

**State of New York v Lone Star Transp., Inc.**

2007 NY Slip Op 31700(U)

March 12, 2007

Supreme Court, Albany County

Docket Number: 0000272/0051

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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STATE OF NEW YORK

*Plaintiff,*

**DECISION and ORDER**  
**RJI NO.: 0105081541S**  
**INDEX NO.: L27-05**

-against-

LONE STAR TRANSPORTATION, INC. and  
JAMES CLAIR WHEELER,

*Defendants.*

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LONE STAR TRANSPORTATION, INC. and  
JAMES CLAIR WHEELER,

*Third-Party Plaintiff,*

-against-

A&R FLAG CAR, INC. and LI NYC TRUCK  
ESCORT SERVICE,

*Third-Party Defendants.*

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LONE STAR TRANSPORTATION, INC. and  
JAMES CLAIR WHEELER,

*Second Third-Party Plaintiffs,*

-against-

FRED STARK, CAROL PROSEDA, CAROL WITTY  
and WILLIAM BENNETT,

*Second Third-Party Defendants.*

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Albany County Supreme County All Purpose Term, March 5, 2007  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Nicole Licata-McCord, Esq.  
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**TERESI, J.:**

Third-Party Defendants, A&R Flag Service, Inc. (hereinafter A&R) bring this motion pursuant to CPLR 2221 to reargue and renew this Court's Decision & Order, dated December 12, 2006. Third-Party Plaintiff, Lone Star Transportation, Inc. (hereinafter Lone Star) opposes the motion.

After fully reviewing the record, this Court denies A&R's motion to renew and reargue.

In respect to the motion to renew, the burden is on the moving party. As such, the moving party must establish the reasons the evidence was not initially presented, the material nature of the new facts and that they could not have been discovered at the prior proceeding. Spa Reality Associates v. Springs Associates, 213 AD2d 781 (Third Dept., 1995). In examining the record in this case the A&R has not satisfied this burden.

A&R contends that this Court erroneously assumed, in granting Lone Star's motion to compel discovery of the Progressive Insurance Policy, that the policy was available to A&R or that Progressive was representing or indemnifying A&R in this action. This Court made no such assumptions regarding Progressive's role in this action. Progressive's non-defense is also wholly irrelevant. Further, A&R did claim, in the original motion, that it was not in possession

of the insurance policy and this Court did not credit that claim, but instead determined that A&R can be compelled to produce an insurance contract to which it is a party.

In respect to A&R's motion to reargue, it must demonstrate to the court that significant facts were overlooked or there was a misapplication of the law in the original decision. See also Spa Reality Associates v. Springs Associates, 213 AD2d 781(Third Dept., 1995). A&R has failed to convince this court of any such errors. A&R contends that this Court mistakenly granted Lone Star's motion to compel discovery pursuant to CPLR § 3101(f) because this Court overlooked the applicable legal standard governing a party's duty to disclose and produce documents that are not in its possession or control. CPLR § 3101(f) requires production of a certified or true copy of insurance policies. Plaintiffs, or in this case Third-Party Plaintiffs, are entitled to such information (Bolton v. Weil, Gotshal & Manges, LLP, 14 Misc3d 1220(A), 2005 WL 5118189 [2005]). Although, it may be true that A&R has failed to preserve and maintain a copy of its liability policy, this cannot be said to be reasonable. A&R is certainly in "control" of its own liability policy.

Accordingly, this Court denies A&R's motion to renew and reargue.

All papers, including this Decision and Order, are being returned to the attorney for the Third-Party Plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: March 12, 2007

Albany, New York

A handwritten signature in cursive script, appearing to read "Joseph C. ...". The signature is written in dark ink and is positioned to the right of the typed text.

JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Third-Party Defendant's Notice of Motion, dated February 14, 2007 with Attached Exhibit A.
2. Third-Party Plaintiff's Opposition, dated February 23, 2007