

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

PRESENT: JANE S. SOLOMON

PART 55

Justice

Rock 49th Rest. Corp.

INDEX NO. 102779/08

Greater NY Mutual Ins. Co.

MOTION DATE 1/13/09

MOTION SEQ. NO. 02

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 5 were read on this motion to/for reargue

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**

PAPERS NUMBERED

FEB 03 2009

Cross-Motion:  Yes  No

COUNTY CLERK'S OFFICE  
NEW YORK

Upon the foregoing papers, it is ordered that this motion is decided as follows

Plaintiff moves to reargue a prior motion that resulted in an order granting defendant's motion to dismiss the complaint (Prior Decision, filed October 22, 2008).

Plaintiff filed a claim for insurance benefits arising from an occurrence on July 12, 2004. Under the terms of the policy, plaintiff had two years from the date of occurrence to commence litigation under the claim. Defendant insurance carrier neither honored nor rejected the claim in the two years after the occurrence, but repeatedly demanded additional documentation (described by plaintiff's principal as a "laundry list" and demands for "countless documents", Aff. Of Andrew Sliverman in Opposition to Motion to Dismiss, Ex D to this motion, paragraphs 13, 19). On October 6, 2006, approximately two years and three months after the occurrence, defendant informed plaintiff that it had completed its investigation and determined that the claim was not covered under the policy. The letter also quoted text from the policy with respect to the two year limit for commencing suit. This lawsuit was commenced in February 2008, approximately sixteen months after the October 6, 2004 letter and nearly three and a half years after the occurrence.

Dated: \_\_\_\_\_

*Page 1 of 2*  
**JANE S. SOLOMON**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

Index No. 102774/08

Plaintiff argues that defendant should be equitably estopped from dishonoring the claim because (1) plaintiff was lulled into believing that litigation was unnecessary because defendant did not outright reject the claim before the two year limit ended and (2) the October 6, 2006 letter further lulled plaintiff into not commencing a lawsuit by quoting the provision imposing a limit on time to commence litigation. It further argues that defendant waived its right to enforce the policy's two year limitation on commencing suit.

These arguments were raised and considered in the prior motion. The motion is denied because plaintiff fails to raise any matter misapprehended or overlooked by the court on the prior motion (CPLR 2221[d][2]). Defendant relied on documentary evidence demonstrating both an enforceable limit on plaintiff's time to file suit, and repeated express communications, beginning just two weeks after the occurrence, stating that defendant was investigating the claim subject to a reservation of rights and that its willingness to investigate should not be construed as a waiver of rights under the policy (Prior Decision, 6, and see documents submitted by defendant on the prior motion, annexed as Ex. B[D] to this motion). Finally, plaintiff fails to explain how the court erred in relying upon the Court of Appeals decision in Blitman Constr. Co. v Ins. Co of N. Am. in holding that a time limit on commencing suit is enforceable, whether or not the policy was read by the insured (66 NY2d 820 [1985]). Accordingly, it hereby is

ORDERED that plaintiff's motion to reargue is denied.

Dated: January 30, 2009

ENTER:

**FILED**  
FEB 03 2009  
COUNTY CLERK'S OFFICE  
NEW YORK  
J.S.C.  
**JANE S. SOLOMON**