

**American Empire Surplus Lines Ins. Co. v Red Hook
Constr. Group-II LLC**

2019 NY Slip Op 32142(U)

June 28, 2019

Supreme Court, New York County

Docket Number: 656296/17

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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AMERICAN EMPIRE SURPLUS LINES
INSURANCE COMPANY,

Plaintiff,

-against-

Index No. 656296/17

RED HOOK CONSTRUCTION GROUP-II LLC;
RED HOOK EQUIPMENT GROUP, LLC; RHGC
SAFETY CORP; EDUARDO HARO; 353-357
BROADWAY LLC; TOLL BROS., INC.; TOLL
BROTHERS REAL ESTATE, INC; TOLL GC, LLC;
EDAN CEVEDA; 470 4TH AVENUE INVESTORS,
LLC; DANYA CEBUS CONSTRUCTION, LLC;
ANDRES GOMEZ; 227 EAST 19TH STREET
OWNER, II, LLC; 227 EAST 19TH STREET OWNER
III, LLC; GRAMERCY SQUARE, LLC; CABGRAM
DEVELOPER, LLC; TOMASZ SOBCZAK; 154 EAST
23, LLC; ANTHONY L. BROWN; CAPE CHURCH
ASSOCIATES, LLC; T.G. NICKEL & ASSOCIATES,
LLC; RYSZARD CALA; 11 HOYT OWNER, L.P. ;
TISHMAN SPEYER PROPERTIES, INC.; and
TRITON CONSTRUCTION COMPANY, LLC,

Motion Seq. No.: 002/005

Defendants.

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DORIS LING-COHAN, J.:

Plaintiff's Motion for a Declaratory Judgment

Plaintiff American Empire Surplus Lines Insurance Company (American Empire) moves,
pursuant to CPLR 3001 (Motion Seq. No. 002), for a judgment declaring that it owes no duty to
defend or indemnify defendants Red Hook Construction Group - II, LLC, Red Hook Equipment
Group, LLC, and RHGC Safety Corp. (together the Red Hook entities) under the Company's

Policy No. 15CG0198598.

American Empire's motion is based upon the failure of the Red Hook entities to comply with a March 14, 2018 order of the Honorable Gerald Lebovits, requiring them to submit to an audit of their business records no later than April 16, 2018, pursuant to the above-referenced insurance policy. As the Red Hook entities have defaulted on this motion, American Empire's motion is granted, as provided below.

It is noted that while initially defendants Cape Church Associates, LLC, T.G. Nickel & Associates, LLC, 353-357 Broadway LLC, Toll Bros., Inc., Toll Brothers Real Estate, Inc. and Toll GC, LLC opposed American Empire's motion for a declaratory judgment, a stipulation of discontinuance, *with prejudice*, has been executed with respect to defendants 353-357 Broadway LLC, Toll Bros. Inc., Toll Brothers Real Estate Inc., and Toll GC, LLC. As to defendants Cape Church Associates, LLC, and T.G. Nickel & Associates, to the extent that they requested that any order issued in response to American Empire's motion for a declaratory judgment explicitly provide that such defendants will not be prejudiced by any action American Empire takes against the Red Hook entities, as such request was not made by cross-motion, it will not be considered by this Court. Moreover, American Empire represents that it is not seeking any relief against such defendants.

Plaintiff's Motion to Discontinue

Plaintiff American Empire's motion to discontinue this action pursuant to CPLR 3217 (b) against

defendants Cape Church Associates, LLC, T.G. Nickel & Associates, LLC, 353-357 Broadway LLC, Toll Bros., Inc., Toll Brothers Real Estate, Inc. and Toll GC, LLC (Motion Sequence No. 005) is granted. As indicated above, since the filing of the within motion, plaintiff and defendants 353-357 Broadway LLC, Toll Bros., Inc., Toll Brothers Real Estate, Inc. and Toll GC, LLC have stipulated to the discontinuance of this action, with prejudice.

With respect to defendants Cape Church Associates, LLC and T.G. Nickel & Associates, LLC, generally, a party cannot be forced to litigate, thus, discontinuance should be granted absent special circumstances (*see Burnham Serv. Corp. v Natl. Council on Compensation Ins., Inc.*, 288 AD2d 31, 32 [1st Dept 2001]; *Shapiro, Inc. v Milspemes Corp.*, 20 AD2d 857 [1st Dept 1964]; *Eugenia VI Venture Holdings, Ltd. v Maplewood Equity Partners*, 38 AD3d 264 [1st Dept 2007]). Here, as no special circumstances have been shown, plaintiff's motion for discontinuance is granted. Further, opposing defendants have not established a basis for an award of costs, expenses and attorneys' fees, as a condition of such discontinuance (*see Matter of Lawrence v Miller*, 79 AD3d 417 [1st Dept 2010]); *Mighty Midgets, Inc. v Centennial Ins. Co.*, 47 NY2d 12, 21-22 [1979][“it has now long been the universal rule in this country not to allow a litigant to recover damages for the amounts expended in the successful prosecution or defense of its rights”).¹

¹ Such defendants did not seek affirmative relief with respect to the within motion, via cross-motion.

Order

Accordingly, it is hereby

ORDERED that plaintiff's motion for a declaratory judgment (Motion Seq. No. 002) is granted; it is further

ADJUDGED and DECLARED that plaintiff American Empire Surplus Lines Insurance Company owes no duty to defend or indemnify defendants Red Hook Construction Group - II LLC, Red Hook Equipment Group, LLC, or RHGC Safety Corp. under the Company's Policy No. 15CG0198598; it is further

ORDERED that plaintiff's motion to discontinue this action pursuant to CPLR 3217 (b), with prejudice, as to defendants Cape Church Associates, LLC and T.G. Nickel & Associates, LLC, is granted; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy upon defendants, with notice of entry.

Dated: June 28, 2019



Hon. Doris Ling-Cohan, J.S.C.