

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present HONORABLE FREDERICK D.R. SAMPSON IAS TERM, PART 31
Justice

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147 25 STREET JACKSON HEIGHTS, INC.,

Index No: 3646/13
Motion Date: 1/14/16
Motion Cal. No: 170
Motion Seq. No: 4

Plaintiff,

-against-

JOE GINA, JOE GINA CONTRACTING, INC
and PREFERRED CONTRACTORS
INSURANCE COMPANY,

Defendants.

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PREFERRED CONTRACTORS INSURANCE
COMPANY, RRG,

Third-Party Plaintiff,

-against-

JOE GINA and JOE GINA CONTRACTING, INC.,
-----X

FILED
APR 14 2016
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 7 were read on defendant/third-party plaintiff Preferred Contractors Insurance Company, RRG's (PCIC) motion, seeking an order granting it default judgment, pursuant to CPLR 3215(b), as against co-defendants/third-party defendants Joe Gina and Joe Gina Contracting, Inc. (collectively "Joe Gina Contracting, Inc."), and further, for an order, pursuant to CPLR 3212, declaring that PCIC has no duty to defend or to indemnify Joe Gina Contracting in connection with claims by plaintiff in the main action, and on plaintiff's cross-motion, pursuant to 3212, seeking summary judgment on the issue of liability, and further, seeks an order allowing plaintiff to conform the pleadings to proof submitted herein to increase the amount sought to the sum of \$94, 760.00, plus interest.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion-Affirmation-Exhibits.....	1 - 3
Notice of Cross-Motion-Affirmation-Exhibits.....	4 - 6

Reply Affirmation/Opposition to Cross-Motion..... 7

Upon the foregoing papers, it is hereby ordered that the motion and cross-motion are disposed of as follows:

Plaintiff commenced the underlying action, seeking to recover for breach of contract and negligence for damages sustained to a certain premises as a result of work performed by the defendants/third-party defendants Joe Gina and Joe Gina Contracting, Inc., in the replacement of a parapet wall on the roof of plaintiff's five-story cooperative building in Jackson Heights, NY. Defendant/third-party plaintiff PCIC now moves, seeking default judgment as against Joe Gina and Joe Gina Contracting, Inc., and further, for a determination that it is not obligated to defend co-defendants/third-party defendants in the main action.

To the extent PCIC seeks default judgment as against defendant/third-party defendant Joe Gina, same is denied. Absent from the papers is any proof of service as to said individual.

As to that branch of the motion seeking default judgment as against Joe Gina Contracting, Inc., PCIC submits proof of service, copy of the pleadings, and an affidavit of merit. Accordingly, default judgment is granted as against Joe Gina Contracting, Inc.

As to that branch of the motion seeking a declaration regarding coverage, PCIC contends that the applicable provision in the insurance policy issued on behalf of Joe Gina Contracting, Inc., specifically precludes coverage for any claims "arising out of, resulting from, caused by, contributed to by or in any way related to work . . . construction, renovation or reconstruction on any building . . . that exceeds three stories in height. It is undisputed that the subject premises is in excess of three stories. However, plaintiff contends, in opposition, that regardless of the height of the building, PCIC, is still responsible for insuring defendant Joe Gina Contracting, Inc., as it relates to the performance of their contractual obligations in repairing the roof of plaintiff's building, and further, that the damages sustained were not height related. Plaintiff's counsel argues that because plaintiff claims that due to the negligence of defendants/third-party defendants Joe Gina Contracting, Inc., it suffered damages to the roof of a subject premises, the policy still inures to plaintiff's benefit.

PCIC also argues that the policy specifically excludes coverage for property damage that arises out of a claim for breach of contract. PCIC also contends that the cost of repairing and replacing the insured's (Joe Gina Contracting, Inc.) faulty work does not constitute "property damage" caused by an "occurrence" under the policy. Under New York law, "[l]iability policies do not provide coverage where the complaint sounds in contract and not in negligence" (*Royal Ins. Co. of Am. v Ru-Vai Elec. Corp.*, 1996 WL 107512, [ED NT 1996] [citations omitted]). "The important distinction is not whether the complaint states a contract or tort theory, but whether the damage to be remedied is the faulty work or the product itself or injury to person or other property" (*Id.*).

"Generally, when an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language" (*Gaetan v Firemen's Ins. Co. of Newark*, 264

AD2d 806 [2d Dept 1999]; see *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304 [1984]). "Such exclusions or exceptions from policy coverage must be specific and clear in order to be enforceable, and they are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction" (*Gaetan v Firemen's Ins. Co. of Newark, supra*; see *Seaboard Sur. Co. v Gillette Co.*, *supra*; *Belt Painting Corp. v TIG Ins. Co.*, 293 AD2d 206 [2d Dept 2002] *affd.* 100 NY2d 377 [2003]). The burden of establishing that there can be no other reasonable interpretation of a particular exclusion other than what is stated lies with the insurance company (see *Gaetan v Firemen's Ins. Co. of Newark, supra*; see *Seaboard Sur. Co. v. Gillette Co.*, *supra*).

Here, it is clear that the exclusion provisions relied upon by the movant are clear and unmistakable. Plaintiff, in opposition and in its' cross-motion, fails to raise any triable issues of fact concerning the interpretation of the exclusion.

Accordingly, that branch of third-party plaintiff's motion, seeking summary judgment declaring that PCIC has no duty to defend or so indemnify defendant/third-party defendant Joe Gina Contracting, Inc. is granted.

Dated: March 28, 2016



 L.S.C.

FILED
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