

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

2008 NY Slip Op 32148(U)

July 24, 2008

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

Justice

Index Number : 604180/2006

NICOLETTI GONSON SPINNER

vs

YORK CLAIMS SERVICE

Sequence Number : 005

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

Is 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

per attached is decided

FILED
JUL 31 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/24/08

EJG
EMILY JANE GOODMAN J.S.C.

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):

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-Party Defendants.

-----X
Emily Jane Goodman, J.S.C.:

FILED
JUL 31 2008
COUNTY CLERK'S OFFICE
NEW YORK

The motion to renew/reargue, made by Defendant/Third Party Plaintiff York Claim's Service, Inc. (York), is denied. A motion to reargue was already denied by Decision and Order, dated July 10, 2008. York's efforts to advocate its position, rejected by this Court, has been relentless. The Memorandum in support of the motion is 102 pages, despite Uniform Rule 14's limit of 30 pages, and is rejected. In this history of this litigation, York attempted to "supplement the record" of its summary judgment motion, which was denied in a 25 page Decision and Order, dated October 4, 2007 (that decision disposed of all issues in the

action). York then moved to reargue the October, 4, 2007 decision, which was denied by Decision and Order, dated July 10, 2008. York also separately moved to reargue/renew the Decision and Order, dated October 4, 2007, in this motion. As Third-Party Defendants Colonial Cooperative Insurance Company and Stephen Muehlbauer point out, York has litigated the issues raised in the third party action in five courts, in two states. Moreover, as Third-Party Defendants point out, York chose to pursue to third party action here, while simultaneously pursuing overlapping claims in arbitration. Thus, as noted in the Court's prior Decision and Order, dated July 10, 2008, the fact that nearly seven months later, an arbitrator made a determination contrary to this Court's, has no bearing on this Court's decision. Although York cites evidence from the arbitration hearing in support of renewal, York cannot collaterally attack a decision of this Court, made after careful consideration, based on the facts and law as presented to it. For instance, in its 102 page memorandum of law (which, as stated above, is rejected), York characterizes an affidavit submitted to this Court by Third Party Defendant Muehlbauer as "false" and filled with "yet another bold face lie" because Muehlbauer "conceded" at the arbitration that he had input in retaining Pollack, while his affidavit stated that the decision to "retain Pollack and then to transfer Pollack's CCIC cases 'were made solely and exclusively by'

Forthoffer, Lind and Haluszka."

York seems to have forgotten that this Court's Decision and Order, dated October 4, 2007, stated the following:

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 misled by Mr. Muelbauer into going along with his insistence that Pollack should be replaced." Aff. of Gary Forthoffer at 5-6, 15.

Accordingly, even if, based on the arbitration testimony, the Court would consider Third Party Defendant Muehlbauer's affidavit as "false" in that regard (which it does not), such testimony would not alter the Court's determination given that York's theory is dependant on this Court ignoring Muehlbauer's supervisor's approval of Pollack's replacement--and especially--York General Counsel's approval of Pollack's replacement, due to the quality of Pollack's work, presumably something General Counsel would be in a better position to determine than Muehlbauer, a non-attorney.

It is hereby

ORDERED that the 102 page memorandum of law in support of the motion is rejected as it is in violation of Rule 14; and it is further

ORDERED that the motion to reargue/renew is denied.

This Constitutes the Decision and Order of the Court.

Dated: July 24, 2008

ENTER:



**J.S.C.
EMILY JANE GOODMAN**

FILED
JUL 31 2008
COUNTY CLERK'S OFFICE
NEW YORK