

**American States Ins. Co. v Graphic Arts Mut. Ins.
Co.**

2020 NY Slip Op 34125(U)

December 10, 2020

Supreme Court, New York County

Docket Number: 651372/2018

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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INDEX NO. 651372/2018

AMERICAN STATES INSURANCE COMPANY and
GENERAL INSURANCE COMPANY OF AMERICA,

MOTION DATE 03/02/2020

Plaintiffs,

MOTION SEQ. NO. 004

- v -

GRAPHIC ARTS MUTUAL INSURANCE COMPANY, NOVA
CASUALTY COMPANY, PRAETORIAN INSURANCE
COMPANY, and NAVIGATOR INSURANCE COMPANY,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 97, 98, 99, 100, 101,
102, 103, 104, 105, 106, 107, 108, 109, 111, 112, 113

were read on this motion for REARGUMENT/RECONSIDERATION

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiffs American States Insurance Company
and General Insurance Company of America's motion for reargument
is DENIED; and, it is further

ORDERED that the motion of plaintiffs American States
Insurance Company and General Insurance Company of America for
renewal is GRANTED; and it is further

ORDERED that the Decision/Order dated January 6, 2020 is
rescinded and vacated and the original motion of Navigators
Insurance Company to dismiss and/or for a declaration in its
favor is DENIED; and it is further

ORDERED that defendants Navigators Insurance Company is directed to file and serve an answer within 30 days of service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to submit a proposed preliminary conference order or a competing proposed preliminary conference order to 59nyef@nycourts.gov and NYSCEF on February 5, 2021.

DECISION

In this action for a declaratory judgment, plaintiffs American States Insurance Company (American States) and General Insurance Company of America (General) move for an Order, pursuant to CPLR 2221 [d] and [e], granting them leave to reargue and/or renew defendant Navigators Insurance Company's (Navigators) motion to dismiss, which was decided by Decision/Order dated January 6, 2020, and upon such reargument and renewal, plaintiffs ask this court to vacate such Order and to deny the motion to dismiss.

In its January 6, 2020 decision, this court granted defendant Navigators Insurance Company's (Navigators) motion, pursuant to CPLR 3211 (a) (1) and (7), to dismiss and severed the complaint as against Navigators, to the extent of issuing a declaration in its favor, ruling that Navigators is not obligated to provide a defense, or coverage, in connection with the underlying action, entitled County of Nassau v Commercial

Concrete Corp., Index No.: 608267/2016, Supreme Court, Nassau County.

On the original motion, this court considered the question of coverage. Specifically, whether in the underlying action involved an alleged accident or loss as defined under the policy, during the policy period, from September 2016 to September 2017. In finding that there were no allegations of loss that occurred during the policy period, the court found:

"Contrary to plaintiff's argument that it, 'is not clear when the damaging conduct occurred,' the complaint alleges that the 'accident'- the clogged drain and subsequent flooding - occurred in August, 2015, well before the effective date of the policy. The specifically identified damages, claimed by the County, the approximately \$4.8 million for remediation work completed in March 2016, also do not suggest any reasonable possibility that property damage occurred during the policy period.

Although the complaint alleges that county will incur additional damages for future remediation work, it does not allege what work will be required or when such work will occur. Notably, as of February 2018, as County asserted in its motion to amend the complaint to add Ready Mix as a defendant, the alleged 'Phase II' remediation work still had not commenced. Thus, there are no allegations of additional damages occurring during the policy period. Also contrary to plaintiffs' apparent argument that County's request for injunctive relief demonstrates that damage continues, there are no allegations that the alleged illegal dumping has continued; the injunctive relief was requested to avoid any future reoccurrence "

(NYSCEF docket no. 94 [Decision and Order on Navigators' motion to dismiss] at 10).

In support of their motion, plaintiffs argue they are entitled to the requested relief on four grounds. The crux of plaintiffs' argument is that there is clear evidence of the dumping in 2015, prior to the period of the policy, and also evidence of dumping in 2018, after the policy period, creating an inference that there was dumping during the policy period and, therefore, a real possibility of coverage, entitling plaintiffs' to coverage for a defense in the underlying action.

In support of their first ground, plaintiffs state that this court misapprehended that the damages claimed in the Underlying Action (as hereinafter defined) are not the damages purportedly caused by the August 2015 flood, but instead, the damages claimed by the County of Nassau are damages to its catch basin and drainage system purportedly caused by the release of concrete slurry by Commercial Concrete Corp. (Commercial Concrete) and New York Ready Mix, Inc. (Ready Mix) into the system.

Second, plaintiffs state that this court overlooked the allegations in the pleadings of the underlying action that could be reasonably read to include the release of concrete slurry by Commercial Concrete and Ready Mix, and causing damages to the catch basin and drainage system, right up to and through the date the underlying action was commenced.

"The County's allegation that damages continue to occur is evidenced by the request for injunctive relief, where the County alleges as follows:

'The County is further entitled to prospective injunctive relief against Commercial Concrete compelling it to adjust its operations so that, in the future, illegal discharge of concrete or a concrete-water mixture into the County's Storm Water System does not occur'

The clear inference from this allegation is that the damaging conduct was continuing as of the date of the Verified Complaint"

(memo in support at 3).

Third, plaintiffs argue that this Court misapprehended that New York case law compels the duty to defend whenever the allegations of the complaint in the underlying action "suggest a reasonable possibility of coverage and that whenever the underlying complaint does not preclude the possibility of injury-in-fact occurring during the policy period, the policy may be triggered" (memo in support at 1-2).

The fourth ground that movants urge is that this Court overlooked the motion of the County to amend its complaint, and that the Court in the underlying action granted the motion, to add:

"allegations that Commercial Concrete and/or Ready Mix have continued their activities regarding the washing of concrete mixing trucks at the Facilities and/ or in the public roadway near the Facilities in a manner that causes concrete and concrete slurry to enter into the County's Rushmore Street Drain and storm water basin No. 51"

(memo in support at 2).

Plaintiffs argue that their motion to renew should be granted because, after the motion to dismiss was fully submitted, new evidence and papers were filed in the underlying action making it clear that the County was alleging that the release of Concrete Slurry and resulting damage to the catch basin and drainage system was occurring, "right up to and through the date the Underlying Action was commenced, including during the policy period of Navigators' policy" (memo in support at 2).

In their reply, plaintiffs argue that Navigators does not dispute that the County, in the Underlying Action, offered specific evidence of alleged illegal dumping on March 1, 2018, March 6, 2018, October 26, 2018, and November 1, 2018. Rather, plaintiffs urge that Navigators simply argues that there is no evidence of alleged illegal dumping during Navigators' policy period - September 16, 2016 to September 16, 2017.

The County alleges that, in the Underlying Action, the purported release of Concrete Slurry by Commercial Concrete and Ready Mix damaged its catch basin and drainage system. The County alleges that the alleged illegal dumping started prior to 2015 and continued right into 2018. The County does not allege it started and stopped; rather, it specifically alleges that it "continued." The County alleges that this continued alleged

illegal dumping is continuing to cause the same damages. Upon such allegations, plaintiff's further argue that:

"Given the evidence that there was dumping of Concrete Slurry before Navigators' policy period, the evidence that there was dumping of Concrete Slurry after Navigators' policy period, and the allegation that the dumping 'continued,' discovery may show that the dumping occurred at some point from September 16, 2016 to September 16, 2017 - during Navigators' policy period"

(memo in reply at 7).

In support of their renewal motion, plaintiffs argue that the affidavits submitted in the underlying action, after the motion to dismiss was fully submitted, demonstrate the ongoing nature of the dumping:

In addition, on January 17, 2019, after the motion to dismiss was fully submitted, the County served and filed in the Underlying Action, the affidavit of Kevin Cummings, a Special Investigator for the Bureau of Claims and Investigations in the Nassau County Attorney's Office. This affidavit shows that the County's allegations in the Underlying Action include that the alleged illegal dumping continued, even after the Underlying Action was commenced. It also states that, "[o]n November 15, 2018, I observed hardened concrete in the catch basin." In the Underlying Action, on January 29, 2019, the County submitted the affidavit of Edward A. Smith, Esq., in further support of the motion for a preliminary injunction. Mr. Smith argued that the County has shown that "Commercial Concrete is washing its concrete trucks in a manner such that the resulting concrete slurry is discharged into the public roadway." He uses the term "is", rather than "was", to argue it was still ongoing

(memo in support at 6).

Plaintiffs argue that these documents did not exist at the time they were required to file their opposition to the motion,

and therefore were unavailable for use in opposition to the motion. Thus, based upon the liberal standard of duty to defend, and because this is pre-discovery, plaintiffs argue they are entitled, upon reargument and renewal, to a denial of Navigator's motion to dismiss.

In opposition, Navigators essentially argues that plaintiffs offer no facts that there was dumping during the policy period, and that plaintiffs offer only factual support for allegations of dumping in 2015 and 2018, and not in between:

"Plaintiffs attempt to convince the Court they are entitled to reargument or renewal of the motion to dismiss by alleging that these "new facts include [sic] the Decision and Order dated May 10, 2019 . . . has shown that the allegedly illegal dumping of Concrete Slurry continued to as late as November 1, 2018." Moving Memo at 12. This self-serving description of Nassau County's new allegations is incorrect. The Underlying Order, the Cummings Aff., and the November 2018 Violation show that allegedly illegal dumping of concrete slurry occurred between March 2018 and November 2018. Plaintiffs have not identified a single allegation by Nassau County that any illegal dumping occurred during the period from September 30, 2016 and September 30, 2017"

(memo in opp at 9-10).

Discussion

C.P.L.R. 2221 (d) provides, in relevant part, as follows:

"(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. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals."

The Court denies plaintiffs' motion for reargument, as there is no merit to their argument that this court misapprehended either the facts or law.

C.P.L.R. 2221 [e] provides in relevant part:

"(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."


Pursuant to C.P.L.R. §2221 [e][2], a motion for leave to renew "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" (see Ramos v City of New York, 61 AD3d 51, 54 [1st Dept 2009]). The Court may grant the branch of the motion to renew in the interest of justice (see Mejia v Nanni, 307 AD2d 870, 871 [1st Dept 2003] ["Although renewal motions generally should be based on newly discovered facts that

could not be offered on the prior motion (see CPLR 2221 [e]), courts have discretion to relax this requirement and to grant such a motion in the interest of justice”).

On its motion to renew, plaintiffs argue, based upon the affidavits of Kevin Cummings, a Special Investigator for the Bureau of Claims and Investigations in the Nassau County Attorney's Office, and of Edward A. Smith, Esq., submitted in the underlying action after this motion was submitted, that there is a real possibility that an incident or incidents of dumping occurred during the policy period. Where the underlying complaint does not preclude the possibility that the injury-in-fact occurred during the subject policy period, the policy is triggered (American Empire Ins. Co. v PSM Ins. Co., 259 AD2d 341, 343 [1st Dept 1999]; Greater N.Y. Mut. Ins. Co. v Royal Ins. Co., 238 AD2d 261 [1st Dept 1997]).

The court shall grant the motion of plaintiffs to renew, shall vacate the Order dated January 6, 2020, and shall deny Navigator's motion to dismiss. Based upon the submissions of the parties, the Court finds that there are factual allegations in the Underlying Action that the illegal dumping has continued through 2018 (see NYSCEF Doc No. 112 ["The allegations of continued illegal dumping through at least 2018, combined with allegations of prior dumping, and that there is no indication that the County alleges the dumping stopped or that there was a

moratorium on dumping, compel the conclusion that the pleadings and facts in the Underlying Action suggest a reasonable possibility of coverage"]. The facts of dumping in 2015 and 2018, before and after the policy raise a question about dumping during the term of the policy and there are no facts offered undermining the possibility that an injury occurred during the term of the policy.

<u>12/10/2020</u> DATE					 DEBRA A. JAMES, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE