

Jepol Constr. Inc. v ProSight Syndicate 1110
2024 NY Slip Op 35373(U)
November 20, 2024
Supreme Court, Queens County
Docket Number: Index No. 723987/2022
Judge: Joseph Risi
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE JOSEPH RISIIA PART 3

A. J. S. C.

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JEPOL CONSTRUCTION INC.,

Index Number: 723987/2022

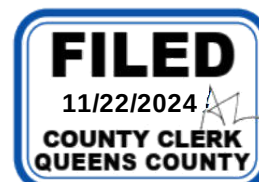
Plaintiff,

Motion Sequence #1

-against-

DECISION/ ORDER

PROSIGHT SYNDICATE 1110, a/k/a ProSight
Speciality Management Company Inc., NEW YORK
MARINE & GENERAL INSURANCE
COMPANY, SOUTHWEST MARINE &
GENERAL INSURANCE COMPANY and
AMERICAN EMPIRE SURPLUS LINE
INSURANCE COMPANY,



Defendants.

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The following numbered papers were read on this motion by plaintiff for summary judgment against defendants, ProSight Syndicate 1110, a/k/a ProSight Specialty Management Company, Inc.; New York Marine & General Insurance Company, and Southwest Marine & General Insurance Company (hereafter “Coaction” or “Coaction Defendants”), pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion - Affirmation - Affidavit - Exhibits	EF 14-25
Answering Affirmation - Exhibits	EF 29-53
Reply Affirmation - Exhibits	EF 54-58

Upon the foregoing papers, it is ordered that the motion by plaintiff is determined as follows:

Plaintiffs filed the instant declaratory judgment action seeking a declaration that “defendant insurance companies . . . are obligated to defend and indemnify (plaintiff) in connection with negligence claims” by one, Priya Varadachary (“Priya”), for damages arising from the negligence of plaintiff in performing contractual construction work at 219 Clermont Avenue, Brooklyn, New York. In January 2014, Priya contracted with plaintiff, as general contractor, for work to be performed at her home, and, in a second contract, for additional work to be done in her basement and on the first floor, in the amount of approximately \$202,000.00. In June 2017, a third contract added work to be performed in the cellar, for an additional cost of \$71,000.00. On August 20, 2020, Priya sent plaintiff a Notice of Termination and Demand for Reimbursement, for failing to

complete the contracted-for work, and, on February 15, 2021, filed for arbitration with the A.A.A., against plaintiff, listing causes of action for breach of contract; fraud; unjust enrichment; violation of GBL §349; and to pierce the corporate veil/alter ego. On September 21, 2021, Priya filed a First Amended Statement of Claim in the Arbitration action, adding a Sixth Cause of Action for negligence. The Coaction Defendants allege that in October 2021, “at plaintiff’s request,” Coaction agreed to defend plaintiff “on account of the negligence claim” in the First Amended Statement of Claim in the Arbitration. Coaction further asserts that it did not agree to defend plaintiff on the previous five causes of action, which were being defended by plaintiff’s private counsel, Philip Orner, Esq.

Coaction declares that on September 12, 2022, the first day of testimony at the Arbitration hearing, during Priya’s testimony, they learned that Priya sought damages against plaintiff based solely on the problems encountered with the work plaintiff “performed and/or oversaw” in its capacity as general contractor, and that Priya sought damages for “completing or replacing” work plaintiff had “agreed to perform” pursuant to the multiple contracts between the parties. Coaction asserts that this was the first time that Priya mentioned she was seeking damages for plaintiff’s “faulty or incomplete work,” and only wanted to recover damages for repairing same. As a result, on September 15, 2022, Coaction disclaimed coverage, in writing, “for the damages sought by (Priya) as they are specifically excluded under all of the . . . Coaction policies. The allegations of Breach of Contract, Fraud, Unjust Enrichment, Violations of NY General Business Law §349, and Alter Ego/Piercing the Corporate Veil do not meet the definition of “property damage” caused by an “occurrence” as defined by the policies” and, also, for any “property damage caused by Jepol’s negligence (which) has been shown to be the faulty work and or property damage to the contracted for work, which is specifically excluded.”

Plaintiff brought this motion for summary judgment seeking a declaratory judgment against Prosight and New York Marine & General Insurance Company, on the Second and Third Causes of Action, for late disclaimer of coverage, alleging that such defendants are “statutorily estopped from disclaiming coverage under Insurance Law §3420(d)(2)” in connection with the underlying Arbitration proceeding. Coaction Defendants oppose.

Initially, “[a]n action for a declaratory judgment as to the rights of the insured vis-à-vis his or her insurance carrier is the appropriate means of resolving a coverage dispute” (*McDonald v Shore*, 100 AD3d 602, 603 [2012]; see *Iacobellis v A-1 Tool Rental, Inc.*, 65 AD3d 1015 [2009]).

“[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; see *Wonderly v City of Poughkeepsie*, 185 AD3d 632 [2d Dept 2020]; *Oxford Health Plans (NY), Inc. v Biomed Pharms., Inc.*, 181 AD3d 808 [2d Dept 2020]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (see *Trustees of Columbia Univ. in the City of N.Y. v D’Agostino Supermarkets, Inc.*, 36 NY3d 69 [2020]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). On plaintiff’s motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving defendants (see *Hewitt v Palmer Veterinary Clinic, P.C.*, 35 NY3d 541 [2020]; *Matter of New*

York City Asbestos Litig., 33 NY3d 20 [2019]; *Monroy v Lexington Operating Partners, LLC*, 179 AD3d 1053 [2d Dept 2020]; *Rivera v Town of Wappinger*, 164 AD3d 932 [2d Dept 2018]).

The court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented This drastic remedy should not be granted where there is any doubt as to the existence of such issues . . . or where the issue is 'arguable' [citations omitted] (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see also, *Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; see *Charlery v Allied Transit Corp.*, 163 AD3d 914 [2d Dept 2018]; *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v New York Med. Ctr.*, 64 NY2d 851 [1985]; *Cach, LLC v Khan*, 188 AD3d 1135 [2d Dept 2020]).

In the instant action, plaintiff requests that the court find summary judgment against Coaction Defendants for their alleged late disclaimer of coverage, pursuant to Insurance Law §3420(d)(2). Said motion is denied, as that statute reads, in pertinent part, "If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident . . . , it shall give written notice as soon as reasonably possible of such disclaimer of liability or denial of coverage to the insured" The instant matter does not involve any claim for personal injury. Thus, such statute may not form the basis for summary judgment herein.

Further, plaintiff's failure to raise the possibility of a violation of "common-law estoppel," prior to its mention in its Reply Memorandum of Law herein, renders such argument a "new grounds" for relief, which is not properly before the court, as "[t]he function of reply papers is to address arguments made in opposition to the position taken by the [non-movant] and not to permit the movant to introduce new arguments in support of, or new grounds or evidence for, the motion" (*Lee v Law Offs. of Kim & Bae, P.C.*, 161 AD3d 964, 965 [2d Dept 2018]; see *Standard Fire Ins. Co. v Sanchez*, 222 AD3d 761 [2d Dept 2023]; *Kogut v Village of Chestnut Ridge*, 214 AD3d 777 [2d Dept 2023]; *USAA Fed. Sav. Bank v Calvin*, 145 AD3d 704 [2d Dept 2016]).

Consequently, the motion by plaintiff seeking summary judgment declaring that Coaction Defendants are statutorily estopped from disclaiming coverage herein, pursuant to Insurance Law §3420(d)(2), is denied.

Plaintiffs' remaining contentions and arguments are either without merit, or need not be addressed in light of the foregoing determinations.

Accordingly, plaintiff's motion is denied.

This is the decision and order of the Court.

Date: November 20, 2024



Hon. Joseph Risi, A.J.S.C.

