from the plaintiff therein pursuant to the settlement agreement, not from the New Jersey Property-Liability Insurance Guaranty Association.

Significantly, the denial of subrogation against an insured of an insolvent insurance company here would not undermine New York's important public policy of protecting victims of negligence and allowing them economic redress since Organic and the Matlaks have already been completely made whole by recovery through their own insurance

companies (*compare Givens v Kingsbridge Hgts. Care Ctr., Inc.*, __ AD3d __, 2019 NY Slip Op 02967 [1st Dept Apr. 18, 2019] [distinguishing risk retention groups from traditional insurance companies since risk retention groups "are not required to contribute to a guaranty fund which would be available in the event of their insolvency" in a negligence action by a former nursing home resident who sought to recover for injuries directly against the nursing home and its insolvent risk retention group]). Rather, the court finds that to permit subrogation here would run contrary to the purpose of the property/casualty insurance security fund, which was created to protect insureds at the expense of solvent insurers. This purpose of the property/casualty insurance security fund mandates the conclusion that New York, like Pennsylvania, would find that Utica and Public, as solvent insurance companies, cannot seek subrogation from the estate of Mr. Jakubek, as the insured of an insolvent insurance company, at least to collect any amount that previously would have been covered by Castlepoint, the insured's insolvent insurer.[4]

To find Jakubek personally liable for subrogation would contravene one of the stated purposes of the PPCIGA Act, which, as discussed above, is "to avoid financial loss to . . . policyholders as a result of the insolvency of an insurer" (40 Pa Cons Stat § 991.1801 [1]). The property/casualty insurance security fund in New York was similarly "intended to secure

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[4]Here, as previously discussed, Organic and the Matlaks have recovered their damages in full and have been made whole by their respective insurance policies. Thus, the issue of where a solvent insurer seeks to collect payments from an insured of an insolvent insurer that were in excess of the original policy coverage that the insured had with its insolvent insurer has not been raised here.

the obligations of insurers to policyholders and beneficiaries in case of insolvency" (*American Ins. Assn. v Bouchard*, 102 AD2d 775, 776 [1st Dept 1984], *affd as mod on other grounds sub nom. American Ins. Assn. v Chu*, 64 NY2d 379 [1985], *appeal dismissed, cert denied* 474 US 803 [1985]; *see also* Insurance Law § 7603; *Matter of Reliance Ins. Co.*, 35 AD3d at 191). The court finds that New York law and Pennsylvania law do not, in fact, conflict, since under either state's laws, Utica and Public are not permitted to seek subrogation from Jakubek. Consequently, the court finds that Utica and Public's claims for subrogation from Jakubek are barred. Jakubek's motion for dismissal, must, therefore, be granted (*see Merchants Ins. Group*, 732 F Supp 2d at 156).

Wherefore it is hereby Ordered that, Jakubek's motion for reargument is granted, and upon reargument, the court's January 10, 2019 order is vacated; and it is further,

Ordered that Jakubek's motion for an order dismissing the complaints of Utica and Public as against her, as the administrator of Mr. Jakubek's estate, is granted and EWA JAKUBEK is granted Judgment dismissing the claims of plaintiff Utica First Insurance Company and plaintiff plaintiff Public Service Mutual Insurance Company against the ESTATE of EDWARD JAKUBEK .

This constitutes the decision, order, and judgment of the court

E N T E R,

J. S. C.

HON. WAYNE P. SAITTA
J.S.C

KINGS COUNTY CLERK
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