

<b>Roman v 1781 Riverside, LLC</b>
2019 NY Slip Op 30414(U)
February 20, 2019
Supreme Court, New York County
Docket Number: 655631/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

INDEX NO. 655631/2017
MOTION SEQ. NOS. 001, 002, 003, and 004

MICHAEL ROMAN,

Plaintiff,

- v -

1781 RIVERSIDE, LLC, EDEL MANAGEMENT CORP.,
COMBINED REAL ESTATE PURCHASING ENTERPRISES,
STARR INDEMNITY & LIABILITY COMPANY, DUAL
COMMERICAL LLC, ALLIED WORLD ASSURANCE COMPANY
(U.S.), INC., UNILITE INSURANCE AGENCY, FOUR BROTHERS
GENERAL CONTRACTING & DEVELOPMENT, INC., F
BROTHERS CONSTRUCTION, INC., PREFERRED
CONTRACTORS ASSOCIATION, PREFERRED GENERAL
CONTRACTORS INSURANCE COMPANY, RRG, PREFERRED
CONTRACTORS INSURANCE COMPANY RISK RETENTION
GROUP, LLC, NY EAST ATLANTIC INSURANCE BROKERAGE,
and SIS, INC.,

Defendants.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 17, 18, 19, 64, 65, 66, 67

were read on this motion to DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 40, 42, 69, 70, 71, 72, 73, 87

were read on this motion to DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 30, 31, 32, 33, 34, 35, 36, 37, 41, 75, 76, 77, 78, 79

were read on this motion for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 004) 43, 44, 45, 46, 47, 48, 49, 51, 52, 53, 54, 55, 56, 57, 58, 59, 81, 82, 83, 84, 85

were read on this motion to DISMISS

Motion sequence numbers 001, 002, 003, and 004 are consolidated for disposition in this action.

Upon the foregoing documents, it is ordered that the motions are **decided as follows**.

This is a declaratory judgment action commenced by plaintiff Michael Roman (“Roman”). In motion sequence numbers 001, 002, and 004, defendants Starr Indemnity & Liability Company (“Starr Indemnity”), Preferred Contractors Insurance Company Risk Retention Group, LLC i/s/h/a Preferred Contractors Association, Preferred Contractors Insurance Company, RRG and Preferred Contractors Insurance Company Risk Retention Group, LLC (“PCIC”), Wholesale Insurance Services i/s/h/a SIS, Inc. (“SIS”), and Unilite Insurance Agency (“Unilite Insurance”) move, pursuant to CPLR 3211(a)(1), (3) and (7), to dismiss the complaint.

In motion sequence 003, defendants 1781 Riverside, LLC (“1781 Riverside”) and Edel Family Management Corp. (“Edel”) move, pursuant to CPLR 3212(b), for summary judgment dismissing the complaint. They also move, in the alternative, to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). After oral argument, and after a review of the parties’ papers and the relevant statutes and caselaw, it is ordered that the motions are **decided as follows**.

#### **FACTUAL AND PROCEDURAL BACKGROUND:**

The facts of this case have been set forth in a prior decision of this Court rendered in an underlying action styled *Roman v 1781 Riverside LLC*, Supreme Court, New York County Index Number 153372/2016 (“the underlying action”). Plaintiff Roman was allegedly injured on May 2, 2015, when he fell at a construction project on premises owned by defendant 1781 Riverside. (Doc. 66 at 3–4.) At the time, Four Brothers General Contracting & Development, Inc. (“Four Brothers”) was the general contractor engaged in the construction project. (*Id.*) In a decision rendered in the

underlying action on December 2, 2016, this Court granted Roman a default judgment against Four Brothers. (Doc. 66.)

Roman thereafter commenced this declaratory judgment action against the captioned defendants by filing a summons and complaint on August 30, 2017. (Doc. 8.) The relationships of the parties are as follows: The subject premises are owned by 1781 Riverside (Doc. 66 at 3–4), which hired Four Brothers to perform construction work at the premises (Doc. 31 at 3). However, it is alleged that 1781 Riverside and Four Brothers never executed a contract concerning the construction project (*id.*), and no contract between the two parties has been submitted in the parties' papers. Four Brothers was issued insurance policy PCIC5025-PCA505835-MA-02 by PCIC. (Doc. 22 at 3.) This policy was evidently “produced” by SIS. (*Id.*)

1781 Riverside owns the premises, and Edel manages the building. (Doc. 31 at 3.) Starr Indemnity issued general insurance liability policy SIKCGF01356-01 (Doc. 9 at 4), and Allied World Assurance Company (“AWAC”) issued insurance policy 0308-3955, to Edel (Doc. 8 at 6–7). Unilite Insurance is the insurance broker for Edel. (Doc. 49 at 7–8.)

In his complaint in this declaratory judgment action, Roman alleges that PCIC disclaimed coverage to Four Brothers because it had engaged “in operations outside of those disclosed in the Policy Application.” (Doc. 8 at 8; Doc. 45 at 40.) The complaint further alleges that, upon learning of Roman’s suit in the underlying action, AWAC issued a reservation of rights, claiming “the right to deny coverage based on the construction operations exclusion contained in the Policy” (*id.* at 8; *see also* Doc. 45 at 46).

Roman asserts three causes of action: His first cause of action seeks declaratory relief to determine the respective rights of the parties under the PCIC insurance policy, and specifically whether defendants are required to defend and indemnify Four Brothers in the underlying action

pursuant to the policy. (Doc. 8 at 9–11.) The second cause of action also seeks declaratory relief, but this time to determine the rights of the parties with respect to the AWAC policy issued to Edel. (*Id.* at 11–13.) His third cause of action alleges that defendants collectively failed to procure sufficient liability insurance coverage to cover his injuries. (*Id.* at 13–14.)

Defendants Starr Indemnity, PCIC, SIS, and Unilite Insurance all move to dismiss Roman’s complaint pursuant to CPLR 3211(a)(7). (Docs. 5 at 2; 22 at 2; 49 at 6.) PCIC, SIS, and Unilite Insurance also move for dismissal under CPLR 3211(a)(3) (Docs. 22 at 3; 49 at 6), and Starr Indemnity further moves to dismiss under CPLR 3211(a)(1) (Doc. 5 at 22).

Defendants 1781 Riverside and Edel move, pursuant to CPLR 3212(b), for summary judgment in their favor dismissing the complaint. (Doc. 31 at 2.) In particular, they maintain that Roman has failed to produce any contract by which they were obligated to procure insurance on behalf of Four Brothers. (*Id.* at 8–10.) In the alternative, they move for dismissal of the complaint pursuant to CPLR 3211(a)(1) and (7). (*Id.* at 10–15.)

Roman has opposed all the motions and has cross-moved to stay the proceedings in both the instant action and the underlying action “pending a preliminary conference in [this] action to address the pending procedural, discovery and coverage issues involved in [this] action.” (*See, e.g.*, Doc. 64 at 1.) This Court notes that, in opposing each defendant’s motion, Roman has essentially submitted the same arguments, which are that this Court should stay the proceedings (*see, e.g.*, Doc. 41 at 5) and that “most, if not all, coverage issues giving rise to [this] declaratory judgment action might be more easily resolved via a conference . . . rather than piecemeal motion practice” (*see, e.g., id.* at 8).

**LEGAL CONCLUSIONS:**

On a CPLR 3211 motion to dismiss a complaint, “the pleading is to be afforded a liberal construction. [The court is to] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994].)

CPLR 3211(a)(1) provides for dismissal based on documentary evidence. Should the reviewing court find that the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law, dismissal will be granted. (*See 150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]; *see also Leon*, 84 NY2d at 88.) If the “allegations are contradicted by documentary evidence, they are not presumed to be true or granted every favorable inference . . . .” (*Sterling Fifth Assocs. v Carpentille Corp., Inc.*, 9 AD3d 261, 261–62 [1st Dept 2004].)

Pursuant to CPLR 3211(a)(3), dismissal is warranted if the party asserting the cause of action does not have the legal capacity to sue. (*See CPLR 3211[a][3]*.)

Further, a motion to dismiss a cause of action for failure to state a claim pursuant to CPLR 3211(a)(7) “test[s] the facial sufficiency of the pleading in two different ways.” (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014].) First, “the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law.” (*Id.*) Second, the court may dismiss a claim where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (*Id.*)

**a. Motion Sequence 001: Starr Indemnity's CPLR 3211 Motion to Dismiss.**

With respect to motion sequence 001, Starr Indemnity issued general insurance liability policy SIKCGF01356-01 to Edel. (Doc. 9 at 4.) In the policy, both the “Named Insured Schedule” (Doc. 6 at 9–10) and the “Who is an Insured” (*id.* at 21–22) sections do not list Four Brothers as an additional insured under the policy. “[A] party that is not named an insured or an additional insured on the face of [a] policy is not entitled to coverage.” (*Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004].)

In opposing Starr Indemnity's motion, Roman merely maintains that “most, if not all, coverage issues giving rise to [this] declaratory judgment action might be more easily-resolved via a conference . . . rather than piecemeal motion practice.” (Doc. 64 at 3.) However, because the documentary evidence establishes that Four Brothers is not an additional insured entity under the policy that Starr Indemnity issued to Edel (Doc. 6), Roman is not entitled to a declaration that Starr Indemnity is required to defend and indemnify Four Brothers in the underlying action. Thus, dismissal of Roman's claim for a declaration that Starr Indemnity is required to defend and indemnify Four Brothers in the underlying action is therefore granted pursuant to CPLR 3211(a)(1).

**b. Motion Sequence 002: PCIC's and SIS's CPLR 3211 Motion to Dismiss.**

It is well-settled in this State that, at common law, “an injured person possessed no cause of action against the insurer of the tortfeasor.” (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 353 [2004].) To remedy “this inequity” (*id.*), our Legislature passed Insurance Law § 3420, which allows a claimant to bring a direct action against a tortfeasor's insurer under limited circumstances. An “injured party must first obtain a judgment against the tortfeasor, serve the insurance company

with a copy of the judgment and await payment for 30 days.” (*Id.* at 858.) “Compliance with these requirements is a condition precedent to a direct action against the insurance company.” (*Id.*; see also *Taggart v State Farm Mut. Auto. Ins. Co.*, 272 AD2d 222, 222 [1st Dept 2000] (plaintiff has no standing to sue tortfeasor’s insurer if § 3420’s requirements are not met).)

In the instant action, PCIC issued to Four Brothers policy PCIC5025-PCA505835-MA-02. (Doc. 22 at 3.) Although this Court, through a prior decision and order dated December 2, 2016 (Doc. 26), granted Roman a default judgment against Four Brothers (Doc. 26), no proof has been submitted—and Roman has not even argued—that the requirements of § 3420 were satisfied prior to commencing this declaratory judgment action against PCIC. Roman’s declaratory judgment action seeking to have PCIC defend and indemnify Four Brothers in the underlying action must therefore be dismissed. (See *Fusco v Am. Colonial Ins. Co.*, 221 AD2d 231, 231 [plaintiff could not compel defendant-insurer to pay a default judgment when § 3420 was not met].)

With respect to defendant SIS, plaintiff, in his declaratory judgment action complaint, avers that SIS “was the producer of a certain policy of liability insurance for Four Brothers.” (Doc. 23 at 6). An affidavit submitted by SIS’s general counsel also represents that “SIS served as the wholesale producer” of the insurance policy that PCIC issued to Four Brothers. (Docs. 24 at 3; 87.) However, because Roman has not established that he had a contractual relationship with SIS or that they were in privity with each other,<sup>1</sup> his declaratory judgment action must also be dismissed as against SIS. (See *Arredondo v City of New York*, 6 AD3d 328, 329 [1st Dept 2004] (“It is well settled that the duty of an insurance broker runs to its customer and not to any additional insureds since there is no privity of contract for the imposition of liability.”).)

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<sup>1</sup> Again, this Court notes that Roman has submitted the same opposition to each defendant’s motion. His argument that a conference—rather than motion practice—is more appropriate to resolve the various insurance coverage issues (Doc. 69 at 5) is insufficient to defeat PCIC’s and SIS’s motion for dismissal.

**c. Motion Sequence 004: Unilite's CPLR 3211 Motion to Dismiss.<sup>2</sup>**

With regard to defendant Unilite, this Court similarly finds that Roman's complaint should be dismissed for lack of privity. Unilite was the insurance broker for Edel. (Doc. 44 at 2.) Unilite procured both the AWAC policy and the Starr Insurance policy for Edel. (Doc. 49 at 10–11.) Since a “broker’s duty is to its customer . . . and not to additional insureds” (*Fed. Ins. Co. v Spectrum Ins. Brokerage Servs.*, 304 AD2d 316, 317 [1st Dept 2003]), Roman's complaint seeking a declaration that Unilite is obligated to defend and indemnify Four Brothers in the underlying action should be dismissed.

**d. Motion Sequence 003: 1781 Riverside's and Edel's CPLR 3212 Motion for Summary Judgment.**

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) In so doing, the movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*)

A threshold question in tort cases is whether the defendant owed a duty of care toward the injured party. (*See Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 138 [2002].) Because 1781 Riverside and Edel hired Four Brothers to perform construction work at the premises (Doc. 36 at 2), the primary inquiry is whether Four Brothers executed a contract with 1781 Riverside and Edel, and whether such a contract obligated them to procure insurance and to defend and indemnify Four Brothers in any personal injury action arising from the work.

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<sup>2</sup> Because motion sequences 001, 002, and 004 all seek dismissal, this Court will consider them first before motion sequence 003, which is the motion for summary judgment by defendants 1781 Riverside and Edel.

Defendants have submitted an affidavit by the property manager (Doc. 36), who testified that, although Four Brothers was hired to perform construction work, no contract was ever executed between the parties (*see id.* at 2). Defendants have therefore established their prima facie showing that they were not required to procure insurance on behalf of Four Brothers, and that they are not obligated to defend and indemnify Four Brothers in the underlying action. Roman's papers do not establish that defendants 1781 Riverside and Edel owed him a duty or that they had a duty to procure insurance on behalf of Four Brothers. 1781 Riverside's and Edel's motion is therefore granted.

Finally, this Court determines that Roman's cross-motion in opposition to each of the defendant's motions should be denied. He seeks a stay of the proceedings in both the instant action and the underlying action "pending a preliminary conference in [this] declaratory judgment action to address the pending procedural, discovery and coverage issues involved in this declaratory judgment action." (*See, e.g.*, Doc. 41 at 5.) Given the foregoing discussions, however, this Court fails to see why a stay of the proceedings is necessary in either action.

In accordance with the foregoing, it is hereby:

**ORDERED** that defendant Starr Indemnity & Liability Company's motion to dismiss the complaint (motion sequence 001) of plaintiff Michael Roman is granted; and it is further

**ORDERED** that the motion by defendants Preferred Contractors Insurance Company Risk Retention Group, LLC i/s/h/a Preferred Contractors Association, Preferred Contractors Insurance Company, RRG and Preferred Contractors Insurance Company Risk Retention Group, LLC and Wholesale Insurance Services i/s/h/a SIS, Inc. to dismiss plaintiff's complaint (motion sequence 002) is granted; and it is further

**ORDERED** that defendants 1781 Riverside, LLC's and Edel Family Management Corp.'s motion for summary judgment dismissing plaintiff's complaint (motion sequence 003) is granted; and it is further

**ORDERED** that Unilite Insurance Agency's motion to dismiss plaintiff's complaint (motion sequence 004) is granted; and it is further

**ORDERED** that plaintiff's complaint is dismissed as to each of the moving defendants; and it is further

**ORDERED** that plaintiff's cross-motion in response to each of defendant's motions seeking to stay the proceedings is denied; and it is further

**ORDERED** that the instant action's caption shall now read:

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MICHAEL ROMAN

Index No. 655631/2017

Plaintiff,

-against-

COMBINED REAL ESTATE PURCHASING  
ENTERPRISES, DUAL COMMERCIAL LLC, ALLIED  
WORLD ASSURANCE COMPANY (U.S.), INC.,  
FOUR BROTHERS GENERAL CONTRACTING &  
DEVELOPMENT, INC., F BROTHERS  
CONSTRUCTION, INC., NY EAST ATLANTIC  
INSURANCE BROKERAGE,

Defendants.  
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and it is further

**ORDERED** that counsel for defendant Starr Indemnity & Liability Company is directed to e-mail the General Clerk's Office at [genclerk-ords-non-mot@nycourts.gov](mailto:genclerk-ords-non-mot@nycourts.gov) with a copy of this order with notice of entry, within 30 days after this order is entered, and the clerk is directed to

enter judgment accordingly and to mark the court's records to reflect the change to the caption;  
and it is further

**ORDERED** that counsel for defendant Starr Indemnity & Liability Company is directed to serve a copy of this order with notice of entry on all parties within 30 days after this order is entered; and it is further

**ORDERED** that his constitutes the decision and order of this Court.

2/20/2019  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE