

**Inter-Reco, Inc. v SRC Constr. Corp. of Monroe**

2009 NY Slip Op 32934(U)

November 5, 2009

Supreme Court, Nassau County

Docket Number: 19788/05

Judge: F. Dana Winslow

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**INTER-RECO, INC., as agent for the  
Sirius America Insurance Company,**

**TRIAL/IAS, PART 6  
NASSAU COUNTY**

**Plaintiffs,**

**-against-**

**MOTION SEQ. NO.: 002  
MOTION DATE: 8/27/09**

**SRC CONSTRUCTION CORP. OF MONROE,**

**INDEX NO.: 19788/05**

**Defendants.**

**The following papers having been read on the motion (numbered 1-3):**

**Notice of Motion.....1**  
**Notice of Cross Motion.....2**  
**Reply Affirmation.....3**

Defendant, SRC Construction Corp. of Monroe ("SRC"), moves for an Order of this Court, pursuant to CPLR 2221(e), to renew plaintiff, Inter-Reco's prior motion which resulted in this Court's Decision and Order dated March 31, 2009 on the grounds that there is new proof, which was not previously available to the defendant and which directly contradicts the language of this Court's decision and raises an additional issue of fact.

Plaintiff, Inter-Reco, Inc., as agent for the Sirius America Insurance Company ("Inter-Reco"), also moves, for an Order of this Court, pursuant to CPLR 2221(a), to renew and reargue it's motion which resulted in this Court's Order of March 31, 2009, and upon such renewal and/or reargument, modifying this Court's decision by granting it summary judgment in this action.

This action is for an outstanding audit premium. This Court, in its prior

Order dated March 31, 2009, found that while plaintiff, Inter Reco had established by conclusive proof that defendant owed the plaintiff the amount of \$324,138.00, an amount established by its audit, it had failed to establish, as required by statute, service of the audit upon the defendant, and solely upon these grounds, denied the plaintiff summary judgment relief. Upon the instant applications, both parties seek to renew and/or reargue Inter-Reco's prior motion.

Defendant, SRC, in moving to renew this Court's prior Order, specifically seeks to modify the Court's Order by removing language that the plaintiff submitted ample evidence to demonstrate its entitlement to \$324,138.00 plus interest and instead substituting that amount for the exact amount of the money due and owing to Inter-Reco, to wit, \$251,593.00. Previously, plaintiff moved for summary judgment for the exact amount contained in the audit endorsement, \$324,138.00. (This is the amount referred to in the Order with Notice of Entry.) In opposing plaintiff's motion, defendant, produced the affidavit of its president, with a list of employees and their positions with the company. This was the only objection raised to the audit. Plaintiff, then submitted the reply affidavit of its auditor, Jeff Markowitz wherein Markowitz accepted the information provided by the SRC's President to be true and accurate and accordingly revised the numbers to reflect that the exact amount of money due and owing to Inter-Reco is \$251,593.00. Therefore, although plaintiff opposes defendant's instant motion for renewal, plaintiff agrees that the amount be amended to provide that plaintiff has proved by prima facie evidence that the amount due and owing to it is \$251,593.00.

Pursuant to CPLR 2221(e):

A motion for leave to renew: (1) shall be identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a

change in the law that would change the prior determination; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion (*515 Ave. I Corp. v. 515 Ave. I Tenants Corp.*, 44 AD3d 707 [2<sup>nd</sup> Dept. 2007]; *Veitsman v. G & M Ambulette Serv., Inc.*, 35 AD3d 848 [2<sup>nd</sup> Dept. 2006]).

It is not sufficient that new facts merely be presented to the Court. Specifically, the movant must demonstrate why facts known at the time of the original motion were not then presented to the Court (*Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle, Inc.*, 271 AD2d 636 [2<sup>nd</sup> Dept. 2000]). Indeed, “[a] motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (*Lardo v. Rivlab Transportation. Corp.*, 46 AD3d 759 [2<sup>nd</sup> Dept. 2007]). However, where the facts could not be known at the time of the original motion, or a reasonable justification is given for non-disclosure, the court may properly grant leave to renew (*Lafferty v. Eklecco, LLC*, 34 AD3d 754 [2<sup>nd</sup> Dept. 2006]).

With these guidelines in mind, defendant, SRC’s motion for renewal is **granted** and upon renewal the language of this Court’s prior Order is revised to reflect that the correct amount due and owing to the plaintiff by the defendant is \$251,593.00.

Plaintiff’s application to renew and reargue it’s prior motion is also **granted**.

Pursuant to CPLR 2221(f):

A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the

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determination on the original motion or may alter that determination.

The standards for a motion to renew are stated above. As to the standards for review on a motion to reargue, pursuant to CPLR 2221(d):

A motion for leave to reargue: (1) shall be identified specifically as such; (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and (3) shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry (*Cruz v. Masada Auto Sales, Ltd.*, 41 AD3d 417 [2<sup>nd</sup> Dept. 2007]); *Pryor v. Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2<sup>nd</sup> Dept. 2005]).

Reargument will not be made available if the movant seeks to argue “a new theory of liability not previously advanced” (*Frisenda v. X Large Enterprises*, 280 AD2d 514, 515 [2<sup>nd</sup> Dept. 2001]). Instead, the movant must demonstrate the matters of fact or law that he believes the court has misapprehended or overlooked (*Hoffmann v. Debello-Teheny*, 27 AD3d 743 [2<sup>nd</sup> Dept. 2006]). Absent a showing of misapprehension or the overlooking of a fact, the court must deny the motion (*Barrett v. Jeannot*, 18 AD3d 679 [2<sup>nd</sup> Dept. 2005]).

Plaintiff’s motion to reargue is made on the basis that this Court overlooked or misapprehended the affidavit of Patrick Conklin, the Executive Vice President and Underwriting Manager of Inter-Reco, wherein he states that notice was given to the defendant on at least three different occasions, September 7, 2004, November 12, 2004 and December 1, 2004. In light of the fact that plaintiff annexes a copy of Conklin’s affidavit, together with a copy of the letters providing the requisite notice (*Government Employees Ins. Co. v. Nolan*, 212 AD2d 531 [2<sup>nd</sup>

[\* 5]  
Dept. 1995]), and further, in light of the fact that counsel for plaintiff provides letters that he issued and sent to the insured/defendant dated March 13, 2005 and April 8, 2005 also advising the defendant of the amount due and owing, this Court herewith **grants** plaintiff's application to reargue Inter-Reco's prior motion.

Furthermore, in light of this Court's previous determination that plaintiff had established by prima facie evidence, arising from the terms of the policy and the conducting of an audit, that there is an audit premium due and owing to the plaintiff (*Family Codings, Inc. v. Michigan Mutual Ins. Co.*, 170 AD2d 816 [3<sup>rd</sup> Dept. 1991]), upon renewal and reargument, plaintiff's prior motion for summary judgment is also **granted**.

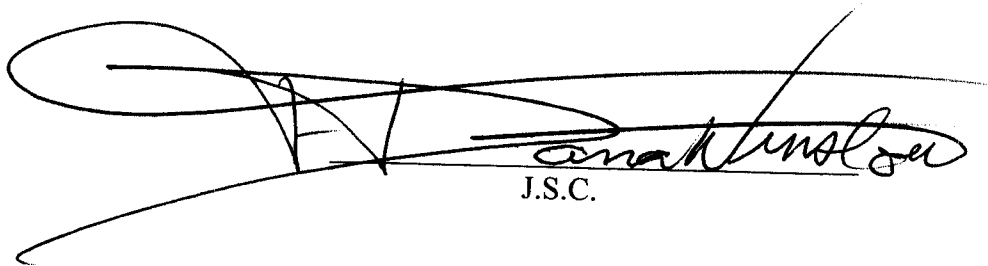
Settle Judgment on Notice.

This Constitutes the Order of the Court.

Dated:

NOV 5, 2009

ENTER:

  
J.S.C.

**ENTERED**  
DEC 07 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE