

**Pavlick v Trustees of Columbia Univ. in the City of
N.Y.**

2008 NY Slip Op 30126(U)

January 3, 2008

Supreme Court, New York County

Docket Number: 0122246/2003

Judge: Michael D. Stallman

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. MICHAEL D. STALLMAN PART 7
Justice

KENNETH PAVLICK,
Plaintiff,

INDEX NO. 122246/2003

Motion Date: 9/28/07

- v -

Motion Seq. No. 009

Motion Cal. No. 77

THE TRUSTEES OF COLUMBIA UNIVERSITY IN
THE CITY OF NEW YORK and TDX
CONSTRUCTION CORP.,
Defendants.

TDX CONSTRUCTION CORPORATION,
Plaintiff,

Third-Party Action

No index number yet assigned.

- v -

NORTH AMERICAN CAPACITY INSURANCE
COMPANY,
Defendant.

The following papers, numbered 1 to 4 were read on this motion to renew & reargue

Notice of Motion— Affidavits — Exhibits AND A-J
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
<u>1-2</u>
<u>3</u>
<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed numeration decision, order and judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 11B)

MICHAEL D. STALLMAN
J.S.C.

Dated: 1/3/08
New York, New York

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

J.S.C.

(THIRD PARTY ACTION ONLY)

MAIN ACTION

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X
KENNETH PAVLICK

Index No. 122246/03

Plaintiff,

Decision, Order and Judgment

- against -

THE TRUSTEES OF COLUMBIA UNIVERSITY IN
THE CITY OF NEW YORK AND TDX CONSTRUCTION
CORPORATION,

Defendants.

-----X
TDX CONSTRUCTION CORPORATION,

Third-Party Action

Plaintiff,

No index number yet assigned.

- against -

NORTH AMERICAN CAPACITY INSURANCE CO.,

Defendant.

-----X
HON. MICHAEL D. STALLMAN, J.:

In this severed third-party action, an insurance coverage dispute, defendant North American Capacity Insurance Co. (NAC) moves for an order, pursuant to CPLR 2221, granting leave to renew and/or reargue the June 5, 2007 decision and order (prior order) of Justice Sherry Klein Heitler, before whom this matter was then pending. Ordinarily, a motion pursuant to CPLR 2221 must be made to the judge who rendered the decision and order. Justice Heitler is currently assigned to serve as a Justice on the Appellate Term, First Department; accordingly, this action was reassigned to this Court. Within the meaning of CPLR 2221 (a), Justice Heitler "is . . . unable to hear it", being no longer assigned to an IAS calendar part. This Court, having been reassigned to the case, may hear the motion in her stead.

BACKGROUND

The insurance dispute emanates from an underlying Labor Law action¹ in which the plaintiff Kevin Pavlick seeks damages for injuries he allegedly sustained on January 23, 2002, when he fell from a scaffold while working for a waterproofing subcontractor at a construction project at Columbia University's Medical Research Building. The building was, and is, owned and operated by The Trustees of Columbia University in the City of New York who had retained plaintiff TDX Construction Corporation as the construction manager at the project site. Upon being named as a defendant in the Labor Law action, TDX commenced a third-party action against Urban Foundations/Engineering, LLC, Construction Waterproofers, Inc., NAC, Crawford Technical Services, and OneBeacon Insurance Group (OneBeacon) in an effort to obtain both defense and indemnification in the underlying action. The prior order resolved three motions pertaining to the third-party action, including a declaration that OneBeacon is not obligated to indemnify or defend TDX in the underlying Labor Law action, together with a summary dismissal of the third-party complaint against OneBeacon. There is no motion before this Court regarding the prior order as it relates to OneBeacon.

I

Although CPLR 2221 (f) provides for a combined motion for leave to reargue and leave to renew, as denominated in the instant notice of motion, the statute mandates that the party making the combined motion "shall identify separately and support each item of relief" (*id.*). A motion for

¹ This insurance coverage dispute was severed, by order of the court dated September 17, 2007, from the underlying action of Kenneth Pavlick v The Trustees of Columbia University in the City of New York and TDX Construction Corporation, Index No. 122246/03, which is currently awaiting trial.

reargument “is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided” (Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979] [citations omitted]). In this respect, it is apparent from the pleadings that the notice of motion was mislabeled inasmuch as NAC has not identified any grounds for the Court to consider with respect to a motion for leave to reargue.

The basis for Justice Heitler’s prior decision denying NAC’s motion in its entirety was that the documents on submission were incomplete, difficult to read, appeared to have been “randomly selected and attached as exhibits without regard to their context, order, or relevance and, therefore, lack[ed] sufficient probative value as evidence in support of the motion.” NAC does not dispute Justice Heitler’s findings in this regard; rather, NAC relies on these very same findings as a basis for its motion for leave to renew.

To this end, NAC seeks leave to renew its motion for summary judgment and a judicial declaration that it does not owe TDX a defense and/or indemnification in the Pavlick action on the ground that it is presenting new evidence not offered on the prior motion which would change the prior determination, together with a reasonable justification for failing to present such matter on the prior motion (CPLR 2221 [e][2] and [3]). Apparently, NAC erroneously and unintentionally failed to submit a complete copy of the policy along with its original motion papers. As a result, Justice Heitler denied NAC’s motion stating, in relevant part:

In its effort to obtain a dismissal of the complaint against it, NAC also submits what purports to be a copy of the subject policy, consisting of only odd-numbered pages. As neither a cover page nor a final page is attached for the court’s review, it is unclear what percentage of the policy has been copied and submitted. Moreover, the submissions include a selection of “endorsement” pages which seem to be important

to the ultimate determination of coverage, and a series of both relevant and irrelevant certificates of insurance. These submissions, when not illegible, appear to have been randomly selected and attached as exhibits without regard to their context, order, or relevance and, therefore, lack sufficient probative value as evidence in support of the motion. As the procedural equivalent of a trial, summary judgment is appropriate only when it is clear that no triable issue of fact exists (Andre v Pomeroy, 35 NY2d 361, 364 [1974]), and based on NAC's submissions, it would be inappropriate to grant the motion for summary judgment.

NAC explains that the law office error was due to issues related to double-sided copying, not an uncommon occurrence. "Given [NAC's] reasonable excuse of law office failure for this inadvertent omission and the absence of a showing of prejudice" to TDX (Cruz v Castanos, 10 AD3d 277, 278 [1st Dept 2004]), this Court grants this part of NAC's motion for leave to renew.

II

Turning to the merits of the underlying motion, NAC seeks summary judgment, pursuant to CPLR 3212, on the plenary claim for a declaratory judgment pursuant to CPLR 3001.

NAC contends that TDX is not an additional insured pursuant to the terms of NAC insurance policy BJK 0000638-00 (the Policy), which NAC issued to Urban Foundations/ Engineering, LLC, and which covered the relevant period of time. TDX produced a copy of the certificate of insurance which clearly and explicitly names TDX as an additional insured under the Policy. In response, NAC directs the Court's attention to, and relies upon, Policy endorsement number 11.

Endorsement 11 states, in relevant part:

It is agreed coverage is provided to the additional insured(s) named in this endorsement as follows:

A. The Term "additional insured" shall also include any person or organization specifically designated an "additional insured" on a certificate of insurance approved by the company.

NAC also offers the sworn affidavit of its employee, claims adjuster Richard W. Morse to explain both the meaning of endorsement 11, and how it bears on TDX's coverage as an additional insured.

In his affidavit, Morse states that:

TDX is not an additional insured as indicated in the terms of the policy [because] [f]or a Certificate of Insurance to be "approved" by North American Capacity Insurance Company, it would be included in the underwriting file retained for the named insured. I have reviewed the underwriting file relevant to this insured and note that there is no certificate of insurance, or any reference to one, providing coverage for TDX, approved by North American Capacity Insurance Company.

Some insurance companies may not recognize an entity's status as an additional insured based only on the fact that the entity's name appears on a certificate of insurance (Insurance Corp. of N.Y. v U.S. Underwriters Ins. Co., 11 AD3d 235, 236 [1st Dept 2004]). However, based upon the language contained in endorsement 11, NAC apparently does. The only condition attached to this recognition by NAC is that the certificate of insurance be "approved by the company." Through Morse's sworn affidavit, NAC attempts to define "approved by the company" as meaning located and/or found in an underwriting file pertaining to the insured. Despite the voluminous documents submitted along with the motion, it appears that movant is relying exclusively on the affidavit of its claims adjuster, which is troubling for its lack of reliance on, or reference to, any specific regulation or written definition of the term "approved by the company" contained in the Policy, in the certificate of insurance, or in any other probative document submitted for the Court's review.

Indeed, NAC cites no legal authority supporting its strained definition; the Morse affidavit in essence, represents an impermissible attempt to use parol evidence to vary the terms of a clear and unambiguous document drafted by NAC itself. Morse's conclusory statement that a copy of the insurance certificate was not found in company files might have some evidentiary significance were

there a factual question presented that would require a hearing. However, no such question is presented. Rather, at issue is the meaning of a contract provision; it is a pure issue of law, and given that Endorsement 11 has a clear meaning on its face, it cannot be varied by the Morse affidavit. NAC has produced no competent evidence that it had not approved the certificate of insurance and TDX's inclusion as an additional insured. Moreover, to accept the Morse interpretation would unfairly accord to insurers the unfettered power to unilaterally vitiate coverage of an additional insured any time an employee, for any reason or no reason, did not locate a copy of the insurance certificate.

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in admissible form” (Zuckerman v City of New York, 49 NY2d 557, 562 [1980][interior quotation marks omitted]).

In light of TDX's production of a copy of the certificate of insurance naming it as an additional insured under the Policy, TDX has made a prima facie showing that it is an additional insured and that it is entitled to declaratory relief for defense and indemnification. Morse's sworn affidavit, which lacks evidentiary support, is inadequate as a basis for declaring that NAC is not obligated to defend and/or indemnify TDX as an additional insured with respect to the Pavlick action. NAC has, therefore, failed to meet its burden of demonstrating entitlement to summary or declaratory judgment in its favor. Neither does NAC's submission demonstrate that any factual question exists.

Under CPLR 3212 (b), a court may sua sponte search the record to grant summary judgment to any deserving non-moving party with respect to an issue that is the subject of the motion before the court (Dunham v Hilco Constr. Co., 89 NY2d 425 [1996]). To this end, the probative evidence

contained in the record establishes TDX's status as an additional insured under the Policy, sufficient to warrant this Court as a matter of law, to direct judgment in favor of TDX (Zuckerman v City of New York, 49 NY2d at 562).

Accordingly, it is

ORDERED that the motion by defendant North American Capacity Insurance Co. for an order granting leave to renew the prior decision and order of Justice Sherry Klein Heitler, dated June 5, 2007, is granted; and that upon renewal of the prior order, it is further

ORDERED that the motions by North American Capacity Insurance Co. for orders granting declaratory and summary judgment are denied; and it is further

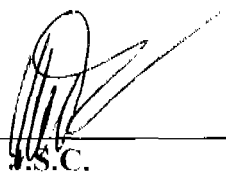
ORDERED that the part of the motion by North American Capacity Insurance Co. which seeks an order granting leave to reargue the prior decision and order is denied; and it is further

ORDERED that this Court, on its own motion, grants reverse summary judgment to TDX Construction Corporation, and it is further

ORDERED, ADJUDGED and DECLARED that North American Capacity Insurance Co. is obligated to defend and indemnify TDX as an additional insured under the Policy (NAC Policy No. BJG 0000638-00) with respect to the action entitled Kenneth Pavlick v The Trustees of Columbia University in the City of New York and TDX Construction Corporation, Index Number 122246/03.

Dated: January 3, 2008
New York, New York

ENTER:


J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 113)