

Deschaine v Tricon Constr., LLC
2022 NY Slip Op 30103(U)
January 13, 2022
Supreme Court, New York County
Docket Number: Index No. 161654/2014
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35

Justice

-----X

ROBERT DESCHAIINE,
Plaintiff,

INDEX NO. 161654/2014

MOTION DATE 09/28/2021

MOTION SEQ. NO. 014

- v -

TRICON CONSTRUCTION, LLC, NATIONAL REALTY &
DEVELOPMENT CORP., MICHAEL BOYLE, DOLLAR
TREE STORES, INC., C.P. PLAZA LIMITED
PARTNERHSIP,

DECISION + ORDER ON
MOTION

Defendant.

-----X

DOLLAR TREE STORES, INC.
Plaintiff,

Third-Party
Index No. 595123/2015

-against-

AMZ CONSTRUCTION SERVICES, INC.
Defendant.

-----X

MICHAEL BOYLE
Plaintiff,

Second Third-Party
Index No. 595166/2015

-against-

AMZ CONSTRUCTION SERVICES, INC.
Defendant.

-----X

TRICON CONSTRUCTION, LLC, C.P. PLAZA LIMITED
PARTNERHSIP
Plaintiff,

Third Third-Party
Index No. 595184/2015

-against-

AMZ CONSTRUCTION SERVICE INC.
Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 014) 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 541, 542, 543, 544, 545, 546

were read on this motion to/for RENEWAL+SUMMARY JUDGMENT.

Upon the foregoing documents, it is

ORDERED that Second Third-Party Plaintiff Michael Boyle (Boyle)'s motion seeking leave pursuant to CPLR 2221 (e) to renew the Court's April 15, 2019, Decision and Order (Motion Seq. 014) is granted; and upon renewal, the Court vacates the part of its prior April 2019 Decision that found questions of fact regarding Boyle's breach of contract claim against Second Third-Party Defendant AMZ Construction Services, Inc. ("AMZ"); and it is further

ORDERED that the branch of Boyle's motion seeking summary judgment as to his breach of contract claim against AMZ for failure to procure insurance coverage is granted; and it is further

ORDERED that the branch of AMZ's cross-motion seeking leave to renew the Court's prior April 2019 Decision pursuant to CPLR 2221 (e) is granted, and upon renewal, the branch of AMZ's cross-motion seeking summary judgment in its favor is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Boyle shall serve a copy of this order with notice of entry, on all parties within ten (10) days.

MEMORANDUM DECISION

In this Labor Law Action, Second Third-Party Plaintiff Michael Boyle ("Boyle") seeks leave to renew the branch of the Court's April 5, 2019 Decision (the "April 2019 Decision") that found questions of fact regarding his breach of contract claim against Second Third-Party Defendant AMZ Construction Services Inc. ("AMZ") (Motion Seq. 014).¹ Upon renewal, Boyle seeks an order granting him summary judgment on his breach of contract claim.

¹ The April 2019 Decision consolidated Motion Sequences 003, 007, 008, and 009 for joint disposition. The parties are seeking leave to renew only the parts of the decision concerning Motion Sequence 008.

AMZ opposes the motion in its entirety, and cross-moves for leave to renew the part of the April 2019 Decision denying summary judgment dismissing Boyle's breach of contract claim, and upon renewal, an order dismissing the claim.

BACKGROUND

In February 2013, Defendants Dollar Tree Stores, Inc. ("Dollar Tree") and Tricon Construction, LLC ("Tricon") entered a contract whereby Tricon would serve as the general contractor overseeing the construction of a Dollar Tree store located in Cobleskill, New York ("the subject premises"). Tricon's responsibilities included coordinating work on the project and retaining subcontractors. Tricon hired Boyle to act as Tricon's on-site superintendent of the project. In this capacity, Boyle then hired AMZ as a subcontractor. (NYSCEF doc No. 412).

The subcontract between Tricon and AMZ contains a section entitled, "Indemnity and Insurance," which provides that AMZ "shall also maintain builder's all-risk insurance covering Josh Zappia, Michael Boyle and AMZ Construction Services Inc. against personal injuries and property damage." (NYSCEF doc No. 50). Prior to the commencement of AMZ's work, AMZ provided Boyle with a Certificate of Liability Insurance (COI) as evidence that it had obtained the builder's all risk insurance in compliance with the contractual terms. (NYSCEF doc No. 525). However, the COI did not specifically name Boyle as an insured party. (NYSCEF doc No. 525 at 4).

On March 6, 2013, Plaintiff Deschaine, an AMZ employee, received an electrical shock from open wires and fell from a scaffold while performing work on the project. Deschaine suffered severe personal injuries as a result and brought this action seeking damages. In his complaint, he set forth claims against Defendants Dollar Tree, Boyle, and Tricon arising out of

Labor Law violations and common law negligence. All three defendants impleaded AMZ.² (*See* Dollar Tree's Third-Party Complaint at NYSCEF doc No. 10; Boyle's Third-Party Complaint at NYSCEF doc No. 14; and Tricon's Third-Party Complaint at NYSCEF doc No. 17).

In late November and early December 2018, all parties to the action filed summary judgment motions on various grounds, which the Court consolidated for joint disposition in its April 2019 Decision. While Boyle did not seek summary judgment on his breach-of-contract claim, AMZ moved for dismissal of the same. As relevant here, the April 2019 Decision denied AMZ summary judgment on Boyle's breach-of-contract claim. The Court noted that, while AMZ provided a COI of a policy held with Cincinnati Insurance Company ("Cincinnati"), the COI did not explicitly identify Boyle as an additional insured³ and could not, without listing the policy itself, demonstrate compliance with the contract (NYSCEF doc No. 412 at 29-30). Consequently, the Court found a question of fact as to whether AMZ procured the proper insurance coverage on behalf of Boyle. (*Id.*).

The Declaratory Judgment Proceeding

Separately, in September 2017, Boyle commenced a declaratory judgment proceeding against AMZ's insurer Cincinnati in this Court (J. Gerald Lebovits). Boyle sought a declaration that AMZ's Cincinnati Policy provided additional insured status to Boyle. (*See* Index No. 655704/2017; Boyle Complaint, NYSCEF doc No. 1). Cincinnati cross-moved for an order granting summary judgment dismissing the proceeding and declaring that Cincinnati had no obligation to defend or indemnify Boyle in the underlying action (*See* Index No. 655704/2017; NYSCEF doc No. 71).

² Only Boyle's third-party complaint against AMZ, specifically his breach-of-contract claim, is relevant for purposes of the instant motion.

³ Boyle is only listed as the certificate holder on the COI and the COI specifically states that it is issued "as a matter of information only and confers no rights upon the certificate holder."

By Order dated April 5, 2021, Justice Lebovits granted Cincinnati's cross-motion for summary judgment dismissing Boyle's declaratory judgment proceeding on the record. Justice Lebovits held that "the complaint is dismissed because Boyle is not an additional insured and defendant [Cincinnati] is not obligated to defend or indemnify Boyle in the underlying action." (NYSCEF doc No. 523 at 13-14.) In the transcript accompanying his order, Justice Lebovits explained that Cincinnati's policy required additionally insured parties to be designated as such in an underlying contract. (*Id.*) As Tricon's contract with AMZ did not use specific language that explicitly stated Boyle should be designated as an "additional insured" party, Justice Lebovits held that AMZ's policy with Cincinnati did not cover Boyle. (*Id.*)

The Instant Motions

On August 24, 2021, Boyle commenced the motion now before this Court, seeking leave to renew the Court's April 2019 Order, and upon renewal, issuing an order granting Boyle summary judgment on his second third-party claim against AMZ for breach of contract for failure to procure insurance (NYSCEF doc No. 510). On October 22, 2021, AMZ cross-moved for leave to renew, and upon renewal, an order granting AMZ summary judgment dismissing Boyle's breach of contract claim (NYSCEF doc No. 531).

Both Boyle and AMZ base their applications for leave to renew on Justice Lebovits' April 2021 Order determination and argue that the Order constitutes new factual evidence not before the Court when it found questions of fact as to Boyle's breach of contract claim. However, the parties disagree as to the significance of the Order. Boyle argues this new evidence eliminates any questions of fact as to whether AMZ adhered to the contract: the contract required AMZ to procure additional insured coverage for Boyle, and Justice Lebovits found that it had not done so. In contrast, AMZ contends that Justice Lebovits' April 2021 Order denied Boyle the

relief he is now seeking (i.e., a determination that AMZ breached its obligations to procure insurance coverage), and Boyle's instant application for the same relief is barred by the doctrine of collateral estoppel.⁴

DISCUSSION

Under CLPR 2221 (e), a motion to renew must be "based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." Furthermore, the party seeking renewal must proffer a reasonable excuse for the failure to present the pertinent facts on the initial motion. (*See* CPLR 2221 (e) (3); *Ezzard v. One East River Place Realty Co.*, 137 AD3d 648 [1st Dept 2016].) A motion for leave to renew should be granted sparingly and is not a second opportunity given freely to a party who has not acted diligently in making the initial motion. (*Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010].)

CPLR 3212 (e) provides that in any action "summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties." The proponent of a summary judgment motion must make a prima facie showing of entitlement as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d, 184, 185-186 [1st Dept 2006].) Once that showing is made, the burden shifts to the opposing party to demonstrate,

⁴ AMZ further argues that Boyle's application is improper as Boyle did not previously move for summary judgment on his breach of contract claim and thus "he certainly cannot be granted summary judgment on renew" (NYSCEF doc No. 532 at 10). AMZ does not cite any authority in support of this proposition. Moreover, given that AMZ previously moved for summary judgment dismissing the same claim, and CPLR 3212 (b) gives the Court the authority to search the record and grant summary judgment to a non-moving party with respect to the issue before it, the Court finds that it can consider Boyle's papers submitted in support of his motion to renew and determine whether summary judgment should be granted for either party.

through admissible evidence, factual issues requiring a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980].)

Here, upon renewal, both parties assert that they have established a *prima facie* showing of entitlement to summary judgment and that there are no outstanding factual issues.

Boyle's Motion for Leave to Renew and for Summary Judgment

Boyle contends that Justice Lebovits' April 2021 Order satisfies the elements required on a motion to renew as it constitutes a new set of facts that were not before the Court when it issued its April 2019 Decision (*See* NYSCEF doc No. 526 at 4-5).

A motion for leave to renew "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention." (*Beiny v Wynyard*, 132 AD2d 190 [1st Dept 1987]). Here, while the Cincinnati policy and its terms were in existence prior to the Court's April 2019 Decision, neither AMZ nor Boyle definitively knew whether the policy's coverage extended to Boyle. In fact, AMZ assumed the policy did extend coverage. (*See* AMZ Affidavit in Support of Motion, NYSCEF doc No. 306 at 13.) The question of whether Cincinnati's policy definitively covered Boyle was not answered until April 2021 when Justice Lebovits rendered his decision.⁵ Consequently, the Court recognizes that Boyle's declaratory judgment action provided additional evidence and clarity to the parties as to whom the Cincinnati policy covered, and this evidence could not have been presented to the Court when it rendered its April 2019 Decision. The Court thus grants Boyle and AMZ's motions for leave to renew.

⁵ That Justice Lebovits' holding constitutes a new set of facts is further evidenced by the shift in AMZ's position. AMZ previously argued before this Court that the policy it procured covered Boyle and that the COI demonstrated that coverage. Now, in support of its instant cross-motion, AMZ argues that it was not obligated to procure coverage in the first place.

Upon renewal, and after further review of the parties' submissions, the Court also finds that Boyle is entitled to summary judgment in his favor as to his breach of contract claim for failure to procure insurance against AMZ.

As discussed *supra*, AMZ's contract with Tricon required it to procure builder's all risk insurance for personal injury and property damage. In rendering its April 2019 Decision, the Court relied on an affidavit from AMZ's president Annalisa Zappia, in which she testified that AMZ sent a COI to Boyle as evidence it procured a policy with Cincinnati in satisfaction of its obligation to procure insurance. (NYSCEF doc No. 412). Yet, as Justice Lebovits determined, AMZ's Cincinnati policy did not cover Boyle. The foregoing evidence demonstrates that Boyle has made a *prima facie* showing that AMZ breached its subcontract with Tricon by not procuring builder's all-risk insurance covering Boyle.

AMZ does not dispute these facts. Rather, it asserts that Justice Lebovits *already* interpreted the policy's underlying subcontract and held that AMZ was not contractually required to procure additional insured coverage (NYSCEF doc No. 532 at ¶¶ 16, 20, 21.) As an initial matter, even if AMZ's interpretation of Justice Lebovits' holding is correct, AMZ still does not explain how it adhered to its subcontract with Tricon at issue in this proceeding, with respect to its obligation to name Boyle as an additional insured. Further, AMZ cites no other evidence of a policy that provides builder's all-risk insurance covering Boyle, as it was obligated to do pursuant to the Tricon subcontract. The only policy that AMZ has submitted in opposition as potentially covering Boyle as an additional insured, does not, per Justice Lebovits' April 2021 Order, cover Boyle.

