

Transporation Ins. Co. v Main St. Am. Assur. Co.

2015 NY Slip Op 30600(U)

March 16, 2015

Sup Ct, Queens County

Docket Number: 703128/14

Judge: Carmen R. Velasquez

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

-----x
TRANSPORTATION INSURANCE COMPANY,

Index No: 703128/14

Plaintiff,

Motion

Dated: October 28, 2014

-against-

M# 2

MAIN STREET AMERICA ASSURANCE
COMPANY,

Defendant.
-----x

The following papers numbered 1 - 3 read on this motion by plaintiff for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1
Affirmation in Opposition - Exhibits	2
Replying Affirmation.....	3

Upon the foregoing papers it is ordered that this motion by plaintiff is decided as follows:

182 5th Avenue, LLC leases premises located at 182 Fifth Avenue, New York, New York to 7- Eleven, Inc. The lease requires the tenant to procure insurance coverage for itself and also for the owner as an additional insured. The lease provided in relevant part: "Each policy evidencing the insurance to be carried by Tenant under this Lease shall contain a clause that such policy and the coverage evidenced thereby shall be primary with respect to any policies carried by Landlord, and that any coverage carried by Landlord shall be excess insurance."

On or about April 29, 2012, the tenant entered into a contract with Lorch Construction Management, LLC which required the latter to act as the general contractor in the construction of a new 7-Eleven store on the property. The contract provided in relevant part: Contractor, at its own expense, shall provide and maintain insurance coverage during the complete term of the Agreement that conforms in all material respects with the following requirements: ... (e) Each of the Contractor's insurance policies shall be

written so as to provide primary coverage and to be non-contributing with respect to any other insurance or self insurance which may be maintained by Owner [7-Eleven]." Lorich obtained a commercial general liability insurance policy from Transportation Insurance Company (TIC) effective from October 22, 2011 to October 22, 2012. The TIC policy provided in relevant part: "Section IV-Commercial General Liability Conditions [:] 4. Other Insurance [:] If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows [:] ... b. Excess Insurance [:] (1) This insurance is excess over: ... (b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.Blanket Additional Insured - Owners, Lessees of Contractors - 3. This insurance is excess of all other insurance available to the additional insured whether on a primary, excess, contingent or any other basis. But if required by the 'written contract' this insurance will be primary and non-contributory relative to insurance on which the additional insured is a Named Insured." The court notes that the IRMI insurance glossary defines "named insured" as follows: "Any person, firm, or organization, or any of its members specifically designated by name as an insured(s) in an insurance policy, as distinguished from others that, although unnamed, fall within the policy definition of an 'insured.'" (www.irmi.com.)

On or about May 1, 2012, Lorich subcontracted work to Ram Interiors & Supply Corp., and the subcontract required Ram to name others as additional insureds on its policy: " You shall furnish a certificate from your insurance carrier to us before commencing the work naming Lorich ... the owner [7-Eleven?], and the architect as additional insured ... and your insurance shall be primary." Ram obtained a commercial general liability insurance policy from Main Street America Assurance Company (MSA) effective from January 22, 2012 to January 22, 2013 which designates as an additional insured any organization that Ram is contractually obligated to have designated as such. The MSA policy provides in relevant part: "Contractors Extension Endorsement BPM 3105 1207 [:] A. Additional Insureds - Each of the following is added to Paragraph C Who Is An Insured of BPM P2- Section II Liability but only as specifically described by the following : 1. Any person(s) or organization(s) for whom you are performing operations is also an additional insured when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. ... Contractors Extension Endorsement BPM 3105 1207 [:] The following is added to

Paragraph H Other Insurance of BPM P3- Section III - Common Policy Conditions : Primary Additional Insured - If a written contract or agreement or permit requires this insurance to be primary for any person or organization with whom you agree to include in paragraph C. Who Is An Insured of BPM P2- Section II - Liability, this Other Insurance provision is applicable. This insurance is primary. This insurance is also non-contributory which means we will not seek contribution from other insurance available to the person or organization with whom you agree to include in Who Is an Insured."

Ram in turn subcontracted work to Rego Park Construction Corp. On August 15, 2012, Elvio Diaz, an employee of Rego, allegedly sustained personal injury as he worked on the construction of the new 7-Eleven store. On January 17, 2013, Diaz began an action for personal injury in the New York State Supreme Court, County of Queens (*Diaz v 182 Fifth Avenue, LLC*, Index No. 1066/13). The complaint in the underlying action brought against the landlord, the tenant, Lorich, and Ram asserts causes of action for negligence and violations of the Labor Law.

By tender letter dated September 20, 2013, TIC demanded that MSA assume the defense of the landlord, the tenant, and Lorich and provide coverage for them. However, by an e-mail from Julio Celorio sent on January 23, 2014, MSA denied coverage for Lorich, the tenant, and the landlord: "As I see it the issue here is whether the loss was a result of our work or of the negligence of another party. Once we have depositions done we will be in a better position to respond to your tender request. Once we have them completed I will formally respond to your tender."

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986].) Plaintiff TIC failed to carry this burden. Defendant MSA properly objects that the instant motion, supported only by an attorney's affirmation and unauthenticated documents, does not meet standards.. "On its motion for summary judgment, the plaintiff had the burden of establishing, by proof in admissible form, its prima facie entitlement to judgment as a matter of law" (*US Bank Nat. Ass'n v Madero*, ___ AD3d ___, ___ NYS2d ___, 2015 WL 542170 [emphasis added]; see, *Cassell v County of Westchester*, 122 AD3d 788 [2d Dept 2014].)

"Affirmations of attorneys who have no personal knowledge of germane facts have no intrinsic evidentiary value" (*Morales v Coram Materials Corp.*, 51 AD3d 86, 96 [2d Dept 2008].) Although the failure to submit an affidavit by a person with knowledge of

the facts is not necessarily fatal to a summary judgment motion where the proponent submits other proof with an attorney's affirmation (see, *Olan v Farrell Lines Inc.*, 64 NY2d 1092 [1985]; *Notskas v Longwood Associates, LLC*, 112 AD3d 599 [2d Dept 2013]), in the case at bar, the plaintiff's attorney failed to authenticate critical documents such as contracts. (see, *Fairlane Financial Corp. v Greater Metro Agency, Inc.*, 109 AD3d 868 [2d Dept 2013].) "A private document offered to prove the existence of a valid contract cannot be admitted into evidence unless its authenticity and genuineness are first properly established ..." (NYCTL 1998-2 *Trust v Santiago*, 30 AD3d 572, 573 [2d Dept 2006]; *Fairlane Financial Corp. v Greater Metro Agency, Inc.*, 109 AD3d at 870.) An affidavit from a knowledgeable party is an appropriate vehicle for authenticating and submitting relevant documentary evidence on a motion for summary judgment. (See, *Muhlhahn v Goldman*, 93 AD3d 418 [1st Dept 2012].) The plaintiff's attorney also did not submit any deposition testimony on this motion which seeks a declaration concerning both a defense and coverage. The plaintiff's attorney merely alleges "on information and belief" that Ram subcontracted work to Rego, the alleged employer of Diaz. The plaintiff's attorney did not submit a copy of the subcontract or prove that there was only an oral agreement.

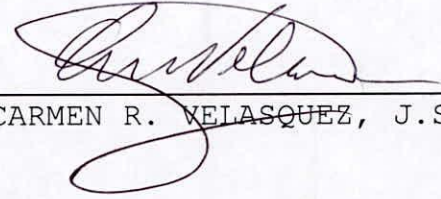
The attempt by the plaintiff's attorney to cure the deficiencies through the submission of a reply affidavit from Paul Tagliaferri, a principal of Lorich, is unavailing. A reply affidavit submitted for the purpose of correcting basic deficiencies in the prima facie showing made in the initial papers submitted by the proponent of a summary judgment motion cannot be taken into consideration. (See, *627 Acquisition Co., LLC v 627 Greenwich, LLC*, 85 AD3d 645 [1st Dept 2011]; *Cevallos v Morning Dun Realty, Corp.*, 78 AD3d 547 [1st Dept 2010]; *Scansarole v Madison Square Garden, L.P.*, 33 AD3d 517 [1st Dept 2006].) The proponent of a summary judgment motion cannot rely on evidence submitted for the first time in his reply papers. (See, *GJF Const. Corp. v Cosmopolitan Decorating Co., Inc.*, 35 AD3d 535 [2d Dept 2006].)

"A movant's failure to sufficiently demonstrate its right to summary judgment requires a denial of the motion regardless of the sufficiency, or lack thereof, of the opposing papers..." (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Cugini v System Lumber Co., Inc.*, 111 AD2d 114, 114 [1st Dept 1985].)

Accordingly, this motion by the plaintiff for summary judgment is denied without prejudice to renewal.

Dated: March 16, 2015 FILED

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 COUNTY CLERK
 QUEENS COUNTY 4


 CARMEN R. VELASQUEZ, J.S.C.