

<b>Kerrigan v TDX Constr. Corp.</b>
2010 NY Slip Op 32706(U)
September 21, 2010
Supreme Court, New York County
Docket Number: 109042/04
Judge: Paul Wooten
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: HON. PAUL WOOTEN**  
*Justice*

**PART 7**

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ELIZABETH FRANCES KERRIGAN, as  
Executrix of the Estate of THOMAS CONNELLY,  
deceased,

Plaintiff,

-against-

INDEX NUMBER 109042/04  
Motion Sequence 018  
**DECISION & ORDER**

TDX CONSTRUCTION CORP., JEM ERECTORS,  
BAY CRANE SERVICE, INC., BAY CRANE  
SERVICE OF LONG ISLAND, INC., KOENIG  
IRON WORKS, INC. and THE TRUSTEES OF  
COLUMBIA UNIVERSITY IN THE CITY OF  
NEW YORK,

Defendants.

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JEM ERECTORS, INC.,  
Third-Party Plaintiff,

-against-

Third-Party Index No. 591138/04

ERIN ERECTORS, INC.,  
Third-Party Defendant.

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TDX CONSTRUCTION CORPORATION and  
THE TRUSTEES OF COLUMBIA UNIVERSITY  
IN THE CITY OF NEW YORK,

Fourth-Party Plaintiffs,

-against-

Fourth-Party Index No.  
590316/05

BETON PREFABRIQUES duLac, INC. and ERIN  
ERECTORS, INC.,

Fourth-Party Defendants.

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TDX CONSTRUCTION CORPORATION and

THE TRUSTEES OF COLUMBIA UNIVERSITY  
IN THE CITY OF NEW YORK,  
Fifth-Party Plaintiffs,

-against-

Fifth-Party Index No. 590317/05

ELIZABETH FRANCES KERRIGAN, as  
Executrix of the Estate of THOMAS CONNELLY,  
deceased,  
Fifth-Party Defendant.

JEM ERECTORS, INC.,  
Sixth-Party Plaintiff,

-against-

Sixth-Party Index No. 590170/06

ERIN INTERIORS, INC.,  
Sixth-Party Defendant.

ELIZABETH FRANCES KERRIGAN, as  
Executrix of the Estate of THOMAS CONNELLY,  
deceased,  
Seventh-Party Plaintiff,

-against-

Seventh-Party Index No.  
590112/06

GENIE INDUSTRIES, UNITED RENTALS and  
TOTAL SAFETY CONSULTING, LLC,  
Seventh-Party Defendants.

The following papers, numbered 1 to 2 were read on this motion by plaintiff(s) for an order to disqualify her counsel as fifth-party defendant and seventh-party plaintiff, and permit her to retain counsel of her choosing.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo) _____	_____
Replying Affidavits (Reply Memo) _____	_____

Cross-Motion:  Yes  No

Plaintiff Elizabeth Frances Kerrigan (Kerrigan), as Executrix of the Estate of Thomas Connelly (the Estate), deceased, her husband, moves by order to show cause to disqualify the law firm of Litchfield Cavo, LLP (Litchfield), as her counsel as fifth-party defendant and seventh-party plaintiff, permit her to retain counsel of her choosing, direct Admiral Insurance Company (Admiral), insurance carrier for the Estate of Thomas Connelly, to pay legal fees and expenses of new counsel, and direct Litchfield to turn over the file to new counsel. Litchfield opposes. The court issued a temporary restraining order, on March 22, 2010, staying this action pending determination of this application.

Decedent Connelly died on July 2, 2002 at a job site at 1130 St. Nicholas Avenue, New York County, owned by the Trustees of Columbia University in the City of New York, when he was allegedly struck by a load being hoisted by a crane. TDX Construction Corp. was the general contractor on the project, which involved, as subcontractors, among others, Jem Erectors, Inc., Bay Crane Service, Inc. and/or Bay Crane Service of Long Island, Inc., Koenig Iron Works, Inc., Erin Erectors, Inc. (Erin), and Beton Prefabriques duLac, Inc. Connelly, a sole proprietor was engaged by Erin to work on the project. The underlying complaint seeks to recover for personal injuries and wrongful death allegedly due to violations of Labor Law §§ 200, 240(1) and 241(6), and negligence.

There are other, related but severed, actions involving insurers and brokers to various parties to the events,<sup>1</sup> including *Kerrigan v RM Associates, Inc.*, New York County Index No. 100316/08, wherein plaintiff sought a declaratory judgment that the Estate was covered by an excess insurance policy issued to Erin by Westchester Fire Insurance Company (Westchester). Although decedent was unnamed in the Westchester policy, the Appellate Division, First Department, held that he was an additional insured, because he was named as an additional

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<sup>1</sup>Some of these other actions were originally interleaved with the actions in the caption above; others were severed from the actions in the caption above. This results in references in the papers to fifth, sixth or seventh-party actions which do not always correspond to the current caption.

insured in the underlying commercial general liability insurance policy, effective January 13, 2002 until January 13, 2003, that Admiral issued to Erin (Exhibit A attached to Order to Show Cause). *Kerrigan v RM Associates, Inc.*, 68 AD3d 659 (1<sup>st</sup> Dept 2009) (the *RM* action). Admiral assumed defense of the Estate in the instant fifth-party action, appointing Litchfield as counsel. Litchfield is also counsel to Admiral as defendant in one or more of the severed actions.

Plaintiff argues that Litchfield's dual role is a conflict of interest. Specifically, Admiral, by Litchfield, filed a notice of motion in the Appellate Division for leave to appear, amicus curiae, in the *RM* action, in order to make submissions in support of defendants-respondents' motion to reargue the court's decision. Exhibit B attached to Order to Show Cause. Admiral asked to intervene, because its policy with Erin underlies the Westchester policy for excess coverage. Admiral asserted that Thomas Connelly, as an individual, was the additional insured under its policy to Erin, not "Thomas Connelly the sole proprietorship." Yet, Admiral claimed that it is Connelly the sole proprietorship that has defense and indemnification obligations in the *RM* action, which should not be Admiral's concern. It is defending the Estate under a reservation of rights, because the ultimate issue of coverage, it stated, rests on "a determination of the nature of the 'Thomas Connelly' insured." Affirmation in Connection with Admiral motion ¶ 8.

Plaintiff maintains that Litchfield's representation of Admiral in Admiral's attempt to deny coverage to the Estate is in conflict with the best interests of the Estate, Litchfield's client as well. This might have been sufficient to disqualify Litchfield. *See City of New York v Clarendon Natl. Ins. Co.* (309 AD2d 779 [2d Dept 2003]) ("It is well settled that where a conflict of interest is probable, such as here, where the insurer has conditioned its defense on a reservation of rights, the insured is entitled to an attorney of its own choosing"). However, Admiral, in its opposition to the instant motion, states that it has dropped the coverage defense in the *RM* action, and has informed plaintiff, in a letter dated April 6, 2010 (Exhibit A attached to Affirmation in Opposition), that it is prepared to proceed without reservation in both defending

the Estate and prosecuting its affirmative claims. By removing any conflict, Admiral maintains that it is free to use Litchfield going forward, citing *American Home Assur. Co. v Weissman* (79 AD2d 923, 923 [1st Dept 1981]):

"[Where the court has resolved a dispute about coverage between plaintiff-insurer and defendant-insured, the court] do[es] not mean to intimate that defendant is now free to select his own counsel and charge the expense thereof to plaintiff. Plaintiff is still entitled to control the defense of the action, including the selection of counsel provided that the defense is pursued in good faith and without any endeavor to demonstrate that the policy issued by plaintiff does not afford coverage to the claim [asserted against defendant in the underlying action]."

With the grounds for asserting a conflict eliminated, plaintiff's motion to disqualify Litchfield is denied.

However, another, more complex, conflict issue arises from plaintiff's reply, which states, apparently for the first time in this motion sequence, "Erin Erectors, Inc., is wholly owned by the plaintiff [Elizabeth] Frances Kerrigan." Reply Affirmation ¶ 6. Plaintiff correctly observes that Litchfield, in the fifth-party action,<sup>2</sup> is defending plaintiff as representative of the Estate, and has asserted cross claims against Erin in the answer to the complaint (Exhibit H attached to Order to Show Cause). Plaintiff argues that "the Litchfield firm seeks to damage the plaintiff, by casting her company, Erin Erectors, Inc., another Admiral insured, in blame." Reply Affirmation ¶ 8. While this is apparently true, it may not necessarily illustrate a conflict for Litchfield, but, rather, a conflict for Kerrigan, posing her role as legal representative and likely beneficiary of the Estate versus her role as sole owner of Erin, the company that received violations from OSHA as a result of the accident.

"The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." *Dannasch v Bifulco*, 184 AD2d 415, 417 (1st Dept

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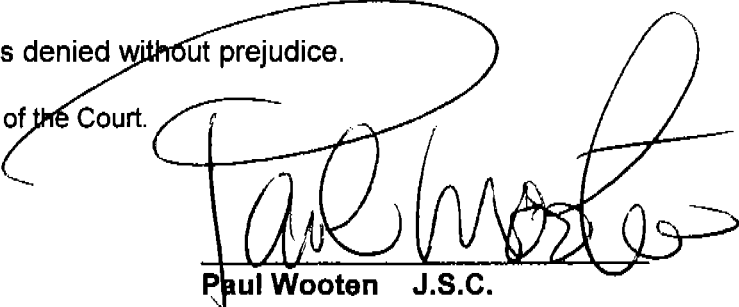
<sup>2</sup>When filed, it was the sixth-party action.

1992). Therefore, the court will not consider the implications of plaintiff's ownership of Erin in this motion. *Serradilla v Lords Corp.*, 50 AD3d 345, 346 (1st Dept 2008) ("The City's challenges to plaintiffs' fifth and sixth causes of action . . . were improperly raised for the first time in the City's reply papers, and we decline to consider them"). However, plaintiff's motion to disqualify Litchfield is denied without prejudice, thus permitting plaintiff to renew her motion if appropriate, or any other party to bring a new motion, in light of this newly-raised fact.

Accordingly, it is

ORDERED that plaintiff's motion to disqualify Litchfield as her counsel as fifth-party defendant and seventh-party plaintiff is denied without prejudice.

This constitutes the Decision and Order of the Court.



Paul Wooten J.S.C.

Dated: September 21, 2010

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

**FILED**  
SEP 30 2010  
NEW YORK  
COUNTY CLERK'S OFFICE