Furthermore, a review of the transcript accompanying Justice Lebovits' April 2021 Order demonstrates that AMZ has misinterpreted the holding. While it is correct that Justice Lebovits

looked into AMZ's subcontract with Tricon, he did so only to interpret the Cincinnati policy's narrow Additional Insured Endorsement section. (NYSCEF doc No. 523 at 13.) To cover third parties, Cincinnati requires policy holders specifically and expressly name them in the underlying contracts as "additional insured" parties. (*Id.*) Thus, as AMZ and Tricon's subcontract did not use such specific language denoting Boyle as an additional insured, Justice Lebovits held Cincinnati was not obligated to defend or indemnify Boyle. (*Id.*) Contrary to AMZ's Counsel's Affirmation (*see* NYSCEF doc No. 532 at ¶ 20, 21), the issue before Justice Lebovits was not whether the AMZ-Tricon contract required AMZ to procure additional insured coverage—it clearly did. Instead, the question was whether AMZ's policy with Cincinnati specifically and expressly included Boyle as an additional insured.⁶

AMZ's breach is more evident when considering alternative insurance policies that it could have purchased. For example, AMZ could have procured a policy similar to the one at issue in *New York City Hous. Auth. V. National Union Fire Ins. Co.* (270 AD 2d 123 [1st Dept. 2000]), a case which Boyle raised in his declaratory judgment action before Justice Lebovits. National Union Fire's policy had an Additional Insured Endorsement that included any person or organization with whom the contractor had "contracted 'to provide insurance such as is afforded under this policy.'" (*Id.*) Justice Lebovits noted that National Union Fire's policy differed from Cincinnati's in that National Union Fire did not specifically require policyholders to name potential additional insured parties as such in its contracts (NYSCEF doc No. 523 at 13.) Had AMZ procured a policy with a broader Additional Insured Endorsement that, like National Union

⁶ In support of its motion for summary judgment, AMZ argues that the doctrine of collateral estoppel applies as the issue before Justice Lebovits and the present issue are identical—whether the subcontract required AMZ to procure additional insured coverage—and Boyle had a full and fair opportunity to contest the prior determination. (*See D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990].) However, as discussed, the issues presented are not identical.

Fire’s, covered anyone with whom it has a contract and not merely those labeled as additional insured, AMZ would likely have procured a policy adhering to its contract, as it would have provided additional insured coverage to Boyle. (Id. at 12-13.) The fact that AMZ chose to procure Cincinnati’s narrower coverage that failed to cover Boyle demonstrates that AMZ breached its obligation to procure insurance.

Accordingly, Boyle has demonstrated a prima facie showing as a matter of law that AMZ breached its obligation, and AMZ has failed to raise questions of fact in opposition. Boyle’s motion for summary judgment is thus granted and AMZ’s cross-motion is denied.

CONCLUSION

Based on the foregoing, it is hereby

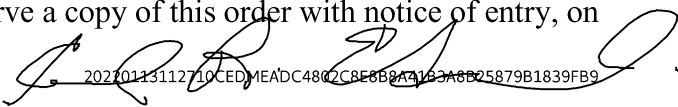
ORDERED that Second Third-Party Plaintiff Michael Boyle (Boyle)’s motion seeking leave pursuant to CPLR 2221 (e) to renew the Court’s April 15, 2019, Decision and Order (Motion Seq. 014) is granted; and upon renewal, the Court vacates the part of its prior April 2019 Decision that found questions of fact regarding Boyle’s breach of contract claim against Second Third-Party Defendant AMZ Construction Services, Inc (“AMZ”); and it is further

ORDERED that the branch of Boyle’s motion seeking summary judgment as to his breach-of-contract claim against AMZ for failure to procure insurance coverage is granted; and it is further

ORDERED that the branch of AMZ’s cross-motion seeking leave to renew the Court’s prior April 2019 Decision pursuant to CPLR 2221 (e) is granted, and upon renewal, the branch of AMZ’s cross-motion seeking summary judgment in its favor is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Boyle shall serve a copy of this order with notice of entry, on all parties within ten (10) days.

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1/13/2022

DATE

CAROL EDMEAD, 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