

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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CHINTAN TRIVEDI,

Plaintiff,

- against -

Index No. **34424/2020E**

Hon. **FIDEL E. GOMEZ**
Justice

**GREATER NEW YORK INSURANCE
COMPANY, CHERYL KEELING,
PROMENADE WEST CONDOMINIUM,**

Defendants.

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The following papers numbered 1, read on this motion, noticed on 1/21/2022, and duly submitted as no. 4 on the Motion Calendar of 2/17/2022.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law		

Plaintiff's motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 4/5/2022

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

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CHINTAN TRIVEDI,

Plaintiff,

DECISION AND ORDER

- against -

Index No. **34424/2020E**

**GREATER NEW YORK INSURANCE
COMPANY, CHERYL KEELING,
PROMENADE WEST CONDOMINIUM,**

Defendants.

-----X

Plaintiff Chintan Trivedi (“Plaintiff”) moves for summary judgment¹ against Defendant Promenade West Condominium (“Defendant”), seeking, *inter alia*, a declaration that Defendant must defend and indemnify him in two actions: *Keeling v Salvo, et al*, Bronx County Supreme Court Index No. 302945/2016E (the “Keeling action”) and *Wesco Ins. Co. v Salvo, et al*, New York County Supreme Court Index No. 652442/2020 (the “Wesco action”), and an order “setting the matter down to determine damages caused by Defendant’s failure to do so previously”. Defendant does not oppose.

For the reasons which follow, Plaintiff’s motion is granted on default and without opposition.

BACKGROUND:

On December 1, 2020, Plaintiff commenced the instant action against Defendants by filing a summons and verified complaint, alleging causes of action for a declaratory judgment and a money judgment. The complaint is verified by Plaintiff.

The complaint alleges that Plaintiff is a real estate broker whose company, RE/MAX in the City and ITC Management, Inc. (“Remax”), was hired by Defendant to manage Defendant’s real estate, by contract dated January 1, 2015 (Compl. ¶ 1).

¹ The Court notes that Plaintiff moves for summary judgment pursuant to CPLR 3211(a)(1). However, CPLR 3211(a)(1) concerns motions to dismiss cause(s) of action based upon a defense founded upon documentary evidence. The section is not applicable to motions for summary judgment.

The complaint alleges that in 2016, Defendant Cheryl Keeling (“Ms. Keeling”), a unit owner at Defendant’s condominium, sued Plaintiff, his company, and Silvana Salvo (“Ms. Salvo”), a member of Defendant’s Board of Directors (the “Board”), in the Keeling action, alleging claims for defamation for stating that she owed money to Defendant (Compl. ¶ 1, 3).

Plaintiff alleges that the only claim left in the Keeling action is the defamation claim (Compl. ¶ 11-12).² Plaintiff alleges that the Board claimed that Ms. Keeling owed unpaid common and other charges to Defendant, and directed Plaintiff, as Defendant’s agent, to and collect these charges (Compl. ¶ 4). Plaintiff alleges that Defendant’s books and records demonstrated that Ms. Keeling owed these charges (Compl. ¶ 5). Plaintiff alleges that he relied on Defendant’s books and records, as true and accurate books of accounts of his principal, and had the right to so rely (Compl. ¶ 6, 8). He alleges that he merely reported what Defendant’s books and records showed, that Ms. Keeling owed these amounts to Defendant. He alleges that this cannot amount to defamation (Compl. ¶ 9). He alleges that Ms. Keeling contests the veracity of those statements (Compl. ¶ 14).

The complaint alleges that since 2016, AmTrust North America/WESCO Insurance Company (“Wesco”) provided defense and indemnity to Plaintiff in the Keeling action, pursuant to its policy with Defendant, with some reservation (Compl. ¶ 16, 20). Plaintiff alleges that Wesco’s and Defendant Greater New York Insurance Company (“GNY”)’s insurance policies made Plaintiff an additional insured entitled to defense and immunity (Compl. ¶ 18).

The complaint alleges that after all claims except the defamation claim were dismissed in the Keeling action, Wesco commenced the Wesco action, seeking a judgment declaring that it need not defend or indemnify Plaintiff or Ms. Salvo in the Keeling action (Compl. ¶ 33).³

Plaintiff alleges that his contract with Defendant required that Defendant “defend and indemnify him in the performance of his job” (Compl. ¶ 17). He alleges that Ms. Keeling’s claim against him is based solely on his “setting forth the records” of Defendant as to the amounts owed by her to Defendant (Compl. ¶ 23, 26). He alleges that part of the duties of a managing agent is to

² On or around July 9, 2019, the Court (Tuitt, J.) in the Keeling action dismissed the cause of action for defamation against Remax, and the causes of action for tortious interference with prospective economic advantage. The only two causes of action which survived are the causes of action for defamation against Ms. Salvo and against Plaintiff.

³ Court records indicate that WESCO filed its summons and complaint with the Court on June 12, 2020. An affidavit of service filed in that action states that Plaintiff was served with the summons and complaint on July 15, 2020, pursuant to CPLR 308(2).

collect amounts due (Compl. ¶ 28). He alleges that Defendant owes a contractual obligation to defend and indemnify him, based on the parties' contract (Compl. ¶ 31), and that Defendant has breached the contract by failing to provide defense and indemnity in the Keeling and Wesco actions (Compl. ¶ 39, 44). Plaintiff also alleges that Defendant should have turned over the defense in the Keeling action to GNY as well as to Wesco, but failed, refused and neglected to do so (Compl. ¶ 32).

On its first cause of action, Plaintiff seeks a judgment declaring that GNY and Defendant must provide defense and indemnity to him in the Keeling and Wesco actions (Compl. ¶ 47). On its second cause of action, Plaintiff seeks a money judgment (Compl. ¶ 50).

On January 3, 2022, Plaintiff filed the instant motion. The motion was marked fully submitted on February 17, 2022.

DISCUSSION:

Plaintiff moves for summary judgment, seeking a declaration that Defendant must defend and indemnify him in the Keeling and Wesco actions. Plaintiff argues that the parties' contract is clear and unambiguous and requires Defendant to defend and indemnify him. Plaintiff also seeks damages resulting from Defendant's breach of the parties' contract. In support of his motion, Plaintiff submitted a copy of the Property Management Agreement dated January 1, 2015, between Defendant and ITC Management, Inc. (the "contract") (Plaintiff's Exhibit 1).

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, 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).

The essential elements in an action for breach of contract “are the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of his or her contractual obligations, and damages resulting from the breach” (*Dee v Rakower*, 112 AD3d 204, 209 [2d Dept 2013]; *Elisa Dreier Reporting Corp. v. Global Naps Networks, Inc.*, 84 AD3d 122, 127 [2d Dept 2011]; *Brualdi v IBERIA Lineas Aeraes de España, S.A.*, 79 AD3d 959, 960 [2d Dept 2010]; *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]; *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]).

Section 16 of the contract, entitled “Indemnification”, states that:

Owner shall indemnify agent against all liabilities of any nature whatsoever in connection with the management and operation of the property, and against all liability for injury or death suffered by any person, resulting directly from the management and operation of the property, provided that this section shall not impose any obligation on Owner to indemnify Agent against the willful misconduct or grossly negligent acts or omissions of Agent or the Agents or employees of Agent. Owner MUST maintain adequate insurance required to be able to cover building, it’s [sic] employees and Agent.

The Agreement states that the Owner is Defendant, and that the Agents are Rebecca Poole, Chintan Trivedi, and ITC Management, Inc. (“ITC”).

Here, Plaintiff has demonstrated its prima facie entitlement to summary judgment. Plaintiff has demonstrated that the parties entered into a contract pursuant to which Defendant agreed to indemnify Plaintiff “against all liabilities of any nature whatsoever in connection with the management and operation of the property”. Plaintiff has demonstrated that he was sued in the Keeling action for statements that he made while performing his duties as a managing agent to collect the amounts due to Promenade (Compl. ¶¶ 23, 26, 28). Defendant does not dispute that part of the duties of a managing agent is to collect the amounts due (Plaintiff’s Exhibit 3; Defendant’s Answer, ¶ 28). Plaintiff has also demonstrated that Wesco commenced the Wesco action to seek a

judgment declaring that it no longer needs to defend him in the Keeling action (Compl. ¶ 33). Plaintiff has demonstrated that Defendant has breached the parties' contract by failing to provide defense and indemnity in the Keeling and Wesco actions (Compl. ¶ 39, 44), and that he has been damaged thereby (Compl. ¶ 48-50). Defendant does not oppose.

Accordingly, Plaintiff's motion for summary judgment is granted on default and without opposition.

It is hereby


DECLARED AND ADJUDGED that Defendant must defend and indemnify Plaintiff in the Keeling and Wesco actions. It is further

ORDERED that upon the filing of a note of issue, the Clerk schedule a hearing on damages. It is further

ORDERED that Plaintiff 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: 4/5/2022

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