

**Pace Univ. v American Family Home Ins. Co.**

2020 NY Slip Op 31087(U)

April 27, 2020

Supreme Court, New York County

Docket Number: 155556/2018

Judge: Paul A. Goetz

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. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

-----X

PACE UNIVERSITY,

Plaintiff,

- v -

AMERICAN FAMILY HOME INSURANCE COMPANY,
FEDERATED MUTUAL INSURANCE COMPANY, R.L.
BAXTER BUILDING CORPORATION, and QUALITY
GLASS SERVICES, INC.,

Defendants.

-----X

INDEX NO. 155556/2018
MOTION DATE
MOTION SEQ. NO. 001
DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19-32, 35-48
were read on this motion to/for DISMISS

Plaintiff Pace University commenced this action seeking a declaration that it is entitled to
insurance coverage and damages for breach of contract in connection with an underlying personal
injury lawsuit arising out of an accident which occurred on August 9, 2017 during a renovation
project at plaintiff's premises. Defendant R.L. Baxter Building Corporation, the general contractor
hired by Pace University, now moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the
complaint. Defendant Federated Mutual Insurance Company cross-moves pursuant to CPLR
3211(a)(1) and (7) to dismiss the complaint.

As a preliminary matter, there are a couple of procedural problems with the motions. First,
defendants' motions under CPLR 3211(a)(1) based on documentary evidence are untimely as
defendants' time to file a responsive pleading has expired, and, indeed, defendants have already
answered the complaint. CPLR 3211(e). Thus, the motions will only be considered under CPLR
3211(a)(7), failure to state a cause of action. Second, defendant Federated Mutual's cross-motion
is not a true cross-motion as it does not seek relief against the moving party, defendant R.L. Baxter.

Nevertheless, plaintiff had ample opportunity to respond to the motion and thus it will be considered.

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the pleading must be afforded a liberal construction and the court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). However, the Court of Appeals has made clear that a defendant can submit documentary evidence in support of a CPLR 3211(a)(7) motion. *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 135 (2014) (citing *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636 (1976)). “When documentary evidence is submitted by a defendant the standard morphs from whether the plaintiff has stated a cause of action to whether it has one.” *Id.* (internal quotations and citations omitted). Thus, if the defendant’s evidence conclusively establishes that the plaintiff has no cause of action, dismissal would be appropriate. *Id.*

With respect to defendant R.L. Baxter, the only cause of action asserted in the complaint asserted against this defendant is the third cause of action for breach of contract in which plaintiff alleges that R.L. Baxter breached the parties’ contract by failing to procure a general liability insurance policy naming plaintiff as an additional insured. Complaint, para. 61. In support of its motion, defendant R.L. Baxter submits the insurance policy it obtained from co-defendant American Family Home Insurance which defines plaintiff as an additional insured. Affirmation of Karen M. Berberich dated December 5, 2019, Exh. I & J (Additional Insured Endorsement CG 20 10 10 01; providing that “Who is an Insured” is amended to include anyone required by written contract). In opposition, plaintiff does not dispute that this insurance policy provides it with additional insured coverage but nevertheless argues that its breach of contract claim against

defendant R.L. Baxter should not be dismissed because the insurance company, defendant American Family Home Insurance, has denied coverage to plaintiff. However, simply because defendant-insurer has denied coverage does not mean that defendant R.L. Baxter breached its contract with plaintiff by failing to procure insurance coverage for the renovation project naming Pace as an additional insured. The evidence submitted by defendant R.L. Baxter conclusively shows that it did in fact procure additional insured coverage for Pace and thus the breach of contract claim asserted against it must be dismissed.

With respect to defendant Federated Mutual Insurance, the only cause of action asserted in the complaint against this defendant is the second cause of action in which plaintiff seeks a declaration from the court that it is entitled to insurance coverage as an additional insured pursuant to the insurance policy defendant Federated Mutual Insurance issued to co-defendant Quality Glass, a subcontractor on the renovation project. Complaint, paras. 47-51 & Exh. D. This additional insured endorsement, like the one in the policy issued to R.L. Baxter, provides additional insured status when required by any construction agreement with defendant Quality Glass. Complaint, Exh. D. However, unlike R.L. Baxter, plaintiff does not allege that it entered into a construction agreement with defendant Quality Glass, a subcontractor. Complaint, paras. 47-51. Rather, plaintiff asserts that the contract between R.L. Baxter and Quality Glass required Quality Glass to indemnify and hold plaintiff harmless for any damages related to the construction work. Complaint, Exh. C, Sec. 5. However, as defendant Federated Mutual Insurance argues in its cross-motion, the Quality Glass contract is silent with respect to any requirement for Quality Glass to procure any third-party liability insurance coverage, let alone insurance coverage naming plaintiff as an additional insured. Complaint, Exh. C. Thus, plaintiff is not entitled to coverage under the additional insured endorsement in the Federated Policy because such coverage is not

required by Quality Glass' construction agreement with R.L. Baxter. Further, plaintiff's argument that there may be additional agreements with Quality Glass is unpersuasive as this is the agreement on which it relies on in its complaint. Thus, this cause of action must be dismissed. Accordingly, it is

ORDERED that the motion to dismiss by defendant R.L. Baxter and the cross-motion to dismiss by defendant Federated Mutual Insurance are granted and the complaint is dismissed as against these defendants, with costs and disbursements awarded to said defendants, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the remaining claims are severed and continued; and it is further

ORDERED that the caption shall be amended to reflect the dismissal of said defendants; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (ww.nycourts.gov/supctmanh)].

4/27/20  
DATE

  
PAUL A. GOETZ, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  SETTLE ORDER  SUBMIT ORDER  OTHER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE