

**Nicoletti Gonson Spinner & Owen LLP v York
Claims Serv., Inc.**

2007 NY Slip Op 33355(U)

October 4, 2007

Supreme Court, New York County

Docket Number: 0604180/2006

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 604180/2006

NICOLETTI GONSON SPINNER &

vs
YORK CLAIMS SERVICE INC.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were filed in support of his motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*and cross motions
are decided for granted*

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

FILED
OCT 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/4/07

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X

NICOLETTI GONSON SPINNER & OWEN LLP
(f/n/a NICOLETTI GONSON & SPINNER, INC.),

Plaintiff,

Index No. 604180/06

-against-

YORK CLAIMS SERVICE, INC.,

Defendant.

-----X

YORK CLAIMS SERVICE, INC.,

Third-Party Plaintiff,

Index No. 590030/07

-against-

COLONIAL COOPERATIVE INSURANCE COMPANY
and STEPHEN MUEHLBAUER,

Third-Part Defendants.

FILED
OCT 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X

Emily Jane Goodman, J.S.C.:

Plaintiff Nicoletti Gonson Spinner & Owen LLP (f/k/a Nicoletti Gonson & Spinner LLP) moves for summary judgment against defendant/third-party plaintiff York Claims Service, Inc. (York) for unpaid legal fees, based on claims for breach of contract, account stated and quantum meruit, and for severance of the complaint from the third-party action (mot. seq. no. 001). The following cross motions are also before the court: (1) York's cross motion for summary judgment, or partial summary judgment, against third-party defendants Colonial Cooperative Insurance

Company (Colonial) and Stephan Muehlbauer (Muehlbauer)¹, on York's third-party action for indemnification; (2) Muehlbauer's cross motion for summary judgment dismissing the third-party complaint as to him; and (3) Colonial's cross motion for summary judgment dismissing the third-party complaint as to it, and for sanctions against York. A separate motion brought by York by Order to Show Cause to "enlarge" the record to include further evidentiary material is also included in this decision (mot. seq. no. 003).

I. Background

Colonial is, by its own account, a small cooperative insurance company which provides commercial insurance to New York businesses, through New York State licensed agents. Muehlbauer was York's claims adjuster. In 1998, York began to provide claims adjustment services to Colonial. These parties memorialized their agreement over the years in a series of agreements. In February 2005, York and Colonial entered into a Claims Service Agreement. York Notice of Cross Motion, Ex. 1. Over time, Muehlbauer began to serve as York's claims adjuster for all Colonial general liability claims. York claims that

¹The parties make a note of the fact that York's cross motion is improper, in that "[a] cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party [internal quotation marks and citations omitted]." *Terio v Spodek*, 25 AD3d 781, 785 (2d Dept 2006); see CPLR 2215. However, as no party has shown any prejudice stemming from York's improper cross motion, the court will address the application.

Muehlbauer and Kenneth Pangburn (Pangburn), Colonial's president, developed a "close relationship" as a result of the work that they did together on Colonial's claims. Aff. of Gary Forthoffer, at 3. Gary Forthoffer (Forthoffer) is York's "District Manager for Claims Operations." *Id.* at 1.

Under the Claims Service Agreement, York was responsible for "Allocated Loss Adjustment Expense," and Service Company fees. Claims Service Agreement, ¶ 2. Colonial retained its responsibility to pay out covered losses under the policies it issued. Among the various service fees York was to cover was the cost of counsel to represent Colonial's insureds.

The Claims Service Agreement contained a clause which reads:

Consistent with its policy obligations to defend and indemnify its insured[s] for covered claims, [Colonial] may assume exclusive management of any claim at any time. Exclusive management includes the right to select or replace counsel representing any insured in a litigated claim. If insured assumes exclusive management of a claim, [York] will have no further responsibility with respect to that claim.

Claims Service Agreement, ¶ 7.

Sometime around 2002, York arranged for the law firm of Ira B. Pollack & Associates PLLC (Pollack) to represent Colonial's insureds. York, pursuant to the Claims Service Agreement, was responsible for paying Pollack's legal fees. To that end, York and Pollack arranged that Pollack would be pre-paid on a fixed fee, per case, basis, rather than on an hourly basis. York maintains that this arrangement allowed York to "better predict

and control its litigation costs." Aff. of Forthoffer, at 4. Forthoffer claims that Muehlbauer "proposed and recommended" this arrangement, and appeared to be satisfied with Pollack's abilities. *Id.*

According to Muehlbauer, Muehlbaeur and Pangburn spoke on the telephone in January 2006 to discuss pending matters. During this conversation, Pangburn informed Muehlbauer that Colonial was considering handling its claims adjustment in-house, so as to eliminate the need for outside adjusters, such as York. According to Muehlbauer, Pangburn also "casually inquired" whether Muehlbauer would consider employment with Colonial, should Colonial follow through with a transition of claims adjustment from York to Colonial. Muehlbauer Aff., at 2. Muehlbauer claims that he told Pangburn that he would consider an offer, should such be made.

Sometime in early 2006, Muehlbauer allegedly became disenchanted with Pollack's work for Colonial, as evidenced most clearly in very negative comments he made in his file notes. See e.g. Forthoffer Aff., Ex. 3. As a result, Muehlbauer suggested to York that Pollack be replaced by other firms, including plaintiff. According to York, Muehlbauer stated that transferring Colonial's files to another firm would result in a "cost savings" to York. Forthoffer Aff., at 6.

Plaintiff, having been asked to review some of Colonial's

case files, shared Muehlbauer's belief that Pollack was mishandling files and, in a March 7, 2006 e-mail to Muehlbauer, Pangburn insisted that all Colonial's files be transferred from Pollack to other firms, including plaintiff. *Id.*, Ex. 4.

In June 2006, Pangburn contacted Muehlbauer to offer him employment, as Colonial had indeed determined to do all further claims adjustment in-house. Muehlbauer accepted. Pangburn then informed York of Colonial's decision to terminate the Claims Service Agreement, pursuant to its terms, and to employ Muehlbauer.

Under the terms of the Claims Services Agreement, the parties established a cut-off date for the agreement of November 30, 2006. Muehlbauer claims that he continued to work scrupulously on York's behalf until he left its employ, and that he left York on good terms.

Despite the November 30, 2007 termination date of the Claims Service Agreement, York returned all the claim files it was responsible for to Colonial in September 2006, and ceased making Allocated Loss Adjustment Expenses, which included payments due to plaintiff.

At this time, plaintiff had been handling York's insureds' interests since February 2006, apparently retained at the suggestion of Muehlbauer, acting as York's employee. Frank M. Nicoletti (Nicoletti), an attorney in plaintiff's firm, claims

that York paid over 100 of plaintiff's bills without objection, starting from that time. Nicoletti Affirm.², at 1. These bills were sent on a quarterly cycle. However, in September 2006, York terminated plaintiff's services, leaving bills for legal services through September 15, 2007 unpaid. York, in separate termination letters, each dated September 14, 2006, and relating to each file which plaintiff was handling, stated, as pertinent, that:

[York] has reviewed its agreement with [Colonial] with respect to this matter. Under that agreement, [Colonial] becomes responsible for all costs associated with the defense of a matter once it selects or removes defense counsel, or otherwise exercises "exclusive management" of the file. It appears that [Colonial] replaced the prior defense counsel with your firm and therefore has become responsible for all costs associated with the defense of this matter.

Although the exact date that [Colonial] first exercised "exclusive management" of the file of this matter is not of concern to your firm, it is important nonetheless, that your firm understand that, effective with the date of this letter, York will not be further involved in this matter. It will therefore be necessary for your firm to deal directly with [Colonial] with respect to this matter. In addition, your firm will need to make arrangements with [Colonial] in connection with payment of your firm's fees from your receipt of this letter onward.

Nicoletti Affirm., Ex. F.

Plaintiff claims that it was not aware of the existence of the Claims Service Agreement. However, believing that the matter

²The court notes that Nicoletti should have made his statements by means of an affidavit, not by affirmation, despite the fact that he is an attorney. Nevertheless, in the interests of judicial economy, and because no complaint or showing of prejudice has been made, the affirmation will be accepted.

of who would pay Colonial's legal fees going forward was a dispute only between York and Colonial, plaintiff billed York for all pending matters through September 14, 2006, for a total due of \$142,101.15 (the September and October 2006 bills). Nicoletti Affirm., Ex. G.

This suit arises out of York's refusal to pay the September and October 2006 bills, for legal services through September 14, 2006. The crux of York's defense, and of its third-party action for indemnity, is its belief that plaintiff came to represent Colonial as part of a conspiracy among plaintiff, Colonial, and Muehlbauer to take the representation of Colonial's insureds away from Pollack, substitute plaintiff in Pollack's place, and make it appear to be a choice made by York through the person of Muehlbauer. By these means, Colonial could hide the fact that the change was, in actuality, an exercise of "exclusive management" of the files on its part by Colonial, which should have, under the Claims Service Agreement, ended all of York's responsibility to pay for plaintiff's service. Thus, as a result of the alleged conspiracy, the Claims Service Agreement stayed in effect, plaintiff was paid, and York's costs increased tremendously.

York grieves that plaintiff's fees were duplicative, and more expensive, than the payments York had already pre-paid to Pollack. York claims that these additional fees amount to

\$189,000, and that it was further denied "hundreds of thousands of dollars" by Colonial on the termination of the Claims Service Agreement. *Id.* at 17.

In October 2006, York commenced an action in the Superior Court of New Jersey, Morris County (the New Jersey action), bringing claims against Colonial and Muehlbauer based on the same facts, and same theory of conspiracy, which York reiterates in its present third-party action for indemnification. Colonial and Muehlbauer responded by making a motion by Order to Show Cause in Supreme Court, Ulster County, seeking an "injunction in aid of arbitration" to compel the discontinuance of the New Jersey action, and for an order enjoining York from prosecuting any other civil action against Colonial and Muehlbauer relating to the Claims Services Agreement, based on an arbitration clause contained therein (the Ulster County proceeding).

In his Decision and Judgment dated February 5, 2007 (Pangburn Aff., Ex. 7) (February Decision), Justice Henry F. Zwack of the Ulster County Supreme Court determined that the relief which Colonial and Muehlbauer sought in the petition was inappropriate, and that the proper procedure would have been to "seek to compel arbitration with incidental relief staying the New Jersey action pending issuance of a final arbitration award." *Id.* at 2. However, Justice Zwack proceeded to construe the petition as requesting that relief. *Id.*

In his Decision, Justice Zwack found that, based on the language of the arbitration clause, Colonial and Muehlbauer had "made a prima facie showing that [York] should be compelled to arbitrate at least some of the issues raised in the New Jersey action." *Id.* at 3. He further found that some of the claims against Muehlbauer, despite being a non-signatory to the Claims Service Agreement, should nevertheless be arbitrated, as most of the issues brought against Muehlbauer in the New Jersey action were "inextricably interwoven" with those brought against Colonial. *Id.*

Justice Zwack further found that, although the arbitration agreement contained "very broad" language calling for the arbitration of "[a]ny controversy or claim arising out of or relating to" the Claims Service Agreement (*id.* at 5), the arbitration clause only allowed for the recovery of contract damages, not relief in tort. Therefore, the arbitration clause "does not constitute an agreement to arbitrate such controversies." *Id.* at 6.

Justice Zwack concluded that all of the claims in the New Jersey action brought against Colonial sounded in contract (despite their designation), so as to be barred by the arbitration agreement. Justice Zwack stayed the New Jersey action as to Colonial. As for the claims brought against Muehlbauer in the New Jersey action, Justice Zwack stayed any

claim which alleged that Muehlbauer "induced [Colonial] to take over exclusive management of claims, or improperly acquiesced in such conduct" (*id.* at 7), but permitted York to continue to pursue its action in New Jersey against Muehlbauer for tortiously inducing Colonial to terminate the Claims Service Agreement. In sum, York was directed to proceed to arbitration, and the New Jersey action was stayed as to all claims against Colonial, and all claims against Muehlbauer, except for the single claim of tortious interference.

II. Motions and Cross Motions

Plaintiff moves for summary judgment against York on what it claims is a simple breach of contract action, based on its unpaid bills, and that it has also established valid claims against York based on accounts stated and quantum meruit. York demurs, claiming that the motion is premature, in that York requires discovery to flesh out its theory that plaintiff, Colonial, and Muehlbauer conspired to replace Pollack with plaintiff.

York, in its cross motion, seeks indemnification from Colonial and Muehlbauer for any damages plaintiff might obtain, based on its theory that these parties were involved in the conspiracy to replace Pollack with plaintiff as Colonial's counsel. As previously noted, York contends that, by means of the conspiracy, Colonial was able to exercise "exclusive control" over the management of its files, and place plaintiff in

Pollack's place, while making it appear that York had authorized the change of attorneys, rather than Colonial. As a result, York would continue to be obligated under the Claims Service Agreement to pay plaintiff's bills. Muehlbauer's reward for participation in the alleged scheme was, presumably, to obtain employment with Colonial.

York contends that there are numerous factual issues unresolved in the main action, and much discovery which must be had as to matters exclusively within the knowledge of the other parties, before there can be any decision regarding plaintiff's claims against York. York maintains that the acts thus far established show the likelihood that, with extensive discovery, it will be able to make a case for conspiracy.

York, in support of a conspiracy theory, sets forth the following timeline. It notes that Pangburn and Muehlbauer became friendly while working together. In January 2006, Pangburn told Muehlbauer that it might be moving its business in-house, and he offered Muehlbauer a job if Colonial ceased using York's services. York alleges that, from then on, Pangburn and Muehlbauer conducted "secret discussions" concerning Muehlbauer's employment. York's Memorandum of Law in Further Support of York's Cross Motion Against Muehlbauer, at 2. Then, in early 2006, Muehlbauer, although he had allegedly approved of Pollack's performance up until that time, began to complain about Pollack's

work, and to excoriate Pollack with "exaggerated and misleading criticism," which is mostly found in his claim file notes (Aff. of Gary Forthoffer at 16).

Plaintiff, in early 2006, was apparently asked by Muehlbauer to review some of the matters which Pollack was handling. Plaintiff allegedly found numerous deficiencies in Pollack's handling of the cases. York finds plaintiff's comments to be "petty and vindictive" (*id.*), and reviews, in some detail, several files in which plaintiff failed to act differently than Pollack had, in order to show that there had never been any real problem with Pollack's work. York here contends that plaintiff, Muehlbauer, and Colonial were setting the stage for plaintiff to step into Pollack's shoes, without revealing to York that Colonial was acting on its own volition, rather than on York's advice, a plan which could only succeed with Muehlbauer's participation. York insists that it will be able to prove these allegations, and more, should it be permitted to proceed with its action.

Muehlbaeur, in his cross motion, notes that he was not a signatory of the Claims Service Agreement, which was executed well before he came to work for York. He maintains that York, in the persons of Forthoffer (York's District Manager for Claims Operations), Peter Lind (York's general counsel), and Nicholas Haluszka (another District Manager for York), made all the

decisions regarding the transfer of all of Colonial's files to plaintiff, and other attorneys. Thus, he claims that he had no part in any injury York may have suffered upon the change of attorneys, and that the third-party action should be dismissed as to him.

Colonial cross-moves for summary judgment dismissing the third-party complaint as to it, based on the purported collateral estoppel effect of the decision rendered by Justice Zwack in the Ulster County proceeding. It also opposes York's cross motion based on the existence of triable issues of fact.

III. Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Kesselman v Lever House Restaurant*, 29 AD3d 302, 303 (1st Dept 2006), quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion's opponent to offer evidentiary facts sufficient to raise a triable issue of fact. *Kesselman*, at 303-304. However, "assertions, unsupported by competent evidence, are, at best, speculative and conclusory and, as such, insufficient to defeat ... summary judgment motions." *Caruso v John Street Fitness Club, LLC*, 34 AD3d 296, 296 (1st Dept 2006);

see also *Kane v Estia Greek Restaurant, Inc.*, 4 AD3d 189 (1st Dept 2004).

A. Plaintiff's Motion for Summary Judgment

York's belief in a conspiracy to oust Pollack and insert plaintiff as counsel for the claims of Colonial's insureds is supported by a complex and imaginative gossamer of conclusory allegations, devoid of evidentiary facts. Although, as York reminds the court, CPLR 3212 (f) may support a denial of a motion for summary judgment "when it appears that facts supporting the position of that party exist but cannot be stated," and where these facts "are exclusively within the knowledge and control of the movant" (*Global Minerals and Metals Corp. v Holme*, 35 AD3d 93, 102-103 [1st Dept 2006]), "[t]o speculate that something might be caught on a fishing expedition provides no basis pursuant to CPLR 3212 (f) to postpone decision on [a] summary judgment motion [internal quotation marks and citations omitted]." *Orange County-Poughkeepsie Limited Partnership v Bonte*, 37 AD3d 684, 687 (2d Dept 2007). In asking this court to forestall summary judgment against York based on the elaborate web of suspicion it has woven, York is proposing such a fishing expedition, without providing real evidence which might suggest something to discover.

In any event, even assuming that York could produce some evidence of the conspiracy between plaintiff, Muelbauer and

Colonial, the evidence indicates that Muelbauer was not the individual at York who ultimately approved the replacement of Pollack and the selection of plaintiff. As noted, York's theory is dependant on the finding that it did not exercise "exclusive management" over Colonial's claims, which includes the right to select or replace counsel. York's General Counsel, Peter E. Lind, submits an affidavit acknowledging that he approved the replacement of Pollack because Muelbauer (a non-attorney) criticized the quality of Pollack's work. Aff. of Peter E. Lind at 5. Although Lind claims that he would not have agreed to replace Pollack had he known about discussions between Muelbauer and Pangburn regarding terminating the Claims Service Agreement and Muelbauer's potential employment, he nonetheless approved the replacement of Pollack. Forthoffer, Muehlbauer's supervisor, also acknowledges that he was involved with the approval of the replacement of Pollack, but complains that he "was mislead by Mr. Muelbauer into going along with his insistence that Pollack should be replaced." Aff. of Gary Forthoffer at 5-6, 15.

Accordingly, plaintiff has made a prima facie showing that York breached its obligation to pay plaintiff for the unpaid invoices and York has failed to offer evidentiary facts sufficient to raise a question of fact as to why it is not liable. Therefore, plaintiff is entitled to summary judgment on

its cause of action for breach of contract.

Plaintiff is also entitled to summary judgment on its cause of action for an account stated. "An account stated exists where a party to a contract receives bills or invoices and does not protest within a reasonable time." *Bartning v Bartning*, 16 AD3d 249, 250 (1st Dept 2005); see also *Federal Express Corporation v Federal Jeans, Inc.*, 14 AD3d 424 (1st Dept 2005).

On September 18, 2006, plaintiff received faxed letters from York, dated September 14, 2006, pertaining to each of the cases which plaintiff was handling for Colonial. In the faxes, York informed plaintiff that York would no longer be responsible for paying plaintiff's bills, which would henceforth be the obligation of Colonial. Affirm. of Nicoletti, Ex. F. In the letter, York states that, due to Colonial's exercise of "exclusive management" of each file, "York would not be further involved in this matter." *Id.* at 1. The letter concludes that "from your receipt of this letter onward," plaintiff would have to look to Colonial for payment of its fees. *Id.*

Plaintiff is seeking payment for the September and October bills sent to York, for services rendered prior to September 15, 2006, the date when York claimed it would no longer be responsible for Colonial's bills "onward." York said nothing in its termination letter about refusing to pay for work concluded prior to the agreement's termination, and there is no evidence

that any objection to these invoices was made after receipt. As such, plaintiff is also granted summary judgment on a theory of account stated.

Plaintiff cannot, however, succeed on its cause of action based on quantum meruit. "[T]he existence of a valid and enforceable contract governing a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same subject matter [internal quotation marks and citation omitted]." *IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 404-405 (1st Dept 2007); see also *Zito v Fischbein, Badillo, Wagner & Harding*, 35 AD3d 306 (1st Dept 2006). Because there is a valid contract between York and plaintiff, quantum meruit is not a viable vehicle for recovery.

B. Colonial's Cross Motion for Summary Judgment and Sanctions

Colonial moves for summary judgment dismissing the third-party complaint as to it, based on the alleged collateral estoppel effect of the February Decision. "The equitable doctrine of collateral estoppel is 'intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it.'" *Matter of Juan C. v Cortines*, 89 NY2d 659, 667 (1997), quoting *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 (1985); see also *Landau, P.C. v LaRossa, Mitchell & Ross*, 41 AD3d

371 (1st Dept 2007). Collateral estoppel will apply to bar a subsequent action when the identical issue was decided in the prior action, and be decisive of the subsequent action, and where the party to be estopped had a full and fair opportunity to contest the prior determination. *Matter of Juan C. v Cortines*, 89 NY2d 659, *supra*.

In the February Decision, Justice Zwack held that all of the claims brought by York against Colonial and Muehlbauer, excepting a single claim against Muehlbauer, had to be arbitrated, requiring the stay of the New Jersey action, with the exception of the one claim. York has interpreted the February Decision so as to deny Colonial and Muehlbauer's application that York be precluded from commencing any further civil actions based on the same claims raised in the New Jersey action, such as the present third-party action.

In a decision dated July 24, 2007 (the July Decision), Justice Zwack addressed two new motions brought by Colonial: a motion enjoining York to discontinue the third-party actions pending in Supreme Court, Westchester County (an action brought by another law firm), and in the present action³, and moved to renew its application enjoining York from commencing any civil

³Colonial also moved to find York in contempt of the February Decision, while York cross-moved for an order requiring Colonial to discontinue its request for sanctions in the present action.

actions against Colonial and Meuhlbauer, and enjoining York to submit any disputes to arbitration in Kingston. York cross-moved to stay the arbitration pending its appeal of the February Decision.

In the July Decision, Justice Zwack explained certain holdings in his prior decision. Justice Zwack upheld York's interpretation of the February Decision, stating that "the plain wording of the Court's February 5, 2007 Decision and Judgment" did not preclude York's bringing of third-party actions based on the Claims Service Agreement in other venues. July Decision, at 3. He proceeded to say that:

[w]hile [Colonial] had sought to enjoin [York] from prosecuting any civil actions against [Colonial and Muehlbauer] relating to the Claims Service Agreement entered into between the parties and to enjoin respondent to submit any dispute against [Colonial and Muehlbauer] to arbitration in Kingston, New York, this Court did not grant such broad relief in its [February] Decision and Order. This Court therefore declines to direct [York] to discontinue the third-party actions, or any motions contained therein, as requested by [Colonial].

Id. at 4.

Because the July decision was rendered after this motion was fully submitted, and no party has had the opportunity to address that decision, this court declines to reach the issue of collateral estoppel, absent further briefs. However, further briefs are unnecessary because this action can be disposed of other grounds.

Colonial is entitled to summary judgment dismissing the third-party complaint because York has failed to produce evidence which might raise a question of fact as to any alleged wrongdoing on the part of Colonial, and even if York did, York has not established that it would be entitled to common law indemnification based on the Claims Service Agreement. Common-law indemnification "permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party." *Tiffany At Westbury Condominium v Marelli Development Corp.*, 40 AD3d 1071, 1077 (2d Dept 2007). Because there is no evidence that Colonial is a wrongdoer, it cannot be held liable to York based on indemnification. Further, as previously noted, the evidence indicates that Muelbauer was not the individual at York who ultimately approved the replacement of Pollack and the selection of plaintiff. Accordingly, York cannot succeed on its argument that Colonial exercised "exclusive management" over the claim files through the acts of Muelbauer, however allegedly disloyal. That part of Colonial's cross motion seeking sanctions is denied.

C. Muehlbauer's Cross Motion for Summary Judgment

Muehlbauer, in his cross motion, seeks to have the third-party action dismissed as to him, based on law of the case, prior action pending (CPLR 3211 [a] [4]) and failure to state a cause of action (CPLR 3211 [a] [7]).

Muehlbauer cannot rely on the doctrine of law of the case as a ground for dismissal. "The law of the case doctrine is part of a larger family of kindred concepts, which includes *res judicata* (claim preclusion) and collateral estoppel (issue preclusion). These doctrines, broadly speaking, are designed to limit relitigation of issues." *People v Evans*, 94 NY2d 499, 502 (2000). "The doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined in an earlier stage of the proceeding." *Brownrigg v New York City Housing Authority*, 29 AD3d 721, 722 (2d Dept 2006). It "applies only to legal determinations that were necessarily resolved on the merits in the prior decision [citation omitted]." *D'Amato v Access Manufacturing, Inc.*, 305 AD2d 447, 448 (2d Dept 2003).

As seen from the cases cited above, the doctrine of law of the case does not apply to decisions made in other venues. The preclusion of issues or claims made in similar or related proceedings would fall under the heading of collateral estoppel or *res judicata*. Law of the case, on the other hand, applies to decisions made "in an earlier stage" of the same proceeding in which the issue was decided. Therefore, Muehlbauer cannot rely on the holdings of the Ulster County proceeding to influence the present action under the doctrine of law of the case.

Muehlbauer also argues that the New Jersey action (which is

currently stayed) is a prior pending action, pursuant to CLPR 3211 (a) (4), requiring the dismissal of the present third-party action. An action may be dismissed under CPLR 3211 (a) (4) where the prior pending action involves the same parties and seeks the same or substantially the same relief. *Liebert v TIAA-CREF*, 34 AD3d 756 (2d Dept 2006); *White Light Productions, Inc. v On The Scene Productions, Inc.*, 231 AD2d 90 (1st Dept 1997). In the New Jersey action, York based its claim for damages on the same allegations of conspiracy upon which the present action is based, but York did not request damages based on indemnification. At that time, plaintiff had not yet brought an action against York, and indemnification was not an issue.

The court need not decide whether the actions seek "substantially the same relief" because Muehlbauer's cross motion to dismiss is granted pursuant to CLPR 3211 [a] [7]. York has not come forward with evidence supporting its conspiracy theory, or evidence suggesting that further discovery would lead to relevant evidence supporting such a theory, which would entitle York to indemnification for legal fees paid. Even if such evidence was produced, the evidence indicates that Muehlbauer was not the individual at York who ultimately approved the replacement of Pollack and the selection of plaintiff. Accordingly, York cannot succeed on its argument that Colonial exercised "exclusive management" over the claim files through the

acts of Muelbauer, however allegedly disloyal, which forms the basis for York's claim that it is entitled to indemnification from Muelbauer for payment of plaintiff's legal fees.

D. York's Cross Motion for Summary Judgment

In light of the foregoing discussion, it is manifest that York's cross motion for summary judgment must fail.

E. York's Motion for Leave to Supplement the Record

York's recent application to "supplement" the record to include even more documentary proof of the alleged conspiracy is denied. CPLR 2214 permits the inclusion of further evidentiary material in a already-submitted motion "if the court for good cause shown shall otherwise direct." CPLR 2124 (d). York's excuse for failing to present its new evidence earlier is that it has been required to search through an immense number of documents to retrieve the material which, it claims, will bolster its conspiracy theory.

York's excuse does not amount to "good cause shown." York has been in possession of the documents for eight months, and has waited four months after the submission of the motion to make its proffer of new evidence. York should have produced this evidence earlier, and had sufficient time to do so.⁴

⁴This court also finds that York's submissions, along with its explanation of their import, amount to a sur-reply, which this court declines to accept. See *Pinkow v Herfield*, 264 AD2d 356, 357 (1st Dept 1999) ("[t]his Court has consistently refused to protract summary judgment motion practice beyond the papers

In any event, for the reasons stated above, the court's decision would not be effected even if the documents with which York seeks to supplement the record actually evidenced a conspiracy between plaintiff, Muelbauer and Colonial.

Accordingly, it is

ORDERED that plaintiff Nicoletti Gonson Spinner & Owen LLP's (f/k/a Nicoletti Gonson & Spinner LLP) motion for summary judgment on its complaint (mot. seq. no. 001) is granted in favor of plaintiff and against defendant York Claims Service Inc. in the amount of \$53,943.48, from the invoice of September 8, 2006, and \$88,157.57, from the invoices of October 4 and 5, 2006, for a total of \$142,101.15, together with interest at the rate of 9% per annum from the above dates, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendant York's cross motion for summary judgment, or partial summary judgment, against third-party defendants Colonial Cooperative Insurance Company and Stephan Muehlbauer, in York's third-party action for indemnification, is denied; and it is further

ORDERED that Stephan Muehlbauer's cross motion for summary

specified in CPLR 2214 [b]"); see also *Traders Company v AST Sportswear, Inc.*, 31 AD3d 276 (1st Dept 2006).

judgment dismissing the third-party complaint as to him is granted; and it is further

ORDERED that the third-party complaint is dismissed as to Stephan Muehlbauer, with costs and disbursements to this third-party defendant as taxed by the Clerk of the Court; and it is further

ORDERED that Colonial Cooperative Insurance Company's cross motion for summary judgment dismissing the third-party complaint as to it, and for sanctions, is granted as to dismissal of the third-party complaint, and denied as to sanctions; and it is further

ORDERED that the third-party complaint is dismissed as to Colonial Cooperative Insurance Company, with costs and disbursements to this third-party defendant, as taxed by the Clerk of the Court; and it is further

ORDERED that York's motion to enlarge the record (mot. seq. no. 003) is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This Constitutes the Decision and Order of the Court.

Dated: October 4, 2007

FILED
ENTER:
OCT 18 2007
NEW YORK
COUNTY CLERK'S OFFICE


EMILY JANE GOODMAN