SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12

Justice

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OLD REPUBLIC GENERAL INSURANCE CORP., INDIVIDUALLY, and A/S/O PORT MORRIS TILE & MARBLE CORP.,

Plaintiff,

- v -

ACE AMERICAN INSURANCE COMPANY, TISHMAN CONSTRUCTION CORP., TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, 99 CHURCH INVESTORS, LLC., and WILLIS OF NEW YORK, INC.,

Defendants.

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INDEX NO. 651474/2019

MOTION DATE _____

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 72-81, 98, 99 were read on this motion to renew.

By notice of motion, defendant ACE American Insurance Company moves pursuant to CPLR 2221(d), (e) for leave to reargue and renew its motion for summary judgment. Plaintiff opposes.

I. BACKGROUND

By decision and order dated December 9, 2020, ACE's motion for summary judgment was denied on the ground that an issue of fact remained as to whether plaintiff's subrogor, Port Morris, had completed its contractual work and whether work remaining after the ACE insurance policy period had expired constituted "repair work." (NYSCEF 70).

By decision and order dated December 21, 2020, a motion for summary judgment filed in a related action by defendants 99 Church Investors LLC, Tishman Construction Corporation, and

Tishman Construction Corporation of New York, *99 Church Investors LLC, et al. v Old Republic Insurance Company, et al.*, 152827/2019, was granted and it was declared that plaintiff is required to indemnify, defend, and reimburse them in another related action, *Castillo v 99 Church Investors, et al.*, 154952/2017, notwithstanding issues of fact as to whether the punch list work Port Morris was performing at the time of the accident constituted repair work or is evidence that all of the work called for in the contract was not complete, based on the submission by them of a Port Morris invoice reflecting that as of April 30, 2017, it had not completed its contractual work. (NYSCEF 74).

II. CONTENTIONS

Relying on the December 21, 2020 decision and order, ACE argues that evidence in the record establishing that ACE's policy affords no coverage to Port Morris was overlooked, denies that Port Morris's contractual work was complete on the day of the accident, and argues that Port Morris was engaged in punch list work, as reflected by the exhibits it submitted in support of its motion for summary judgment, which it contends, were substantively the same as those submitted in the other action. (NYSCEF 49).

In opposition, although plaintiff acknowledges that the two decisions and orders contradict each other, it contends that the award of summary judgment in the other action was erroneous, and maintains that there is an issue of fact as to whether Port Morris was engaged in repair work at the time of the accident. It observes that ACE submits no new evidence apart from the **December 21, 2020** decision and order, and references its arguments in opposition to ACE's summary judgment motion. Moreover, plaintiff asserts, necessary discovery remains outstanding. According to plaintiff, while decisions on the summary judgment motions pended, it had obtained an affidavit from a Port Morris employee, dated January 8, 2021, in which he

states, as pertinent here, that while he has no direct knowledge of the accident, to the extent that the claimant was doing sanding work, he was engaged in punch list repair work. (NYSCEF 79). Plaintiff also claims that ACE's interpretation of its policy renders its endorsement "illusory" and creates an "impossibility," because the contract calls for post-contract punch list items to be completed, yet the policy extension only applies if contractual work is completed. (NYSCEF 77-79).

III. ANALYSIS

Pursuant to CPLR 2221(d), as pertinent here, a motion for leave to reargue must "be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." Pursuant to CPLR 2221(e), as pertinent here, a motion for leave 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," and the movant must present a "reasonable justification for the failure to present such facts on the prior motion."

Per the December 21, 2020 decision and order, issues of fact remain as to whether, at the time of the claimant's alleged accident, punch list work constitutes "repair work" or is evidence that the contractual work was incomplete. However, in that action, the movants also submitted a Port Morris invoice reflecting that as of April 30, 2017, Port Morris's non-punch list and non-repair work on the 59th floor was incomplete, and thus, they established their *prima facie* entitlement to summary judgment.

Critically, ACE did not submit the Port Morris invoice reflecting the status of the work as of April 30, 2017, and thus failed to meet its *prima facie* burden. Consequently, plaintiff's

opposition and supporting exhibits, including the Port Morris invoice, were not considered. (*See Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [movant's failure to tender sufficient evidence to demonstrate *prima facie* entitlement to summary judgment "requires a denial of the motion, regardless of the sufficiency of the opposing papers"]).

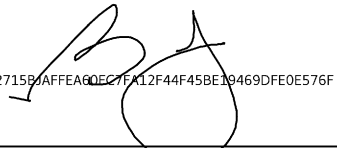
Nevertheless, in light of the December 21, 2020 decision and order, and as the Port Morris invoice is in the record, leave to renew and reargue is warranted. As the invoice reflects that as of April 30, 2017, Port Morris's work on the 59th floor was not complete, ACE demonstrates, *prima facie*, that its policy does not afford coverage.

Plaintiff fails to raise an issue of fact in opposition, as the Port Morris employee's affidavit is only evidence of the work engaged in by the claimant at the time of his accident, not Port Morris in general. Moreover, the insurance policy endorsement is neither illusory nor impossible.

Accordingly, it is hereby

ORDERED, that defendant ACE American Insurance Company's motion for leave to renew and reargue is granted, and on reargument and renewal, its motion for summary judgment is granted, and plaintiff's claims against it are severed and dismissed; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.



6/3/2021
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE