

AMEC Constr. Mgt., Inc. v City of New York
2015 NY Slip Op 30444(U)
March 16, 2015
Sup Ct, New York County
Docket Number: 604391/04
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
AMEC CONSTRUCTION MANAGEMENT, INC.,

Plaintiff,

-against-

CITY OF NEW YORK AND MAZZOCCHI
WRECKING, INC.,

Defendants.

-----X
MAZZOCCHI WRECKING, INC.,

Plaintiff,

-against-

EVERGREEN RECYCLING OF CORONA,
and CITY OF NEW YORK,

Defendants.

-----X
TULLY ENVIRONMENTAL, INC. (named herein
and d/b/a EVERGREEN RECYCLING OF CORONA,

Third-Party Plaintiff,

-against-

AMEC CONSTRUCTION MANAGEMENT, INC.
and BOVIS LEND LEASE LMB, INC.,

Third-Party Defendants.

-----X
KATHRYN E. FREED, J.S.C.

Index No. 604391/04

DECISION AND ORDER
Mot. Seq. No. 005

Index No. 111906/05

FILED

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RECITATION, AS REQUIRED BY CPLR 2219 (a),
OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

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UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action by a subcontractor claiming it is owed fees relating to its clean up of Ground Zero in the aftermath of the September 11, 2001 attacks on the World Trade Center, third-party defendant Bovis Lend Lease LMB, Inc. (“Bovis”) moves, by order to show cause (1) pursuant to CPLR 2221(d), for reargument of that branch of its prior motion to dismiss the cross claims of defendant/third-party plaintiff Tully Environmental, Inc. d/b/a Evergreen Recycling of Corona (“EROC”), which was allegedly omitted from this Court’s decision and order (York, J.) dated January 27, 2014 and entered on February 3, 2014 (“the February, 2014 Order”); and (2) pursuant to CPLR 2221(e), granting Bovis leave to renew its argument that EROC’s cross-claims are jurisdictionally defective due to the holding of the February, 2014 Order. Upon granting reargument or renewal, Bovis submits that the Court should dismiss EROC’s cross-claims with prejudice. Alternatively, if Bovis’ motion is denied, Bovis moves to renew its motion to strike the Note of Issue and Certificate of Readiness filed by plaintiff Mazzocchi Wrecking, Inc. (“Mazzocchi”), pursuant to 22 N.Y.C.R.R. § 202.21(e), to permit limited discovery from EROC based upon special and

unforeseeable circumstances. For the reasons stated herein, Bovis' motion to reargue is **granted** and its motion to renew is **denied**. Upon reargument and review of the papers, the Court modifies the February, 2014 Order to the extent of denying Bovis' motion to dismiss EROC's cross claims. This Court also directs that a limited amount of discovery shall be completed on or before May 15, 2015.

Factual and Procedural Background:

This action, which has a long and tortuous procedural history, arises from clean up work performed following the September 11, 2001 attack on the World Trade Center. In the aftermath of the attack, New York City was in a state of emergency. The area where the attack occurred, known as Ground Zero, was inundated with approximately three billion pounds of dangerously hot and unstable debris, burning underground fires, and victims' remains, all of which needed to be cleaned up. The cleaning process began immediately after the attack. Four Construction Managers ("CMs"), AMEC Construction Management, Inc. ("AMEC"), Bovis, Turner Construction, Inc., and EROC, directed and controlled various subcontractors, including Mazzocchi, in performing the clean-up work.

Months after the attack, the City of New York ("the City") entered into contracts with the CMs. Prior to the existence of the City's contracts with the CMs, the CMs entered into contracts with subcontractors. Thus, the subcontractors were under the control and direction of the CMs. The City only made payments to the CMs, who in turn disbursed payments to the subcontractors. On October 4, 2001, AMEC entered into a contract with Mazzocchi. The agreement authorized Mazzocchi to work at Ground Zero, provided that AMEC would pay Mazzocchi for its work ("the AMEC-Mazzocchi Contract"), and that the City would reimburse AMEC for the payments it made.

The subcontractors sent their bills and invoices to the CMs which evaluated, adjusted, approved, and certified the subcontractors' work when submitting their own payment requisitions to the City. If an issue arose regarding a subcontractor's billing, the City would communicate with the CM for which the subcontractor performed work, and the CM would in turn communicate with its subcontractor.

The City assigned different designations to the various stages of the clean up work. "Phase I" referred to the time period from September 11, 2001 through January 6, 2002. "Phase II" referred to work performed on or after January 7, 2002 through on or about May of 2002. The instant action, commenced by Mazzocchi against the City and EROC on or about August 22, 2005, involves payment disputes related to work performed during Phase II of the clean-up. Pursuant to an order of this Court (Feinman, J.) dated August 22, 2006, the instant action was consolidated with a related action pertaining to Phase I of the clean-up, entitled *AMEC Construction Management, Inc. v City of New York and Mazzocchi Wrecking, Inc.*, Index No. 604391/2004 ("AMEC Action") (hereinafter collectively "the Consolidated Actions").

In its complaint in the AMEC Action, AMEC alleged that it paid Mazzocchi approximately \$13 million as the reasonable value of work performed pursuant to the AMEC-Mazzocchi Contract. The City then requested that AMEC perform an audit of payments made to Mazzocchi, which revealed that Mazzocchi was paid \$3 million more than permitted by the City's standards at the time. AMEC sought the return of the \$3 million from Mazzocchi, and Mazzocchi counterclaimed against AMEC and the City for \$783,851.44, plus interest.

In this action, Mazzocchi sued for payment in the amount of \$1,374,334.49 from the City or, alternatively, from EROC, for work performed during Phase II. In turn, EROC filed a third-party

complaint seeking damages from AMEC and Bovis alleging that, if Mazzocchi were found to be entitled to recover from EROC, then AMEC and Bovis should be held responsible for any amounts due based on the theories of restitution or implied indemnification. In prior motions, AMEC moved for summary judgment to dismiss Mazzocchi's counterclaims, and Mazzocchi moved to dismiss the complaint in the AMEC Action. On January 16, 2013, before a decision was issued on these motions, Mazzocchi entered into a settlement agreement with the City, releasing the City from all claims it had against it.

By order dated January 16, 2013 and entered January 23, 2013 ("the January, 2013 Order"), this Court (Jaffe, J.) denied AMEC's motion for summary judgment dismissing Mazzocchi's counterclaims, granted Mazzocchi's motion to dismiss AMEC's complaint, and granted leave for the litigants to serve amended complaints to replead any additional causes of action. In the February, 2014 Order, this Court clarified that the January, 2013 Order "would not have a preclusive effect as to any claims not dismissed on the merits." Ex. A to Semetis Aff. of 3/24/14, at 4. Mazzocchi then filed an amended answer, reasserting its claims against AMEC for breach of contract in the amount of \$783,851.44 plus interest, and filed an amended verified complaint dated February 12, 2013 alleging claims for (1) breach of contract, (2) account stated, (3) quantum meruit, and (4) unjust enrichment against EROC; (5) breach of contract against AMEC; and (6) breach of contract, (7) account stated, (8) quantum meruit, and (9) unjust enrichment against AMEC and Bovis. As a result, EROC filed an amended verified answer with cross-claims against Bovis dated March 25, 2013.

In response, AMEC moved to dismiss Mazzocchi's amended answer, pursuant to CPLR 3211(a)(6), and to dismiss Mazzocchi's amended verified complaint, pursuant to CPLR 3211(a)(5),

on res judicata grounds. On or about April 26, 2013, Bovis moved to dismiss the sixth through ninth causes of action of Mazzocchi's amended complaint, pursuant to CPLR 3211(a)(5), stating that the claims were barred by res judicata and the applicable statute of limitations; or to dismiss those same causes of action for failure to state a claim upon which relief can be granted, pursuant to CPLR 3211(a)(7); or to dismiss Mazzocchi's entire amended complaint, pursuant to CPLR 1003, 1009, and 3025, and to dismiss EROC's cross-claims against Bovis.

In the February, 2014 Order, this Court (1) denied AMEC's motion to dismiss Mazzocchi's amended verified answer on the grounds that res judicata did not apply to Mazzocchi's counterclaims, and such counterclaims were identified as not subject to dismissal based upon the January 2013 Order; (2) denied AMEC's motion to dismiss Mazzocchi's amended verified complaint on the ground that res judicata did not apply to the claims in the complaint since it was not the subject of a prior motion on the merits and no final judgment was issued; and (3) granted Bovis' motion to dismiss the sixth through ninth causes of action in Mazzocchi's amended verified complaint on the grounds that the applicable statute of limitations had run on the claims stated therein. Bovis' April 26, 2013 motion also asserted that it was entitled to dismissal of EROC's cross claims on the grounds that they were jurisdictionally and procedurally defective based upon Mazzocchi's failure to file a supplemental summons and its failure to move to amend the complaint pursuant to CPLR 3025(b); were mooted by the settlement between Mazzocchi and the City; and should be dismissed based upon res judicata grounds because the cross-claims were based on a derivative finding of liability against EROC and the January, 2013 Order dismissed Mazzocchi's claims against EROC.

Bovis now moves, pursuant to CPLR 2221, for renewal and reargument of its motion to dismiss EROC's cross-claims or, alternatively, pursuant to 22 N.Y.C.R.R. § 202.21(e), to strike the Note of Issue and Certificate of Readiness to permit limited discovery of EROC in order for Bovis to respond to EROC's cross-claims. In support of its motion, Bovis submits, *inter alia*, copies of the January, 2013 and February, 2014 Orders; the relevant portions of the uncompleted deposition of Thomas Olesczuk, EROC's Project Manager, signed releases by AMEC that release and indemnify Bovis from any claims arising out of the World Trade Center Disaster Recovery Project, and the relevant portions of the deposition of Gerard Frech, an independent corporate investigator of Stier, Anderson, & Malone, LLC, retained by the City to monitor the clean-up project. Bovis argues that the foregoing documents establish the need for continued discovery to establish whether it had a direct relationship with EROC.

Positions of the Parties:

Bovis argues that it is entitled to reargument of its motion to dismiss EROC's cross-claims and that, upon reargument, EROC's cross-claims must be dismissed with prejudice. In support of this argument, Bovis claims that, although this Court noted in its February, 2014 Order that Bovis moved to dismiss EROC's cross-claims, it failed to decide that branch of Bovis' motion. Further, EROC failed to file opposition papers in response to this portion of Bovis' motion, or to raise any verbal opposition to Bovis' motion to dismiss EROC's cross-claims at the October 9, 2013 oral argument before this Court. Accordingly, Bovis urges that the dismissal of EROC's cross-claims with prejudice should be granted on default.

Additionally, Bovis asserts that, in its January, 2013 Order, this Court determined that liability for Mazzocchi's claims in the Consolidated Actions was properly charged to the City and the claims were settled as a result of Mazzocchi's January 16, 2013 settlement with the City. Ex. F to Semetis Aff. of 3/24/14, at 6. The January, 2013 Order further ruled that Mazzocchi "failed to identify any remaining claims against EROC, and absent any alleged claim for breach of contract in the complaint other than one based on a now non-existent potentiality, nothing remains left to decide." *Id.* Thus, Bovis asserts that, since EROC's cross-claims against Bovis were premised on any entitlement of Mazzocchi to recover from EROC, the Court effectively dismissed any remaining claims EROC may have.

Bovis argues that it is entitled to renewal of its motion to dismiss EROC's cross-claims on the ground that the cross-claims are jurisdictionally defective since Bovis is no longer a party to Mazzocchi's amended verified complaint due to the February, 2014 Order. Specifically, Bovis asserts that the cross-claims are jurisdictionally defective because EROC failed to comply with CPLR 3019(d) when it served its answer on Bovis without a summons. As a result, Bovis asserts that the Court lacks personal jurisdiction over Bovis, requiring dismissal of EROC's cross-claims.

In the alternative, Bovis argues that, if the instant application is denied, then it is entitled to limited discovery from EROC regarding that party's cross-claims against Bovis. Specifically, Bovis asserts that EROC must be compelled to serve responses to Bovis' Second Set of Interrogatories and Second Notice of Discovery and Inspection dated April 5, 2010, and that the deposition of EROC's Project Manager, Thomas Oleczuk, must be completed.

In opposition to Bovis' motion, EROC argues that Bovis failed to establish its entitlement to renewal or reargument of its motion to dismiss EROC's cross-claims. In support, EROC submits

an affidavit of Thomas Olesczuk, which EROC asserts fully describes the roles of Mazzocchi, EROC, Bovis, AMEC, and the City in both Phase I and Phase II of the clean-up project. Mr. Olesczuk also stated in his affidavit that EROC was merely a distributor of funds to Mazzocchi and received no fees for submitting Mazzocchi's bills. Instead, payment of outstanding bills should be sought from the City, AMEC, or Bovis. EROC's counsel also maintains that, in serving EROC's amended answer, he "inadvertently failed to include a new third party summons." Wynn Aff., at ¶6. Relying on *Patrician Plastics Corp. v. Bernadel Realty Corp.*, 25 N.Y.2d 599 (1970), EROC's counsel asserts that the amended cross-claim "contained exactly the same allegation as the original cross claim filed by EROC's previous counsel in 2005. Therefore, since Bovis was not a 'newly added defendant' and there were no 'special circumstances' such as a new claim . . . the failure to serve a supplemental summons [was] not a jurisdictional defect." *Id.* Next, EROC's counsel argues that he also "[i]nadvertently failed to respond to Bovis' motion to dismiss the Cross-Claim . . . when [he] filed [the] cross motion to dismiss the Amended Verified Complaint." *Id.*, ¶ 7. EROC argues that the Court should decide Bovis' motion on the merits against Bovis in the interest of justice and that the Court should not grant Bovis' motion on default "because the default was not willful." *Id.*, ¶ 10.

In an affirmation, AMEC submits Bovis' third-party answer dated March 16, 2006 to clarify the relationship between Bovis, AMEC, and EROC during Phase II of the clean-up project. AMEC refers the Court to paragraphs 19 through 27 of Bovis' third-party answer that describe a Memorandum of Understanding ("MOU") entered into between AMEC and Bovis, assigning certain responsibilities and obligations to these parties in relation to Phase II of the clean-up project. The MOU was entered into on or about January 11, 2002 and provides that Bovis and AMEC were to

share equal liability for any damages. Williams Aff. Ex. A, ¶¶ 21, 25-26. AMEC also submits the MOU and directs the Court's attention to paragraph 3, which provides that "AMEC agrees to perform on the Project as a Construction Consultant to [Bovis] and not in any other capacity with any other party." Williams Aff., ¶ 4; *id.* Ex. B, ¶ 3.

In an affirmation in opposition to Bovis' motion, Mazzocchi argues that Bovis' interpretation of the January, 2013 Order, that any further claims Mazzocchi has against EROC are effectively dismissed, is in direct contravention to the February, 2014 Order. Specifically, Mazzocchi asserts that the February, 2014 Order clearly stated that no final determination was made as to any claims against any remaining parties other than the City. Alternatively, Mazzocchi asserts that Bovis' motion, to the extent it seeks to vacate the Note of Issue, should be denied. Mazzocchi maintains that Bovis had every opportunity to obtain the discovery it presently seeks prior to the filing of the Note of Issue. Thus, it asserts, Bovis waived its opportunity to obtain the discovery it seeks and no unusual or unanticipated circumstances exist to warrant any further discovery at this time.

In a memorandum of law in further support of its motion, Bovis asserts that the absence of a contract or business relationship between EROC and Bovis for the work of EROC and Mazzocchi at Ground Zero, as evidenced by Mr. Olesczuk's affidavit, bars the relief sought in EROC's cross-claims. Further, at his deposition, Gerard Frech, the investigative monitor assigned to audit AMEC during Phase II, testified that EROC was assigned to AMEC and that he knew of no agreement between EROC and Bovis. Alternatively, Bovis argues that, if EROC's cross-claims are not dismissed, Bovis is entitled to complete its discovery of EROC due to EROC's refusal to comply with three compliance orders directing EROC to respond to Bovis' Second Set of Interrogatories and its Second Request for Production of Documents. Bovis asserts that it anticipates its requested

discovery to take only a few weeks and urges that it would not interfere with scheduling of the trial in the instant action.

Further, Bovis argues that EROC has not established either an excusable default or meritorious defense warranting consideration of its affidavit in opposition to Bovis' motion to dismiss its cross-claims. Relying on CPLR 5015 and *Kouzos v. Dery*, 57 A.D.3d 949 (2d Dept 2008), Bovis asserts that Wynn's explanation for his failure to respond to its motion to dismiss EROC's cross-claims is a "conclusory, undetailed, and uncorroborated claim of law office failure [that] did not amount to a reasonable excuse" and the Court should not credit counsel's argument. *Kouzos*, 57 A.D.3d at 949. Additionally, Bovis asserts that EROC's failure to serve Bovis with a summons constitutes a jurisdictional defect and that EROC's reliance on *Patrician Plastics Corp.*, *supra*, is misplaced. In *Patrician Plastics Corp.*, the newly added party availed itself of the court's jurisdiction by filing an amended complaint without a supplemental summons on an original defendant in the case and the court held that, in this instance, failure to serve a supplemental summons was not a jurisdictional defect. Bovis asserts that it is a non-party being brought before this Court and, as a result, EROC is required to serve it with a summons in accordance with CPLR Article 30.

Conclusions of Law:

Reargument

A motion for leave to reargue, pursuant to CPLR 2221(d), "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the proper motion." Such motion "is addressed to the sound discretion of the court." *William P. Pahl Equip. Corp. v.*

Kassis, 182 A.D.2d 22, 27 (1st Dep't 1992), *lv dismissed*, 80 N.Y.2d 1005 (1992), *rearg. denied* 81 N.Y.2d 782 (1993). Professor David Siegel in N.Y. Prac, § 254, at 449 (5th ed), instructs that a motion to reargue “is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind.”

This Court, in its discretion, hereby grants reargument of Bovis' motion to dismiss EROC's cross-claims to the extent that the cross-claims were not addressed in the February, 2014 Order. Bovis correctly alleges that this Court overlooked the matter of its motion to dismiss EROC's cross claims by failing to decide this portion of its motion. Although the February, 2014 Order acknowledged that Bovis moved “to dismiss the cross claims of EROC against Bovis,” this Court did not address this issue. Ex. F to Semetis Aff. of 3/24/14, at 5, 8. While Bovis is correct that written opposition was not submitted by EROC, the Court is still obliged on a motion for accelerated judgment to determine the merits of the application. *Cf. Liberty Taxi Mgmt., Inc. v. Gincheran*, 32 A.D.3d 276, 277 & n.1 (1st Dep't 2006) (citing *Vt. Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004) (“[T]he failure to oppose a motion for [accelerated judgment] alone does not justify the granting of [such motion]. Instead, the . . . court must still assess whether the moving party has fulfilled its burden of demonstrating [the merits of its claim]”).

This Court notes that the arguments raised by Bovis as a basis for dismissing EROC's cross-claims are essentially identical to those arguments seeking the dismissal of Mazzocchi's claims in Bovis' original motion to dismiss. Justice York conducted an in depth legal analysis on these matters, and this Court adheres to his findings. This Court first addressed Bovis' res judicata argument that the January, 2013 Order dismissed Mazzocchi's claims against EROC and stated that “[a]s a preliminary matter, as discussed above the Prior Order did not have any res judicata effect

on any remaining claims of Mazzocchi. Thus, the motion to dismiss on the basis of res judicata is denied.” Ex. A to Semetis Aff. of 3/24/14, at 8. By denying the motion on res judicata grounds, this Court also rejected Bovis’ interpretation of the January, 2013 Order, i.e., that EROC’s cross-claims must be dismissed because Mazzocchi’s settlement with the City terminated any of Mazzocchi’s remaining claims. On the contrary, this Court stated that “the Settlement here specifically contemplates that it would have no effect on the claims that Mazzocchi may have against any other parties.” *Id.*, at 6. This Court also addressed the jurisdictional grounds for Bovis’ motion and held that “[t]he remaining arguments with regard to jurisdictional defects, are moot,” referring to Bovis’ argument that failure to file a supplemental summons with an amended pleading constituted significant prejudice which could not be remedied. *Id.*, at 10; *see* Bovis’ Mot. to Dismiss at 20. Additionally, this Court suggested that the third-party complaint by EROC gave Bovis “notice of a potential restitution or indemnification claim.” Semetis Aff. (3/24/14) Ex. A at 9. Therefore, Bovis’ motion to reargue is granted and, upon reargument, Bovis’ motion to dismiss EROC’s cross claims is denied, thereby resolving any ambiguity in the February, 2014 Order.

Renewal

A motion for leave to renew “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 “shall contain reasonable justification for the failure to present such facts on the prior motion.” CPLR 2221(e)(2), (3). Additionally, a motion to renew “is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and

therefore not brought to the court's attention.” *William P. Pahl Equip. Corp.*, 182 A.D.2d, *supra* at 27. “Renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application.” *Foley v. Roche*, 68 A.D.2d 558, 568 (1st Dep’t 1979).

This Court, in its discretion, hereby denies renewal of Bovis’ motion to dismiss EROC’s cross-claims. The purpose of a motion to renew is not to bring up new arguments upon facts that were known to the parties when the underlying motion was filed. *Foley v. Roche*, 68 A.D.2d, *supra* at 568 (holding that a motion to renew is improper “where a party has proceeded on one legal theory on the assumption that what has been submitted is sufficient, and thereafter sought to move again on a different legal argument merely because he was unsuccessful upon the original application” and denying such an application where it was not “supported by new facts or information which could not have been readily and with due diligence made part of the original motion”).

Bovis asserts that its motion for renewal should be granted on the ground that EROC’s cross-claims are jurisdictionally defective for failure to serve Bovis with a third-party summons with its answer, pursuant to CPLR 3019(d),¹ after the February, 2014 Order dismissed Bovis as a direct defendant in the Consolidated Action. This is clearly an attempt by Bovis to reargue its jurisdictional defect argument submitted in its prior motion to dismiss. It also appears that this is an attempt to circumvent the time requirements under the CPLR for a summary judgment motion

¹ CPLR 3019(d) provides that “[w]here a person not a party is alleged to be liable, a summons and answer containing the counterclaim or cross-claim shall be filed, whereupon he or she shall become a defendant. Service upon such a defendant shall be by serving a summons and answer containing the counterclaim or cross-claim.”

by submitting the argument in a motion to renew. *See Brill v. City of New York*, 2 N.Y.3d 648 (2004) (discussing the time requirements for a motion for summary judgment under the CPLR).

There are no new facts submitted that were either unknown to Bovis at the time the motion was filed or that were not considered by the Court when it issued the February 2014 Order. Whether Bovis was prejudiced by EROC's failure to file a supplemental summons was a fact known when the prior motion was submitted and logic dictates that prejudice must be weighed regarding when the summons arguably should have been served. The supplemental summons should have been served with EROC's amended verified answer on or about March 25, 2013. However, at the time that EROC served its amended verified answer, Bovis was already a direct defendant in the original action due to Mazzocchi's amended verified complaint, dated February 12, 2013, and thus Bovis was not prejudiced by EROC's failure to file the supplemental summons.² Additionally, in its February, 2014 Order, this Court held that Bovis had notice of EROC's cross claims from its properly served third-party complaint, filed on or about December 23, 2005, which "gave notice of a potential restitution or indemnification claim." Ex. A to Semetis Aff. of 3/24/14, at 9. Since Bovis had notice of EROC's claims since 2005, it was not prejudiced when EROC's amended verified answer with cross-claims was filed in 2013. The fact that Bovis was later dismissed from the original action does not cause it prejudice. The instant case is analogous to *Patrician Plastic Corp., supra*, wherein

² In Siegel, N.Y. Prac., § 227, at 375 (5th ed), Professor David Siegel provided an example addressing this same scenario:

Suppose, for example, that P, injured in an accident involving tortfeasors A, B, and C, sues only A and B. A in his answer can cross-claim both B and C for contribution, but since C is not a party, C would have to be served with a summons accompanying the answer containing the cross-claim, while B would be served with only the answer and the service would be by mere mail to his attorney.

the court found that the original defendant in the action was not prejudiced by the failure of a newly added plaintiff to serve the new defendant with a supplemental summons. 25 N.Y.2d, *supra* at 608. The court in *Patrician Plastic Corp.* held that the failure to serve a supplemental summons was “not a jurisdictional defect but, at worst, an irregularity which the court may and should ignore especially since no prejudice to any party resulted from the omission.” *Id.*

Bovis’ reliance on *Locastro v. City of New York*, 2013 N.Y. Slip Op. 32090(U), 2013 WL 4857958 (Sup Ct NY County 2013), is mistaken. In *Locastro*, the defendant in the action not only failed to serve a summons, but it also did not file a third-party action against the third-party defendant that it improperly served. Since the third-party defendant was not a party to the plaintiff’s action, there was no basis upon which to maintain the third-party action. Here, Bovis was already a direct defendant in the consolidated action and was a third-party defendant in a properly commenced third-party action. Accordingly, this Court denies Bovis’ motion to renew.

Post-Note of Issue Discovery

This Court grants Bovis’ request for discovery on the grounds that EROC has failed to comply with three prior discovery orders. Ex. 2 of Ex. G to Semetis Aff. of 3/24/14. This Court, in its discretion, orders the deposition of Thomas Olesczuk to be completed within 45 days of service of a copy of this order with notice of entry or EROC will face preclusion of Mr. Olesczuk as a witness at trial. *See Perez v Vasquez*, 66 AD3d 494 (1st Dept 2009). Under the circumstances, where Justice York did not actually rule on Bovis’ motion to dismiss EROC’s cross-claims, allowing Mr. Olesczuk to testify at trial would essentially serve to reward EROC, which has not complied with its discovery obligations as directed by prior court orders. This Court further orders EROC to serve,

within 45 days, responses to Bovis' Second Set of Interrogatories and Second Notice of Discovery and Inspection dated April 5, 2010, also upon penalty of preclusion.

Therefore, in light of the foregoing, it is hereby:

ORDERED that Bovis' motion for reargument of its April 26, 2013 motion to dismiss EROC's cross-claims is granted; and it is further,


ORDERED that, upon reargument and review of the papers submitted, Bovis' April 26, 2013 motion to dismiss EROC's cross-claims is denied, and this Court's February, 2014 Order is modified accordingly; and it is further,

ORDERED that Bovis' motion for renewal of its April 26, 2013 motion to dismiss EROC's cross-claims is denied; and it is further,

ORDERED that Bovis' motion to conduct limited post-Note of Issue discovery is granted, and that, within 45 days, EROC is to serve responses to Bovis' Second Set of Interrogatories and Second Notice of Discovery and Inspection dated April 5, 2010, and to produce Thomas Olesczuk of EROC for the completion of his deposition, upon penalty of preclusion; and it is further,

ORDERED that this constitutes the decision and order of the Court.

Dated: March 16, 2015



Hon. Kathryn E. Freed, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT