

Amtrust N.A, Inc. v Pavloff

2020 NY Slip Op 33518(U)

October 24, 2020

Supreme Court, New York County

Docket Number: 156855/2019

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53

Justice

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AMTRUST NORTH AMERICA, INC.,

Plaintiff,

- v -

SHERRI PAVLOFF, FARBER BROCKS & ZANE, LLP

Defendant.

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INDEX NO. 156855/2019

MOTION DATE 05/15/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 87, 88, 89, 90, 91, 92, 93, 94, 127, 128, 129, 130, 131

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, (i) defendants' motion for leave to reargue pursuant to CPLR § 2221(d), and, upon reargument, for dismissal pursuant to CPLR § 3211(a)(1) and (a)(7), and (ii) plaintiff's cross motion to renew its request to file a sur-reply on the prior motion are denied.

The relevant facts are set forth in the court's prior decision dated April 23, 2020 (the Prior Decision; NYSCEF Doc. No. 59). Familiarity is presumed.

A motion to reargue, which is addressed to the sound discretion of the court, requires that the movant "establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979]; CPLR § 2221[d]). Crucially, it is not "a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (id.).

On this motion, the defendants argue that the court overlooked certain testimony of the plaintiff's adjuster, Brian Kuhn, and that of Curt Schiner, counsel for one of the defendants in the underlying action that is the subject of this legal malpractice action. The court did not overlook any such evidence. The evidence was duly considered and found insufficient to justify dismissal at this stage of the proceeding. Specifically, the deposition testimony of Mr. Kuhn and Mr. Schiner do not absolve Ms. Pavloff of liability. Indeed, their testimony highlights the claim for legal malpractice, not disavows it, and Mr. Kuhn's need for a lawyer whose conduct met the requisite standard of care, and not one whose conduct potentially fell below it.

Indisputably, Ms. Pavloff had a copy of the conservation order that required consent to enter into any settlement, which she testified that she only "briefly reviewed" (NYSCEF Doc. No. 15 at 17-18). On the record before the court, all that is established is that Mr. Kuhn, the adjuster, incorrectly believed that he still had authority to go forward with the settlement. Although both Ms. Pavloff and Mr. Schiner inquired as to whether he could go forward with the settlement offer following the conservation order, neither inquired what basis Mr. Kuhn had to believe that he had authority to settle the case. To the extent that Ms. Pavloff argued that there is a lack of causation, the argument fails. The fact that Mr. Kuhn was advised on a conference call with his superiors and other members of AmTrust's Major Case unit prior to the Pruss settlement that settlements in excess of \$900,000 required approval does not change the result. It appears that Mr. Kuhn mistakenly thought that the previously obtained settlement authority, including his settlement authority in the Pruss matter, remained intact and that the conservation order and the need to obtain approval only applied prospectively. The plaintiff asserts that had Mr. Kuhn been

given proper legal advice as to the effect of the conservation order and what needed to be done in light of the conservation order, Mr. Kuhn would have acted differently. Whether Mr. Kuhn would have acted differently had he received this advice and whether Ms. Pavloff's conduct met the requisite standard of care under the circumstances is simply not appropriate to decide at this stage of the proceeding.

Furthermore, the court did not make any factual finding. The court merely observed based on the defendants' arguments, that it was counsel's duty to advise the client, and not the other way around (NYSCEF Doc. No. 59 at 9 ["It was her job to provide legal advice to Mr. Kuhn and AmTrust as the client, not the other way around"]).

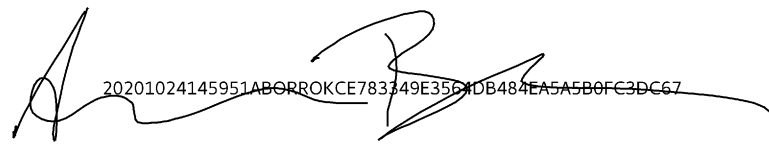
The defendants' argument that legal advice about the conservation order was outside the scope of Ms. Pavloff's representation is equally unavailing as there was no formal written retainer agreement and the plaintiff alleges that Ms. Pavloff's representation including her duty to do due diligence into whether the settlement could proceed in light of the conservation order which she "briefly reviewed." Put another way, the plaintiff argues that it is axiomatic that an engagement to try or settle a case, as Ms. Pavloff herself alleges, necessarily includes understanding whether you have authority to perform that function and if you can represent the same on behalf of your client as an officer of the court when you have knowledge of an existing court conservation order that suggests the contrary. In addition, when your client retains you to settle a case and you later learn that their authority to proceed may be effected by a court order, the plaintiff argues that you must do more than merely ask if they can proceed. You must also make sufficient inquiry to

ensure that they understand the effect of the court order and advise them if their belief is in fact mistaken. This, the court held was sufficient to proceed at this stage of the litigation.

The court has considered the defendants' remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that the defendants' motion to reargue is denied; and the plaintiff's cross motion to file a sur-reply on the prior motion is also denied.



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10/24/2020

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE