

**Utica First Ins. Co. v Gristmill Earth Realty Corp.**

2011 NY Slip Op 31262(U)

May 3, 2011

Sup Ct, Nassau County

Docket Number: 018519-09

Judge: Steven M. Jaeger

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,  
Acting Supreme Court Justice

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UTICA FIRST INSURANCE COMPANY a/s/o  
MIO MIO, INC.,

Plaintiff,

-against-

GRISTMILL EARTH REALTY CORP., ISLAND  
CONTRACTING, HENRY REBMANN  
PLUMBING & HEATING, INC. AND STEVEN  
AIELLO ELECTRICAL CONTRACTING, INC.,

Defendants.

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MERRIMACK MUTUAL FIRE INSURANCE  
INSURANCE COMPANY A/S/O BIG FISH  
LITTLE POND, LLC., D/B/A DAY BOAT CAFÉ,

Plaintiff,

-against-

GRIST MILL EARTH REALTY, MIO  
RESTAURANT, PAINTING THE ISLAND,  
INC., D/B/A ISLAND CONTRACTING,  
HENRY REBMANN PLUMBING &  
HEATING, STEVEN AIELLO  
ELECTRICAL CONTRACTING, AND  
ROBERT M. LABAW, R.A.,

Defendants.  
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TRIAL/IAS, PART 43  
NASSAU COUNTY  
INDEX NO.: 018519-09

MOTION SUBMISSION  
DATE: 2-10-11

MOTION SEQUENCE  
NOS. 2 and 3

Action No. 1

INDEX NO. 26087-09  
MOTION SEQUENCE  
NOS. 1-4  
Action No. 2

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NEW YORK MUNICIPAL INSURANCE  
RECIPROCAL a/s/o VILLAGE OF ROSLYN,

INDEX NO. 9369-10

Action No. 3

Plaintiff,

-against-

HENRY REBMAN PLUMBING &  
HEATING, INC., ISLAND CONTRACTING  
INC. and JOHN SANTOS,

Defendants.  
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The following papers read on this motion:

- Notice of Motion, Affirmation in Support, and Exhibits (Deft. Island Contracting) X
- Notice of Cross Motion, Affirmation and Exhibit (Deft. Aiello) X
- Notice of Motion and Affirmation (Pltf. in Action No. 2) X
- Notice of Motion and Affirmation (Pltf. in Action No. 2) X
- Notice of Motion, Affirmation and Exhibits (Pltf. in Action No. 3) X
- Affirmation in Opposition (Deft. Gristmill in Action No. 1) X
- Affirmation in Opposition (Pltf. in Action No. 2) X
- Affirmation in Support X
- Affirmation in Support of Cross Motion X
- Reply Affirmation X
- Memorandum of Law X

Motion by Island Contracting ("Island") and cross-motion by Steven Aiello  
Electrical Contracting, Inc. ("Electrical") pursuant to CPLR 3124 for an order directing  
plaintiff Merrimack Mutual Fire Insurance ("Merrimack"), a/s/o of Big Fish Little Pond,

LLC., d/b/a Day Boat Café (“the Café”) and Mio Mio, Inc. (“Mio”), to provide its cause and origin reports, are denied.

Motion by Merrimack pursuant to CPLR 3025 for leave to file an amended complaint wherein the caption is amended to identify Merrimack as “Merrimack Mutual Fire Insurance Company a/s/o BFLP, LLC d/b/a Day Boat Café” is granted without opposition.

Motion by Merrimack pursuant to CPLR 3215 for a default judgment against defendants Grist Mill Earth Realty (“Grist Mill”) and Robert M. LaBaw, RA, in the amount of \$175,040.00 is withdrawn as to Grist Mill, and conditionally granted as to Robert M. LaBaw, RA without further court order, unless he shall serve and file an answer within 45 days of service upon him by regular mail and certified mail, return receipt requested, of a copy of this order with notice of entry.

Motion by New York Municipal Insurance Reciprocal (“NYMIR”) a/s/o Village of Roslyn (“the Village”), pursuant to CPLR 3025 for leave to amend the plaintiff’s pleadings to allege claims against Grist Mill and Electrical, and to allow service of the amended summons and amended complaint in Action #3 upon counsel for these defendants, is granted.

Motion by Island pursuant to CPLR 602(a) for an order consolidating the action entitled *Hermitage Insurance Company a/s/o Grist Mill Earth Realty Corp. v Henry Rebmann Plumbing and Heating, et al*, Index # 19064, with the three prior actions already joined by this Court, is withdrawn pursuant to the parties’ stipulation.

The three actions that have been joined for discovery and trial pursuant to this Court's order dated May 27, 2010, are subrogation actions arising out of a fire that took place on December 15, 2008. The fire damaged properties located at 1361, 1363, and 1365 Old Northern Boulevard, Roslyn, New York.

In the first motion and cross-motion, Island and Electrical, respectively, seek an order directing Merrimack to provide its cause and origin report by William Hayden. This Hayden report was produced for Merrimack as result of a joint inspection held on December 23, 2008, at the scene of the fire. Island and Electrical both argue that their inability to investigate the premises as it existed after the fire and before its complete renovation warrants production of the Hayden report. They further argue that an insurer's first-party cause and origin report is not privileged, and therefore is discoverable, as it is prepared in the ordinary course of business.

Merrimack objects to both arguments. First, it states, without refutation, that the representatives present at the inspection on December 23, 2008, included not only expert Hayden, but both Steve Aiello for Electrical and John Santos for Island. Under these circumstances Island and Electrical had the same opportunity that Merrimack had to investigate the scene of the fire, and no explanation is provided for the claim to the contrary.

As to discoverability, Merrimack insists that the Hayden report was not made for the purpose of assessing first-party benefits to its insured, but only for subrogation purposes. Island and Electrical insist that, at most, this renders the Hayden report a "mixed purpose" report, which is not exempt from discovery.

CPLR 3101(a) provides for full disclosure of all evidence material and necessary in the prosecution or defense of an action, with the test being one of “usefulness and reason” (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). New York’s policy of liberal discovery “encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise (*Spectrum Systems International Corp. v Chemical Bank*, 78 NY2d 371, 376 [19991]).

In general courts have found that investigation reports prepared by experts for insurers, which aid insurers in deciding whether to pay or reject claims, are reports made in the regular course of business and, consequently such reports are not privileged as materials prepared in anticipation of litigation (*148 Magnolia, LLC v Merrimack Mut. Fire Ins Co.*, 62 AD3d 486, 487 [1<sup>st</sup> Dept. 2009]; *Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 191 [1<sup>st</sup> Dept. 2005]; *Bombard v Amica Mut. Ins. Co.*, 11 AD3d 647, 648 [2<sup>nd</sup> Dept. 2004]; *Landmark Ins. Co. v Beau Rivage Restaurant, Inc.*, 121 AD2d 98, 101 [2<sup>nd</sup> Dept. 1986]). In addition “mixed purpose” reports, for the purpose of determining the legitimacy of the loss and preparation for litigation are discoverable (*Plimpton v Massachusetts Mut. Life Ins. Co.*, 50 AD3d 532 [1<sup>st</sup> Dept. 2008]; *Landmark Ins. Co.*, 121 AD2d at 102).

This case differs from those cited above because Merrimack has submitted the affidavit of Andrew Hayes, the first party adjuster assigned to this claim, who states that “payments were made” to the insured before the Hayden report was received by Merrimack, and that the sole purpose of the Hayden report was for use in this subrogation litigation. In reply Island insists that Merrimack “was still ‘evaluating the

loss' before determining that subrogation claim existed; before subrogation counsel became involved; and before the instant lawsuit was commenced" (Greiper reply affirmation, par. 7).

In *Landmark Ins. Co.* the court found that there was a point in that case after which an expert's report was prepared exclusively for anticipated litigation, namely, when "the insurer had previously issued a disclaimer of coverage," or "had made a firm decision to do so" (*Landmark Ins. Co.* at 102). In the instant case, Mr. Hayes' conclusion that the report was done "for the purposes of developing the case against defendants" satisfies the Court that here Merrimack had made a firm decision to proceed with this subrogation litigation, and that this weighs in favor of protecting the Hayden report from discovery.

In addition, this Court has reviewed Merrimack's Response to Defendant Rebmann Plumbing & Heating's Expert Witness Disclosure ("Response," Exhibit B to the Gallin Affirmation), and finds that this Response provides Island and Electrical with sufficient information regarding Mr. Hayden and his report to avoid unfair surprise at trial (see generally *McDonald v Finely's Inc.*, 20 AD3d 900 [4<sup>th</sup> Dept. 2005](plaintiffs entitled to factual data and test results in expert's report, but not the expert's opinions)).

For all of the above reasons, namely, the opportunity of the movants to obtain the same information, the purpose of the report for use in this subrogation litigation, and the availability of the summary of the Hayden report in Merrimack's Response, this Court is compelled to deny the motion by Island and the cross-motion by Electrical for an order directing Merrimack to produce the Hayden cause and origin report.

In Action #2 Merrimack seeks a default judgment in the amount of \$175,040, pursuant to CPLR 3215 against Robert M. LaBaw, RA, the architect for renovations at Mio, the restaurant at 1363 Old Northern Boulevard. According to the complaint defendant LaBaw had opined that the building at 1363 Northern Boulevard could be properly protected without sprinklers, and this lack of sprinklers played a role in the spread of the fire. The moving papers contain an affidavit by Albert Margaritis, an owner of the Café, with exhibits documenting damages sustained and payments made. These motion papers also contain an affidavit by expert Hayden, wherein he describes conditions at 1363 Old Northern Boulevard that contributed to the spread of the fire.

Defendant LaBaw was personally served on January 15, 2010, with the summons and verified complaint. He has not answered or appeared in this action, and on this record Merrimack is entitled to a default judgment. However, in view of this Court's strong preference for dispute resolution on the merits, leave to enter a default judgment against defendant LaBaw in the amount of \$175,040.00 is conditionally granted to Merrimack, unless within 45 days of service of a copy of this order with notice of entry defendant LaBaw shall serve and file an answer herein.

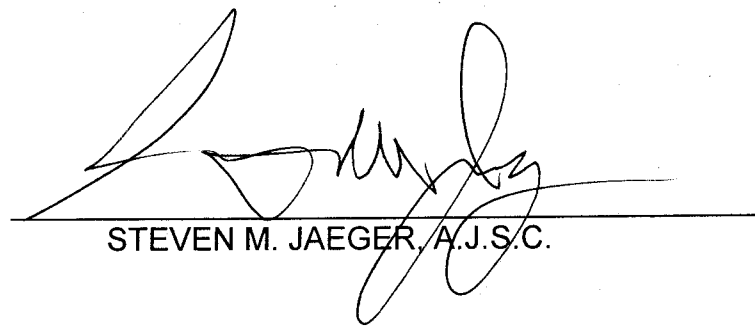
In Action #3 NYMIR seeks leave to serve an amended complaint, alleging subrogation claims against Grist Mill and Electrical, and adding these entities as defendants. Grist Mill has an ownership interest in the subject property, and Electrical performed work on the premises at the subject property. Grist Mill objects on the grounds of unreasonable delay.



Leave to amend a pleading should be freely granted in the absence of prejudice or surprise, or a showing that the proposed amendment is palpably insufficient and devoid of merit on its face (CPLR 3025(b); *Giunta's Meat Farms, Inc. v Pina Const. Corp.*, 80 AD3d 558 [2<sup>nd</sup> Dept. 2011]; *Post v County of Suffolk*, 80 AD3d 682 [2<sup>nd</sup> Dept. 2011]; *Bogal v Finger*, 59 AD3d 653 [2<sup>nd</sup> Dept. 2009]). Mere lateness is not a barrier to amendment in the absence of prejudice (*Edenwald Contracting Co., Inc. v City of New York*, 60 NY2d 957 [1983]). Prejudice is not found in the mere exposure of the defendant to greater liability; instead there must be some indication that the defendant has been hindered in the preparation of its case (*Loomis v Civetta Corrino Const. Corp.*, 54 NY2d 18, 23 [1981]). Parties may be joined by the court at any stage of the action (CPLR 1003).

The requisite prejudice has not been shown, and the proposed amendment is not palpably insufficient or devoid of merit. Consequently, leave to amend is granted, and NYMIR is authorized to serve an amended summons and the amended complaint in Action #3 upon counsel for Grist Mill and Electrical in Actions #1 and 2.

Dated: May 3, 2011



STEVEN M. JAEGER, A.J.S.C.

**ENTERED**  
MAY 04 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE