

New York Bus Operators v Arthur J. Gallagher & Co.
2024 NY Slip Op 35156(U)
October 23, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 615531/2017
Judge: Jerry Garguilo
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SHORT FORM ORDER

INDEX NO. 615531/2017

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY**

PRESENT:

**HON. JERRY GARGUILO
SUPREME COURT JUSTICE**

**MOTION RETURN DATE: 10/2/24
MOTION SEQ# 019 MOTNDECD
MOTION SEQ#021 MOTNDECD**

**NEW YORK BUS OPERATORS
COMPENSATION TRUST,**

Plaintiff,

**ALL PARTIES VIA NYSCEF
(FULL PARTICIPATION RECORDED)**

-against-

ARTHUR J. GALLAGHER & CO. et al.,

Defendants.

**ARTHUR J. GALLAGHER & CO., GALLAGHER
BASSETT SERVICES INC., and RISK
MANAGEMENT PLANNING GROUP, INC. n/k/a
YORK RISK SERVICES GROUP, INC.,**

Third-Party Plaintiffs,

-against-

NETWORK ADJUSTERS, INC.,

Third-Party Defendant.

In rendering its decision, the Court has considered the following:

1. Please see the attached NYSCEF Document Lists for motion seqs. #019 & #021.

The Court heard oral argument on October 2, 2024 to consider reargument applications concerning issues of expert disclosure and opinion evidence. At the outset, the Court recited a portion of the affirmation by Ms. Monahan in opposition on behalf of the Third-Party Defendants to the petition of Defendants to reconsider its prior Short Form

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Order and therefore to continue to allow expert disclosure. The Court recited the following:

The Court can reverse a prior order where circumstances have changed, or the court determines the interest of achieving substantial justice would be furthered. The doctrine (the law of the case) is not an absolute mandate and may be ignored in “extraordinary circumstances” citing a case *Foley v Roche*, 86, A.D.2d 887. [Ms. Monahan's submission] goes on to suggest that there are extraordinary circumstances supporting the present situation. (TR. 10/2/24 p.7)

Clearly this Court’s Short Form Order conflicts with that of Justice Emerson.

The Court thereafter noted,

As I was saying, Ms. Monahan goes on to note here, there are extraordinary circumstances supporting such reconsideration, and NYBOCT should be permitted to introduce expert-opinion testimony concerning those critical issues, both in support of its claims as Plaintiff and in defense of the counterclaims. Thus, the introduction of expert testimony at this stage is appropriate. (TR. 10/2/24 p.8)

At that point the Court directed all the attorneys to dedicate some time to the comments submitted by Ms. Monahan. In response to the Court's direction regarding Ms. Monahan's submission, Defendants’ Counsel, Samuel Thomas, noted the following:

Now, at the time, and I quoted this in my reply affidavit, document number 775 of page 5, Mr. Rosenberg¹ expressly asked, "All right. So, at least, on behalf of your roles talking to the plaintiff's attorneys, attorneys for the plaintiff on the counterclaim, you are not looking for any expert discovery at this point?"

Ms. Monahan replied, “No. We noticed an appeal from that decision.”

¹ The parties should note that this Court's Short Form Order of July 29, 2024, was submitted to Mr. Rosenberg, the Special Master, for review, content, and comment.

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Mr. Rosenberg and Mr. Barbiero, what about you as Plaintiff on the main claim?

Mr. Barbiero said, "I would just echo what Ms. Monahan said." So a year and a half ago they expressly told Mr. Rosenberg during the course of this whole issue that they were not seeking any expert discovery. (TR. 10/2/24 pp. 25-26)

The relief sought by the movants as stated on the record is as follows:

Your Honor, our position on the motion for reargument is simply this: To get reargument on a motion, that we're only talking about this one, of the experts, we have to establish we overlooked something or misapprehended something. Our opinion or proposition is that you [the Court] overlooked Justice Emerson's order and that it warrants removal or redaction of that one sentence from your order and allow the case to proceed to motions for summary judgment and ultimately trial. (TR. 10/2/24 pp. 32-33)

Ms. Monahan was given an opportunity to respond to Defendants' recounting of conversations with Mr. Rosenberg.

The Court noted in referring to Defendants' comments the following:

THE COURT: Okay. Couple of things came up just now, comments of Mr. Rosenberg who the Court, of course, consults with, the court-appointed neutral.

MS. MONAHAN: Yes, your Honor.

THE COURT: What do you have to say?

MS. MONAHAN: Well, I'll start with the court-appointed neutral piece. My answer to the question of whether we were still pursuing experts was that we weren't pursuing experts anymore. I said no. We filed an appeal. Perhaps my brevity is being misconstrued, but we filed an appeal from the decision

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that said they're not going to have any experts in this case because it's a simple breach of contract case. I wouldn't have filed an appeal if I agreed with that decision. That's just a misrepresentation. (TR. 10/2/24 pp. 32-33)

Justice Emerson wrote:

The primary issue to be decided by the court is whose obligation it was to report the claim that is the subject of this action in a timely manner to the plaintiff's excess-insurance carrier or to NYBOCT. It is undisputed that the claim should have been reported when it reached a certain threshold amount and that it was not reported in a timely manner. Whose obligation it was to report the claim involves interpreting the parties' agreements to determine the parties' obligations thereunder, which is an issue for the court. The agreements, including the indemnification provisions upon which the plaintiff relies, are not so confusing that their interpretation is beyond the ken of a typical factfinder, nor do they involve issues of such scientific or technical complexity that an expert explanation is required to allow the court to understand them.

[Dkt. Entry No. 581]

In reaching her decision, Justice Emerson considered, and rejected, NYBOCT's arguments in favor of utilizing expert witnesses, as follows:

The plaintiff seeks to introduce expert testimony to establish that, as licensed insurance professionals, the defendants owed NYBOCT legal duties independent of their contractual obligations for which they can be held liable (i.e., professional malpractice). The plaintiff may not utilize an expert to offer an opinion as to the legal standards that he believes should have governed the parties' conduct. [citations omitted] (*emphasis added*)

While insurance is a licensed and regulated business, the acts and omissions for which the plaintiff seeks to hold the

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defendants liable are, in essence, clerical, administrative, or even ministerial in nature. The plaintiff provides the court with no authority for its contention that "licensed insurance professionals," particularly those performing the tasks at issue here, may be liable for professional malpractice. Rather, the opposite appears to be the case. The Court of Appeals has held that insurance agents and brokers, while licensed, are not deemed to be "professionals" for malpractice purposes... [citations omitted]

A court may correct a prior order where that order was plainly wrong and thereby prevent the need for costly appeals. *Foley v. Roche*, 86 A.D.2d 887, 887, 447 N.Y.S.2d 528, 829 (2d Dep't 1982). A court can reverse a prior order where circumstances have changed, or the court determines the interests of achieving substantial justice would be furthered. *Kaplan v Finy*, 209 A.D.2d 248, 252, 618 N.Y.S.2d 777, 781 (1st Dep't 1994). The doctrine (Law of the Case) is not an absolute mandate and may be ignored in "extraordinary circumstances." *Foley*, 86 A.D.2d at 887, 447 N.Y.S.2d at 529. The Court finds no extraordinary circumstances.

The Court suspects that Plaintiffs were attempting to communicate to the Court that in the event they prevailed on their appeal and dismissed causes of action are reinstated, the issue of experts would in fact come to the fore. The Court will afford the Plaintiffs the benefit of the doubt. Perhaps the rationale of leaving the door open, in the event the Appellate Division modifies and/or reverses the determination of Judge Emerson, and considering the circumstances that expert testimony was at one time (pre-motion) anticipated by all parties² the Court will modify its Short Form Order as follows:

Expert disclosure and exchange as to any claim sounding in Breach of Contract is **DENIED**. As to that issue, the Law of the Case has been proven. The Court will not allow expert testimony/opinions. However, in the event the Appellate Division modifies the determination of Justice Emerson concerning the causes of action that have been dismissed, all parties shall reserve their rights to suggest or prove the necessity of expert testimony as to any causes of action that are reinstated by the Appellate Division.

ORDERED that the applications seeking reargument of this Court's July 29, 2024,

² See DKT. Entry No. 245 concerning Richard Sabetta.

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Short Form Order to remove the expert disclosure and exchange requirement is **GRANTED** and upon a review of the submissions, the Court modifies its order to the extent herein; it is further

ORDERED that the parties shall submit a joint briefing schedule for summary judgment motions to be so ordered.

The foregoing constitutes the decision and **ORDER** of this Court.

Dated: October 23, 2024


HON. JERRY GARGUILO, JSC