

Norguard Ins. Co. v 140 W. 28 Owner LLC
2021 NY Slip Op 32718(U)
December 20, 2021
Supreme Court, New York County
Docket Number: Index No. 154822/2020
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE **PART** **12**

Justice

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NORGUARD INSURANCE COMPANY AS
SUBROGEE OF EUNHASU CORPORATION,
EUNHASU CORPORATION,

Plaintiffs,

- v -

140 WEST 28 OWNER LLC, OMNIBUILD
CONSTRUCTION INC., NEAL WEXLER
INDIVIDUALLY AND DOING BUSINESS AS
WEXLER ASSOCIATES, WEXLER ASSOCIATES
LLC, N. WEXLER, P.C., TROLYDIA TESTING &
INSPECTIONS LLC, SKY MATERIALS CORP.,
GENE KAUFMAN, ARCHITECT P.C., RA
ENGINEERING, LLP AS SUCCESSORS IN
INTEREST TO RA CONSULTANTS LLC,
RA CONSULTANTS LLC, EDWARD TOROSSIAN,
EMPIRE STATE LAYOUT INC., NIDAL ABISAAB,
TAGLIC GEOMATICS, INC.

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 110-119, 121-129, 131, 132

were read on this motion to dismiss.

By notice of motion, defendant Taglic Geomatics, Inc. moves pursuant to CPLR 3211(a)(1), (3) and (7) for an order dismissing the complaint and all cross claims against it, and pursuant to 22 NYCRR § 130-1.1 and CPLR 8303-a for an order imposing sanctions and costs on plaintiff and/or plaintiff's counsel for the frivolous commencement of the action against it. Defendants Edward Torossian, P.E. and Trolydia Testing & Inspections LLC (collectively, LLC) oppose.

**DECISION + ORDER ON
MOTION**

In this action, plaintiff insurance company sues as subrogee of its insured, Eunhasu Corporation, which owns the premises at 46-148 West 28th Street in Manhattan. According to the complaint, defendant 10 West 28 Owner (10 West) owns the premises at 140 East 28th Street which abuts Eunhasu's. In 2017, 10 West commenced construction of a new building on its premises, and it entered into a licensing agreement with Eunhasu whereby it agreed to hire third-party contractors to ensure that Eunhasu's premises would remain structurally sound during the construction. (NYSCEF 4).

Plaintiff alleges that 10 West hired Taglic to perform professional geomatic and site safety services associated with the construction, and that it was expected to test and inspect and/or perform site safety for the shoring, underpinning, lateral support, and/or other foundation safeguards during the building's erection. (*Id.*).

Plaintiff alleges that during the construction, in September 2017 Eunhasu's premises sustained building movement and structural damage, including lateral movement and shifting. It contends that the damage was caused by Taglic's failure to provide sufficient testing or inspections or other foundation safeguards for underpinning its premises. Plaintiff asserts claims against Taglic for negligence. (*Id.*).

I. CONTENTIONS

A. Taglic (NYSCEF 112)

Taglic contends that plaintiff fails to state a claim against it as it had no contract with Eunhasu and owed it no duty of care, and that it had no agreement with 10 West, but had been hired by defendant Vanguard Construction Solutions, LLC to provide optical geomatic measurements and report them to Vanguard, which it did. Taglic denies having had any role in the construction, excavation, or development of the building and observes that although plaintiff

discontinued its claims against Vanguard, it refused to discontinue its claims against it, thereby warranting the inference that its litigation against Taglic is frivolous.

Taglic submits the affidavit of its principal, who states therein that it was orally hired by Vanguard and that the scope of its work was setting up optical monitors, reading the measurements of the movement of Eunhasu's building, and reporting the measurements to Vanguard. It performed its work between July and September 2017 and worked for no one other than Vanguard. The principal denies that Taglic had any duty related to site safety during the construction or to perform services related to foundation safeguards. (NYSCEF 118).

B. LLC (NYSCEF 121)

LLC contends that the motion is premature absent depositions and discovery, and observes that plaintiff served a verified bill of particulars in which it provides details about the geomatic monitoring at issue. It also contends that it needs discovery to determine the business relationships among defendant companies and to prove or disprove Taglic's allegations.

II. ANALYSIS

Given plaintiff's failure to oppose the motion and its discontinuance of its claims against Vanguard, the entity with which Taglic contracted, it is reasonably inferred that plaintiff realized that it had no cause of action arising from the geomatic measurements conducted by Taglic/Vanguard. In any event, Taglic establishes that it neither owed nor breached a duty to plaintiff, absent evidence of an agreement between them or that it was negligent. While LLC contends that discovery is necessary, it does not identify what information it needs or seeks from Taglic.

Moreover, as plaintiff refused to discontinue the action against Taglic despite Taglic's request that it do so in order to save Taglic the time and expense of having to move to dismiss,

and as plaintiff then defaulted in opposing the motion, thereby conceding that its claim against Taglic has no merit, sanctions are warranted. (22 NYCRR § 130-1.1[in determining whether conduct frivolous, court may consider, *inter alia*, whether conduct continued after lack of legal or factual basis apparent]; see *Rodrigues v Occhipinti*, 49 AD3d 708 [2d Dept 2008] [as plaintiff no longer wanted to pursue action but did not discontinue it, sanctions warranted to reimburse defendant for expenses and attorney fees incurred in defending itself and moving for dismissal]).

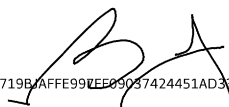
III. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of defendant Taglic Geomatics, Inc. is granted and the complaint and all cross claims against it are severed and dismissed, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED, that Taglic’s motion for sanctions against plaintiff is granted, and Taglic is directed to submit an affirmation setting forth its costs and fees incurred in filing the instant motion.

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12/20/2021
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