

**Southwest Mar. & Gen. Ins. Co. v Accredited Sur. &
Cas. Co.**

2025 NY Slip Op 32522(U)

June 26, 2025

Supreme Court, Kings County

Docket Number: Index No. 512983/2024

Judge: Heela D. Capell

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 19 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 26 day of June, 2025.

P R E S E N T:

HON. HEELA D. CAPELL,
Justice.

-----X
SOUTHWEST MARINE AND GENERAL INSURANCE COMPANY,

Plaintiff,

-against-

Index No.: 512983/2024
Motion Sequence: 2

ACCREDITED SURETY AND CASUALTY COMPANY,

Defendant.

-----X

The following e-filed papers read herein:
Notice of Motion, Affirmations, and Exhibits Annexed _____
Affirmations in Opposition and Exhibits Annexed _____
Reply Affirmations and Exhibits Annexed _____

NYSCEF Doc Nos.:
33-35
36
57

In this action for a declaratory judgment, defendant Accredited Surety and Casualty Company (“Accredited”) moves (in motion sequence number 2), pursuant to CPLR 2221 (d), seeking leave to reargue its motion to dismiss the complaint filed by plaintiff Southwest Marine and General Insurance Company (“Southwest Marine”), which was denied by order of this court dated November 21, 2024.

In its complaint, Southwest Marine seeks a declaration that Accredited has a primary and non-contributory duty to defend and indemnify Southwest Marine’s named insureds, Britt Realty LLC (“Britt”) and 1504 Jeff LLC (“1504 Jeff”), as additional insureds under the commercial general liability policies issued by Accredited to Capri Construction Corp. (“Capri”) and Barrier Associates (“Barrier”). Britt and 1504 Jeff are defendants in an underlying property damage action pending in this court entitled *Ramos v 1504 Jeff LLC*

et al. (Index No. 500478/22) (the “Underlying Action”). In the Underlying Action, the plaintiffs allege that Britt and 1504 Jeff, among others, “performed general contractor and/or construction management services inclusive of demolition, excavation and construction work at [the underlying] Defendants’ premises” and that such work caused significant damage to the underlying plaintiffs’ premises, including foundational cracks, water leakage, building movement and structural damage (NYSCEF Doc No. 9, at ¶¶ 13, 30-32). Britt and 1504 Jeff subsequently commenced a third-party action against other contractors on the project, including Capri and Barrier (Accredited’s named insureds). In their third-party complaint, which incorporates the underlying complaint by reference, Britt and 1504 Jeff allege that they entered into a contract or agreement with Capri and Barrier for those entities to perform work at the premises, and that Capri and Barrier did, in fact, perform such work at the premises (NYSCEF Doc No. 14, ¶¶ 21-22, 25-26). The third-party complaint further alleges that “if the plaintiffs...were caused to sustain property damage” as alleged, “then same was brought about and sustained by reason of the carelessness, recklessness or negligence and/or acts of omission or commission by the third-party defendants [including Capri and Barrier]” (*id.*, ¶ 34).

In its prior motion, pursuant to CPLR 3211 (a) (7) to dismiss Southwest Marine’s complaint (motion sequence number 1), Accredited argued that neither the allegations in the Underlying Action nor the extrinsic facts triggered Accredited’s duty to defend Britt and 1504 Jeff. By order dated November 21, 2024, this court denied Accredited’s motion on the ground that “Defendant failed to show there is no possible basis on which it might eventually be held to be obligated to indemnify the insured” (NYSCEF Doc No. 31).

Accredited now seeks leave to reargue the prior motion, arguing that the court improperly used the heightened summary judgment standard (CPLR 3212) for evaluating its motion rather than the standard for reviewing a motion to dismiss pursuant to CPLR 3211. Southwest Marine opposes Accredited's motion.

Discussion

CPLR 2221 (d) allows a party to seek reargument at “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” (*McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]). “A motion for leave to reargue 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” (*FPG CH 94 Amity, LLC v Pizzarotti, LLC*, 218 AD3d 651, 654 [2d Dept 2023]).

Accredited's motion to reargue is granted; however, upon reargument, its motion to dismiss is again denied.

Under New York law, an insurance company's duty to defend arises “whenever the allegations within the four corners of the underlying complaint *potentially* give rise to a covered claim” (*Frontier Insulation Conts, Inc. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997] [emphasis added]; *Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65 [1991]; *Long Is. Rail Rd. Co. v New York Mar. and Gen. Ins. Co.*, 198 AD3d 888 [2d Dept 2021]). The insurance company's duty to defend is determined, therefore, by matching the allegations in the Underlying Action against the insurance policies at issue (*see Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984]).

Here, Accredited failed to establish that Southwest Marine's complaint does not state a cause of action under CPLR 3211 (a) (7). On a motion to dismiss pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*298 Humboldt, LLC v Torres*, 197 AD3d 1081, 1083 [2d Dept 2021]). "[T]he pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (*Jesberger v CVS Health Sols., LLC*, 222 AD3d 849, 850 [2d Dept 2023]). Contrary to Accredited's contention, the underlying complaint sets forth allegations that, if proven true, could potentially fall within the scope of coverage, thereby triggering Accredited's duty to defend. Whether the claims are ultimately meritorious is irrelevant at this stage.

Moreover, Accredited's failure to submit the applicable insurance policy (or policies) further undermines its motion. Without the policy language, Accredited cannot establish as a matter of law that the allegations in the underlying action fall outside the scope of coverage. This omission is particularly significant in a motion to dismiss based on CPLR 3211 (a) (7), where the policy language is essential to assess the legal sufficiency of the claim. The court therefore finds that Accredited has not demonstrated entitlement to dismissal under CPLR 3211 (a) (7).

Accordingly, it is

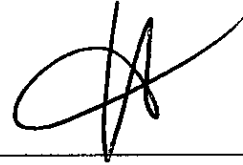
ORDERED that Accredited's motion to reargue its motion to dismiss is granted; it is further

ORDERED that upon reargument, Accredited's motion to dismiss is denied; and it is further

ORDERED that Southwest Marine's counsel is directed to electronically serve a copy of this decision/order with notice of entry on Accredited's counsel and to electronically file an affidavit of service with the Kings County Clerk.

This constitutes the decision and order of the court.

E N T E R



HON. HEELA D. CAPELL, J.S.C.

KINGS COUNTY CLERK
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