SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice PART 35

Zagoria, Steven

- v -

Wingate, Russotti

SEQ: #002

INDEX NO. 150028/09

MOTION DATE 11/24/10

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In this action alleging legal malpractice and to recover on a judgment, defendants Winget, Russotti & Shapiro, LLP ("WRS"), Clifford H. Shapiro and William P. Hepner (collectively "WRS") move to reargue their cross-motion for summary judgment.

Factual Background

In October 2003, Plaintiff Steven A. Zagoria ("Zagoria") tripped and fell while he was leaving a restaurant owned by nonparty York Specialty Food Inc.'s ("York"), and engaged WRS to pursue a claim against York. WRS notified York of Zagoria's injuries, and requested York to immediately forward the letter to York's insurance carrier. WRS also requested York to notify WRS of the identity of that carrier. York gave notice of the accident to Tower Insurance Company of New York ("Tower"), but did not provide WRS with the identity of that carrier.

York commenced a declaratory judgment action against its insurer Tower and Zagoria, seeking a judgment declaring that Tower was obligated to defend and indemnify York. On appeal of a decision denying Tower's summary judgment motion, the First Department dismissed York's complaint, holding that York's notice to Tower was untimely, in that York "became aware of the claimant's accident within three days, but did not notify Tower of the possibility of a claim until eight months later."

WRS obtained a jury verdict against York in favor of Zagoria, and Zagoria demanded that

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: _____ _____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

Tower pay the judgment pursuant to Insurance Law § 3420. Tower denied the demand on the ground that it had obtained a declaratory judgment determining that it was not obligated to pay any recovery, due to untimely notice.

Zagoria then commenced this action, asserting that Tower is obligated to pay the judgment, based on Insurance Law § 3420, which enables an injured party to sue an insurance company directly after the injured party has obtained, and attempted to collect on, a judgment. He further claimed legal malpractice against WRS.

Zagoria then moved for summary judgment on his complaint, and the defendants all cross-moved to dismiss the complaint.

By Order dated September 22, 2010, the Court denied plaintiff's motion, granted summary judgment in favor of Tower, and denied summary judgment to WRS. The Court stated, in relevant part as to WRS as follows:

> The final issue to consider is whether Zagoria's claim in the complaint, that defendant attorneys' failure to provide Tower with adequate notice of the accident, can support his claim for legal malpractice. Although the parties do not address this issue, in order for the defendant attorneys to make a prima facie showing of entitlement to summary judgment, they must demonstrate that there is no material issue of fact regarding the merit of any of the claims raised in the complaint. . . . The issue of adequate notice to Tower, pursuant to Insurance Law 3420 is raised in the complaint. Complaint, ¶81.
>
> The defendant attorneys do not allege, much less bring forth evidence, that they provided Tower with written notice of the accident. Rather, they point to the fact that Tower was informed of the accident. However, that information may have been provided orally. Oral notice is insufficient to meet the requirements of Insurance Law §3420, which provides specifically that notice by an injured party must be in writing. Insurance Law §3420 (a)(3). Having failed to show that they provided written notice to Tower, and in view of Tower's evidence that there was no such evidence, the defendant attorney's have not demonstrated entitled to summary judgment dismissing the Complaint.

WRS argues that the Court overlooked part of the record (Exhibit 10 to plaintiff's motion for summary judgment) evidencing that York provided Tower with written notice of the accident on October 8, 2003. Such notice to Tower was provided at the instruction of WRS (Exhibit 8 to plaintiff's motion). Therefore, since Tower was provided with written notice, WRS is entitled to summary judgment.

In opposition, plaintiff argues that WRS has again failed to show that it provided written notice to Tower on plaintiff's behalf. Rather, WRS relies on the fact that York provided written notification of plaintiff's accident to Tower and claims, without any justification, that it was at the instruction of WRS. Insurance Law §3420 states that written notice to the insurance company be made by or on behalf of the injured person. It is clear that WRS never provided written notice of plaintiff's accident to Tower. Further, although WRS relies on York's written notice of plaintiff's accident to Tower, WRS does not present any evidence that York submitted the notice to Tower at the request of WRS. Merely pointing out that York's notice to Tower

included WRS's letter to York does not lead to the conclusion that York submitted notice to Tower on behalf of plaintiff. WRS failed to preserve and pursue plaintiff's Insurance Law § 3420 claim against Tower. Not only did WRS fail to provide written notice of plaintiff's claim to Tower, but WRS also failed to assert a cross-claim based on Insurance Law §3420 on behalf of plaintiff in a Declaratory Judgment action which prevented plaintiff from being able to collect on the judgment from Tower and from an increase in the past and future pain and suffering award that the Appellate Division would have directed following an appeal of the verdict in the York Lawsuit.

In reply, WRS argues that York provided written notice to Tower the instruction of the WRS pursuant to Insurance Law §3420, which specifically states that written notice to the insurance company be made by or on behalf of the injured person. On or about September 3, 2003, the same day plaintiff retained WRS, WRS instructed York to notify its carrier of the accident on behalf of the plaintiff. On September 18, 2003, York's agent, A Plus Coverage, Inc., submitted a written fax to Tower's claims department including a General Liability Loss Notice and WRS's letter, as written notice of the accident to Tower. This was obviously done on behalf of plaintiff, at the instruction of WRS (indeed the accident occurred in February 2003 and was not reported until two weeks after WRS was retained) and constitutes written notice of the accident. Plaintiff's assertion that this does not qualify as notice to Tower on behalf of plaintiff, is incorrect and the two cases cited by plaintiff are inapposite.

Discussion

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*,182 AD2d 22 [1st Dept] *lv. denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588 [lst Dept 1979] ("A party cannot raise questions, advance new arguments, or assume a position inconsistent with that taken on the original motion"); *William P. Pahl Equipment Corp. v Kassis, supra*). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

In light of WRS's argument that this Court overlooked certain facts presented in the record, the Court grants reargument. However, upon reargument, the Court adheres to its earlier determination.

WRS does not dispute this Court's holding that Insurance Law §3420 "permits an injured party to collect from an insurance company even if the insured failed to give proper notice of the accident, [but] in order to do so, the injured party must have given written notice of the accident to the insurer." (Decision, page 7).

WRS's first contention, that the Court overlooked part of the record evidencing that York provided Tower with written notice of the accident on October 8, 2003, lacks merit. This Court acknowledged such notice (Decision, page 3), and noted that the First Department held that York

failed to comply with the notice requirements of the insurance policy. The First Department decision addressed the October 8, 2003 notice by York, stating that the eight month delay from the time York "became aware the claimant's accident" in February 2003 vitiated the policy. In other words, the October 8, 2003 notice from York was untimely. Thus, in order for Zagoria to recover, Zagoria must have given written notice of the accident, and it was uncontested that Zagoria did not dispute the attestation from Tower's vice president, that Tower did not receive any written notice from Zagoria. WRS's second contention that York's notice to Tower was provided at the instruction of WRS is inconsequential, since York's notice was deemed untimely. Therefore, WRS failed to establish, as a matter of law, that proper (timely) notice was given to Tower by the injured party (Zagoria), *or on behalf of* the injured party. Further, the exhibits WRS relies upon, *i.e.*, its instruction to York to notify York's insurer, and the subsequent notice to Tower on October 8, 2003 fail to demonstrate that proper (timely) notice was given to Tower by the injured party (Zagoria), or on behalf of the insured party.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants Winget, Russotti & Shapiro, LLP, Clifford H. Shapiro and William P. Hepner for leave to reargue is granted, and upon reargument, the Court adheres to its earlier determination.

This constitutes the decision and order of the Court.

Dated 12-6-10 **ENTER:** _____, **J.S.C.**

HON. CAROL EDMEAD

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**