

Wesco Ins. Co. v JRS Realty Enters., LLC

2024 NY Slip Op 34177(U)

November 15, 2024

Supreme Court, Kings County

Docket Number: Index No. 501724/2019

Judge: Ingrid Joseph

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At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 15th day of November 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

-----X
WESCO INSURANCE COMPANY, as subrogee of
R&C MANAGEMENT CO. and 297 LENOX REALTY
LLC,

Plaintiff(s)

Index No: 501724/2019
Motion Seq. 7

ORDER

-against-

JRS REALTY ENTERPRISES, LLC, GEMSTAR
CONTRACTING CORP., MR. DEMOLITION, INC.,
STRUCTURAL ENGINEERING & DETAILING P.E.,
P.C., and ROBERT SIQECA, P.E.,

Defendant(s)

-----X
JRS REALTY ENTERPRISES, LLC and GEMSTAR
CONTRACTING CORP,

Third-Party Plaintiffs,

-against-

CERTAIN UNDERWRITERS AT LLOYD'S,
LONDON, UNITED SPECIALTY INSURANCE
COMPANY, MAIN STREET AMERICA GROUP,
CELA CONCRETE, INC., STRUCTURAL
ENGINEERING & DETAILING P.E., P.C. and
ROBERT SIQECA, P.E.,

Third-Party Defendants.

-----X

The following e-filed papers read herein:

- Notice of Motion//Affidavits Annexed
- Exhibits Annexed/Reply.....
- Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....
- Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....

NYSCEF Nos.:

- 163-164; 192
- 177-182
- 183-188

In this matter, Third-Party Defendant Cela Concrete Inc. ("Cela") moves (Motion Seq. 7) for an Order pursuant to CPLR 2221 seeking re-argument of this Court's Decision and Order dated July 7, 2022, which granted motions made by Third-Party Defendants Certain Underwriters at Lloyds ("Lloyds") and United Specialty Insurance Company ("United") which sought dismissal of the Third-Party Amended Complaint of JRS Realty Enterprises, LLC ("JRS") and Gemstar Contracting Corp. ("Gemstar") pursuant to CPLR 3211; and upon granting re-argument, for reinstatement of the Third-Party Complaint against the moving insurance carriers. Lloyds and United have opposed the motion.

This action arises from alleged property damage sustained by Wesco Insurance Company's insured R & C Management Co., and 297 Lenox Realty LLC ("297 Lenox Realty"), to a six-story building located

at 297 Lenox Road in Brooklyn, New York. JRS, the owner of an adjacent property located at 309 Lenox Road, had demolished an existing two-story building and retained Gemstar to act as construction manager to construct and develop a new eight-story building at that location. Gemstar was insured by Lloyds who issued a primary general liability policy and United who issued an excess policy. A request for defense and indemnification was made by Lloyds and United on behalf of its named insured Gemstar and JRS, who was listed as an additional insured on the policies. Lloyds and United disclaimed coverage to Gemstar and JRS under an “Earth Movement Exclusion,” since the underlying complaint alleged that the property damage was caused by excavation, construction, and/or demolition work that caused soil movement under portions of the foundation of the building located at 297 Lenox Road. In February of 2020, JRS and Gemstar filed an Amended Complaint wherein they asserted causes of action for declaration of defense, indemnification, reimbursement, breach of contract, negligence, contribution, failure to procure insurance, and for declaratory judgment against the various parties herein. On March 20, 2020, and May 21, 2020, Lloyds and United filed motions to dismiss JRS and Gemstar’s Amended Complaint, pursuant to CPLR 3211(a)(1), which were granted by the court by order dated July 7, 2022.

In support of its motion, Cela argues that in reaching its conclusion this Court ignored an alternative cause of the property damage theory alleged in the JRS and Gemstar Amended Complaint which alleged that a payloader struck the building located at 297 Lenox Road. Cela argues that the Earth Movement Exclusions in the Lloyds and United policies do not categorically exclude claims for cracks to a building resulting from being struck by a payloader and that since there is a possibility that the payloader striking the building caused damage to the buildings without movement of land, earth or soil, the motions to dismiss should have been denied. Additionally, Cela argues that as insurers, Lloyds and United are obligated to prove that the relied upon exclusion negates coverage in clear language and is subject to no other reasonable interpretation, which they failed to do. Cela contends that because JRS and Gemstar are entitled to the inference that the cracks in the building were caused without movement of earth, land, or soil, that there is a possibility of coverage, thus Lloyds’ and United’s duty to defend has been triggered. Cela states that the duty to defend exists even if it is ultimately determined that the property damage was caused by “earth movement,” and that until an adjudication is made that the property damage was caused in whole or in part by earth movement or subsidence, there is a possibility that the cause may be determined to be the payloader striking the building.

In opposition, Lloyds argues that Cela does not have standing to reargue the decision because it is not an aggrieved party since the underlying decision involves Lloyds’ and United’s motions to dismiss JRS and Gemstar’s Amended Complaint and that Cela has not requested relief nor was any relief asserted against it. Lloyds states that Cela’s crossclaims against it were not dismissed in the court’s underlying decision thus it does not have standing to bring this application. Nonetheless, Lloyds argues that the court did not

overlook or misapprehend any facts or law in its decision and that the court fully addressed and rejected Cela's argument that the Earth Movement exclusion and the Subsidence Exclusions did not preclude coverage for the allegation that the damage to the subject building was caused by the payloader striking the building. Additionally, Lloyds requests that the court search the record and dismiss Cela's crossclaims for common law and contractual indemnity against it because Cela has not established privity between the parties, nor does it have a claim for common law indemnification because Lloyds is an insurance company not a contractor and it did not take any direct action to cause any property damage to the subject building. In opposition, United asserted the same argument that the court did not overlook or misapprehend any law or facts in its underlying decision, therefore Cela's motion should be denied.

Motions for leave to reargue are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision (CPLR 2221; *Mudgett v Long Island R.R.*, 81 AD3d 614 [2d Dept. 2011]; *Barnett v Smith*, 64 AD3d 669 [2d Dept. 2009]). A motion for re-argument 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 (*Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819 [2d Dept. 2011]; quoting *McGill v Goldman*, 261 AD2d 593 [2d Dept. 1999]). The movant must make an effort to demonstrate in what manner the court, in rendering the original determination, overlooked or misapprehending the relevant facts or law (*Id.* at 820; *Nicolia v Nicolia*, 84 AD3d 1327 [2d Dept. 2011]). Once the court reviews the merits of the movant's arguments, the court, by doing so, has granted re-argument, and must determine whether to adhere to the original determination, or alter the original determination (see *McNeil v Dixon*, 9 AD3d 481 [2d Dept. 2004]; see also *Nationstar Mortgage, LLC v Sim*, 197 AD3d 1178 [2d Dept. 2021]; *NYCTL 1998-2 Trust v Michael Holdings, Inc.*, 77 AD3d 805 [2d Dept. 2010]).

Only an aggrieved party or a person substituted for him or her may appeal from an appealable judgment, order, or final order (see CPLR 5511; *Rooney v Salem*, 228 AD3d 600 [2d Dept 2024]; *Matter of LaMarca v Quirk*, 110 AD3d 808 [2d Dept 2013]). A party is aggrieved when the court denies, in whole or in part, such party's requested relief. Likewise, a party is aggrieved when a court grants relief, in whole or in part, against such party and such party had opposed the requested relief (see *Mixon v TBV, Inc.*, 76 AD3d 144, [2d Dept. 2010]; *Matter of Dolomite Products Co., Inc. v Town of Ballston*, 151 AD3d 1328, 1331 [3d Dept. 2017]). Aggrievement does not hinge upon a court's reasons underpinning why relief was granted or denied (see *Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d 465 [1986]). A party that disagrees with the rationale or findings of a court's decision, but is awarded its sought relief, is not aggrieved (see *Parochial Bus Sys. v. Board of Educ. of City of N.Y.*, 60 NY2d [1983]). "The concept of aggrievement is about whether relief was granted or withheld, and not about the reasons therefor" (*Mixon* at 149).

Here, the court finds that Cela does not have standing to bring the instant application for re-argument. Notwithstanding the fact that Cela opposed the underlying motions, it was not aggrieved by the order granting the motions because the movants did not seek, and the order did not grant, any relief against Cela. Assuming arguendo that Cela had standing to bring the instant application, the court finds that Cela's moving papers present the same arguments already considered by the court, which are insufficient to warrant modification of the order. Specifically, the court in addressing Cela's argument held that:

Lloyd's and United Specialty's motions to dismiss under 3211 (a)(1) are based upon the Earth Movement and Subsidence exclusions, respectively, in the subject policies of insurance. In the third-party complaint, JRS and Gemstar attribute the incident to a construction pay loader controlled by Cela. They also concede that the incident warranted a complaint from the DOB with a category code of "building shaking, vibrating, structural stability affected." JRS and Gemstar further concede that the complaint stated "FDNY requests structural stability inspection due to a pay loader striking building causing a crack from parapet to floor." JRS and Gemstar also conceded that the incident involving the pay loader resulted in damage to 298 Lenox Road. Since the Lloyd's earth movement exclusion disregards what caused the movement of land, earth, or soil, the fact that it could have been caused by a pay loader is of no consequence. The Lloyd's policy specifically provides that the exclusion applies regardless of any other cause or event contributing concurrently or in any sequence or manner to the movement of land, earth or soil. Even under a Strict, narrow construction, the court finds that the language in Lloyd's earth movement exclusion specifically, clearly, and unmistakably excludes coverage for the damage resulting from the pay loader incident.

To the extent that the coverage is precluded for JRS and Gemstar under the Lloyd's policy, it follows that both entities are also precluded from obtaining coverage under the United Specialty commercial excess coverage policy. Even if this were not the case, the subsidence exclusion contained in the United Specialty policy specifically and unequivocally excludes coverage for damage that would not have occurred, in whole or part, but for the subsidence (the caving in or sinking) of land that is caused in whole or in part by the operations of any insured or any subcontractor, such as Cela in this case.

With respect to Lloyd's request to search the record and dismiss Cela's crossclaims against it, A Court may search the record and grant summary judgment in favor of a nonmoving party only with respect

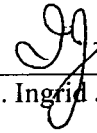
to a cause of action or issue that is the subject of the motions before the court.¹ Here however, the issue of Cela's crossclaims were not raised in its Notice or Motion nor are such crossclaims the subject of the motion currently before the Court at this time. Thus, Llyod's request is denied.

Accordingly, it is hereby,

ORDERED, that Cela's motion to reargue is denied for lack of standing. The court adheres to its original decision.

Matters or issues not addressed herein are without merit or moot.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice

¹ (*Williams v. Cnty. of Suffolk*, 215 AD3d 893 [2d Dept. 2023]; see also *Dunham v. Hilco Const. Co.*, 89 NY2d 425 [1996]; *Netjets, Inc. v. Signature Flight Support, Inc.*, 43 AD3d 1014, 842 NYS2d 492 [2d Dept. 2007]).