

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
94 E. 208 STREET PARTNERS, LLC,

Plaintiff,

- against -

Index No. **29090/2020E**

Hon. **FIDEL E. GOMEZ**
Justice

**CERTAIN UNDERWRITERS AT LLOYD’S
OF LONDON, WESTERN WORLD
INSURANCE COMPANY, KINGSTON
INSURANCE COMPANY, FAVORED
DESIGN & CONTRACTING INC., PIONEER
GENERAL CONSTRUCTION CO., LINZI
CONTRACTING SERVICES INC., P&G
BROKERAGE INC., JOSE VELASQUEZ,
MANUEL HUERTA, LUIS QUIZHPI, JUAN
MAYLLASHUGU, SANTIAGO MAYANCELA,
LUIS ROMERO MAURIZACA and RELIABLE
INSURANCE SERVICES, LLC,**

Defendants.

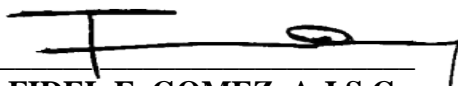
-----X

The following papers numbered 1 to 3, read on this motion, noticed on 2/25/2022, and duly submitted as no. 4 on the Motion Calendar of 3/25/2022.

| | <u>PAPERS NUMBERED</u> | |
|--|------------------------|--|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | 1 | |
| Answering Affidavit and Exhibits | 2 | |
| Replying Affidavit and Exhibits | 3 | |

Defendant Western World Insurance Company’s motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 5/26/22

Hon. 
FIDEL E. GOMEZ, A.J.S.C.

1. CHECK ONE..... CASE DISPOSED NON-FINAL DISPOSITION
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER DO NOT POST
 FIDUCIARY APPOINTMENT REFEREE APPOINTMENT
 NEXT APPEARANCE DATE: _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
94 E. 208 STREET PARTNERS, LLC,

Plaintiff,

DECISION AND ORDER

- against -

Index No. **29090/2020E**

**CERTAIN UNDERWRITERS AT LLOYD’S
OF LONDON, WESTERN WORLD
INSURANCE COMPANY, KINGSTON
INSURANCE COMPANY, FAVORED
DESIGN & CONTRACTING INC., PIONEER
GENERAL CONSTRUCTION CO., LINZI
CONTRACTING SERVICES INC., P&G
BROKERAGE INC., JOSE VELASQUEZ,
MANUEL HUERTA, LUIS QUIZHPI, JUAN
MAYLLASHUGU, SANTIAGO MAYANCELA,
LUIS ROMERO MAURIZACA and RELIABLE
INSURANCE SERVICES, LLC,**

Defendants.

-----X

Defendant Western World Insurance Company (“Defendant”) moves for summary judgment dismissing the second amended complaint and all cross-claims as alleged against it. Defendant argues that there was no insurance policy in effect pursuant to which Plaintiff may be covered and that it is not estopped from denying coverage. Plaintiff opposes, arguing that the motion is identical to an earlier motion to dismiss, is premature as it was made prior to discovery, and that there are issues of fact warranting a denial of the motion.

For the reasons which follow, Defendant’s motion is granted.

BACKGROUND:

On August 19, 2020, Plaintiff commenced the instant action against Defendants by filing a summons and complaint. On November 1, 2021, Plaintiff filed a second amended complaint,

alleging causes of action for, *inter alia*, a declaratory judgment and breach of contract (the “Complaint”).¹

The Complaint alleges that Plaintiff is the owner and operator of the property located at 94 E 208 Street, Bronx, NY (the “Property”) (Compl. ¶ 21). Plaintiff alleges that it planned to develop the Property as a multiple apartment building (the “Project”) (Compl. ¶ 22). Plaintiff alleges that in order to construct the Project, it hired defendant Favored Design and Contracting Inc. (“Favored”) as the general contractor. Plaintiff alleges that pursuant to term 8.16 of its construction agreement with Favored dated March 15, 2019, Favored was to maintain insurance coverage of \$1,000,000.00 for liability and \$2,000,000.00 in aggregate coverage at all times while performing the work. Favored was to also provide Plaintiff with a certificate of insurance naming Plaintiff as an additional insured (Compl. ¶ 23).

The Complaint alleges that Favored engaged the services of sub-contractors, including Defendant Pioneer General Construction Co., LLC (“Pioneer”)² for the Project (Compl. ¶ 25). The Complaint alleges that Defendant provided insurance to Pioneer (Compl. ¶ 7). Plaintiff alleges that Defendant Reliable Insurance Services, LLC (“Reliable”) acted as a broker/agent for Defendant (Compl. ¶ 19, 27). Plaintiff alleges that it was covered under Defendant’s policy issued to Pioneer, which named Plaintiff as an additional insured (Compl. ¶ 26). Attached to Exhibit B of the Complaint is a certificate of liability insurance, listing the insurer as Defendant, the insured as Pioneer, the producer as Reliable, and indicating that a commercial general liability policy exists under policy no. NPP2802707 for the period effective March 1, 2019, through March 1, 2020 (Exhibit B to Compl.).

The Complaint alleges that on or around August 27, 2019, an incident at the Project site resulted in alleged injuries and the death of a worker at the Project site (the “Accident”). The allegedly injured workers commenced three actions in the Bronx County Supreme Court, titled

¹ On April 5, 2022, the Court (McShan, J.) issued a Decision and Order granting renewal of Plaintiff’s prior cross-motion seeking leave to amend its complaint to add Lakhi General Contractor Inc. (“Lakhi”) as a defendant, and granted Plaintiff leave to add Lakhi as a defendant. The Court directed Plaintiff to serve the amended complaint within 30 days of the date of the Decision and Order. On April 28, 2022, Plaintiff filed a Third Amended Complaint, adding Lakhi as a defendant.

² Plaintiff refers to Pioneer as “Pioneer General Contractor Company, LLC” in par. 7 of the Complaint. However, Plaintiff also refers to Pioneer as “Pioneer General Construction Co” in the caption and as “Pioneer General Construction Co, LLC” in par. 10 of the Complaint.

Jose Velasquez v 94 E 208 Street Partners, LLC, Pioneer General Construction Co., LLC, and Linzi Contracting Services, Inc., under Index No. 31258/2019E, *Juan M. Maillazhungo v 94 E 208 Street Partners, LLC, Pioneer General Construction Co., LLC, and Linzi Contracting Services, Inc.*, under Index No. 31261/2019E, and *Manuel Huerta, Luis Quizhpi, Juan Mayallashugu, Santiago Mayancela and Luis Romero Maurizaca v 94 E 208 Street Partners LLC, et al*, under Index No. 27361/2020E (the “Underlying Actions”) (Compl. ¶ 28). Plaintiff alleges that it forwarded the summons and complaint for the first two of the three cases to the defendant insurers, but they denied coverage and failed to defend Plaintiff in the Underlying Actions.

On October 28, 2021, Defendant filed an answer to the Complaint, asserting ten affirmative defenses.

On November 17, 2021, Defendant P&G Brokerage Inc. filed an answer to the Complaint, with cross-claims against Defendant and other Defendants in this action for indemnification and contribution. On November 22, 2021, Defendant Linzi Contracting Services Inc. filed an answer to the Complaint, with a cross-claim against Defendant and other Defendants in this action for apportionment, contribution and/or indemnification.

On February 2, 2022, Defendant filed the instant motion for summary judgment. On March 25, 2022, the motion was marked fully submitted.

DISCUSSION:

Defendant moves for summary judgment dismissing the Complaint and all cross-claims against it, arguing that there was no policy to Pioneer in effect at the time of the Accident. As such, Defendant argues that there is no coverage for Plaintiff for the claims in the Underlying Actions. In support, Defendant submitted, *inter alia*, the affidavit of Jeffrey Plew, the Regional Director of Underwriting – Mid Atlantic Contract Division at the Western World Insurance Group (“Western Group”)³.

Mr. Plew asserts that Western Group only issued two policies to Pioneer: (1) a commercial general policy effective May 28, 2014, through November 19, 2014, under policy no.

³ There is no explanation regarding Defendant’s relationship with Western Group. However, a review of the policies submitted in Exhibits G and H of Defendant’s motion indicates that Western Group consists of and/or issues insurance policies through at least three different companies, one of them being Defendant. Plaintiff makes no arguments in opposition addressing this issue.

NPP8208707⁴ and (2) a commercial general policy effective August 4, 2016, through August 4, 2017, under policy no. NPP8363915⁵ (Affidavit of Jeffrey Plew, ¶ 3-5). The two policies are attached as Exhibits G and H to Defendant’s motion.

Mr. Plew asserts that Western Group did not issue any policy to Pioneer that was in effect on the date of the Accident (Affidavit of Jeffrey Plew, ¶ 6). He asserts that Western Group did not issue a policy to Pioneer effective March 1, 2019, through March 1, 2020, under policy no. NPP2802707 (Affidavit of Jeffrey Plew, ¶ 7).

Defendant argues that Plaintiff cannot rely on the representations in the certificate of insurance, as it is not evidence of insurance. Defendant also argues that the certificate of insurance expressly states that it is issued as a matter of information only. In any case, Defendant argues that it refers to a policy that did not exist.

Defendant also argues that it cannot be bound by any representations in the certificate of insurance, since it did not have an agency relationship with Reliable. Mr. Plew asserts that Reliable was not and is not an agent of Western Group. He also asserts that Reliable does not have any authority to act for or bind Western Group in any capacity (Affidavit of Jeffrey Plew, ¶ 8).

CPLR § 3212(b) provides, in relevant part, that:

A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. . . . The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “Failure to make such prima facie showing requires a denial of the motion,

⁴ This policy appears to have been issued through a non-party, Tudor Insurance Company.

⁵ This policy appears to have been issued through Defendant.

regardless of the sufficiency of the opposing papers” (*Alvarez* at 324). Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

As a preliminary matter, the Court notes that contrary to Plaintiff’s assertions, Defendant filed its answer to the second amended complaint prior to filing the instant motion for summary judgment. Moreover, the standard which governs a motion for summary judgment is decidedly different from that which governs a motion for dismissal. As such, that Defendant previously moved for dismissal of the complaint pursuant to CPLR 3211 based on the same arguments being made on this motion for summary judgment is not sufficient grounds to defeat Defendant’s motion.

Here, Defendant established its prima facie entitlement to summary judgment. Defendant demonstrated via the affidavit of Mr. Plew and the attached documents that it did not issue a policy to Pioneer which was in effect at the time of the Accident. As such, Defendant has demonstrated that there is no policy pursuant to which Plaintiff could be covered.

Additionally, Defendant established via the affidavit of Mr. Plew that Reliable is not its agent. As such, Defendant has demonstrated that it is not responsible for the representations Reliable made on the certificate of insurance and that it is not estopped from denying the existence of the coverage (*Structure Tone, Inc. v National Cas. Co.*, 130 AD3d 405, 406 [1st Dept 2015] [holding that the defendant insurance company was not bound by the representations made in the certificate of insurance, which was produced by plaintiffs’ broker, as no agency agreement existed between the defendant insurance company and the broker]).

In opposition, Plaintiff has not raised an issue of fact warranting a denial of Defendant’s motion. Plaintiff submitted as Exhibit B of its opposition a Project Specific General Liability Insurance Summary and Affirmation dated March 20, 2019 (the “Affirmation”), submitted to the NYC Department of Buildings, on which Reliable certified that the attached certificate of insurance is accurate in all material respects. The attached certificate of insurance lists Defendant as an insurer, Reliable as the producer, and Pioneer as the insured. The certificate states, in relevant part, that there is a commercial general liability policy issued by Defendant under policy no. NPP2802707, effective March 1, 2019, through March 1, 2020. However, the certificate also states that: “[t]his certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies below. This certificate of insurance does not constitute a contract

between the issuing insurer(s), authorized representative or producer, and the certificate holder.” (Plaintiff’s Exhibit B). Per well settled law, the foregoing certificate is not sufficient to raise an issue of fact as to the existence of the alleged insurance coverage⁶ (*Rodless Props., L.P. v Westchester Fire Ins. Co.*, 40 AD3d 253, 254-255 [1st Dept 2007]; *Insurance Corp. of New York v U.S. Underwriters Ins. Co.*, 11 AD3d 235, 236 [1st Dept 2004] [“the certificate of insurance naming Ginsburg as an additional insured is not, by itself, sufficient to raise a factual issue as to the existence of coverage”]; *Halmar Builders of New York, Inc. v Team Star Contractors, Inc.*, 13 AD3d 581, 582 [2d Dept 2004]; *see also Empire Ins. Co. v Insurance Corp. of New York*, 40 AD3d 686, 686 [2d Dept 2007] [“a certificate of insurance which expressly states that it is ‘issued as a matter of information only and confers no rights upon the certificate holder,’ as does the certificate in this case, is insufficient, by itself, to show that such insurance had been purchased”]; *American Ref-Fuel Co. of Hempstead v Resource Recycling, Inc.*, 248 AD2d 420, 423 [2d Dept 1998]).

Moreover, Plaintiff’s argument that discovery is necessary to determine Reliable’s relationship with Defendant does not warrant a denial of Defendant’s motion.⁷ As stated above, Defendant demonstrated via the affidavit of Mr. Plew that Reliable is not its agent, and as such, it is not liable for Reliable’s representations on the certificate of insurance. However, even if discovery revealed that Reliable was Defendant’s agent, or acted as Defendant’s agent, Defendant would not be obligated to provide Plaintiff with coverage or be estopped from denying coverage to Plaintiff, as “[e]stoppel may not be used to create coverage where no insurance policy existed” (*Wausau Ins. Cos. v Feldman*, 213 AD2d 179, 180 [1st Dept 1995]; *see also Penske Truck Leasing Co. v Home Ins. Co.*, 251 AD2d 478, 480 [2d Dept 1998]; *Nassau Ins. Co. v Manzione*, 112 AD2d 408, 409 [2d Dept 1985] [“Where there is no coverage under an insurance policy because the policy was not in existence at the time of the accident, estoppel cannot be used to create coverage”]; *Wainwright v Charlew Const. Co., Inc.*, 302 AD2d 784, 785 [3d Dept 2003]). Here, Defendant

⁶ The Court notes that Plaintiff admits in its Statement of Material Facts that there was no policy of insurance issued by Defendant to Pioneer in effect on the date of the Accident (Plaintiff’s Statement of Material Facts, ¶ 2).

⁷ While pursuant to CPLR 3212(f), summary judgment will be denied if it appears that facts necessary to oppose the motion are within the exclusive knowledge of the moving party (*Franklin Natl Bank of Long Is. v De Giacomo*, 20 AD2d 797, 797 [2d Dept 1964]; *De France v Oestrike*, 8 AD2d 735, 735-736 [2d Dept 1959]), the proponent of denial on grounds of prematurity must demonstrate that reasonable attempts to discover the relevant facts were made (*Sasson v Setina Mfg. Co., Inc.*, 26 AD3d 487, 488 [2d Dept 2006]; *Cruz v Otis El. Co.*, 238 AD2d 540, 540 [2d Dept 1997]). Here, Plaintiff fails to establish that it attempted to discover relevant facts from Defendant.

demonstrated that there was no policy in effect at the time of the Accident. As such, even if Reliable was Defendant’s agent, or acted as Defendant’s agent, Reliable’s actions in producing the certificate of insurance could not be used to create coverage as there was no insurance policy in existence.⁸

Accordingly, Defendant’s motion for summary judgment is granted.

In light of the foregoing, the cross-claims alleged against Defendant for contribution and/or indemnification are dismissed, without opposition (*Casey v New York Elevator & Elec. Corp.*, 107 AD3d 597, 599 [1st Dept 2013] [“Because the amended complaint against NYE should have been dismissed, Broadway’s counterclaim and Winoker’s cross claim for contribution against NYE, and NYE’s claims for contribution against Broadway and Winoker, should also have been dismissed”]; *San Andres v 1254 Sherman Ave. Corp.*, 94 AD3d 590, 592 [1st Dept 2012] [“In light of the dismissal of the complaint as against Eltech, Sherman’s common law indemnification claim against Eltech must also be dismissed”]).

It is hereby

ORDERED that the clerk dismiss the complaint against Defendant Western World Insurance Company; and it is further

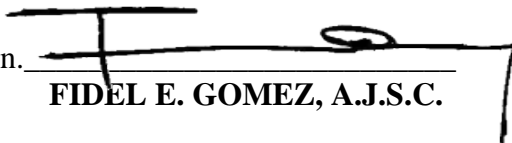
ORDERED that the clerk dismiss Defendant P&G Brokerage Inc.’s cross-claims against Defendant for indemnification and contribution; and it is further

ORDERED that the clerk dismiss Defendant Linzi Contracting Services Inc.’s cross-claim against Defendant for apportionment, contribution and/or indemnification; and it is further

ORDERED that Defendant serve a copy of this Decision and Order upon all parties, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 5/26/22

Hon. 
FIDEL E. GOMEZ, A.J.S.C.

⁸ The Court notes that Plaintiff is not listed as an additional insured on the certificate of insurance.