

**Wausau Bus. Ins. Co. v Langan Engg. & Env'tl. Servs.,  
Inc.**

2024 NY Slip Op 30658(U)

March 4, 2024

Supreme Court, New York County

Docket Number: Index No. 154988/2020

Judge: Paul A. Goetz

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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. PAUL A. GOETZ **PART** **47**

*Justice*

-----X

WAUSAU BUSINESS INSURANCE COMPANY,  
  
Plaintiff,

**INDEX NO.** 154988/2020

**MOTION DATE** 09/01/2023

**MOTION SEQ. NO.** 006

- v -

LANGAN ENGINEERING AND ENVIRONMENTAL  
SERVICES, INC., SLCE ARCHITECTS, LLP,  
GEOTECHNICAL SERVICES CORP., ROBERT W.  
BRONZINO, DURAMAX HEAVY EXCAVATION AND  
FOUNDATION INC., THOMAS FRANGIPANE,

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X

LANGAN ENGINEERING AND ENVIRONMENTAL  
SERVICES, INC.

Third-Party  
Index No. 595407/2023

Plaintiff,

-against-

THE JOHN BUCK COMPANY, 281 BROADWAY HOLDINGS,  
LLC, PAVARINI MCGOVERN, LLC

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 148, 149, 150, 151, 152, 153, 154, 155, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 170, 171, 172, 175, 176, 177, 178

were read on this motion to/for DISMISSAL.

In this subrogation action, third-party defendants The John Buch Company (JBC), and Pavarini McGovern, LLC (Pavarini) move to dismiss the third-party complaint on the grounds that it fails to state a claim and that pursuant to CPLR § 1007 it is an improper third-party

action.<sup>1</sup> Third-party plaintiff Langan Engineering and Environmental Services Inc. (Langan) and two other defendants in the underlying action, SLCE Architects LLP (SLCE) and Robert W. Bronzino (Bronzino), cross-move to disqualify the law firm representing both plaintiff and third-party defendants on the grounds that a non-waivable conflict of interest exists prohibiting counsel from representing these parties.

## BACKGROUND

A plan was devised for a condominium development project at 57 Reade Street, New York, NY 10007 (the project) by: JBC, the development manager; 281 Broadway, the owner of the premises; and Pavarini, a construction consultant (collectively, the insureds). Wausau Business Insurance Company (Wausau) insured these three entities against liability for the project for up to \$1 million per occurrence. Through various subcontracts, the insureds hired defendants to perform construction work, and in each subcontract, the subcontractors agreed to indemnify the respective insured against liability for its conduct. During the excavation process, the foundations of adjacent properties were compromised and causing the buildings to tilt, and the adjacent property owners filed several lawsuits against the insureds, including *Randall Co. LLC v 281 Broadway et al*, Index No 100982/2008 (*Randall* action) and *Lexington Insurance Company et al v 281 Broadway Holdings LLC et al*, Index No 114043/2010 (*Lexington* action). The *Randall* action settled for \$2.2 million (NYSCEF Doc No 152), requiring Wausau to exhaust its \$1 million policy on behalf of JBC and 281 Broadway. In another set of cases against Pavarini, Wausau paid another \$169,000 in defense costs. Finally, in resolving the *Lexington* action, a global settlement was entered into whereby JBC, 281 Broadway, Pavarini, and Langan,

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<sup>1</sup> According to counsel for third-party defendants, 281 Broadway did not join in the motion because the company was dissolved on December 4, 2020 (NYSCEF Doc No 155, p. 1).

among others, contributed to the total settlement payment and agreed to release all claims against each other arising out of the project (NYSCEF Doc Nos 161; 153, pp. 21-32).

On July 4, 2020, Wausau, which was not a party to the settlement, filed this action against defendants to recover \$1,169,000 in expenditures on the grounds that the claims made against the insureds were based on vicarious liability for defendants' conduct, and therefore Wausau—as subrogee of the insureds—is entitled to indemnification (NYSCEF Doc No 1). Langan, in turn, filed a third-party complaint against the insureds, asserting causes of action for (1) negligent misrepresentation, based on the insureds' alleged representations that they had the authority to enter into the global settlement agreement and release Langan from all claims, both on their behalf and on behalf of their insurer; (2) unjust enrichment, based on the insureds' retention of the benefit of Langan's settlement payment, though Langan is still exposed to liability; and (3) contribution, in the event that Langan is held liable for Wausau's money damages, based on the insureds' own culpable conduct (NYSCEF Doc No 112).

## DISCUSSION

### Conflict of Interest

Langan, SLCE and Bronzino (collectively, cross-movants) argue that a non-waivable conflict of interest exists prohibiting counsel for both plaintiff and third-party defendants from representing all of these parties (NYSCEF Doc Nos 167 & 172).

Rule 1.7 of the Rules of Professional Conduct provides that “a lawyer shall not represent a client if a reasonable lawyer would conclude that [ ] the representation will involve the lawyer in representing differing interests” (Rule 1.7(a)(1)). However, “[n]otwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent

representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing” (Rule 1.7(b)).

A movant seeking disqualification of an opponent’s counsel faces a heavy burden (*Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d 1, 13 [1st Dept 2016]). A party has a right to be represented by counsel of its choice, and any restrictions on that right “must be carefully scrutinized” (*Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 469-70 [1st Dept 2013] [internal quotation marks omitted]). Courts should also examine whether a motion to disqualify is made for tactical purposes, such as depriving an opponent of quality representation (*Solow v Grace & Co.*, 83 NY2d 303, 310 [1994]). The decision whether to grant a motion to disqualify rests in the discretion of the motion court (*Macy’s Inc. v J.C. Penny Corp., Inc.*, 107 AD3d 616 [1st Dept 2013]).

Here, the cross-movants do not have standing to seek disqualification of counsel because they are neither former nor present clients of the law firm (*Hall Dickler Kent Goldstein & Wood, LLP v McCormick*, 36 AD3d 758, 759 [2d Dept 2007] [“Since the defendant third-party plaintiff . . . was neither a former nor a present client of the law firm . . . , she did not have standing to seek the disqualification of Benowich or his law firm from dual representation of the plaintiff and the third-party defendants”]). SLCE and Bronzino’s cross-motion is improper for the additional reason that it was filed in response to a motion to dismiss *Langan’s* third-party complaint; SLCE and Bronzino are only party to the underlying action, not to the third-party action.

Even if the cross-movants did have standing, they failed to meet their heavy burden of demonstrating that Jaffe & Asher must be disqualified from representing third-party defendants due to its concurrent representation of Wausau. No conflict exists at this stage of the litigation, as Wausau and third-party defendants' interests are aligned; they both seek to hold defendants directly liable for the excavation incident. Though a conflict of interest could develop if the representation of both parties were to continue, as determined *supra*, the third-party complaint will be dismissed, rendering such speculation moot. Moreover, in the waiver obtained by Jaffe & Asher, its representation of third-party defendants was limited for the sole purpose of filing this motion to dismiss, and third-party defendants agreed to replace Jaffe & Asher with new counsel in the event that the motion is denied (NYSCEF Doc No 176). The representation is therefore permissible under Rule 1.7(b). Accordingly, counsel will not be disqualified and third-party defendants' arguments for dismissal may be considered.

#### Dismissal

Third-party defendants argue that Langan fails to state a claim for: (1) negligent misrepresentation, as third-party defendants never represented that they had the authority to release Langan from Wausau's potential claims; (2) unjust enrichment because Langan received the benefit it bargained for, and in any event, third-party defendants did not benefit at its expense; and (3) contribution or indemnification because Langan is being held directly liable for its own wrongdoing, rather than vicariously liable for the wrongdoing of third-party defendants (NYSCEF Doc No 155). They also argue that this action is improper under CPLR § 1007, which provides that "a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant," and note that Langan released them from all claims. Langan opposes, arguing that it has successfully stated its claims

for negligent misrepresentation, unjust enrichment, and contribution or indemnity; and that its complaint complies with CPLR § 1007.

When determining if a complaint should be dismissed for failing to state a cause of action pursuant to CPLR § 3211(a)(7), “the complaint must be liberally construed, the allegations therein taken as true, and all reasonable inferences must be resolved in plaintiff’s favor” (*Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319, 319 [1st Dept 2006]). The motion “must be denied if from the pleading’s four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*id.* [internal quotations omitted]). However, “factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently or clearly contradicted by documentary evidence are not entitled to such consideration” (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]).

Langan cannot maintain this action, as it explicitly released third-party defendants from all existing and future claims relating to the construction project. The global settlement, entered into on the record on October 31, 2016, included counsel for Langan and the insureds (NYSCEF Doc No 161). Counsel for JBC stated the following:

[A] full and complete resolution on the terms of the general release have been negotiated with respect to the Lexington matter. There are a various numbers of parties making contributions to this settlement. The consideration is not only the dismissal of this case, but the dismissal of all related actions, cross claims, counterclaims, third-party actions, contribution claims, breach of contract claims, in any way arising out of, growing from or related to the construction activity or design activity concerning this construction project. . . And principally this is a global release in its broadest form possible met [sic] to provide absolute protection from any further claims or liabilities with respect to any and all claims . . . related to this construction project against any of the Defendants or Third-party Defendants who are in this Lexington matter and represented here today or otherwise referenced on the docket as Defendants or Third-party Defendants. This would include contribution [and] indemnity . . .

*Id.*, 5:21-6:5, 8:16-9:2 [emphasis added]; see also NYSCEF Doc No 153, pp. 21-30. Counsel for both third-party defendants and Langan agreed to these terms (*id.*, 13:10-15, 13:24-14:3-5). Thus, the third-party action “is barred in its entirety, as a matter of law, by the [] release” which was “the product of rigorous, arm’s length negotiations between sophisticated parties, all of whom were advised by their own expert legal counsel” (*Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 76 AD3d 310, 314-15 [1st Dept 2010]; *Nuntnarumit v Lyceum Partners LLC*, 165 AD3d 532, 532 [1st Dept 2018] [“The releases . . . are a complete defense to all claims asserted,” including negligent misrepresentation and unjust enrichment]; *Halkedis v Two East End Ave. Apt. Corp.*, 137 AD2d 452, 453 [1st Dept 1988] [“Having executed the general release[, the corporation] may not now assert its [] right to indemnification or contribution”]). Since Langan’s causes of action are not viable, as they are rooted in the same occurrence from which third-party defendants were released from all liability, third-party defendants’ motion to dismiss the third-party complaint will be granted.

### CONCLUSION

Accordingly, it is

ORDERED that third-party defendants’ motion to dismiss the third-party complaint is granted in its entirety, and it is further

ORDERED that the cross-motions seeking to disqualify Jaffe & Asher LLP are denied, and it is further

ORDERED that the caption shall be amended to reflect the dismissal of the third-party complaint as follows:

WAUSAU BUSINESS INSURANCE COMPANY,

Plaintiff,

- v -

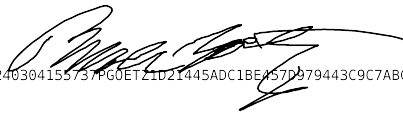
LANGAN ENGINEERING AND ENVIRONMENTAL SERVICES, INC., SLCE ARCHITECTS, LLP, GEOTECHNICAL SERVICES CORP., ROBERT W. BRONZINO, DURAMAX HEAVY EXCAVATION AND FOUNDATION INC., THOMAS FRANGIPANE,

Defendants.

And it is further

ORDERED that counsel for third-party defendants shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the General Clerk’s Office, who are directed to mark the court’s records to reflect the change in caption, and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website).

  
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3/4/2024  
DATE

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PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
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"/>	OTHER
			<input type="checkbox"/>	REFERENCE