

**Byrne v Lend Lease (US) Constr. Inc.**

2022 NY Slip Op 34325(U)

November 15, 2022

Supreme Court, New York County

Docket Number: Index No. 153864/2016

Judge: Richard Latin

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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. RICHARD LATIN PART 46V

Justice

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THOMAS BYRNE, KAREN BYRNE,
Plaintiff,

- v -

LEND LEASE (US) CONSTRUCTION INC.,LEND LEASE
(US) CONSTRUCTION LMB INC.,FIVE STAR ELECTRIC
CORP., EXTELL WEST 57TH STREET LLC

Defendant.

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INDEX NO. 153864/2016

MOTION DATE 10/17/2022,
10/17/2022

MOTION SEQ. NO. 007 007

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 191, 192, 193, 194,
195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 191, 192, 193, 194,
195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER .

Upon the foregoing documents, it is ordered that defendants Lend Lease (US)
Construction, Inc., Lend Lease (US) Construction LMB, Inc. ("Lend Lease"), and Extell West 57th
Street, LLC motion, pursuant to CPLR 2221, for leave to reargue and renew the court's decision
and order dated June 14, 2022 is determined as follows:

A motion for leave to reargue is addressed to the sound discretion of the court and may be
granted upon a showing that the court overlooked or misapprehended the relevant facts or
misapplied any controlling principle of law (CPLR 2221 [d] [2]; Frenchman v Lynch, 97 AD3d
632, 633 [2d Dept 2012]; William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, 27 [1st Dept
1992], lv dismissed in part and denied in part 80 NY2d 1005 [1992], rearg denied 81 NY2d 782
[1993]; Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979]). Reargument is "not designed to
provide an unsuccessful party with successive opportunities to reargue issues previously decided,

or to present arguments different from those originally presented” (*McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; *see also Levi v Utica First Ins. Co.*, 12 AD3d 256, 258 [1st Dept 2004]).

“A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such provision be procured and that the provision was not complied with” (*DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011], quoting *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dept 2003]). Exhibit C to Five Star’s trade contract required Five Star to purchase commercial general liability insurance with a single limit of at least \$2,000,000 per occurrence and in the aggregate, and name Bovis entity “Bovis Lend Lease LMB, Inc., its parents and affiliates” as additional insureds, in addition to commercial umbrella liability insurance with limits of \$5,000,000 per occurrence and in the aggregate (NYSCEF Doc No. 130 at 333). In moving for summary judgment, Lend Lease did not explain why Five Star was required to purchase insurance for its benefit. Five Star’s contract required it to purchase insurance naming Bovis Lend Lease LMB, Inc., not Lend Lease, as an additional insured. Lend Lease could also not make its prima facie showing in its reply papers (*see Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). Thus, the Court did not overlook or misapprehend the facts or law and reargument is denied.

As for the branch of the motion seeking renewal of the motion, a motion for leave to renew a prior motion must be based upon “new facts not offered on the prior motion that would change the prior determination” or must show that “there has been a change in the law that would change the prior determination” (CPLR 2221 [e] [2]; *see also Melcher v Apollo Med. Fund Mgt. L.L.C.*, 105 AD3d 15, 23 [1st Dept 2013]; *Matter of Katz*, 63 AD3d 836, 837-838 [2d Dept 2009]). Furthermore, the papers must “contain [a] reasonable justification for the failure to present such

facts on the prior motion” (CPLR 2221 [e] [3]). “Although renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion (*see* CPLR 2221 [e]), courts have discretion to relax this requirement and to grant such a motion in the interest of justice” (*Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]; *accord Matter of Pasanella v Quinn*, 126 AD3d 504, 505 [1st Dept 2015]; *BLDG ABI Enters., LLC v 711 Second Ave Corp.*, 116 AD3d 617, 618 [1st Dept 2014]; *Tuccillo v Bovis Lend Lease, Inc.*, 101 AD3d 625, 627-628 [1st Dept 2012]).


Lend Lease now provides an affidavit from an assistant general counsel from Lendlease Americas, Inc., indicating that “[o]n May 17, 2011, Bovis Lend Lease LMB, Inc. changed its name to Lend Lease (US) Construction LMB Inc. as part of a global branding initiative where all corporate entities around the world were moved under the one unified brand of ‘Lend Lease’” (NYSCEF Doc No. 193, Young aff, ¶ 3; *see also* NYSCEF Doc No. 203). “In general, a change in the corporate name does not affect the identity, rights, or liabilities of the corporation” (18 C.J.S. Corporations § 143). When a corporation changes its name, the corporation is entitled to enforce contracts made before the name change *JSC Foreign Economic Assoc. Technostroyexport v International Trade & Dev. Servs., Inc.*, 386 F Supp 2d 461, 470 [SD NY 2005] [noting that “(i)t is clear from the parties' submissions, however, that JSC and AOOT are the same corporation . . .”]).

Thus, in the interests of justice, leave to renew is granted, and upon renewal Lend Lease (US) Construction LMB Inc. is granted partial summary judgment as to liability on its breach of contract claim against Five Star. Although Five Star submitted a certificate of insurance (NYSCEF Doc No. 162), this evidence is insufficient to raise an issue of fact as to whether it procured the required insurance (*see Prevost v One City Block LLC*, 155 AD3d 531, 536 [1st Dept 2017]). Even

if the Court were to consider Five Star’s insurer’s coverage letter, Five Star apparently procured an insurance policy that limits coverage to liability “caused by [the named insured’s] acts or omissions” (NYSCEF Doc No. 131 at 5). However, this was inadequate. Five Star’s contract states that “the use of any form . . . will not be acceptable if they limit coverage to the Additional Insured for liability caused by their own acts or omissions, or those of the named insured (or someone acting on behalf of the named insured)” (NYSCEF Doc No. 130 at 333). Five Star also did not provide a commercial umbrella insurance policy in opposition, which it was required to obtain under its trade contract (*id.*).

Accordingly, the motion is granted solely to the extent that the branch seeking leave to renew is granted, and upon renewal, defendant Lend Lease (US) Construction LMB, Inc. is entitled to summary judgment as to liability on its breach of contract claim against defendant Five Star Electric Corp.

This constitutes the decision and order of the Court.

<u>11/15/2022</u> <b>DATE</b>			 <hr/> <b>RICHARD LATIN, J.S.C.</b>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> DENIED		