NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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PREFERRED CONTRACTORS INSURANCE COMPANY, RISK RETENTION GROUP, LLC,

Plaintiffs,

- against -

JCNA CORP. d/b/a NAJC; FLINTLOCK CONSTRUCTION SERVICES, LLC; LG BROADWAY MANAGEMENT, INC.; 1 SEAL USA LLC d/b/a A1 FIRE SEAL; A1 MECHANICAL SEAL, INC.; BIG APPLE DESIGNERS, INC.; and ESTATE OF LUIS MIGUEL DURAN SOLANO, Deceased,

Defendants.

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Index No. **809856/2021E**

Hon. **FIDEL E. GOMEZ**
Justice

The following papers numbered 1, read on this motion, noticed on 7/20/2022, and duly submitted as no. 1 on the Motion Calendar of 7/20/2022.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		

Plaintiffs Preferred Contractors Insurance Company and Risk Retention Group, LLC's motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 10/5/22

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

1. CHECK ONE..... ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION IS..... ☐ GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT
X NEXT APPEARANCE DATE: **November 14, 2022, at 2:00 p.m. - PC**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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PREFERRED CONTRACTORS INSURANCE COMPANY, RISK RETENTION GROUP, LLC,

Plaintiffs,

DECISION AND ORDER

- against -

Index No. **809856/2021E**

JCNA CORP. d/b/a NAJC; FLINTLOCK CONSTRUCTION SERVICES, LLC; LG BROADWAY MANAGEMENT, INC.; 1 SEAL USA LLC d/b/a A1 FIRE SEAL; A1 MECHANICAL SEAL, INC.; BIG APPLE DESIGNERS, INC.; and ESTATE OF LUIS MIGUEL DURAN SOLANO, Deceased,

Defendants.

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Plaintiffs Preferred Contractors Insurance Company and Risk Retention Group, LLC ("Plaintiffs") move for an order granting a default judgment against Defendants JCNA Corp. d/b/a NAJC; 1 Seal USA LLC d/b/a A1 Fire Seal; A1 Mechanical Seal, Inc.[1]; Big Apple Designers, Inc.; and Estate of Luis Miguel Duran Solano, Deceased ("Defendants") pursuant to CPLR § 3215(a) and (b) and setting this matter down for an inquest at the time of trial.

For the reasons which follow, Plaintiffs' motion is granted, in part, on default and without opposition.

BACKGROUND:

On July 20, 2021, Plaintiffs commenced the instant action by filing a summons and complaint, which alleges thirteen causes of action for declaratory judgment.

The complaint alleges that Plaintiffs issued an insurance policy to Defendant JCNA Corp. d/b/a NAJC ("JCNA") for the period commencing on April 25, 2019, and terminating on April 25,

[1] Counsel asserts in his affirmation that default judgment is being sought against "1 Seal USA LLC d/b/a A1 Mechanical Seal, Inc." There is no such party. However, it is clear from Plaintiffs' submission of affidavits of service of process upon Defendants 1 Seal USA LLC d/b/a A1 Fire Seal and A1 Mechanical Seal USA, Inc. that default judgment is being sought against these two separate defendants.

2020, under policy no. PCA5020-PC309897 (the "Policy") (Compl., p. 1). The complaint alleges that the Policy contains liability limits of $1,000,000.00 per occurrence, with aggregate limits of $2,000,000.00 products-completed operations and a $2,000,000.00 general aggregate limit subject to a $50,000.00 sublimit for incidents arising out of work by independent contractors and subcontractors (Compl. ¶ 43). It also alleges that coverage is subject to a $5,000.00 self-insured retention (Compl. ¶ 44). Attached to the complaint is a copy of the Policy.

Plaintiffs seek a declaration that the Policy does not provide coverage for potential claims arising out of the fatal injuries allegedly sustained by Luis Miguel Duran Solano ("Mr. Solano"), in an elevator accident (the "Incident") at a jobsite located at 1227 Broadway, New York, NY (the "Project") (Compl., p. 1).

The complaint alleges that LG Broadway Management, Inc. ("LG") was the owner of the Project (Compl. ¶ 11), and that Flintlock Construction Services, LLC ("Flintlock") was the construction manager of the Project (Compl. ¶ 12). Plaintiffs allege that Flintlock retained Big Apple Designers, Inc. ("Big Apple") to perform carpentry for the Project and to perform fireproofing of the elevator shafts for the Project (Compl. ¶ 13-14). Plaintiffs allege that Big Apple subcontracted the work to JCNA (Compl. ¶ 15).[2]

The complaint alleges that Mr. Solano was employed by JCNA when the Incident occurred (Compl. ¶ 10). Plaintiffs allege that on or around October 24, 2019, Mr. Solano was ascending to the 33rd floor of the Project when he dropped his cellphone. Plaintiffs allege that when he bent over to retrieve his cellphone, he allegedly struck his head on the ceiling of a lower floor while the elevator platform was still in operation, which caused his death (Compl. ¶ 17-18, ¶ 92).

The complaint alleges that JCNA breached the Policy's reporting requirements, because it did not provide Plaintiffs with notice of the Incident (Compl. ¶ 21). Plaintiffs allege that JCNA has failed to cooperate or communicate with Plaintiffs to assist with information for its investigation to assess JCNA's liability exposure and potential defenses (Compl. ¶ 22, 25-34). Plaintiffs allege that these breaches entitle Plaintiffs to a declaration of no coverage (Compl. ¶ 23). Plaintiffs allege that the only information they have is that which was provided by Flintlock, LG, 1 Seal USA LLC d/b/a A1 Fire Seal ("1 Seal") and Big Apple (Compl. ¶ 24).

[2] The complaint also alleges that A1 Mechanical Seal, Inc. subcontracted the work to conduct fireproofing to JCNA (Compl. ¶ 16). Although this appears to conflict with par. 15, the allegation that JCNA was subcontracted the work is not in dispute.

Plaintiffs also allege that JCNA has failed to pay the Policy's self-insured retention, which is a condition precedent to coverage (Compl. ¶ 41).

The complaint alleges that Flintlock, LG and 1 Seal claim that they qualify for additional insured status, have claims for contractual indemnification against JCNA, and threaten to bring third party claims against JCNA (Compl. ¶ 35). Plaintiffs allege that they do not qualify for additional insured status (Compl. ¶ 36-40).

Under Count 1, Plaintiffs seek a declaration that they are not obligated to defend or indemnify JCNA in connection with any claims arising out of the Incident based on the Policy's Employers' Liability Exclusion (Compl. ¶ 49-55). Under Count 2, Plaintiffs seek a declaration that Plaintiffs are not obligated to defend or indemnify JCNA in any actions arising out of the Incident based on the Policy's Action Over Exclusion (Compl. ¶ 56-60). Under Count 3, Plaintiffs seek a declaration that Plaintiffs are not obligated to defend JCNA against claims arising out of the Incident based on the Policy's Building and Structures Exceeding Three Stories Exclusion (Compl. ¶ 61-68). Under Count 4, Plaintiffs seek a declaration that Plaintiffs are not obligated to defend JCNA against claims arising out of the Incident based on the Policy's Injury or Damage to Day Laborers Exclusion (Compl. ¶ 69-74). Under Count 5, Plaintiffs seek a declaration that Plaintiffs are not obligated to defend or indemnify JCNA against claims for breach of contract and/or contractual indemnity arising out of the Incident based on the Policy's Contractual Indemnity Liability Exclusion and based on the absence of an insured contract (Compl. ¶ 75-80). Under Count 6, Plaintiffs seek a declaration that, to the extent that any safety regulations were not complied with, Plaintiffs are not obligated to defend JCNA against any claims arising out of the Incident based on the Policy's Noncompliance with Safety Regulations Exclusion (Compl. ¶ 81-85). Under Count 7, Plaintiffs seek a declaration that, to the extent that none of the Plaintiffs' other coverage defenses apply, coverage is limited to $50,000.00 to the extent that Mr. Solano was an independent contractor or subcontractor or any other independent contractor or subcontractor caused and/or contributed to the Incident based on the Policy's Independent Contractors/Subcontractors Sublimit (Compl. ¶ 86-89). Under Count 8, Plaintiffs seek a declaration that the Policy does not provide defense or indemnity coverage for claims arising out of the Incident based on Defendant's breach of the reporting requirements (Compl. ¶ 90-100). Under Count 9, Plaintiffs seek a declaration that JCNA has not cooperated with Plaintiffs' investigation of JCNA's potential liability defenses and claims for apportionment or contribution, and JCNA's failure to do so defeats both defense and

indemnity coverage based upon the Policy's Assistance and Cooperation of the Insured Condition (Compl. ¶ 101-105). Under Count 10, Plaintiffs seek a declaration that they are not obligated to defend or indemnify any putative additional insured because the Policy's Additional Insured Endorsement's insuring provisions have not been met, as there is no written contract between JCNA and the other defendants requiring JCNA to procure insurance for an additional insured (Compl. ¶ 106-110). Under Count 11, Plaintiffs seek a declaration that Plaintiffs' coverage is excess, and as such, Plaintiffs are not obligated to defend any putative additional insured (Compl. ¶ 111-121). Under Count 12, Plaintiffs seek a declaration that there is no additional insured coverage, either for defense or indemnity, because the putative additional insureds have not established that the Incident arose out of the insured's acts or omissions or that any putative additional insured is liable based on the strict liability or negligence of the insured (Compl. ¶ 122-126). Finally, under Count 13, Plaintiffs seek a declaration that the Policy does not provide defense or indemnity coverage for claims against the insured for failure to procure insurance (Compl. ¶ 127-131).

In sum, Plaintiffs seek a declaration that the Policy does not provide indemnification for any claims arising out of the Incident, a declaration that the Policy exclusions and breaches of conditions preclude coverage to JCNA for the Incident, and a declaration that the Policy exclusions and breaches of conditions preclude coverage to Mr. Solano's Estate (the "Estate") for the Incident. In the alternative, Plaintiffs seek a declaration that the Policy is excess over all insurance policies issued to JCNA (Compl., p. 26).

On June 29, 2022, Plaintiffs filed the instant motion. On July 20, 2022, the motion was marked fully submitted.

DISCUSSION:

Plaintiffs seek a default judgment against Defendants, and the scheduling of an inquest at the time of trial of this action. Plaintiffs assert that Defendants were properly served with the summons and complaint. Plaintiffs assert that Defendants have not appeared, answered, or otherwise moved with respect to the complaint. Plaintiffs also assert that they complied with the additional mailings required by CPLR § 3215(g).

CPLR § 3215(a) provides in relevant part that: "When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial . . . the plaintiff may seek a default judgment against him."

CPLR § 3215(f) provides in relevant part that:

> On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party. . . Proof of mailing the notice required by subdivision (g) of this section, where applicable, shall also be filed.

(*See also Zelnik v Biedermann Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; *Stevens v Law Office of Blank & Star, PLLC*, 155 AD3d 917 [2d Dept 2017]). Thus, "[o]n a motion for leave to enter a default judgment against a defendant based on the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant's default" (*Deutsche Bank National Trust Company v Hall*, 185 AD3d 1006, 1008 [2d Dept 2020]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59 [2d Dept 2013]; *Pampalone v Giant Bldg. Maintenance, Inc.*, 17 AD3d 556, 557 [2d Dept 2005]). "To demonstrate 'the facts constituting the claim' the movant need only submit sufficient proof to enable a court to determine that 'a viable cause of action exists'. CPLR 3215(f) expressly provides that a plaintiff may satisfy this requirement by submitting the verified complaint" (*Fried*, 110 AD3d 56 at 59-60).

In support of their motion, Plaintiffs submitted, *inter alia*, the affirmation of their counsel; the Affidavit of Merit of Vincent Aiello, Senior Claims Specialist for Golden State Claims Adjusters, the third-party claims administrator for Plaintiffs; the summons and complaint; and affidavits of service of the summons and complaint upon Defendants. In his affidavit, Mr. Aiello verifies the allegations in the complaint (Affidavit of Vincent Aiello, ¶ 3-4).

Defendants' Default:

JCNA:

The affidavit of service dated September 3, 2021, states that JCNA was served with the summons and complaint on September 3, 2021, by service upon the Secretary of State of the State of New York pursuant to Business Corporation Law § 306 (Plaintiffs' Exhibit D).

BCL § 306(b)(1) states, in relevant part, that:

> Service of process on the secretary of state as agent of a domestic or authorized foreign corporation shall be made by personally delivering to and leaving with the secretary of state or a deputy, or

> with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. *Service of process on such corporation shall be complete when the secretary of state is so served* (emphasis added).

Service upon the Secretary of State as agent for a defendant corporation constitutes valid service (*Union Indem. Ins. Co. of New York v 10-01 50th Ave. Realty Corp.*, 102 AD2d 727, 728 [1st Dept 1984]; *Perkins v 686 Halsey Food Corp.*, 36 AD3d 881, 881 [2d Dept 2007]). Service of process is complete when plaintiff serves the Secretary of State, "irrespective of whether the process subsequently reache[s] the corporate defendant" (*Fisher v Lewis Construction NYC Inc.*, 179 AD3d 407, 408 [1st Dept 2020]).

Here, JCNA was served with the summons and complaint on September 3, 2021, the date on which the Secretary of State was served with the summons and complaint (BCL § 306[b][1]). As such, it had until October 3, 2021, to serve an answer (CPLR 320[a]). JCNA did not serve an answer by that date and is thus in default.

1 Seal:

The affidavit of service dated August 11, 2021, states that 1 Seal was served with the summons and complaint on August 11, 2021, by service upon the Secretary of State of the State of New York pursuant to Limited Liability Company Law § 303 (Plaintiffs' Exhibit E).

LLC § 303(a) provides, in relevant part, that:

> Service of process on the secretary of state as agent of a domestic limited liability company or authorized foreign limited liability company shall be made by personally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. *Service of process on such limited liability company shall be complete when the secretary of state is so served* (emphasis added).

Service upon the Secretary of State as agent for a defendant limited liability company constitutes valid service (*Drillman v Marsam Realty 13th Ave., LLC*, 129 AD3d 903, 903 [2d Dept 2015]). Service of process is complete upon delivery of the summons and complaint to the

Secretary of State (*Paez v 1610 Saint Nicholas Ave. L.P.*, 103 AD3d 553, 553-554 [1st Dept 2013]; *SP&S Associates, LLC v Insurance Co. of Greater New York*, 80 AD3d 529, 544 [1st Dept 2011]).

Here, 1 Seal was served with the summons and complaint on August 11, 2021, the date on which the Secretary of State was served with the summons and complaint (LLC § 303[a]). As such, it had until September 10, 2021, to serve an answer (CPLR 320[a]). 1 Seal did not serve an answer by that date and is thus in default.

A1 Mechanical Seal, Inc.:

The affidavit of service dated August 9, 2021, states that "A1 Mechanical Seal USA, Inc." was served with the summons and complaint at 9 Fawn Hill Drive, Almont, NY on August 5, 2021 (Plaintiffs' Exhibit F).

Here, Plaintiffs have not demonstrated that A1 Mechanical Seal, Inc. was properly served with the summons and complaint. The affidavit of service states that "A1 Mechanical Seal USA, Inc." was served with the summons and complaint. To the extent that this name differs from the name on the caption of this action, "A1 Mechanical Seal, Inc.", the Court cannot determine whether the correct party has been served with process. Plaintiffs have not proffered any explanation for this discrepancy.

Big Apple:

The affidavit of service dated August 11, 2021, states that Big Apple was served with the summons and complaint on August 11, 2021, by service upon the Secretary of State of the State of New York pursuant to Business Corporation Law § 306 (Plaintiffs' Exhibit H).

Here, Big Apple was served with the summons and complaint on August 11, 2021, the date on which the Secretary of State was served with the summons and complaint (BCL § 306[b][1]). As such, it had until September 10, 2021, to serve an answer (CPLR 320[a]). Big Apple did not serve an answer by that date and is thus in default.

Estate of Mr. Solano:

The affidavit of service dated July 30, 2021, states that the Estate, c/o Herlberto & Cabrera, was served with the summons and complaint on July 29, 2021, by delivering to and leaving the

summons and complaint with Maritza Cruz, a legal clerk authorized to accept service, at 480 39th Street, 2nd Floor, Brooklyn, NY (Plaintiffs' Exhibit I).

Counsel may accept service of process as an authorized agent (*See, e.g., 6 Davis Associates, Inc. v Rye Castle Apartment Owners, Inc.*, 242 AD2d 528, 529 [2d Dept 1997]; *Preferred Elec. & Wire Corp. v Duracraft Products, Inc.*, 114 AD2d 407, 407 [2d Dept 1985]).

Here, the Estate was served with the summons and complaint on July 29, 2021, the date on which its counsel was served with the summons and complaint. As such, it had until August 28, 2021, to serve an answer (CPLR 320[a]). The Estate did not serve an answer by that date and is thus in default.[3]

Compliance with CPLR § 3215(g):

Plaintiffs have demonstrated compliance with the additional mailings required by CPLR § 3215(g) by submitting counsel's affirmation and a copy of the letter and summons mailed to the Defendants (Plaintiffs' Exhibit J).

Declaratory Judgment:

CPLR 3001 provides, in relevant part, that: "The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds." "[G]ranting a declaratory judgment is left to the court's discretion" (*Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983]; *American News Co. v Avon Pub. Co.*, 283 AD 1041, 1042 [1st Dept 1954]).

"A declaratory judgment is intended 'to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact'. The general purpose of a 'declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations'. Thus, a declaratory judgment requires a 'justiciable controversy,' in which not only does the plaintiff 'have an interest sufficient to constitute standing to maintain the action but also that the controversy involve present, rather than hypothetical, contingent or remote, prejudice to plaintiffs" (*Touro College v Novus University*

[3] If this service constitutes service by "personal delivery", as indicated by Plaintiffs' letter dated June 9, 2022, submitted as Exhibit J of Plaintiffs' motion, the Estate would have had until August 18, 2021, to serve an answer (CPLR 320[a]).

Corp., 146 AD3d 679, 679-680 [1st Dept 2017]). "[A] declaratory judgment should only be granted when it will have a direct and immediate effect upon the rights of the parties" (*Enlarged City School Dist. of Middletown v City of Middletown*, 96 AD3d 840, 841 [2d Dept 2012]). A "request for a declaratory judgment is premature 'if the future event is beyond the control of the parties and may never occur'" (*AB Oil Services, Ltd. v TCE Insurance Services, Inc.*, 188 AD3d 624, 626 [2d Dept 2020]). Finally, "[d]eclaratory relief 'only provides a declaration of rights between parties' and 'cannot be executed upon so as to compel a party to perform an act" (*Trovato v Galaxy Sanitation Services of New York, Inc.*, 171 AD3d 832, 834 [2d Dept 2019]).

Here, Plaintiffs have demonstrated their prima facie entitlement to default judgment against Defendants, with the exception of Defendant A1 Mechanical Seal, Inc. Specifically, Plaintiffs have demonstrated their entitlement to a declaration that, as it applies to the Defendants herein, with the exception of Defendant A1 Mechanical Seal, Inc., the Policy does not provide indemnification for any claims arising out of the Incident, that the Policy exclusions and breaches of conditions preclude coverage to JCNA and to the Estate for the Incident, and that the Policy is excess over all insurance policies issued to JCNA.[4]

Accordingly, Plaintiffs' motion for default judgment is granted against Defendants, with the exception of Defendant A1 Mechanical Seal, Inc., over whom Plaintiffs have not demonstrated proper service of process.

Inquest:

Plaintiffs' request to set this matter down for an inquest on damages is denied, as Plaintiffs do not seek damages in their complaint. The complaint seeks only declarations and determinations of the legal rights of the parties. Likewise, Plaintiffs' motion fails to demonstrate that they are entitled to any damages.

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[4] Significantly, the complaint, as verified by Mr. Aiello, alleges that Defendants are not entitled to coverage under the language of the Policy. It is well settled that "the interpretative principles applicable to a contract of insurance generally are indistinguishable from those to which courts may resort in treating with other contracts" (*Loblaw v Employers' Liab. Assur. Corp., Ltd.*, 57 NY2d 872, 876 [1982]; *State v Am. Mfrs. Mut. Ins. Co.*, 188 AD2d 152, 154 [3d Dept 1993]). Accordingly, whether coverage exists under the terms of a policy is a question of law to be determined by a court (*Molycorp, Inc. v Aetna Cas. and Sur. Co.*, 78 AD2d 510 [1st Dept 1980]). Indeed, it is the court's responsibility to determine the rights and obligations of the parties under an insurance contract, using the specific language of the policy itself (*Sanabria v Am. Home Assur. Co.*, 68 NY2d 866, 868 [1986]; *State v Home Indem. Co.*, 66 NY2d 669, 671 [1985]; *Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172 [1973]; *Stasack v Capital Dist. Physicians' Health Plan Inc.*, 290 AD2d 866 [3d Dept 2002]).

It is hereby

ORDERED that the Clerk enter default judgment in favor of Plaintiffs Preferred Contractors Insurance Company and Risk Retention Group, LLC and against Defendants JCNA Corp. d/b/a NAJC; 1 Seal USA LLC d/b/a A1 Fire Seal; Big Apple Designers, Inc.; and Estate of Luis Miguel Duran Solano, Deceased, on all allegations in the complaint. It is further

DECLARED AND ADJUDGED that as against Defendants JCNA Corp. d/b/a NAJC; 1 Seal USA LLC d/b/a A1 Fire Seal; Big Apple Designers, Inc.; and Estate of Luis Miguel Duran Solano, Deceased, the Policy does not provide indemnification for any claims arising out of the Incident, the Policy exclusions and breaches of conditions preclude coverage to JCNA and to the Estate for the Incident, and that the Policy is excess over all insurance policies issued to JCNA. It is further

ORDERED that this matter is scheduled for a **Preliminary Conference** on **Monday, November 14, 2022, at 2:00 p.m.** It is further

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

This constitutes the Decision and Order of this Court.

Dated: 10/5/22

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