

Quezada v Rodrigues-Plank

2014 NY Slip Op 31705(U)

July 2, 2014

Supreme Court, New York County

Docket Number: 109419-2009

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GEORGE J. SILVER
Justice

PART 10

Index Number : 109419/2009
QUEZADA, YOMARIS
vs.
RODRIGUES-PLANK, CRISTINA
SEQUENCE NUMBER : 007
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

FILED

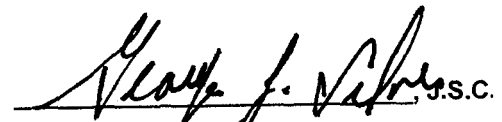
JUL 03 2014

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: JUL 02 2014


HON. GEORGE J. SILVER

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
YOMARIS QUEZADA,

Plaintiff,

Index No. 109419-2009

-against-

DECISION/ORDER

CRISTINA RODRIGUES-PLANK and OPEN DOOR
FAMILY MEDICAL CENTER, INC.,

Defendants.

-----X
CRISTINA RODRIGUES-PLANK,

Third-Party Plaintiff,

Index No. 590279-2012

-agaisnt-

THE HARTFORD, HARTFORD ACCIDENT AND
INDEMNITY COMPANY and HARTFORD CASUALTY JUL 03 2014
INSURANCE COMPANY,

Third-Party Defendants.

-----X
CRISTINA RODRIGUES-PLANK,

Second Third-Party Plaintiff,

Index No. 590530-2013

-agaisnt-

ALLSTATE ENVIRONMENTAL CORP. and HUDSON
INSURANCE GROUP,

Second Third-Party Defendants.

-----X

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

FILED

NEW YORK
COUNTY CLERKS OFFICE

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause, Affidavits, Exhibits Annexed & Memorandum of Law.....	<u>1, 2</u>
Affirmation in Opposition, Affidavit(s) & Exhibits.....	<u>3</u>
Memorandum of Law in Further Support of Motion.....	<u>4</u>
Notice of Cross-Motion, Affirmation & Exhibits.....	<u>5</u>
Memorandum of Law in Opposition to Cross-Motion.....	<u>6</u>
Affirmation in Opposition.....	<u>7</u>

Plaintiff Yomaris Quezada (plaintiff) commenced this action against defendant/third-party plaintiff/second third-party plaintiff Cristina Rodrigues-Plank (Rodrigues-Plank) and defendant Open Door Family Medical Center, Inc. (Open Door) alleging causes of action for negligence and violations of Labor Law §§ 200, 240 [1] and 241 [6] as a result of an accident that allegedly occurred on December 6, 2008 at the premises located at 80 Beekman Avenue, Sleepy Hollow, New York (the premises). The complaint alleges that Rodrigues-Plank is the owner of the premises and that Open Door is a lessee of the premises. Rordrigues-Plank commenced a third-party action against The Hartford, Hartford Accident and Indemnity Company and Hartford Casualty Insurance Company (collectively Hartford) in which she seeks a declaration that Hartford has a duty to indemnify and defend Rodrigues-Plank on a primary basis and to reimburse for any defense costs incurred by her in the action commenced by plaintiff. Rodrigues-Plank commenced a second third-party action against second third-party defendants Allstate Environmental Corp. (Allstate) and Hudson Insurance Group (Hudson) in which she seeks a declaration that Hudson has a duty to defendant and indemnify her on a primary basis as an additional insured under the Commercial General Liability (CGL) policy issued by Hudson to Allstate and to reimburse her for defense costs by her in defending plaintiff's action. Hudson now moves by Notice of Motion dated September 13, 2013 for an order dismissing the second third-party complaint pursuant to CPLR §§ 3211 [a] [1] and [a] [7]. Rodrigues-Plank cross-moves pursuant to CPLR § 3211 [e] and CPLR § 3025 for leave to amend the second third-party complaint.

In support of the motion to dismiss, Hudson contends that it does not have a duty to defend or indemnify Rodrigues-Plank or to reimburse her for any defense costs incurred by her because she is not additional insured under the CGL policy issued by Hudson to Allstate. Specifically, Hudson contends that the documentary evidence establishes that Rodrigues-Plank is not an additional insured under the CGL policy issued by Hudson to Allstate because there is no written agreement by Allstate to name Rodrigues-Plank as additional insured as is required by the policy. The additional insured provision of the CGL policy defines an additional insured as "Any person(s) or organization(s) whom the Named Insured agrees, in a written contract, to name as an additional insured." According to Hudson, the proposals and agreements between Allstate and Rodrigues-Plank pertain only to asbestos removal that Allstate was to perform at the premises and how much such work would cost. Hudson argues that these proposals do not contain an

agreement by Allstate to procure insurance coverage for Rodrigues-Plank or to name her as an additional insured under Allstate's policy with Hudson.

Hudson also contends that the certificate of insurance naming Rodrigues-Plank as an additional insured does not confer additional insured status on Rodrigues-Plank because there is no written contract in which Allstate agreed to name her an additional insured.

In opposition, Rodrigues-Plank contends in her affidavit that in November 2008 she responded to requests by Open Door, who was a triple net lessee of the premises, to assist them in expanding the premises by entering into a written agreement with Open Door wherein she agreed to pay for a portion of the work Open Door wanted performed at the premises. Rodrigues-Plank contends that she and her attorney discussed payment schedules and insurance information, with Allstate's owner, Jose Montas (Montas) during which Rodrigues-Plank indicated that Allstate must provide Rodrigues-Plank with a certificate of insurance naming her as an additional insured under his policy with Hudson before Allstate was to begin work on the premises. Rodrigues-Plank also claims that there was an agreement between her and Allstate that payment would be made unless a certificate of insurance was provided. On November 18, 2008 Montas provided Rodrigues-Plank with a certificate of insurance naming her as an additional insured. Thereafter a payment agreement was drawn up and signed by Montas. Rodrigues-Plank issued a check for a down payment in the amount of \$12,000 on the same date and work began shortly after the check was deposited. Although the alleged November 18, 2008 written agreement signed by Montas is silent with respect to the issue of insurance, Rodrigues-Plank claims that Allstate's agreement to defend, indemnify and provide additional insurance to Rodrigues-Plank was part and parcel to the written agreement.

Rodrigues-Plank argues that she because she would not have allow the asbestos-removal work to proceed until she had been named as an additional insured she relied in the certificate of insurance to her detriment. Consequently, Rodrigues-Plank claims Hudson should be estopped from denying her coverage under the CGL policy June 4, 2014.

It is well established that in determining whether to grant a motion to dismiss based upon a failure to state a cause of action pursuant to CPLR § 3211 [a] [7], the pleading is to be afforded a liberal construction (CPLR § 3026), and the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118 [1st Dept 2002]). Stated another way, the court's role in a motion to dismiss is limited to determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint (*id.*). "In assessing a motion under CPLR § 3211 [a] [7] . . . a court may freely consider affidavits submitted by the [nonmoving party] to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon v Martinez*, 84 NY2d 83, 88, 638 NE2d 511, 614 NYS2d 972 [1994] [internal quotation marks and citations omitted]).

On a motion to dismiss pursuant to CPLR §3211[a] [1] "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324, 865 NE2d 1210, 834 NYS2d 44 [2007]) (internal citations omitted) Such a motion "may be appropriately granted only when the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing

a defense as a matter of law” (*Goshen v Mut. Life Ins. Co. of NY*, 98 NY2d 314, 774 NE2d 1190, 746 NYS2d 858 [2002]). Documentary evidence includes, “judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable” (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]).

The Appellate Division, First Department has repeatedly held that the language of the insurance policy at issue herein unambiguously requires a written contract between the insured and the party seeking coverage to add that party as an additional insured (*AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.*, 102 AD3d 425 [1st Dept 2013]; *Linarello v City Univ. of N.Y.*, 6 AD3d 192 [1st Dept 2004]; *see also West 64th St., LLC v Axis U.S. Inc.*, 63 AD3d 471 [1st Dept [2009]). Rodrigues-Plank does not dispute the fact that there is no written contract between her and Allstate wherein Allstate agreed to add Rodrigues-Plank as an additional insured under Hudson’s CGL policy. Therefore, the plain terms of Hudson’s policy have not been met and Rodrigues-Plank cannot seek coverage from Hudson as an additional insured (*AB Green Gansevoort, LLC*, 102 AD3d at 426). Because there was no written contract to add Rodrigues-Plank as an additional insured, the certificate of insurance issued in her name on the on the same day she issued payment to Allstate does not confer coverage, does not bring Rodrigues-Plank within the additional insured coverage afforded by the policy or otherwise raise any factual issues which would warrant denial of Hudson’s motion (*West 64th St, LLC*, 63 AD3d at 472).

Rodrigues-Plank’s claim that Hudson should be estopped from denying her coverage under the policy is also without merit. Accepting as true Rodrigues-Plank’s claim that payment to Allstate and the commencement of Allstate’s asbestos abatement work were conditioned upon Allstate providing her with a certificate of insurance, and that Professional Risk Planners, Inc., the party that issued the certificate of insurance, is an agent of Hudson and Hudson is liable for its acts, estoppel cannot be invoked to create coverage where none exists (*American Ref-Fuel Co. v Resource Recycling*, 248 AD2d 420 [2d Dept 1998]). Here, pursuant to the plain terms of the insurance policy, additional insured coverage exists only where there is a written contract between the insured and a third-party wherein the insured agrees to name the third-party as additional insured. Since no such written contract exists, there is no such coverage and estoppel will not operate to create such coverage. Since the documentary evidence submitted by Hudson in the form of the insurance policy conclusively establishes that Hudson is not obligated to defend and indemnify Rodrigues-Plank, or to pay her defense costs, the motion to dismiss is granted.

Rodrigues-Plank cross-moves to amend the second third-party complaint to assert a fourth cause of action that Hudson is equitably estopped from denying coverage to Rodrigues-Plank. Generally, leave to amend a pleading is freely granted in the absence of prejudice or surprise to the opposing party. Mere lateness is not a barrier to amendment. To establish prejudice, which must be significant (*see Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 459 NE2d 164, 471 NYS2d 55 [1983]), there must be some indication that the opposing party will have been hindered in the preparation of its case or prevented from taking some measure to support its position (*see Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 429 NE2d 90, 444 NYS2d 571 [1981]). Moreover, on a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations but simply show that the proffered amendment

is not palpably insufficient or clearly devoid of merit (*MBIA Ins. Corp v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). As discussed above, the doctrine of estoppel cannot be invoked to create coverage where none exists (*Wausau Inc. Cos. v Feldman*, 213 AD2d 179 [1st Dept 1995]). Moreover, the certificate of insurance relied upon by Rodrigues-Plank "is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists" (*Buccini v 1568 Broadway Assoc.*, 250 AD2d 466 [1st Dept 1998]). Therefore, because Rodrigues-Plank's proposed amendment is insufficient and devoid of merit, the cross-motion for leave to amend is denied.

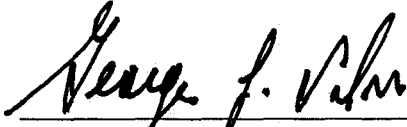
In light of the foregoing, it is hereby

ORDERED that second third-party defendant Hudson Insurance Group's motion to dismiss is granted and the second third-party complaint against it is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that second third-party plaintiff's Cristina Rodrigues-Plank's cross-motion to amend the second third-party complaint is denied with respect to the proposed fourth cause of action; and it is further

ORDERED that second third-party defendant Hudson Insurance Group is to serve a copy of this order, with notice of entry, upon all parties to the action within 20 days of entry.


George J. Silver, J.S.C.

JUL 02 2014
Dated:
New York County

HON. GEORGE J. SILVER

FILED
JUL 03 2014
NEW YORK
COUNTY CLERK'S OFFICE