SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

STARR INDEMNITY + LIABILITY COMPANY

-v-

MONTE CARLO, LLC, et al

INDEX NO. 651048/13

MOTION DATE

MOTION SEQ. NO. 005

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is by defendants for leave to reargue and renew is DENIED per the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: September 19, 2013

J.S.C.

MELVIN L. SCHWEITZER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

STARR INDEMNITY & LIABILITY COMPANY,	:	
Plaintiff,	:	Index No. 651045/13
-against-	:	DECISION AND ORDER
MONTE CARLO, LLC, DORCHESTER, LLC, and GREAT AMERICAN INSURANCE COMPANY,	:	Motion Sequence No. 005
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

By Decision and Order dated June 12, 2013, the court denied the motion for Preliminary Injunction (Motion Sequence No. 001) submitted by defendants Monte Carlo, LLC and Dorchester, LLC (collectively, Monte Carlo), and vacated the Temporary Restraining Order issued on May 2, 2013. Defendants now move, on order to show cause, for leave to reargue and renew that decision. The facts of this case are set forth fully in the prior decision and will not be repeated here, except where necessary.

Leave to Reargue

CPLR 2221(d) provides:

> (d) A motion for leave to reargue:
>
> 1. shall be identified specifically as such;
>
> 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
>
> 3. Shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.

Defendants do not point to any fact or legal argument that the court "overlooked or misapprehended" that would support reargument. They argue that the court was obligated, but failed to hold an evidentiary hearing because there were disputed issues of material fact. CPLR 6312 (c) mandates a hearing when the moving party's papers demonstrate the elements required for the issuance of a preliminary injunction, and the opposing party then raises issues of fact with respect to those elements (CPLR 6312 [c]; *see 1234 Broadway LLC v West Side SRO Law Project, Goddard Riverside Comm. Ctr.*, 86 AD3d 18, 23-24 [1st Dept 2011]). In its May 2 decision, the court found that defendants had failed to meet their burden to establish a likelihood of success on the merits: "The court finds that Monte Carlo has not tendered sufficient proof to demonstrate a likelihood of success on the merits" (6/12/13 Decision and Order).

Starr also argues that the court found a factual dispute existed. The court did refer to a dispute, but it also stated: "Monte Carlo alleges that at the time they applied for the Policy, the Premises had no standing code violations. It is not clear, however, based on the supporting documents that this is in fact the case" (*Id.*). The court was referring to the papers submitted by defendants to support the motion. That defendants' submission showed the issue was disputed does not cure the failure to establish a likelihood of success; it supports the court's conclusion. Leave to reargue is denied.

Leave to Renew

CPLR 2221(e) provides:

> (e) A motion for leave to renew:
>
> 1. shall be identified specifically as such;
>
> 2. shall be based upon new facts not offered on the prior motion

> that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
>
> 3. shall contain reasonable justification for the failure to present such facts on the prior motion.

Defendants claim that the court did not have an opportunity to review their Reply papers filed in support of their preliminary injunction motion because an e-mail from the court granting them leave to file a reply had not been sent to their counsel. The court cannot determine the accuracy of this allegation from the submitted papers. Regardless, defendants have failed to show "new facts . . . that would change the prior determination." *Id.*

Finally, defendants argue that "once claims are made against an insured, the insurer [loses] its common-law right of rescission" (Defendants' Reply Memo, pg.3). This is not the law. Rather, under New York law, "[O]nce a claim is lodged under the policy, a rescission by notice . . . can only be prospective" *(Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co.*, 61 AD3d 412, 414-415 [2009]). An insurer can still rescind after a claim is made against the insured, but it could potentially remain obligated to defend the insured against the previously made claim. As the Appellate Division, First Department explained in *Federal Ins. Co. v Kozlowski*, 18 AD3d 33 (2005): [O]nce a policy goes into effect and a claim has been made, the status quo is changed and a defense of rescission must await a judicial determination. This does not mean that once a claim is made under such a policy, the rescission would only be effective as to new claims. We clearly held that once a claim is lodged under the policy, a rescission by notice (i.e. without a judicial determination) can only be prospective, but '[n]eedless to say, if [the insurer] prevails in its claim of right to rescind on the basis of fraud in the inducement, its obligation to defend [the insured] is

vitiated and the policy will be rendered void from its inception irrespective of the point in the life of the policy that a liability claim may have arisen'" (*id.* at 40). Accordingly, it is

ORDERED that defendants' motion for leave to reargue or renew is denied.

Dated: September 19, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER