

<b>Ricciardi v Bernard Janowitz Constr. Corp.</b>
2011 NY Slip Op 33815(U)
June 2, 2011
Sup Ct, Queens County
Docket Number: 15466/03
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 6

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CHRISTOPHER RICCIARDI and MARIA  
RICCIARDI,  
Plaintiffs,

Index No. 15466/03  
Motion  
Date March 1, 2011

-against-

BERNARD JANOWITZ CONSTRUCTION CORP.,  
et al.,  
Defendants.

Motion  
Cal. No. 32

Motion  
Sequence No. 10

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BERNARD JANOWITZ CONSTRUCTION CORP.,  
Third-Party Plaintiff,

-against-

JME FIRE SPRINKLER CORP.,  
Third-Party Defendant.

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WJ HARBOR RIDGE, LLC,  
Second Third-Party Plaintiff,

-against-

ME FIRE SPRINKLER CORP.,  
Second Third-Party Defendant.

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WJ HARBOR RIDGE, LLC,  
Third Third-Party Plaintiff,

-against-

ALL ISLAND CLEANING,  
Third Third-Party Defendant.  
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PAPERS  
NUMBERED

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Upon the foregoing papers it is ordered that the branch of the motion by defendant/third-party plaintiff, Bernard Janowitz Construction Corp. ("Janowitz") for an order pursuant to CPLR 2221 granting reargument of the motion for attorney's fees by second third-party plaintiff/third-third party plaintiff, WJ Harbor Ridge, LLC ("Harbor Ridge") as well as reargument of the moving defendant's prior cross motion to assess any attorney's fees awarded in this matter to the third-party defendant/second third-party defendant, JME Fire Sprinkler Corp. ("JME") is granted.

Upon reargument, that branch of Janowitz's motion for an order denying Harbor Ridge's motion for attorneys fees is hereby denied.

In a decision and order dated November 22, 2010, this Court granted Harbor Ridge's motion for attorney's fees. Janowitz and JME maintain that because Harbor Ridge failed to tender its defense during the course of the litigation, and instead presented Janowitz and JME with a substantial bill several months after the trial, its motion for attorney's fees should have been denied based on the doctrine of equitable estoppel and laches. Janowitz and JME maintain that Harbor Ridge sat on its right to a legal defense from Janowitz and/or JME and only sought to enforce its right to a legal defense after the case had been tried and settled, and because neither Janowitz nor JME had the right to appoint counsel of their choosing to defend Harbor Ridge or to present a joint defense, and thus limit their eventual exposure for defense costs, they were prejudiced. Janowitz and JME further maintain that while Harbor Ridge claims that Janowitz and JME had a duty to defend Harbor Ridge in the underlying action, Harbor Ridge never asked to be defended in the underlying action and absent a request for a defense, there can be no duty to defend.

It is well-established law that the doctrine of equitable estoppel can only be invoked "where a [party] acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice", and the doctrine "is to be invoked sparingly and only under exceptional circumstances" (*LoCicero v. Metropolitan Transportation Authority*, 288 AD2d 353 [2d Dept 2001][citations omitted]). "Only a showing of fraud, misrepresentation, deception, or similar affirmative misconduct, along with reasonable reliance thereon, will justify the imposition of estoppel" (*Yassin v. Sarabu*, 284 AD2d 531 [2d Dept 2001][citations omitted]). Laches is defined as an equitable bar, "based on a lengthy neglect or omission to assert a right

and the resulting prejudice to an adverse party" (*Saratoga County Chamber of Commerce v. Pataki*, 100 NY2d 801 [NY 2003]).

Harbor Ridge maintains that the tendering of a defense had nothing to do with the right Harbor Ridge earned through its indemnification cause of action. Harbor Ridge maintains that motion practice commenced in which it sought contractual indemnification against Janowitz. By order of Justice Rosengarten dated November 27, 2006, Harbor Ridge was granted conditional summary judgment against Janowitz pending the outcome of any finding of negligence on the part of Janowitz. Harbor Ridge maintains that summary judgment would not accrue until and only if Janowitz was found to be negligent at the trial of this matter, and so it is misplaced for Janowitz to argue that Harbor Ridge should have tendered their defense before summary judgment actually accrued to them.

The Court finds Janowitz and JME's argument that they were prejudiced because Harbor Ridge failed to tender its defense during the course of the litigation to be unavailing. Janowitz and JME were on notice of Harbor Ridge's request to be defended via the summary judgment motion brought by Harbor Ridge in 2006 seeking, *inter alia*, contractual indemnification against Janowitz, which motion was vigorously opposed by Janowitz and JME. As such, Janowitz and JME cannot now claim that they were not on notice of a request by Harbor Ridge to be defended.

Accordingly, that branch of Janowitz's motion for an order denying Harbor Ridge's motion for attorneys fees is hereby denied.

Upon reargument, that branch of Janowitz's motion for an order granting the cross motion to assign those fees to JME is hereby denied.

Janowitz maintains that because JME contractually promised to defend and indemnify Harbor Ridge and Janowitz and to purchase insurance for the benefit of JME and Janowitz, JME has the primary duty to pay Harbor Ridge's legal defense costs. The Court previously found that Janowitz was seeking summary judgment on a claim not raised in the third-party complaint. Janowitz contends that it did indeed assert a cause of action against JME in the third-party complaint based on its breach of a contractual duty to procure insurance.

The Court adheres to its original decision on the cross motion as the third-party complaint fails to make any claims as against JME's insurance carrier, Ace Westchester, and in effect,

Janowitz is seeking in the cross motion a declaration from the Court that Ace Westchester, JME's insurance carrier, who is not named as a party in this action, is obligated to pay for Harbor Ridge's defense.

Accordingly, that branch of Janowitz's motion for an order granting the cross motion to assign those fees to JME is hereby denied.

Pursuant to a prior order of this Court dated November 22, 2010, this matter is now set down for an attorney's fees hearing on Tuesday, September 20, 2011, 2:00 P.M., IAS Part 6, courtroom 24, 88-11 Sutphin Blvd., Jamaica, New York. Counsel are directed to contact the clerk of Part 6 at (718) 298-1113 on Monday, September 19, 2011 to ascertain the availability of the Court.

This constitutes the decision and order of the Court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: June 2, 2011

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**Howard G. Lane, J.S.C.**