

**Charles Bardlyn Enters., Inc. v Rockingham Ins.
Co.**

2022 NY Slip Op 31321(U)

April 18, 2022

Supreme Court, Kings County

Docket Number: Index No. 520763/20

Judge: Karen B. Rothenberg

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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 18th day of April 2022.

P R E S E N T:

HON. KAREN B. ROTHENBERG,

Justice.

-----X

CHARLES BARDYLYN ENTERPRISES INC.

Plaintiff,

-against-

Index No.: 520763/20

ROCKINGHAM INSURANCE COMPANY and TRI-NORTHERN GROUP, LTD.,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____

45-53

Opposing Affidavits (Affirmations) _____

57-60

Reply Affidavits (Affirmations) _____

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Upon the foregoing papers in this declaratory judgment action regarding an insurance coverage dispute, plaintiff Charles Bardylyn Enterprises Inc. (CBE) moves (mot. seq. 2) for an order, pursuant to CPLR 2221 (d), granting it leave to reargue the court’s prior Order dated August 24, 2021, and upon reargument: (1) modifying the order and granting CBE the right to choose its own defense counsel in connection with the claims asserted in the underlying personal injury action, *Sessoms v Charles Bardylyn Enterprises*,

Inc., Sup Ct, Kings County, index No. 503549/2020 (the Underlying Action); and (2) pursuant to CPLR 3212, granting it summary judgment on the ground that Rockingham Insurance Company's (Rockingham) disclaimer of coverage was untimely.

In the prior Order, the Court directed that Rockingham must defend CBE in the Underlying Action but that Rockingham was entitled to choose CBE's counsel, since there has been no showing that Rockingham's interest in defending the Underlying Action conflicted with CBE's (*see* Order at 15). The court also denied summary judgment in favor of CBE, finding that CBE has not met its burden of demonstrating that Rockingham's disclaimer was untimely (*id.* at 9).

In the present motion, CBE contends that the Court overlooked and misapplied controlling case law in determining that there was no showing that Rockingham's interest in defending the Underlying Action conflicted with CBE's interest. In that regard, CBE contends that the issue of its liability is intertwined with the question of insurance coverage, which mandates that CBE have the ability to choose its defense counsel. CBE claims that because indemnity is excluded by the provisions of its policy, its interests conflict with CBE's. CBE further argues that when an insurer conditions its defense on a reservation of rights, the insured is entitled to choose its own attorney.

With regard to timeliness of the disclaimer, CBE contends that the Court misapplied relevant case law in determining that its disclaimer was timely. To that end, CBE argues that Rockingham was on notice that Sessoms slipped and fell on slippery liquid and had sufficient information to disclaim from the time that the complaint was filed. Rockingham was not entitled to wait to investigate all possible grounds to disclaim coverage before

issuing a disclaimer.

In opposition, Rockingham contends that its notice was “provided as soon as is reasonably possible” after investigating the claim. Rockingham argues that it was required to fully investigate the claim, and they properly requested additional information before disclaiming. Rockingham further contends that CBE has not submitted any new law or facts in support of its motion to reargue.

With respect to choice of counsel, Rockingham contends that an insured’s right to choose its own counsel only applies to rare instances where a potential conflict exists between the insurer and insured. Rockingham argues that this is only necessary where the insurer’s defense attorney has a duty to the insurer to defeat liability only upon grounds which would render the insured liable. Rockingham contends that, here, both it and CBE have a common interest in defeating the claims in the underlying action.

Discussion

“A motion for leave to reargue . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion” (CPLR 2221 [d] [2]). A motion for reargument is addressed to the sound discretion of the court that decided the original motion (*see Fuessel v Chin*, 179 AD3d 899, 900 [2d Dept 2020]; *Bueno v Allam* 170 AD3d 939, 940 [2d Dept 2020]). A court providently exercises its discretion in granting a party’s motion for leave to reargue when the party has satisfactorily demonstrated the manner in which the court overlooked or misapprehended matters of fact or law in its original decision (*see Barrett v Jeannot*, 18 AD3d 679, 680 [2d Dept 2005]; *Matter of Progressive Northeastern Ins. Co. v Cipolla*, 119 AD3d 946, 947

[2d Dept 2014)].

The court, in its discretion, hereby grants leave to reargue and, upon such reargument, adheres to its original decision.

As previously held in the prior Order, Rockingham's 59-day delay of disclaiming coverage was not unreasonable given the lack of information provided to Rockingham in both, the notice of claim and complaint, in the Underlying Action (*see West 56th St. Assoc. v Greater N.Y. Mut. Ins. Co.*, 250 AD2d 109, 114 [1st Dept 1998]; *McGinley v Odyssey Re [London]*, 15 AD3d 218 [1st Dept 2005]). CBE was first notified of the claim by a vaguely worded December 23, 2019 letter, which CBE claims that it received a month later, on January 23, 2020. On the next day, CBE submitted a notice of claim to Rockingham, explaining that it was unaware of the incident. The complaint in the Underlying Action, which enumerated the basis for CBE's negligence did not give any further details as to specific location or the nature of the accident, was filed on February 12, 2020. CBE was served on February 18, 2020. CBE's principal then forwarded the complaint to Rockingham on the same day, and again reiterated that he lacked information regarding Sessoms' personal injury claim. Ten days later, on February 28, 2020, Rockingham reserved its rights and requested additional information from CBE regarding inspection and maintenance at the property where the accident occurred. Rockingham disclaimed coverage 23 days later, on March 23, 2020. Given this timeline, the vagueness of Sessoms' attorneys' letter and complaint, and Rockingham's need to investigate the incident, it cannot be said that Rockingham unduly delayed disclaiming insurance coverage.

With respect to CBE's contention that it is entitled to choose its own counsel, the court finds that there has been no showing that Rockingham's interest in defending the Underlying Action conflicts with CBE's (*see Public Service Mut. Ins. Co v Goldfarb*, 53 NY2d 392, 401 [1981]; *Baron v Home Ins. Co.*, 112 AD2d 391, 393 [2d Dept 1985]). "Independent counsel is only necessary in cases where the defense attorney's duty to the insured would require that he defeat liability on any ground and his duty to the insurer would require that he defeat liability only upon grounds which would render the insurer liable" (*Goldfarb*, 53 NY2d at 401, fn. 1). "On the other hand, where multiple claims present no conflict -- for example, where the insurance contract provides liability coverage only for personal injuries and the claim against the insured seeks recovery for property damage as well as for personal injuries -- no threat of divided loyalty is present and there is no need for the retention of separate counsel" (*id.*). Contrary to CBE's contention, the mere fact that Rockingham reserved its rights does not necessarily present a conflict mandating Rockingham's choice of counsel (*see Singh v New York City Tr. Auth.*, 17 AD3d 262 [1st Dept 2005] [reversing lower court's order directing insurer to engage counsel of insured's choosing and reimbursing counsel fees where insurer defended under reservation of rights]; *Lowe v Madison 79 Associates, Inc.*, index No. 105975/07 [Sup Ct, New York County July 2, 2011], Feinman, J.; *Great American Insurance Company v Houlihan Lawrence, Inc.*, 449 F Supp 3d 354, 373 [US Dist Ct, SD NY 2020]).

Conclusion

Accordingly, it is

ORDERED that CBE's motion pursuant to CPLR 2221(d), granting it leave to reargue the court's prior Order dated August 24, 2021, is granted, and upon reargument, the court adheres to its original decision denying CBE's request both, for summary judgment and to choose its own counsel.

The court has considered the parties' remaining contentions and finds them unavailing. Any relief not expressly granted herein is denied.

This constitutes the decision and order of the court.

E N T E R,



Hon. Karen B. Rothenberg
J. S. C.