

**Old Republic Natl.Tit. Ins. Co. v Joseph Nicoletti
Assoc. Professional Land Surveyors**

2018 NY Slip Op 33583(U)

September 11, 2018

Supreme Court, Nassau County

Docket Number: 609079/16

Judge: James P. McCormack

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice of the Supreme Court

_____ **x**

**TRIAL/IAS, PART 23
NASSAU COUNTY**

**OLD REPUBLIC NATIONAL TITLE
INSURANCE COMPANY,**

Plaintiff(s),

Index No.: 609079/16

-against-

**Motion Seq. No.: 003 & 004
Motion Submitted: 7/2/18**

**JOSEPH NICOLETTI ASSOCIATES
PROFESSIONAL LAND SURVEYORS,
P.C. a/k/a JOSEPH NICOLETTI LAND
SURVEYOR, P.C.,**

Defendant(s).

_____ **x**

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....X
- Notice of Cross Motion/Opposition/Supporting Exhibits.....X
- Affirmation in Reply/Opposition.....X
- Reply Affirmation.....X

Plaintiff, Old Republic National Insurance Company (Old Republic), moves this court for an Order pursuant to CPLR § 2221(a), granting them leave to renew and reargue the decision of this court dated February 1, 2018, which granted in part and denied in part their motion for summary judgment. Defendants, Joseph Nicoletti Associates

Professional Land Surveyors, P.C. a/k/a Joseph Nicoletti Land Surveyor, P.C. (Nicoletti), opposes the motion and cross moves for leave to reargue the same decision which denied their motion for summary judgment.

Old Republic hired Nicoletti to perform a survey of certain property. Nicoletti performed the survey, and based upon the survey, Old Republic issued title insurance to non-party TEP Charter School Assistance, Inc. (TEP). Old Republic alleged the survey failed to include an encroachment, and as a result, they had to pay a claim to TEP in the amount of \$89,123.00. They sued Nicoletti for common law indemnification and sought reimbursement for that amount. Each party then moved for summary judgment. Old Republic sought summary judgment on the complaint and Nicoletti's affirmative defenses. The court granted the motion related to the affirmative defenses but denied the motion on the complaint. Nicoletti sought summary judgment dismissing the complaint. The court denied the motion. Both sides now argue the court erred in denying in part, or in whole, their motions. Nicoletti does not argue, however, that dismissal of their affirmative defenses was in error.

A motion for leave to renew or reargue is addressed to the sound discretion of the Supreme Court (see *Matter of Swingearn*, 59 AD3d 556 [2d Dept. 2009]). A motion for renewal "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR § 2221[e] [2]). A motion for reargument must 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" (CPLR § 2221[d][2]). It is not designed, however, to provide an unsuccessful party with successive opportunities to re-litigate the issues previously decided (*see Foley v. Roche*, 68 AD2d 558, 567 [1st Dept. 1979]), or to present arguments different from those originally tendered (*see Giovanniello v. Carolina Wholesale Off. Mach. Co., Inc.*, 29 AD3d 737, 738 [2d Dept. 2006]).

Pursuant to CPLR § 2221(d)(3) a motion for reargument "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry". There is no statutory limit to the time within which a litigant can file a motion to renew based upon facts not offered on the prior motion that would change the prior determination pursuant to CPLR § 2221[e]. While each motion was timely filed, the Supreme Court has jurisdiction to reconsider its prior order "regardless of statutory time limits concerning motions to reargue" (*Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]; *see Aridas v Caserta*, 41 NY2d 1059 [1977]; *cf. Matter of Huie [Furman]*, 20 NY2d 568 [1967]; *Johnson v Incorporated Vil. of Freeport*, 303 AD2d 640 [2d Dept. 2003]).

To prevail upon a motion to renew, a party must proffer both "new facts not offered on the prior motion that would change the prior determination . . . and . . . reasonable justification for the failure to present such facts on the prior motion" (CPLR §

2221 [e] [2], [3]; see *New York Cent. Mut. Fire Ins. Co. v Caddigan*, 15 AD3d 581 [2d Dept. 2005], *JP Morgan Chase Bank, N.A. v Malarkey*, 65 AD3d 718, 719-720 [3d Dept. 2009]; *Johnson v Title N., Inc.*, 31 AD3d 1071, 1071-1072 [3d Dept. 2006]).

**OLD REPUBLIC'S MOTION TO REARGUE AND
RENEW (MOTION SEQ. 003)**

The February 1, 2018 order found that Old Republic was not entitled to summary judgment on the complaint because they did not establish a duty was owed to TEP, the injured party. In reaching that decision, the court relied on, and cited to, *Rosado v. Proctor & Schwartz*, 66 NY2d 21 (1985) for the proposition that for common law indemnification to lie, both the indemnitor and the indemnitee must owe a duty to the injured party. It appears the court applied too narrow an interpretation to the doctrine. As pointed out by Old Republic, the Court of Appeals issued a broader definition of the doctrine as related in *Raquet v. Braun*, 90 NY2d 177 (1997): "...the key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is 'a separate duty owed the indemnitee by the indemnitor'". (*Raquet* at 183, quoting *Mas v. Two Bridges Assocs.*, 75 NY2d 680, 690 [1990]). The fact that a party may not owe a duty to the injured party does not preclude a cause of action for common law indemnification. (*Raquet v Braun, supra*). Herein, the

court erred in finding that the lack of a duty owed to TEP from Nicoletti prevented summary judgment on the common law indemnification cause of action. As such, reargument is granted and the court will reconsider its prior decision.

The crux of the complaint is that Nicoletti performed the survey and failed to include the encroachment. By failing to include the encroachment, the title insurance policy Old Republic issued to TEP did not except the encroachment. As a result, they were forced to pay TEP \$89,123.00. As Old Republic was forced to pay TEP due to Nicoletti's negligence, Nicoletti should indemnify Old Republic.

Common law indemnification is available where one party has been forced to pay another party for the wrongs committed by a third party. (*Curreri v. Heritage Property Inv. Trust, Inc.*, 48 AD3d 505 [2d Dept. 2008]). One may not seek common law indemnification when they bear some responsibility for the injury. (*Lui v. Town of East Hampton*, 117 AD3d 689 [2d Dept. 2014]). As the alleged wrong herein was the failure to include the encroachment on the survey, it cannot be argued that Old Republic was liable in any way. Therefore, the only issue is whether Nicoletti committed a wrong. In support of their original motion, Old Republic submitted, *inter alia*, an affidavit and a survey from Adjooiap Autar who surveyed the property for, among others, TEP. Mr. Autar states there is an encroachment and provides a survey indicating same. In light of his affidavit and the other proof provided, the court finds Old Republic has established

entitlement to summary judgment as a matter of law. The burden shifts to Nicoletti to raise a material issue of fact requiring a trial of the action.

In opposition, Nicoletti does not submit an affidavit of anyone with firsthand knowledge to refute Mr. Autar's finding that there is an encroachment. Instead, they argue that Old Republic failed to show that Nicoletti deviated from a standard of care, or that Nicoletti breached a duty to Old Republic. Further, they argue the complaint is not clear on what duty, if any, was breached, while presuming it was the duty to provide an accurate survey. If the duty was to provide an accurate survey, then what they are really arguing is professional negligence, and the failure to include an expert's affidavit on which professional standards was violated is fatal to their claim. They argue "No other obligation on the part of Nicoletti has been identified which entitles Old Republic to be indemnified...". The court finds this logic faulty.

Nicoletti does not deny it was hired to perform a survey. They offer nothing to contradict Mr. Autar's affidavit which, taken in conjunction with their survey, allows the court to presume the Nicoletti survey failed to include the encroachment. It is interesting to note that they offer no admissible evidence to challenge Old Republic's assertion, and Mr. Autar's affidavit, that there is an encroachment. Instead, they rely on the argument that an expert is required to determine they breached a duty. The court disagrees. Old Republic has indeed established a duty was breached by proving they hired Nicoletti to

perform the survey, that they issued a policy based upon that survey, that the survey was inaccurate, and based upon that inaccuracy they were forced to pay TEP. Contrary to Nicoletti's assertion Old Republic has established that an inaccurate survey was presented, and the court does not require an expert's opinion to find that the providing of an inaccurate survey is the breach of a duty.

In opposition to the motion to reargue, Nicoletti asserts the argument that the common law indemnification cause of action should have been dismissed outright because it was duplicative of the malpractice claim. While the court finds this is likely an argument raised for the first time in opposition to reargument, the court will address it anyway.

The complaint herein contains one cause of action for common law indemnification. The February 1, 2018 order indicated that while the complaint mentioned professional negligence and negligence, it was one for common law indemnification. The court further found, citing to *McDermott v. City of New York*, 50 NY2d 211, 218 (1980), that a cause of action for common law indemnification was a separate cause of action and independent of the alleged underlying wrongdoing. Therefore, there is no malpractice claim of which the common law indemnification claim is duplicative. The February 1, 2018 order does state that, "to the extent that" the complaint is one for malpractice and negligence, those causes of action were time-barred.

Regardless, the court determined then, and now, that the complaint makes out a viable, stand-alone cause of action for common law indemnification. Having raised no other arguments in opposition, the court finds Nicoletti has neither raised an issue of fact nor submitted legitimate grounds to deny reargument to Old Republic.

As for Old Republic's motion to renew, the court finds it is merely an extension of the motion to reargue. Regardless, as the court is granting reargument and changing its prior decision, the motion to renew is rendered moot.

NICOLETTI'S MOTION FOR REARGUMENT (MOTION SEQ. 004)

Nicoletti's motion for reargument is based upon the same arguments raised in opposition to Old Republic's motion for reargument. They argue that this court erred by not dismissing Old Republic's complaint due to the fact that the common law indemnification cause of action was duplicative of the malpractice cause of action. As stated, *supra*, the court found this argument spurious, and possibly inappropriate for being raised for the first time in opposition to/in support of reargument. Regardless, the court finds it did not misapprehend or misconstrue any facts or law in denying Nicoletti's prior motion.

Accordingly, it is hereby;

ORDERED, that the Old Republic's motion for leave to reargue the February 1,

2018 order of this court is GRANTED; and it is further

ORDERED, that upon reargument, so much of the court's February 1, 2018 order that denied Old Republic's motion for summary judgment on the complaint is vacated and the order is amended to grant Old Republic's motion for summary judgment on the complaint; and it is further

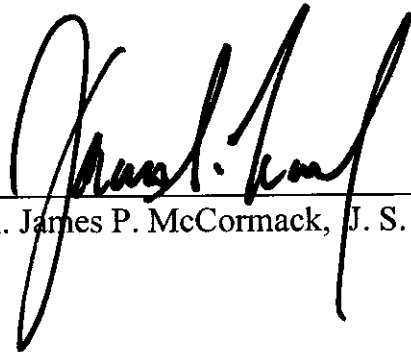
ORDERED, that Old Republic's motion for leave to renew this court's February 1, 2018 order is DENIED as moot; and it is further

ORDERED, that Nicoletti's motion for reargument is DENIED in its entirety.

This constitutes the Decision and Order of the Court.

Settle judgment on notice.

Dated: September 11, 2018
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.

ENTERED
SEP 12 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE