

<b>Navigators Ins. Co. v Ironshore Indem. Inc.</b>
2017 NY Slip Op 30886(U)
April 25, 2017
Supreme Court, New York County
Docket Number: 161419/2014
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY**

**PRESENT: DEBRA A. JAMES**  
*Justice*

**PART 59**

NAVIGATORS INSURANCE COMPANY, Individually  
and as Subrogee of 835 AVENUE OF THE  
AMERICAS LP and M.D. CARLISLE CONSTRUCTION  
COMPANY,

Index No.: 161419/2014

Motion Date: 05/03/2016

Motion Seq. No.: 003

Plaintiffs,

**- v -**

IRONSHORE INDEMNITY INC., TRANSEL ELEVATOR,  
INC. and TRANSEL ELEVATOR & ELECTRIC, INC.

Defendants.

The following papers, numbered 1 to 3 were read on this motion to reargue, renew, reconsider  
Order dated October 26, 2015

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED

1
2
3

**Cross-Motion:**       Yes      No

In this declaratory judgment action, defendants TRANSEL  
ELEVATOR & ELECTRIC, INC. (s/h/a TRANSEL ELEVATOR INC. and  
TRANSEL ELEVATOR & ELECTRIC, INC.) (Motion Sequence Number 003)  
and IRONSHORE INDEMNITY INC. (Motion Sequence Number 004) move to  
reargue, renew and reconsider the Order dated October 26, 2015  
(Order) that denied the motion of defendants to dismiss and  
granted the cross motion for summary judgment of plaintiff for a

**Check One:**       **FINAL DISPOSITION**       **NON-FINAL DISPOSITION**

**Check if appropriate:**       **DO NOT POST**       **REFERENCE**

**SETTLE/SUBMIT ORDER/JUDG.**

**MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING**

declaratory judgment in its favor.

The court shall grant reargument, and upon reargument, vacate such order only to the extent of referring this matter to a Special Referee to hear and determine the amount of reasonable defense costs and indemnity payments made by plaintiff in the settlement of the action King & Perroth v 835 Avenue of the Americas, New York County Supreme Court Index No. 11249/2009 (James, J.) (King/Perroth). The court otherwise adheres to such Order.

In its Decision and Order, this court misapprehended Ocean Accident & Guarantee Corporation v Hooker Electro-Chemical Co., 240 NY 37 (1925). In that Ocean Accident, the Court of Appeals (240 NY at 47 [citations omitted]) specifically stated in pertinent part:

It is so well settled as not to require discussion that an insurer who pays claims against the insured for damages caused by the default or wrongdoing of a third party is entitled to be subrogated to the rights which the insured would have had against such third party for its default or wrongdoing. This right of subrogation is based upon principles of equity and natural justice. We recognize at once the fairness of the proposition that an insurer who has been compelled by his contract to pay to or in behalf of the insured claims for damages ought to be reimbursed by the party whose fault has caused such damages and the principle of subrogation ought to be liberally applied for the protection of those who are its natural beneficiaries. Under the circumstances presented in this case the right is in some of its results not different than would be the assignment by the insured of its right of action against the primary wrongdoer for the fault which has caused the damages which have been paid by the insurer. The subrogee acquires rights which as between it and the insured are beyond the power of cancellation and destruction by the latter and

under our practice is entitled to enforce these rights by an action in its own name and without joining the insured as a party.

Thus, contrary to the reasoning in the Order, under the holding of Ocean Accident, the right of plaintiff to subrogation against defendants rests upon principles of tort and not contract. Thus, the subrogation rule enunciated in Ocean does not apply here, since plaintiff does not assert that the defendants were the primary wrongdoers causing injuries to the plaintiffs in the settled and discontinued underlying action of King/Perroth. See Maryland Casualty Company v W.R. Grace and Company, 218 F3d 204 (2d Cir. 1999). Rather as stated in Maryland Casualty (218 F3d at 210):

Of course, under New York law where an insurer, under a duty to defend, wrongfully refuses to do so, it is liable for its share of a reasonable settlement of the suit. It is also a well-settled principle in the law of contribution that when one party jointly liable on an obligation pays more than its pro rata share, it may compel the co-obligors to contribute their share of the amount paid. See Henry L. McClintock, Handbook of the Principles of Equity, 542 (2d ed. 1948). Hence, the relevant inquiry is whether the settlement of the suit was reasonable or equitable, not simply whether there was a settlement.

Under the contract between Transel Elevator & Electric, Inc. (Transel) and M.D. Carlisle Construction Company, Transel had a duty to defend and indemnify subrogees 835 Avenue of Americas and M.D. Carlisle and cause them to be named as additional insureds under the policy of insurance purchased by Transel, as required by such contract. Thus, defendants are liable to plaintiff for

reimbursement of reasonable defense costs and settlement payments made in King & Perroth v 835 Avenue of the Americas, New York County Supreme Court Index No. 11249/2009 (James, J.)

Accordingly, it is hereby

ORDERED that the motion of defendants IRONSHORE INDEMNITY INC. and TRANSEL ELEVATOR & ELECTRIC, INC. (s/h/a Transel Elevator, Inc. and Transel Elevator & Electric, Inc.) to reargue the order dated October 26, 2015 is granted, and upon reargument, vacates such Order only to the extent that the matter the court defense costs and settlement payments made by plaintiff NAVIGATORS INSURANCE CO. in King & Perroth v 835 Avenue of the Americas, New York County Supreme Court Index No. 11249/2009 (James, J.) is to a Special Referee to hear and determine; and it is further

ADJUDGED and DECLARED that 835 Avenue of Americas LP and M.D. Carlisle Construction Company are additional insured under the policy issued by defendant Ironshore Indemnity, Inc. to defendant Transel Elevator & Electric, Inc.; and it is further

ADJUDGED and DECLARED that defendants Transel Elevator, Inc. and Transel Elevator & Electric, Inc. have an obligation to defend and indemnify 835 Avenue of the Americas L.P. and M.D. Carlisle Construction Company under the contract dated May 6, 2008, and must reimburse plaintiff Navigators Insurance Company for the total amount of indemnity and defense costs it incurred

on behalf of 835 Avenue of the Americas and M.D. Carlisle Construction Company in King & Perroth v 835 Avenue of the Americas, New York County Supreme Court Index No. 11249/2009 (James, J.); and it is further

ORDERED that the issue of the amount of indemnity and defense costs incurred by plaintiff Navigators Insurance Company in the defense of King & Perroth v 835 Avenue of the Americas, New York County Supreme Court Index No. 11249/2009 (James, J.) is referred to a Special Referee to hear and determine and that within 60 days from the date of this Order the plaintiffs shall cause a copy of this order with notice of entry, including proof of service thereof, to be filed with the Special Referee clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) to arrange a date for a reference to determine pursuant to CPLR § 4317; and it is further

ORDERED that the referee shall file his or her decision within thirty (30) days after the cause or matter is finally submitted pursuant to CPLR §4319; and it is further

ORDERED and ADJUDGED that in accordance with the foregoing decision of the referee the Clerk is directed to enter judgment in favor of plaintiff NAVIGATORS INSURANCE COMPANY against defendants IRONSHORE INDEMNITY, INC. and TRANSEL ELEVATOR & ELECTRIC, INC. in the amount of \$ \_\_\_\_\_ with interest at the statutory rate from the date of February 12, 2015, until the

date of entry of judgment, as calculated by the Clerk in the amount of \$ \_\_\_\_\_, together with costs and disbursements as taxed by the Clerk of \$ \_\_\_\_\_, and attorney's fees in the amount of \$ \_\_\_\_\_, for a total of \$ \_\_\_\_\_

ADJUDGED that plaintiff Navigators Insurance Company, having an address at \_\_\_\_\_, do recover from defendant Ironshore Indemnity, Inc. having an address at \_\_\_\_\_ and Transel Elevator & Electric, Inc. having an address at \_\_\_\_\_, costs and disbursements in the sum of \_\_\_\_\_, as taxed by the Clerk and plaintiffs shall have execution therefor.

This is the decision and order of the court.

**Dated:** April 25, 2017

**ENTER:**



**DEBRA A. JAMES**

**J.S.C.**