

**Matter of Doran Constr. Corp. v New York State Ins.  
Fund**

2022 NY Slip Op 34994(U)

April 25, 2022

Supreme Court, Westchester County

Docket Number: Index No. 53743/21

Judge: James W. Hubert

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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In the Matter of the Application of

DORAN CONSTRUCTION CORP.,

Petitioner,

For Enforcement of a Money Judgment as Garnishee,

-against-

THE NEW YORK STATE INSURANCE FUND,

Respondent.

-----X  
HUBERT, J.,

The following documents were read on,

(A) this petition (Motion Sequence No. 1) pursuant to sections 5207 and 5227 of the Civil Practice Law and Rules to enforce a money judgment against Respondent, The New York State Insurance Fund (hereafter, "SIF"), as garnishee, and

(B) this cross-motion (Motion Sequence No. 2) pursuant to CPLR 404(a) and 3211(a) for an order dismissing the petition, and for other relief:

Notice of Petition (Motion Sequence No. 1) - Petition - Exhibits -  
Affidavit of Service

Notice of Cross-Motion (Motion Sequence No. 2) - Affirmation -  
Exhibits - Memorandum of Law

Affirmation in Opposition to Cross-Motion - Exhibits - Affidavit  
Reply Affirmation in Further Support of Cross-Motion

Upon consideration of all of the foregoing, and for the following reasons, the cross-motion is denied.

### Factual and Procedural Background

On March 10, 2015, Pedro Morocho commenced a personal injury action in Supreme Court, Westchester County, entitled *Pedro Morocho v Doran Construction Corp., and HM Builders Corporation* (Index No. 53567/2015). Thereafter, Doran Construction Corp. (hereafter, “Doran”), as Defendant/Third-Party Plaintiff, commenced a third party action against Third-Party Defendant, Bipex Construction (hereafter, “Bipex”). On April 14, 2017, this court (Ruderman, J.) granted summary judgment to the plaintiff against Doran, and granted summary judgment to Doran on its third party action against Bipex.

On January 30, 2019, this court (Ruderman, J.), entered judgment in favor of Pedro Morocho and against Doran in the amount of \$22,493,081.65 (hereafter, “Morocho Judgment”), and entered judgment in favor of Doran and against Bipex “for indemnification of any amount paid to [Morocho] by or on behalf of [Doran] (internal quotation marks omitted)” (Petition [NYSCEF DOC. NO. 1] at ¶6) (hereafter, “Bipex Judgment”). SIF is Bipex’s insurer.

Doran’s insurer paid \$1,190,849.32 in partial satisfaction of the Morocho Judgment. SIF indemnified Doran’s insurer for the full amount.

Doran then made two payments of \$2,540.30 each in partial satisfaction of the Morocho Judgment. SIF indemnified Doran for the total amount of \$5,080.60.

Doran then made a payment of \$75,000.00 in partial satisfaction of the Morocho Judgment. However, SIF did not indemnify Doran for any part of that payment, and has refused Doran’s demand that it do so.

Doran commenced the above-captioned special proceeding pursuant to CPLR 403 and 5227 on March 25, 2021, by filing a Notice Of Petition and Petition via the New York State Courts E-Filing system (hereafter, “NYSCEF”), in which Petition Doran seeks judgment directing SIF to pay Doran the sum of \$75,000.00 plus statutory interest from the date of demand, as well as an order awarding Doran attorney’s fees and costs.

In lieu of a responsive pleading, SIF made the instant cross-motion pursuant to CPLR 404(a) and 3211(a) for an order dismissing the Petition by filing via NYSCEF on May 14, 2021. SIF also seeks – in the alternative to dismissal (*see* Affirmation In Support Of Cross-Motion And In Opposition To Petition at ¶¶32-34) – an order “[d]enying the Petition and compelling the Petitioner

to provide discovery to be directed by the Court” (Notice Of Cross-Motion [NYSCEF DOC. NO. 19] at 1).

Doran submitted papers in opposition to the cross-motion by filing via NYSCEF on May 21, 2021.

SIF submitted reply papers in further support of its cross-motion by filing via NYSCEF on May 27, 2021, on which date the cross-motion was deemed fully submitted.

### Discussion

SIF’s cross-motion is denied.

A petition to enforce a money judgment against an agency of the state as garnishee is a special proceeding (*see* CPLR 5207 and 5227).

Pursuant to CPLR 404(a), a respondent in a special proceeding “may raise an objection in point of law by setting it forth in . . . a motion to dismiss the petition.”

Pursuant to CPLR 103(b), “[e]xcept where otherwise prescribed by law, procedure in special proceedings shall be the same as in actions, and the provisions of the civil practice law and rules applicable to actions shall be applicable to special proceedings.”

The phrase, “objection in point of law,” is not statutorily defined. It has been construed to “mean threshold objections of the kind listed in CPLR 3211(a), which are capable of disposing of the case without reaching the merits (internal quotation marks and citation omitted)” (*Matter of Hop-Wah v Coughlin*, 118 AD2d 275, 277 [3d Dept 1987] *revd on other grounds* 69 NY2d 791 [1987]; *see also Matter of Langella v Front Door Assoc., Inc.*, 34 Misc. 3d 1212(A) at \*1-\*2 [Suff. Co. S. Ct. 2012]).

SIF raises two objections in point of law in its cross-motion: “lack of subject matter jurisdiction,” and that “the Petition is contrary to New York law” (Notice Of Cross-Motion [NYSCEF DOC. NO. 19]). The first objection in point of law is the equivalent of the ground for dismissal set forth in CPLR 3211(a)(2). The closest ground for dismissal to the second objection in point of law is CPLR 3211(a)(7) – i.e., “the pleading fails to state a cause of action.” Neither ground for dismissal, nor the procedural mechanism for seeking dismissal, are otherwise prescribed by law in this proceeding.

To the extent that the cross-motion seeks an order dismissing the Petition for lack of subject matter jurisdiction it is denied.

Pursuant to CPLR 105(l), “[a] ‘judgment creditor’ is a person in whose favor a money judgment is entered or a person who becomes entitled to enforce it.”

Pursuant to CPLR 105(m), “[a] ‘judgment debtor’ is a person . . . against whom a money judgment is entered.”

Pursuant to CPLR 5227, “[u]pon a special proceeding commenced by the judgment creditor, against any person who it is shown is or will become indebted to the judgment debtor, the court may require such person to pay the judgment creditor the debt upon maturity, or so much of it as is sufficient to satisfy the judgment.”

Pursuant to CPLR 105(i), “[a] ‘garnishee’ is a person who owes a debt to a judgment debtor, or a person other than the judgment debtor who has property in his possession or custody in which a judgment debtor has an interest.”

Pursuant to the terms of the Bipex Judgment, Doran is the judgment creditor and Bipex is the judgment debtor. SIF does not dispute that as Bipex’s insurer it is obligated to pay Bipex any monies Bipex pays toward satisfaction of the Bipex Judgment. That obligation constitutes a debt to Bipex, and SIF is the possessor or custodian of the monies due on said debt and in which monies Bipex has an interest. In other words, SIF is a garnishee (*see Matter of Bankers Trust Co. v State Dept. of Audit and Control*, 28 AD2d 272, 272-274 [3d Dept 1967]; *cf. Guercio v Hertz Corp.*, 40 NY2d 680, 686 [1976]).

Pursuant to CPLR 5207, “[a]ll procedures for the enforcement of money judgments against other judgment debtors are applicable to the state, its officers, agencies and subdivisions, as a garnishee, except where otherwise prescribed by law.” The procedures applicable to SIF as a garnishee are not otherwise prescribed by law.

Pursuant to CPLR 5221(a)(4), “a special proceeding authorized by this article shall be commenced . . . in the supreme court.”

Thus, to the extent that the cross-motion seeks an order dismissing the Petition for lack of subject matter jurisdiction it is denied.

To the extent that the cross-motion seeks an order dismissing the Petition for failure to state a cause of action under CPLR 3211(a)(7) it is denied.

Upon a motion pursuant to CPLR 3211(a)(7) the court must

accept the facts as alleged in the [petition/complaint] (brackets in original) as true, accord [petitioners] (brackets in original) the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. In so doing, affidavits and other proof submitted by petitioners may be considered to remedy any deficiencies in the petition/complaint, [in which event] the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (internal quotation marks and citations omitted) (*54 Marion Ave., LLC v City of Saratoga Springs*, 162 AD3d 1341, 1342 [3d Dept 2018]; see also *Matter of 1300 Franklin Ave. Members, LLC v Bd. of Trustees of Inc. Vil. of Garden City*, 62 AD3d 1004, 1006 [2d Dept 2009]).

Accepting as true all facts alleged in the Petition and according Doran the benefit of every possible favorable inference therefrom, the Court determines that such facts do fit within a cognizable legal theory – to wit, a special proceeding for an order compelling a garnishee to pay to a judgment creditor a debt which the garnishee owes to the judgment debtor (see CPLR 5227 and 5207). Although Doran submits affidavits and other proof in opposition to the cross-motion, there are no deficiencies in the Petition that need to be remedied.

SIF submits in support of its cross-motion, two affidavits and ten exhibits.

However,

[a]n affidavit submitted by the movant will almost never warrant dismissal under CPLR 3211 unless it establishes conclusively that the proponent of the pleading has no cause of action. Dismissal should not eventuate unless it has been shown that a material fact as claimed by the proponent to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it (internal citations omitted) (*Cajigas v Clean Rite Cleaners, LLC*, 187 AD3d 700, 701 [2d Dept 2020]).

The affidavits submitted by SIF do not establish conclusively that Doran has no cause of action. And neither the affidavits nor any of the exhibits submitted by SIF – either individually or in combination – are sufficient to show that a material fact claimed by Doran in the Petition is not a fact at all and that no significant dispute exists regarding it.

Thus, to the extent that the cross-motion seeks an order dismissing the Petition for failure to state a cause of action under CPLR 3211(a)(7) it is denied.

To the extent that SIF's second objection in point of law, stating that "the Petition is contrary to New York law" (Notice Of Cross-Motion), may be construed as contesting the merits – rather than the jurisdictional or procedural deficiencies – of the Petition, it is denied. An objection based upon the merits is not a "threshold objection[]" of the kind listed in CPLR 3211(a), which [is] capable of disposing of the case *without reaching the merits* (emphasis added)" (*Matter of Hop-Wah v Coughlin*, 118 AD2d at 277), and such relief should be denied where the application therefor is interposed as a branch of a motion to dismiss (*see Matter of 1300 Franklin Ave. Members, LLC v Bd. of Trustees of Inc. Vil. of Garden City*, 62 AD3d 1004, 1006 [2d Dept 2009] ["Since those branches of the Village's motions which were to dismiss the petitions did not seek dismissal based upon an objection in point of law, but instead sought relief on the merits, the Supreme Court properly, in effect, denied those branches of the motions."])

Thus, to the extent that the cross-motion seeks an order dismissing the Petition as contrary to New York Law it is denied.

To the extent that the cross-motion seeks in the alternative to dismissal of the Petition an order "compelling the Petitioner to provide discovery to be directed by the Court" (Notice Of Cross-Motion at 1) it is denied.

The proper procedural vehicle by which to seek such relief would be a motion pursuant to CPLR 3124. SIF has not interposed such a motion.

And even assuming *arguendo* that the procedural impropriety were overlooked, the motion to compel would be denied as fatally premature. SIF does not allege, and there is no indication in the record of this proceeding, that it has served upon Doran any "request, notice, interrogatory, demand, question or order" (CPLR 3124) for disclosure, much less that Doran has "fail[ed] to respond to or comply with" (*id.*) such.<sup>1</sup>

Thus, to the extent that the cross-motion seeks in the alternative to dismissal of the Petition an order compelling Petitioner to provide discovery it is denied.

Pursuant to CPLR 404(a), if the respondent's motion to dismiss the petition is denied, "the

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SIF's recitation of the disclosure that Doran allegedly provided, or was allegedly compelled to provide, to the plaintiff in the *Pedro Morocho v Doran Construction Corp.* action (*see* Affirmation In Support Of Cross-Motion And In Opposition To Petition at ¶¶14-18, 32-34) is entirely irrelevant to its application to compel disclosure here.

court may permit the respondent to answer, upon such terms as may be just; and unless the order specifies otherwise, such answer shall be served and filed within five days after service of the order with notice of entry.”

To the extent that the Petition seeks an order awarding attorney’s fees and costs the application is held in abeyance pending the determination of the Petition.

Accordingly, for the foregoing reasons, it is

ORDERED that the cross-motion of Respondent, The New York State Insurance Fund, pursuant to CPLR 404(a) and 3211(a) for an order dismissing the Petition in the above-captioned special proceeding, is denied, and it is further

ORDERED that the cross-motion of Respondent, The New York State Insurance Fund, for an order compelling Petitioner, Doran Construction Corp., to provide discovery, is denied, and it is further

ORDERED that to the extent the Petition in the above-captioned special proceeding seeks an order awarding Petitioner, Doran Construction Corp., attorney’s fees and costs, it is held in abeyance pending the determination of said Petition, and it is further

ORDERED that Petitioner, Doran Construction Corp., shall within ten days of entry of this Decision And Order serve Respondent, The New York State Insurance Fund, with a copy hereof with notice of entry, and it is further

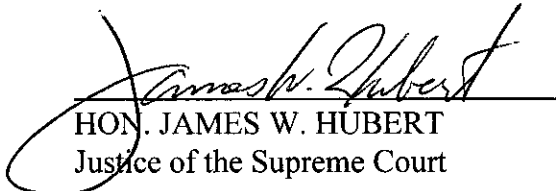
ORDERED that Petitioner, Doran Construction Corp., shall within ten days after service as aforesaid file proof of service by uploading to the New York State Courts E-Filing system, and it is further

ORDERED that Respondent, The New York State Insurance Fund, is permitted to serve and file an answer to the Petition in the above-captioned special proceeding within five days after service upon it of this Decision And Order with notice of entry.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York  
April 25, 2022

ENTER:

  
HON. JAMES W. HUBERT  
Justice of the Supreme Court