

**First Mercury Ins. Co. v Nova Restoration of NY,  
Inc.**

2021 NY Slip Op 30356(U)

February 1, 2021

Supreme Court, New York County

Docket Number: 656240/2016

Judge: Barry Ostrager

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY**

**PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM**

*Justice*

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FIRST MERCURY INSURANCE COMPANY,

Plaintiff,

- v -

NOVA RESTORATION OF NY, INC., NOVA RESTORATION, LLC, AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY, SHANE McMAHON, MARISSA McMAHON, THE COBBLESTONE LOFTS CONDOMINIUM and THE ANDREWS ORGANIZATION f/k/a ANDREWS BUILDING CORPORATION,

Defendants.

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HON. BARRY R. OSTRAGER

INDEX NO.	656240/2016
MOTION DATE	
MOTION SEQ. NOS.	007 & 008

**DECISION + ORDER ON MOTIONS**

Before the Court in this long-running dispute are two motions and two cross-motions to reargue and/or renew the January 7, 2020 decision and order of this Court denying summary judgment motions (NYSCEF Doc. No. 210, mot. seq. nos. 003 and 004). The issue raised in the Amended Complaint and the various counterclaims and cross-claims is whether plaintiff First Mercury Insurance Company (“First Mercury”) and defendant American Empire Surplus Lines Insurance Company (“American Empire”) have a duty to defend and indemnify their common insureds defendants Nova Restoration of NY, Inc. and Nova Restoration LLC (collectively, “Nova”) in the underlying damages action, entitled *Shane McMahon and Marissa McMahon, individually and as parents and natural guardians of their minor children AM, BM and CM, v. The Cobblestone Lofts Condominium, The Andrews Organization f/k/a Andrews Building Corporation, Nova Restoration of NY, Inc., Nova Restoration LLC and John Does 1-5* (Index No. 151136/14), still pending in the Supreme Court of the State of New York, New York County, and a related third-party action (“the Underlying Action”).

This Court held oral argument via Microsoft Teams on these motions to reargue and renew on January 27, 2021 and granted the insurers renewal and summary judgment in their favor on the record of proceedings. This decision memorializes that ruling in greater detail.

As reflected in the Amended Complaint (NYSCEF Doc. 20), First Mercury commenced this action seeking a declaratory judgment that it had no duty to defend and indemnify Nova based on seven different policy exclusions or similar grounds. The central focus of the motions before this Court has been the Sixth Cause of Action, which involves an exclusion related to work involving a certain type of insulation system known as “Exterior Insulation and Finish Systems” or “EIFS”. In the January 7, 2020 decision denying summary judgment, this Court relied on its detailed Interim Order (NYSCEF Doc. No. 195) finding triable issues of fact regarding precisely where the EIFS was located at the building, to what extent the EIFS was impacted by Nova’s work, and the proper definition of the term “structure” in the exclusion.

In the original summary judgment motions, the insurers had relied on three different expert reports: the March 12, 2013 “Water Intrusion Evaluation” by Thornton Tomasetti; the July 1, 2014 affidavit of Christopher Mikrut, M.S., a Senior Environmental Investigator with Microecologies, Inc.; and the October 14, 2011 report of Olmstead Environmental Services, Inc. (NYSCEF Doc. Nos. 97-99). Although all three reports provided some information related to EIFS, supported in some cases by photographs, the primary purpose of the reports was to evaluate water infiltration into the penthouse condominium owned by defendant McMahon and mold that had allegedly developed in the apartment, issues critical to the Underlying Damages action. The Court therefore did not find the reports dispositive of the EIFS exclusion issue, and summary judgment was denied.

Thereafter, the Court allowed the parties to obtain an additional expert analysis. That analysis was performed by Kenneth M. Lies, a Licensed Architect and Senior Principal at Raths, Raths & Johnson, Inc., an engineering, architecture, and forensics consulting firm located in Willowbrook, Illinois. Mr. Lies performed a detailed inspection of the property and an analysis of the work performed. He then prepared both a fourteen-page report dated March 13, 2020 and supported by photographs and an affidavit dated October 19, 2020 summarizing his findings (NYSCEF Doc. Nos. 253-255). The express purpose of the Lies analysis was to investigate the specific issues the Court had identified in its decision denying summary judgment; that is, precisely where the EIFS was located at the building and to what extent the EIFS was impacted by Nova's work. The Lies documents were offered by the insurers to the Court as "new evidence" to support the requests for renewal set forth in the present motions.

Mr. Lies summarized his opinion in his affidavit as follows:

In summary, based upon my field observations during the Site Inspection, an analysis of WBM photographs and other documents reviewed, the cladding materials at the Premises are: (i) EIFS, aka "synthetic stucco"; (ii) corrugated, batten and formed metal sidings; and (iii) brick masonry. I observed and confirmed the presence of the EIFS components, as defined in the "EIFS Endorsements" of the First Mercury and American Empire policies and industry standards. Based on the Site Inspection and related analysis, it is my opinion that EIFS was installed onto various exterior walls not only at the penthouse unit but throughout the building. It is also evident that Nova removed, patched, and performed other work related to the EIFS as part of the exterior renovation work performed.

Relying on the Lies analysis, American Empire moved to reargue and renew this Court's prior decision, urging the Court to grant summary judgment declaring that American Empire had no duty to defend or indemnify Nova in the Underlying Action based on the EIFS exclusion in the policy (mot, seq. 007). First Mercury in its motion moved for similar relief based only on renewal (mot. seq. 008). Defendants The Cobblestone Lofts Condominium and its agent The

Andrews Organization cross-moved for reargument, seeking to dismiss the cross-claims asserted by American Empire against it (mot. seq. 007), and also cross-moved to reargue and dismiss First Mercury's claims against it (mot. seq. 008). As indicated in the decision on the record, the Court denied all requests for reargument, finding that the Court had not overlooked any facts or law that had been submitted with the original summary judgment motions to justify reargument under CPLR 2221(d).

More significantly, however, the Court found the Lies affidavit qualified as "new evidence" and granted renewal pursuant to CPLR 2221(e). Upon renewal, the Court found that the evidence, consisting of detailed findings by a highly-credentialed expert who had conducted an inspection and analysis focused solely of the EIFS issues, resolved the outstanding factual issues and entitled the insureds to summary judgment. Specifically, the Court concluded that the new evidence established that the EIFS exclusions in the policies applied to relieve both First Mercury and American Empire of any duty to defend or indemnify Nova in the Underlying Action.

Accordingly, it is hereby

ORDERED that the motions by American Empire Surplus Lines Insurance Company and the cross-motions by The Cobblestone Lofts Condominium and its agent The Andrews Organization are denied insofar as they seek reargument; and it is further

ORDERED that the motions by American Empire Surplus Lines Insurance Company and First Mercury Insurance Company to renew are granted, and upon renewal it is hereby

DECLARED AND ADJUDGED that neither American Empire Surplus Lines Insurance Company, nor First Mercury Insurance Company, has any duty to defend or indemnify

defendants Nova Restoration of NY, Inc. and Nova Restoration LLC in the Underlying Action pending under Index No. 151136/14; and it is further

ORDERED that all other claims, cross-claims and counterclaims among the parties are dismissed as moot, and any other outstanding request for relief by any party not expressly granted herein is denied.

Dated: February 1, 2021

*Barry R. Ostrager*  
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BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE