

**Atlantic Cas. Ins. Co. v Eastern Fruit & Vegetables
Inc.**

2021 NY Slip Op 31322(U)

April 9, 2021

Supreme Court, Kings County

Docket Number: 510798/2018

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th day of April, 2021.

PRESENT:
HON. CARL J. LANDICINO,

Justice.

-----X
ATLANTIC CASUALTY INSURANCE
COMPANY,

Index #: 510798/2018

Plaintiff,

- against -

DECISION AND ORDER

EASTERN FRUIT & VEGETABLES INC.,
Defendants,

Motion Sequence #3, 4 and 5

-----X
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered (NYSCEF)</u>
Notice of Motion and	
Affidavits (Affirmations) Annexed	<u>45-52, 73, 74, 76, 78, 85, 112</u>
Opposing Affidavits (Affirmations)	<u>55, 87-105, 107, 108, 116</u>
Reply Affidavits (Affirmations)	<u>57-59, 117, 118</u>
Memoranda of Law	<u>53, 54, 56, 75, 86, 119</u>

After a review of the papers and oral argument, the Court finds as follows:

This action concerns an alleged breach of contract between Atlantic Casualty Insurance Company (hereinafter referred to as the "Plaintiff" or "Atlantic"), and Eastern Fruit & Vegetables Inc. (hereinafter referred to as the "Defendant" or "Eastern"). Atlantic seeks the payment of insurance premiums allegedly due and owing by Eastern.

Atlantic moves (motion sequence #3) for an order, (i) pursuant to CPLR 3211(b) dismissing or striking Eastern's sixth affirmative defense; and/or (ii) pursuant to CPLR 2221, granting reargument of the Court's order dated July 2, 2019, and upon reargument "amending the order to find that Atlantic Casualty does, in fact, have the capacity to maintain this lawsuit."

Atlantic also cross-moves (motion sequence #5) for an order (i) pursuant to CPLR 3211(b) dismissing or striking Eastern's second and sixth affirmative defenses and/or (ii) restoring motion sequence #3 and, upon restoring such motion, granting the relief therein (including permitting Atlantic to amend its pleading in order to avoid dismissal).

Motion Sequence #4

Eastern moves (motion sequence #4) to dismiss the Plaintiff's Complaint. As an initial matter, Eastern's motion is denied as a violation of the single motion rule. See CPLR 3211(e), see *Bailey v. Peerstate Equity Fund, L.P.*, 126 AD3d 738, 7 N.Y.S.3d 142 [2d Dept 2015].

Motion Sequence #5

As an initial matter, Atlantic's motion to restore motion sequence #3 is granted. It is clear that the motion (motion sequence #3) was "marked off" the calendar within a year of the filing of this motion to restore it. Therefore, "... restoration is automatic." See *One W. Bank, FSB v. Rosenberg*, 189 AD3d 1600, 140 N.Y.S.3d 86 [2d Dept 2020]. Motion sequence #5 also seeks dismissal of Eastern's second and sixth affirmative defenses. That relief is granted in light of the holding in relation to Motion Sequence #3. As such, motion sequence #5 is granted to the extent that motion sequence #3 is restored and the Defendant's second and sixth affirmative defenses are dismissed. Plaintiff's application to amend its pleading is moot.¹

Motion Sequence #3

As indicated, the Plaintiff seeks to dismiss the Defendant's sixth cause of action and/or leave to reargue (CPLR 2221) this Court's decision and order dated July 2, 2019 resulting in a determination that "Atlantic Casualty does, in fact, have the capacity to maintain this lawsuit."

¹ The Plaintiff has not raised the single motion rule in its opposition papers.

As an initial matter, the motion to reargue is timely. Notice of Entry was served and filed on July 29, 2019 and motion sequence #3 was served and filed on August 28, 2019, "... within thirty days after service of a copy of the order determining the prior motion and written notice of entry." See CPLR 2221(d)(3). Eastern's sixth affirmative defense states as follows: Incapacity to commence and maintain this action.

In its underlying decision and order dated July 2, 2019, this Court found the following:

Based on the plain language of BCL §1312(a), Atlantic's capacity to maintain this action apparently turns on whether or not Atlantic actually "does business" in New York. This presents a question of fact that precludes dismissal at this juncture. Consequently, Eastern's cross motion to dismiss the complaint, pursuant to BCL §1312(a), is denied.

This court determines that it erred in finding that an issue of fact existed as to whether Atlantic actually "does business" in New York. Therefore, the court must determine, for the purposes of this narrowly focused application, whether it erred in determining that there was an outstanding question of whether Atlantic had the right to maintain this action.

Upon review, the court finds that it did err in finding that there was an issue of fact as to whether Atlantic was doing business in New York. In order to come to that conclusion, the Court must read BCL §1312 in conjunction with BLC §1301, as modified by Insurance Law §108(e). When read together, it is clear that as an incorporated foreign insurer, Atlantic is not required to be authorized to do business in the State of New York. As an excess line carrier, it is otherwise regulated and as such is not barred from commencing suit in this state. Whether it does business in New York is not the question.

As such, the Defendant's sixth affirmative defense is dismissed and the Court finds that Atlantic may maintain this action in the State of New York.²

It is hereby ordered as follows:

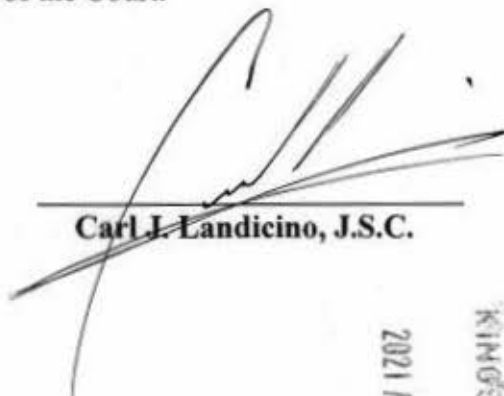
Motion sequence #3 is granted, the Defendant's sixth affirmative defense is dismissed and the Court finds that Atlantic may maintain this action in the State of New York.

Motion sequence #4 is denied as violative of the single motion rule.

Motion sequence #5 is granted to the extent that motion sequence #3 is restored and the Defendant's second and sixth affirmative defenses are dismissed. Plaintiff's application to amend its pleading is moot.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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² The Defendant's Second Affirmative Defense, that the Plaintiff is not licensed to issue insurance policies in New York State, also fails based upon this finding (Motion Sequence #5).