

Old Republic Gen. Ins. Corp. v ACE Am. Ins. Co.
2020 NY Slip Op 34129(U)
December 9, 2020
Supreme Court, New York County
Docket Number: 651474/2019
Judge: Barbara Jaffe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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 12

Justice

-----X

OLD REPUBLIC GENERAL INSURANCE CORP.,
INDIVIDUALLY, AND A/S/O PORT MORRIS TILE
& MARBLE CORP.,

INDEX NO. 651474/2019

MOTION DATE _____

MOTION SEQ. NO. 002

Plaintiffs,

- v -

ACE AMERICAN INSURANCE COMPANY,
TISHMAN CONSTRUCTION CORP., TISHMAN
CONSTRUCTION CORPORATION OF NEW YORK,
99 CHURCH INVESTORS, LLC., WILLIS OF NEW
YORK, INC.,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 55-67
were read on this motion to/for summary judgment.

By notice of motion, defendant ACE American Insurance Company moves pursuant to
CPLR 3212 for an order awarding it summary judgment. Plaintiff opposes.

I. PERTINENT BACKGROUND

By contract dated September 26, 2013, defendant Tishman Construction Corporation of
New York (Tishman NY), the construction manager of the project located at 99 Church Street in
Manhattan, owned by defendant 99 Church Investors, LLC, hired plaintiff's subrogor Port
Morris Tile & Marble Corp. to complete tile and stone work. Pursuant to the contract, Port
Morris was to be covered by 99 Church's owner controlled insurance program (OCIP).
(NYSCEF 39).

Pursuant to the OCIP, ACE issued a policy for the project which reflects that it covers the

insured for damages arising from “bodily injury” during the policy period. It also extends coverage beyond the policy period for “bodily injury” arising from “repair work” which occurs during the “extended on-going operations period.” The “extended on-going operations period” is a six-month period beginning on the date of the “completion of your work,” which, as applicable here, is defined as “[w]hen all of the work called for in your contract has been completed.” “Repair work” is defined as “the ongoing periodic inspections, corrections, repair or replacement work” at the project.

The policy also covers the “products-completed operations hazard,” which includes, as pertinent here, “bodily injury” which occurs “away from premises you own or rent and arising out of ‘your product’ or ‘your work,’” except “work that has not been completed or abandoned.” “Your work” is defined, as pertinent here, “[w]ork or operations performed by you or on your behalf.” The policy contains an endorsement which extends the insurance provided by the “products-completed operations hazard” by six years, beginning on the date of the “completion of your work.” (NYSCEF 34). The policy was in effect from October 1, 2015 to December 31, 2016 and was not renewed.

Pursuant to the OCIP manual for the project, the project owner maintains the right to terminate or modify the OCIP, provided that it gives 60-days’ notice of termination to those covered. (NYSCEF 38).

By summons and verified complaint dated May 24, 2017, a Port Morris employee commenced an action in this court against 99 Church, Tishman, and Tishman NY seeking damages for injuries he sustained on February 10, 2017, when he allegedly fell from a ladder while working on the project. (NYSCEF 35).

By email dated June 22, 2017, former defendant Willis of New York, Inc., the OCIP

manager, informed ACE of the underlying action and that the Port Morris employee was “performing punch-list items [and] was injured when the sander he was using kicked causing him to slip and fall off the ladder he was working on.” (NYSCEF 40).

By third-party summons and complaint dated January 16, 2018, 99 Church, Tishman, and Tishman NY commenced an action against Port Morris seeking common-law and contractual indemnification. (NYSCEF 36).

By letter dated June 12, 2018, ACE acknowledged that Port Morris had tendered its defense to it but denied coverage, as the policy had expired on December 31, 2016, and the alleged date of loss was February 10, 2017. ACE also explained that the “extended on-going operations period” had not yet commenced, because the work had not yet been completed, observing that the Port Morris employee was engaged in “punch list” work. (NYSCEF 43).

By summons and complaint dated March 11, 2019, plaintiff commenced this action alleging, as relevant to this motion, that it had issued a commercial general liability insurance policy to Port Morris, effective May 14, 2016 through May 14, 2017, and that it is currently providing a defense to Port Morris in the Port Morris employee’s underlying action. It seeks a declaration that the claim and the costs and damages incurred by it in the underlying action are insured under ACE’s policy. It also seeks damages for ACE’s alleged breach of contract by refusing to provide for the defense and indemnification of Port Morris. (NYSCEF 1).

By affidavit dated July 22, 2020, filed in a related action, *99 Church Investors LLC, et al. v Old Republic Ins. Co., et al.* (Index no. 152827/2019), Tishman’s project director submitted, as pertinent here, an email dated December 2, 2016 from Willis to Port Morris providing notice that the OCIP was expiring on December 31, 2016, and a letter dated December 20, 2016 from Port Morris to Tishman NY acknowledging the need to supply its own worker’s insurance starting

January 1, 2017, and that “[t]o complete the 59th and 65th floors, the incomplete floors and punch list,” it was submitting an updated price estimate given the new insurance cost. She also submitted a chart dated November 30, 2016, prepared by Tishman, reflecting that Port Morris’s remaining work, “punchlist” and “fit-out” work, required 4,864 man-hours to complete, and punch lists dated January 10, 2017, February 17, 2017, and February 22, 2017, prepared by Tishman, reflecting that it remained for Port Morris to complete its tile/stone work: grouting, caulking, touching up stone, removing scratches and chips, and other similar work. She also submits an application and certificate for payment dated February 23, 2017, submitted by Port Morris to Tishman which reflects that not all work on the project had been completed (NYSCEF 44), and a general release dated August 27, 2018 reflecting that Port Morris had acknowledged receipt of its final payment for the project (NYSCEF 45). (NYSCEF 57).

II. CONTENTIONS

A. ACE (NYSCEF 33-52)

ACE contends that as the Port Morris employee’s accident occurred after the expiration of the policy period, Port Morris’s work was not yet complete, the claim is not covered. It denies that the performance of punch list work constitutes evidence that the work was complete, and references in support the application and certificate for payment, the general release, and Tishman’s punch lists.

B. Plaintiff (NYSCEF 56-64)

In opposition, plaintiff contends that Port Morris was completing post-contract work at the time of the accident, asserting that “punch list” work constitutes repair work. Plaintiff observes that as no depositions have yet been taken wherein a witness could explain these circumstances, it is premature to summarily dispose of this issue and that it and ACE have

sought discovery from Port Morris in a related action concerning its work, and nothing has been produced. Plaintiff also argues that the term “punch list” constitutes repair and replacement work and it references Tishman’s punch lists reflecting that Port Morris was performing touch-ups, repairs, and replacements. Plaintiff contends that while ACE’s submissions originate from Tishman’s motion for summary judgment in the related action, they have not been verified or confirmed to be accurate by Port Morris, and thus, it is entitled to depose a party with knowledge of the records and to inspect Tishman’s entire job file, which has not been provided. It observes that the OCIP manual requires that 99 Church provide 60-days’ notice of termination of the ACE policy, and that as Port Morris received 29-days’ notice, the termination notice is invalid and the policy continued to remain in effect.

C. Tishman, Tishman NY, and 99 Church (NYSCEF 65)

Tishman, Tishman NY, and 99 Church allege that Port Morris had not completed its work at the time of the accident and that the ACE policy applies. To the extent that it is found that the ACE policy does not apply, ACE should only be granted summary judgment if it is determined as a matter of law that plaintiff must defend and indemnify them in the underlying action.

D. Reply (NYSCEF 66)

In reply, ACE reiterates that for the ACE policy to apply, Port Morris’s work had to have been completed, and that the evidence reflects that it was not. That the Port Morris employee may have been engaged in repair work is immaterial, it argues, as the work was incomplete, and it denies having violated the notice provision of the OCIP manual, as notice is only required when the policy is terminated early or modified. Here, however the policy had expired. Even if 60-days’ notice was required, ACE contends, the policy expired on December 31, 2016 and the issue of notice is irrelevant to the claims advanced here. It also denies that further discovery is

necessary and maintains that the documents submitted are verified and authenticated by Tishman, even if not produced in this action. Additionally, it observes, plaintiff, as subrogee of Port Morris, is in the best position to obtain information from Port Morris and its failure to do so does not warrant denial of summary judgment. It denies that a decision on plaintiff's policy coverage is necessary before it may be awarded summary judgment.

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]).

Whether punch list work qualifies as repair work and whether Port Morris completed the work outlined in its contract constitute factual issues. (*See e.g., Constr. Specialties, Inc. v Hartford Ins. Co.*, 97 AD2d 808, 808 [2d Dept 1983] [denying summary judgment motion seeking dismissal of complaint as untimely, because issue of fact existed as to whether "defendant [...] in effect continued to work on the project by having plaintiff perform punch list work"])). Although ACE submits Tishman records reflecting that work remained on the project for completion by Port Morris, the records also show that the work consisted of fixing and

repairing scratches, stains, and chips, and other similar work. While it is undisputed that Port Morris worked on the project after the policy period had expired, ACE's contention that such work does not constitute "repair work" and constitutes evidence that Port Morris had not completed its contractual work is fatally conclusory.

In any event, plaintiff is entitled to further discovery as to whether Port Morris performed post-contractual "repair work," as the description of the work in Tishman's records is terse and vague, and no one has yet been deposed who would be in a position to explain what work was being performed at the project after its expiration and whether that work constitutes "repair work." (CPLR 3212[f]).

As ACE fails to meet its *prima facie* burden and further discovery is necessary, plaintiff's and Tishman's remaining contentions need not be addressed.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant ACE American Insurance Company's motion for summary judgment is denied; and it is further

ORDERED, that the parties are directed to either enter into a stipulation encompassing their next compliance conference on or before March 10, 2021, or appear for the conference in room 341, 60 Centre Street, New York, New York, on March 10, 2021 at 2:15 pm or virtually if necessary.

12/9/2020
DATE

CHECK ONE:

☐
☐
☐
☐

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

☒

DENIED

☒
☐
☐
☐

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE