Colony Ins. Co. v International Contrs. Servs., LLC
2020 NY Slip Op 31687(U)
May 26, 2020
Supreme Court, New York County
Docket Number: 655528/2016
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT:	**HON. ANDREW BORROK**	**PART**	**IAS MOTION 53EFM**
	Justice		

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COLONY INSURANCE COMPANY,

Plaintiff,

- v -

INTERNATIONAL CONTRACTORS SERVICES, LLC, THE CITY OF NEW YORK, A.H. HARRIS & SONS, INC., MICHAEL FITZGERALD

Defendant.

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INDEX NO. 655528/2016

MOTION DATE 12/20/2019

MOTION SEQ. NO. 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 010) 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, A.H. Harris & Sons, Inc.'s (**Harris**) motion to reargue its motion for summary judgment (Mtn. Seq. 008) is denied and Colony Insurance Company's (**Colony**) cross-motion to renew its motion for summary judgment (Mtn. Seq. 009) is denied.

The Relevant Facts and Circumstances

In the underlying personal injury actions captioned *Michael Fitzgerald v. The City of New York, A.H. Harris & Sons. Inc., and International Contractors Services, LLC* (Index No. 304808/09) and *The City of New York v. A.H. Harris & Sons. Inc. and International Contractors Services, LLC* (Index No. 83839/10) (collectively, the **Underlying Action**), Michael Fitzgerald alleged that he was injured by certain materials that were designed and fabricated by International Contractor Services, LLC (**ICS**) (NYSCEF Doc. No. 205, ¶¶ 2-3). Colony issued an insurance policy to ICS for the relevant time period (the **Policy**) and the Supreme Court, Bronx County

struck ICS's answer in the Underlying Action due to its failure to comply with certain discovery demands (NYSCEF Doc. No. 324). On August 12, 2016, Colony disclaimed coverage to ICS in the Underlying Action for ICS's failure to cooperate.

Colony commenced this action on October 19, 2016 to obtain a declaratory judgment that Colony was not obligated to defend, indemnify, or provide coverage to ICS in the Underlying Action. Pursuant to a decision and order (NYSCEF Doc. No. 385, the **Decision**), dated September 13, 2019, this court denied Harris's motion for summary judgment to dismiss this action (Mtn. Seq. 008) and Colony's motion for summary judgment (Mtn. Seq. 009) because (1) there remained material issues of fact concerning whether Colony acted diligently in seeking ICS's cooperation before coverage was denied and (2) Harris did not meet its burden in demonstrating that Insurance Law § 3420 (d) applied because there was insufficient evidence that ICS had a substantial business presence in New York.

The settlement in the Underlying Action was finalized pursuant to a Settlement and Release Agreement, dated September 26, 2019, pursuant to which settlement proceeds would be paid by Zurich American Insurance Company, The Charter Oak Fire Insurance Company, and Colony (NYSCEF Doc. No. 407, ¶ 8, the **Settlement Agreement**; NYSCEF Doc. No. 405, ¶ 25). Counsel for Colony did not receive the Settlement Agreement until December 23, 2019 (NYSCEF Doc. No. 405, ¶ 24).

Harris filed the instant motion for leave to reargue on December 20, 2019 and Colony filed its cross-motion for leave to renew on January 15, 2020.

Discussion

A. Harris' Motion to Reargue

To succeed on a motion for reargument pursuant to CPLR § 2221 (d)(2), a party must demonstrate that the court either (1) overlooked or misapprehended the relevant facts, or (2) misapplied a controlling principle of law (*William P. Paul Equip. Corn. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). Reargument is not intended "to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted" (*Haque v Daddazio*, 84 AD3d 940, 242 [2d Dept 2011]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]).

Here, Harris has not set forth any relevant facts to warrant reargument. To the extent that Harris relies on a Lease Agreement (NYSCEF Doc. No. 223, the **Lease**) and a decision and order, dated May 24, 2018, in the Underlying Action (NYSCEF Doc. No. 224, the **Indemnification Decision**), this record was and remains insufficient to establish that ICS had a substantial business presence in New York.

The Lease simply provides that Harris is an exclusive distributor of ICS in thirteen states, including New York, without specifying the relative volume of work that ICS performed in each state. Although an ICS price list is attached to the Lease, there is no information on how much money was generated by any project in New York or how such sums compared to money generated by projects in other states (*see Vista Eng'g Corp. v Everest Indem. Ins. Co.*, 161 AD3d 596, 599 [1st Dept 2018] [noting that there is no specific definition of the substantial business presence test such that payment under subcontract of $982,500 and unauthenticated email

correspondence that project was insured's "main job" was insufficient to determine whether insured had a substantial business presence in New York]). To the extent that Exhibit C of the Lease contains an "Existing Quotes List" of existing or proposed projects, only two projects are specifically located in New York City and there is no further information about the equipment involved or work performed on these projects.

Further, the Indemnification Decision determined that Harris was entitled to indemnification under ICS's policy because there was no evidence that Harris modified, tampered, maintained, or issued instructions regarding equipment supplied by ICS. However, the Indemnification Decision does not supply information about the value of any ICS projects in New York, the volume of the work, duration of the work, or whether the testimony regarding ICS's practices applied to each and every job ICS performed in New York. Under these circumstances, there remain material issues of fact on whether ICS had a substantial business presence in New York and Harris is not entitled to reopen discovery on this matter at this late stage in the litigation. Accordingly, Harris' motion for leave to reargue its motion for summary judgment (Mtn. Seq. 008) is denied.

B. Colony's Motion to Renew

Pursuant to CPLR § 2221 (e)(2), a motion for leave to renew must be based on additional material facts which existed at the time the prior motion was made, but which were unknown to the party seeking leave to renew, and therefore, not made known to the court (*Foley*, 68 AD2d at 568). Although motions to renew are addressed to the court's sound discretion (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]), such motions are "granted sparingly"

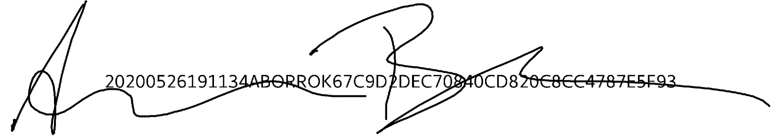
and are not a second chance for parties who have not exercised due diligence submitting facts in the prior motion (*Beiny v Wynyard (In re Beiny)*, 132 AD2d 190, 209-210 [1st Dept 1987]).

Colony asserts that it only received the Settlement Agreement in December 2019 and after the court issued its decision on the prior summary judgment motions. Further, Colony argues that the Settlement Agreement reveals that the real parties in interest in the Underlying Action were the respective insurers, and as a result, Harris' insurer is not entitled to invoke the requirement that a disclaimer be timely issued under Insurance Law § 3420 (d)(2). In its opposition papers, Harris argues that Colony was aware that the parties' insurers participated in settling the Underlying Action as early as July 2019 such that the Settlement Agreement did not disclose any new facts to Colony.

Here, the timeline indicates that the Settlement Agreement was executed on September 26, 2019, which occurred after the court's decision issued on September 13, 2019. Inasmuch as Colony asserts that it was not a party to the Underlying Action and received no information about how Harris's portion of the settlement would be paid (NYSCEF Doc. No. 411, ¶ 7), Colony's motion to renew is improper because although Colony refers to the Settlement Agreement for new facts, the arguments asserted in this cross-motion are in sum and substance identical to those asserted in Colony's sur-reply under Mtn. Seq. 009 (NYSCEF Doc. No. 375). Accordingly, Colony's cross-motion to renew its motion for summary judgment (Mtn. Seq. 009) is denied.

Accordingly, it is

ORDERED that Harris's motion to reargue its motion for summary judgment (Mtn. Seq. 008) is denied and Colony's cross-motion to renew its motion for summary judgment (Mtn. Seq. 009) is denied.



5/26/2020	ANDREW BORROK, J.S.C.
DATE	

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION
	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART [ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER
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