

99 Church Invs. LLC v Old Republic Ins. Co.

2020 NY Slip Op 30608(U)

March 3, 2020

Supreme Court, New York County

Docket Number: 152827/2019

Judge: Barbara Jaffe

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

-----X

99 CHURCH INVESTORS LLC, TISHMAN
CONSTRUCTION CORPORATION, and TISHMAN
CONSTRUCTION CORPORATION OF NEW
YORK,

Plaintiff,

- v -

OLD REPUBLIC INSURANCE COMPANY, AXIS
INSURANCE COMPANY, AMERICAN
INSURANCE COMPANY, PORT MORRIS TILE &
MARBLE CORP., WILLIAM CASTILLO, JR., and
JULISSA CASTILLO (pertaining to an underlying
Action entitled *Castillo v 99 Church Street Investors
LLC, et al.*),

Defendants.

-----X

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24-38, 40, 42-46
were read on this motion to dismiss.

By notice of motion, defendant Axis Insurance Company moves pursuant to CPLR
3211(a)(1) and (7) for an order dismissing the complaint. Defendant Old Republic Insurance
Corp. supports the motion, and plaintiffs oppose.

I. COMPLAINT (NYSCEF 27)

Plaintiff 99 Church Investors LLC contracted with plaintiffs Tishman Construction
Corporation and Tishman Construction Corporation of New York (collectively, Tishman) to
serve as construction manager for a project at 99 Church Street in Manhattan, and Tishman
contracted with defendant Port Morris Tile & Marble Corp. to work at the project. Pursuant to
the contract between Tishman and Port Morris, Port Morris was required to procure and maintain

a commercial general liability insurance policy with annual limits of liability of \$1,000,000 per occurrence and \$2,000,000 in the aggregate, and an excess liability policy with annual limits of \$15,000,000 per occurrence and in the aggregate; both policies were to include plaintiffs as additional insureds.

Port Morris procured an insurance policy from Old Republic for commercial general liability coverage with liability limits of \$2,000,000 per occurrence and \$4,000,000 in the aggregate; 99 Church and Tishman are named as additional insureds. In addition, Port Morris procured from Axis an excess liability policy with liability limits of \$3,000,000 per occurrence and in the aggregate; 99 Church and Tishman are named as additional insureds. Port Morris also procured an excess liability policy from defendant American Insurance Company (AIC) with coverage liability limits of \$10,000,000 per occurrence and in the aggregate; 99 Church and Tishman are named as additional insureds.

By summons and verified complaint dated May 24, 2017, defendants William Castillo, Jr. and Julissa Castillo commenced an action in this court against plaintiffs, alleging that on February 10, 2017, William, a former employee of Port Morris, sustained a gravity-related injury when he fell from a ladder while working on the 99 Church project. (*Castillo v 99 Church Investors LLC, et al.*, Index No. 154952/2017).

Plaintiffs maintain that if the allegations in the *Castillo* action are established, any liability arising from the work was caused by the negligence of Port Morris and William, and that as additional insureds, Old Republic, Axis, and AIC are obligated to defend and indemnify plaintiffs. In the alternative, if Old Republic, Axis, and AIC are not obligated to defend and indemnify plaintiffs, Port Morris must defend and indemnify plaintiffs and reimburse them for any expenses incurred or to be incurred in the defense and indemnification in that action.

Plaintiffs seek reimbursement for themselves or their insurance carrier for all expenses incurred in their defense of the *Castillo* action.

II. CONTENTIONS

A. Axis (NYSCEF 24-35)

Axis contends that the complaint should be dismissed because insurance coverage is precluded under its “wrap-up” exclusion, which bars coverage for damages or liability arising from Port Morris’s work where there was a wrap-up or a consolidated insurance program for the project. In support, it submits the insurance policy Old Republic issued to Port Morris (NYSCEF 28), and its excess liability insurance policy with Port Morris, which reflects that the policy does not apply to liability or damages arising from:

[a]ny of your prior or ongoing operations or operations where the prime contractor, general contractor, project manager, owner of the construction project, or you sponsor(ed) or participate(d) in a Consolidated Insurance Program (CIP) or Wrap-Up, regardless of whether or not the Consolidated Insurance Program (CIP):

- (1) Provides coverage identical to that provided by this policy
- (2) Has limits adequate to cover all claims; or
- (3) Remains in effect;

Consolidated Insurance Program (CIP) means a centralized insurance and loss control program that covers the project owner and all contractors and subcontractors. A consolidated insurance program (CIP) is commonly referred to as a wrap-up or owner controlled insurance program (OCIP).

(NYSCEF 29).

Axis also submits a general liability insurance policy issued by nonparty Ace Group to nonparty 30 Park Place Residential, LLC, that reflects that “[a]ny ‘Enrolled Contractors’ for whom the ‘Named Insured’ contracts to furnish insurance under the ‘Controlled Insurance Program’ and who performs work at the ‘Designated Project(s)’” is an insured, and that

“‘Enrolled Contractor’ means each contractor and subcontractor that we enroll in accordance with our records as participants in the ‘Controlled Insurance Program’ described in the endorsement to this policy entitled Limitation of Coverage to Designated Premises or Project.” Pursuant to endorsement 26 of the policy, the premises at 99 Church Street constitutes a “Designated Premises or Project.” (NYSCEF 30).

In addition, Axis submits a contract between Tishman and Port Morris, which reflects that the Owner Controlled Insurance Program is part of the contract (NYSCEF 31), and a contractors’ insurance manual for the OCIP for the “Four Seasons Hotel and Private Residences” located at 99 Church Street/30 Park Place. The manual provides, as pertinent here:

An Owner Controlled Insurance Program (OCIP) is a single coordinated, insurance program that provides specific coverage for the Owner and **Enrolled Contractors**. The Owner pays the premiums for the OCIP Coverages.

This OCIP provides Workers’ Compensation, Employers’ Liability, General Liability, Excess Liability, Builders’ Risk, Pollution Liability and Railroad Protective Liability coverage to all **Enrolled Contractors** for **On-site Activities**. OCIP coverage applies only to those operations of each **Enrolled Contractor** in connection with their work performed at the **Project Site**.

All **Eligible Contractors** must participate in the OCIP.

(NYSCEF 32) (emphases in original).

Axis contends that the documentary evidence establishes that the construction project had an OCIP, sponsored by 99 Church as the owner, and through ACE Group and that therefore, the wrap-up exclusion applies, and plaintiffs are not entitled to coverage in the *Castillo* action.

B. Plaintiffs (NYSCEF 40)

Plaintiffs contends that Axis’s documentary evidence should be disregarded because they have not been authenticated, observing that they lack a certification and Axis fails to submit an affidavit from an employee authenticating them and attesting to their completeness. To the extent

Axis attempts to submit the missing documentation in its reply, it should be disregarded.

C. Reply (NYSCEF 42-46)

Axis observes that plaintiffs do not address whether the wrap-up exclusion precludes insurance coverage, instead arguing that the Axis's exhibits are not authentic and not viable documentary evidence. It contends that there is no requirement that documentary evidence be certified or accompanied by an affidavit attesting to its authenticity; it need only be unambiguous and of undisputed authenticity. Plaintiffs do not offer a competing version of the documents at issue, Axis asserts, and they have not presented evidence that the documents lack authenticity.

Axis maintains that contracts and insurance policies constitute documentary evidence, that the exhibits it submitted are true and complete, as affirmed by its counsel (NYSCEF 26), and that plaintiffs fail to demonstrate how the exhibits are inaccurate or inauthentic. Axis submits a certified copy of its excess liability insurance policy with Port Morris. (NYSCEF 44). In addition, it asserts, the Ace Group insurance policy was produced by plaintiffs in response to discovery demands in the underlying action. (NYSCEF 45).

III. ANALYSIS

Pursuant to CPLR 3211(a)(1), a party may move for an order dismissing a pleading on the ground that it has a defense based on documentary evidence. Such a motion may be granted where factual allegations in the complaint are flatly contradicted by documentary evidence. (*Kaisman v Hernandez*, 61 AD3d 565, 566 [1st Dept 2009]; *Kliebert v McKoan*, 228 AD2d 232, 232 [1st Dept 1996], *lv denied* 89 NY2d 802 [1996]).

To qualify as documentary evidence, the paper must be unambiguous and of undisputed authenticity, and the contents must be essentially undeniable. (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], citing *Fontanetta v Doe*, 73 AD3d 78, 86

[2d Dept 2010]). Generally, judicial records and “documents reflecting out-of-court transactions,” such as contracts and insurance policies, constitute documentary evidence. (*Ralex Servs., Inc. v Sw. Marine & Gen. Ins. Co.*, 155 AD3d 800, 801–802 [2d Dept 2017], quoting *Fontanetta*, 73AD3d at 84-85; *Hohwald v Farm Family Cas. Ins. Co.*, 155 AD3d 1009, 1010 [2d Dept 2017] [insurance policy constituted documentary evidence]).

While plaintiffs observe that the contracts and insurance policies submitted by Axis lack a certification verifying their authenticity, they do not challenge the documents’ authenticity, correctness, or completeness, and in their complaint, they allege that they procured the policies. Consequently, as they are in possession of the documents, and offer no evidence or argument as to the inaccuracy of Axis’s submissions, plaintiffs’ conclusory denial as to the authenticity of Axis’s submissions is insufficient. (*See e.g., Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 630 [1st Dept 2017] [uncertified work permits and certificates of occupancy sufficient where “plaintiff offer[ed] no reason [...] to doubt their basic authenticity”]; *Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, 388 [1st Dept 2006] [accepting insurance policy as documentary evidence where opposition did not contend that document was “not correct or complete”]).

Axis’s insurance policy reflects that coverage is precluded when the construction project has an OCIP that is sponsored or participated in by the prime contractor, general contractor, project manager, owner of the project, or Port Morris, and the evidence presented by Axis establishes that there was such an OCIP for the project sponsored by the owner, 99 Church. Thus, plaintiffs are not entitled to coverage under the Axis policy. In any event, plaintiffs offer no argument in opposition, aside from their challenge to the policy’s authenticity, as to whether the documents establish that coverage is precluded.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Axis Insurance Company's motion to dismiss is granted, and plaintiffs' causes of action against it are dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the parties are directed to appear for a compliance conference in room 341, 60 Centre Street, New York, New York, on March 18, 2020 at 2:15 pm.

20200303165756B1AFFE58AC5FA6929E4CF880BD2970AC258A0D

3/3/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE