

**Preferred Mut. Ins. Co. v Advanced Elec.
Installations, LLC**

2012 NY Slip Op 32371(U)

September 11, 2012

Sup Ct, NY County

Docket Number: 110524/11

Judge: Joan M. Kenney

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: JOAN M. KENNEY
J.S.C. Justice

PART 8

Index Number : 110524/2011
PREFERRED MUTUAL INSURANCE
VS.
ADVANCED ELECTRICAL
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 110524/11
MOTION DATE _____
MOTION SEQ. NO. 001

The following papers, numbered 1 to 25, were read on this motion to/for Summary Judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s)** 1-11
Answering Affidavits — Exhibits _____ **No(s)** 12-24
Replying Affidavits _____ **No(s)** 25

Upon the foregoing papers, It is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

FILED
SEP 13 2012
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/11/12

Joan M. Kenney, J.S.C.
JOAN M. KENNEY
J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

-----X
Preferred Mutual Insurance, Co.,

Plaintiff,

-against-

Advanced Electrical Installations,
LLC., Matthew J. Hanley, Nancy
Orlando, as Administratrix of the
Estate of Thomas Orlando, and
Nancy Orlando, individually,

Defendants.

-----X
KENNEY, JOAN M., J.

DECISION AND ORDER

Index Number: 110524/11

Motion Seq. No.: 001

FILED

SEP 13 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment dismissing the complaint.

Papers	Numbered
Notice of Motion, Affirmation, and Exhibits, Memo of Law	1-11
Opposition Affirmations, and Exhibits	12-16
Opposition/Cross Motion, and Exhibits	17-24
Reply Affirmation, Exhibits	25

In this declaratory judgment action, plaintiff, Preferred Mutual Insurance Company, moves for an Order, pursuant to CPLR 3212, declaring that there is no coverage for Advanced Electrical Installations, LLC. (AEI), or Matthew J. Hanley (Hanley) for the injuries and/or wrongful death sustained by Thomas Orlando (Orlando); and that Hanley's insurance policy (the policy) is void ab initio.

Defendants Nancy Orlando as Administratrix of the Estate of Thomas Orlando, and Nancy Orlando individually, cross-move for an Order, pursuant to CPLR 3212, granting them summary judgment.

Factual Background

On December 4, 2008, Orlando was either working for or assisting AEI with the installation of solar panels (this is disputed by the parties) on the roof of a home owned by Paul and Maryellen Mattera. In the course of this job, Orlando was caused to fall off of a ladder, and later died from injuries sustained from the fall(the accident).

On December 2, 2009, Nancy Orlando, as Administratrix of the Estate of Thomas Orlando, and Nancy Orlando individually, filed suit in Nassau County Supreme Court against Paul and Maryellen Mattera, and AEI for damages arising out of Orlando's injuries and death which occurred on December 4, 2008 as a result of the accident (the Orlando litigation).

On December 29, 2010, plaintiff alleges that Hanley, for the first time, attempted to add AEI to the policy.

AEI, owned by Hanley and his partner, Mike Seeley, and formed in October of 2007, is a company that is in the business of installing solar panels. While plaintiff issued a commercial general liability policy to Hanley back in 2002, before Hanley had started AEI, plaintiff alleges that AEI is not covered under the policy because of policy language specifically limited the policy to Hanley exclusively, and with respect to the conduct of business of which Hanley was the sole owner. (Moving Papers Exhibit A Section II.1.a). The policy also contained a "Roofing Operations" clause which excluded coverage for any "'bodily injury', [sic] 'property damage' or 'personal and advertising injury' arising out of any Roofing Operations which involve any replacement roof or recovering of existing roof." (Moving Papers Exhibit A pg. 32). The policy also contained language precluding coverage for bodily injury to employees of Hanley and/or his business. (Moving Papers Exhibit A, Sec.I, Part 1.e).

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Plaintiff maintains that they had not received any documentation from Hanley that he wished to add AEI as an insured to the policy, and claims in an affidavit of one of their senior underwriters, Peter Karaman, that had they known about Hanley performing the installation of solar panels they would never have issued him the policy. (Moving Papers Exhibit B ¶ 22).

Hanley alleges that AEI was already added as an insured to the policy since its formation in 2007 because of a representation made to him by his insurance broker, Arnold Scholls.

Hanley claims that after he formed AEI in 2007, he began paying significantly higher insurance premiums to plaintiff, because Hanley believed that AEI was added as an additional insured under the policy. (Affirmation of Matthew Hanley). Also, Hanley alleges he had been paying his premiums on AEI checks. (*Id.* at Exhibit D).

It is noted that there have been no depositions taken of any representatives of plaintiff (most importantly the senior underwriter, Peter Karaman), and there has been no deposition of any defendants, or of Hanley's insurance broker, Arnold Scholls. Discovery in this matter is in its infancy stage.

Arguments

Plaintiff contends that there should be no coverage for AEI or Hanley under the policy because: 1) Hanley did not provide timely notice of the incident alleged in the Orlando action; 2) the policy is void ab initio based on Hanley's material misrepresentations to plaintiff during procurement, placement, issuance, and renewal of the policy; 3) Section I Part 1.e of the policy excludes coverage for *bodily injuries to employees*; and 4) *the roofing exclusion applies*.

Defendants Hanley and AEI maintain that: 1) plaintiff's delay in their notice of defense waiver precludes their disclaimer of liability; 2) Orlando was not paid for the job and is therefore

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not an employee; 3) there was an intent to add AEI as an insured to the policy; and 4) plaintiff's motion is premature due to needed discovery.

Defendants Nancy Orlando as Administratrix of the Estate of Thomas Orlando and Nancy Orlando individually contend: 1) there has been no discovery, and therefore the plaintiff's motion is premature; 2) Orlando was not an employee of AEI or Hanley, but merely assisting a friend; 3) plaintiff did not provide notice that it was disclaiming liability in a timely fashion; 4) the policy should not be voided *ab initio* because Hanley was not in the business of installing solar panels when the policy was enacted; 5) the work being done on the date of the accident does not meet the "Roofing Exclusion;" and 6) plaintiff was aware Hanley had a partner in his business, Michael Seeley, as plaintiff included the partner in certain documents.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." The rule governing summary judgment is well established: "The proponent of a summary

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judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.”

(*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Torterello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

A movant's failure to sufficiently demonstrate its right to summary judgment requires a denial of the motion, regardless of the sufficiency, or lack thereof, of the opposing papers.

(*Winegrad v New York Univ. Med. Center*, 64 NY2d 851; *Zuckerman v City of New York*, 49 NY2d 557; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065; *Lurie v Child's Hosp.*, 70 AD2d 1032; *Cugini v. System Lumber Co.*, 111 AD2d 114 [1st Dept, 1985]).

CPLR 3212(f) states that, “should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.”

Even if statements as to routine practices are sufficient to make a prima facie showing that work on project met certain defined standards, the inability to procure depositions from representatives likely to have knowledge of the type of work done precludes summary judgment. (*Gonzalez v Vincent James Management Co., INC.*, 306 AD2d 226 [1st Dept. 2003]). Based on this standard alone, plaintiff's motion for summary judgment is premature.

Depositions of key witness' are needed to provide essential facts to solve the issue of the many factual disputes prevalent. Plaintiff's assertions that: 1) defendant made material misrepresentations at the inception of the policy and in the years following concerning renewal of

the policy; that Orlando was an employee of Hanley and/or AEI; and that the work performed on the date of the accident falls under the "roofing operation" policy exclusion provisions are all factually disputed by defendants.

The depositions of Hanley; Hanley's insurance broker to plaintiff, Arnold Scholls; and a representative of plaintiff, mainly the senior underwriter Peter Karaman, are necessary to discover currently unavailable facts concerning these factual disputes. Further, additional discovery is required to settle disputes present in defendants' cross-motion as well. Accordingly, it is hereby

ORDERED, that plaintiff's motion to declare no coverage to defendants, and dismiss the action, is denied, in its entirety; and it is further

ORDERED, that defendants' cross-motion, for summary judgment, is denied, in its entirety;

and it is further ORDERED that the parties appear for a preliminary conference on 10/4/12 at 718 Thomas Street Room 304 NYC 1003 at 9:30 a.m.

Dated: 9/11/12

FILED
SEP 13 2012
ENTER:
NEW YORK
COUNTY CLERKS OFFICE
[Signature]
Joan M. Kenney, J.S.C.