

**Integrated Project Delivery Partners, Inc. v Mt.
Hawley Ins. Co.**

2019 NY Slip Op 32740(U)

September 17, 2019

Supreme Court, New York County

Docket Number: 158862/2015

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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INDEX NO. 158862/2015

INTEGRATED PROJECT DELIVERY PARTNERS,
INC.,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 004

- v -

MT. HAWLEY INSURANCE COMPANY,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 92-134, 136-154, 158

were read on this motion for summary judgment.

Defendant moves pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes and cross moves pursuant to CPLR 3212 for summary judgment. Defendant opposes.

I. BACKGROUND

Defendant issued a commercial general liability policy to plaintiff for the period of June 1, 2013 to June 1, 2014. Pursuant to endorsement 102A of the policy, defendant may disclaim insurance coverage unless, as pertinent here:

Certificates of insurance are obtained from each and every "contractor" prior to commencement of such "contractor's" work. Such certificates of insurance must list primary commercial general liability coverage in effect at all times the work is performed with limits equal to or greater than the limits of this policy.

(NYSCEF 95).

On July 25, 2013, plaintiff entered into a contract with a nonparty to serve as general contractor for an interior renovation project to start on July 29, 2013 and be substantially

completed no later than 42 calendar days from the start date. (NYSCEF 101). On August 1, 2013, plaintiff entered into a subcontract with non-party Jhofer Electric Communications & Controls Corp. (Jhofer) to perform electrical work for the project (NYSCEF 103), and on August 2, 2012, they executed a general services contract (NYSCEF 102).

On August 16, 2013, nonparty Raonel Villa, a Jhofer employee, commenced a personal injury action in this court alleging that on August 2, 2013, he had sustained injury while working on the project. (NYSCEF 98; *Raonel Villa v 980 Madison Owner LLC and RFR Holding LLC*, Index No. 157562/2013). On January 13, 2014, plaintiff was impleaded in that action as a third-party defendant. (NYSCEF 110).

By letter dated November 1, 2013, one of the two *Villa* defendants tendered to plaintiff defense and indemnification for itself and the other. (NYSCEF 97).

By email dated November 14, 2013, defendant requested from plaintiff, among other things, a copy of the certificate of insurance provided by Jhofer. (NYSCEF 99). By email dated November 15, 2013, plaintiff provided defendant with, among other things, two certificates of liability insurance issued to entities other than plaintiff, one dated August 3, 2013 and the other dated October 29, 2013. (NYSCEF 100).

By letter dated December 11, 2013, defendant disclaimed insurance coverage in the *Villa* action, on the ground that the certificate of insurance plaintiff provided to it “was issued, and obtained, after the commencement of work” by Jhofer. (NYSCEF 106).

By affidavit dated October 23, 2018, defendant’s claim director states, as pertinent here, that after he received the certificates of insurance from plaintiff, he retained an independent investigator to confirm that the certificates constituted all of those in existence for the project, and that on December 10, 2013, the investigator confirmed that he had interviewed plaintiff’s

CEO and president, who confirmed that Jhofer had commenced work on the project in July 2013, that plaintiff had not obtained a certificate of insurance from Jhofer until August 3, 2013, and that all of the certificates had already been submitted by plaintiff. (NYSCEF 94).

By affidavit dated October 22, 2018, the vice president of the independent investigator states that on December 3, 2013, she personally conducted an interview with plaintiff's CEO and president who confirmed that plaintiff had obtained a certificate of insurance from Jhofer after Villa was injured, that the August 3, 2013 certificate of insurance plaintiff had provided to defendant was the first it obtained from Jhofer, and that there were no other records not yet provided to defendant. (NYSCEF 107).

II. CONTENTIONS

A. Defendant (NYSCEF 92-128)

Defendant contends that plaintiff failed to comply with the endorsement because it had obtained a certificate of liability insurance from Jhofer after both the start of construction and plaintiff's accident. It also observes that the certificate it received was not issued to plaintiff, but to another entity, thereby raising the possibility that plaintiff had never obtained a certificate of insurance from Jhofer. (NYSCEF 128).

B. Plaintiff (NYSCEF 135-152)

Plaintiff alleges that it obtained a certificate of insurance from Jhofer in August 2012, before Jhofer first started working for plaintiff and before the work commenced which is sufficient under the endorsement as it does not require a certificate of insurance for each project, but only for each subcontractor. To the extent that the provision in the endorsement is ambiguous as to whether the certificate of insurance must be for the specific project, it argues, the ambiguity should be resolved in favor of the insured. Moreover, the endorsement is also ambiguous as to

whether the compliance with it constitutes a condition precedent to coverage. Plaintiff also argues that defendant is estopped from disclaiming coverage on a ground not cited in its disclaimer letter. Thus, it contends, plaintiff is entitled to reimbursement for the defense costs it incurred in defending the *Villa* action.

In support, plaintiff submits the affidavit of its president, dated March 15, 2019, in which he states, in relevant part, that plaintiff obtained certificates of insurance from Jhofer months before work commenced and that plaintiff generally obtains additional copies of certificates of insurance for each project. He otherwise maintains that it is common practice to send a certificate of insurance only for each subcontractor, not for each project, and confirms that when plaintiff's insurance claim was investigated, plaintiff only sent the certificate dated August 3, 2013. (NYSCEF 136).

Plaintiff also submits four certificates of liability insurance issued to Jhofer. The first is dated March 14, 2013 and reflects that Jhofer maintained "commercial general liability" from July 10, 2012 to July 10, 2013; the second is dated March 14, 2013 and reflects that Jhofer maintained "workers compensation and employers' liability" insurance from August 8, 2012 to August 8, 2013; the third is dated June 18, 2013 and reflects that Jhofer maintained "commercial general liability" from July 10, 2012 to July 10, 2013; and the fourth is dated June 17, 2013 and reflects that Jhofer maintained "workers compensation and employers' liability" insurance from August 8, 2012 to August 8, 2013. (NYSCEF 143).

C. Reply (NYSCEF 154)

Defendant contends that as the newly submitted certificates of insurance were not disclosed in discovery, they may not be relied on, and that even if considered, two of the certificates list only workers compensation policies, which do not satisfy the policy's

endorsement, and none covers the time period of the project. Defendant also observes that some of the certificates are not for the renovation project and contends that the endorsement is a condition precedent to coverage.

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

As an initial matter, the requirements set forth in the endorsement have been held to constitute conditions precedent to coverage that are clear and unambiguous, and thus, failure to comply with those requirements is a permissible basis for disclaiming coverage. (*Navarro v PC Grp., LLC*, 100 AD3d 722, 723 [2d Dept 2012]; *Mt. Hawley Ins. Co. v Nat’l Builders LLC*, 2009 WL 1919611, *3 [SD NY 2009]).

As defendant demonstrates that the certificates plaintiff provided to defendant are dated after Villa’s accident, it meets its *prima facie* burden of establishing that it properly disclaimed coverage based on plaintiff’s failure to comply with the endorsement’s requirements.

The certificates of insurance plaintiff submits in opposition raise no issue of fact, because

although they are dated before the commencement of the work, they do not reflect that primary commercial general liability coverage was in effect at all times the work was to be performed, 42 days from the date of commencement, and thus, they do not satisfy the conditions set forth in the endorsement. While it is true that an insurer may not raise new grounds to disclaim coverage as affirmative defenses if not raised in its initial disclaimer of coverage (*20-35 86th St. Realty, LLC v Tower Ins. Co. of New York*, 106 AD3d 478, 480 [1st Dept 2013]), the new certificates were indisputably never provided to defendant, thus depriving it of the ability to disclaim coverage on the ground that it did not cover the proper time period.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant’s motion for summary judgment is granted; it is further

ORDERED, that plaintiff’s cross-motion for summary judgment is denied; and it is further

ORDERED, that the complaint is dismissed, and the clerk is directed to enter judgment accordingly.

9/17/2019

DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE