SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

Dorset v. 285 Madison Owner LLC

Dorset, 2023 NY Slip Op 01134 (Supreme Court of the State of New York Appellate Division First Department 2023) · No. Index No. 157440/14; Appeal No. 17426; Case No. 2022-02067 · Decided March 2, 2023

SUMMARY

The Appellate Division, First Department affirmed the denial of summary judgment sought by defendants on contractual defense and indemnification claims and a failure-to-procure-insurance claim. The court held that key contracts and deposition testimony were not properly authenticated or were improperly submitted in reply papers. It also concluded that the insurer's agreement to participate in prorated defense-cost sharing undermined defendants' prima facie showing on the insurance claim.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Renwick, J.P.; Friedman, J.; Gesmer, J.; Singh, J.; Higgitt, J.
JURISDICTION	New York
DECIDED	March 2, 2023
DOCKET	Index No. 157440/14; Appeal No. 17426; Case No. 2022-02067
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from an order denying, to the extent appealed from, defendants' motion for summary judgment on their second third-party claims against Penava Mechanical Corp. for contractual defense and indemnification and failure to procure insurance.
STANDARD OF REVIEW	De novo review of whether the movants established prima facie entitlement to summary judgment through admissible evidence.
PRECEDENTIAL VALUE	Published intermediate appellate opinion; binding precedent within the First Department subject to higher-court authority.
PARTIES	Structure Tone, Inc., 285 Madison Owner LLC, RFR Realty, LLC, RFR Holding (NY) v. Penava Mechanical Corp.

TOPICS

authentication | summary judgment | construction law | appellate procedure

PRACTICE AREAS

commercial litigation | construction law | insurance | evidence | appellate procedure

QUESTIONS PRESENTED

1. Whether defendants established prima facie entitlement to summary judgment on their contractual defense and indemnification claims through admissible, authenticated contract documents.
2. Whether documents submitted for the first time in reply or authenticated through deposition testimony concerning documents not shown to the witness could support defendants' prima facie showing.
3. Whether defendants established prima facie entitlement to summary judgment on their claim that Penava failed to procure insurance.

HOLDINGS

1. A party seeking summary judgment must support its prima facie showing with admissible evidence, and contract documents cannot be authenticated through deposition testimony when the witness was not shown the documents, did not identify them as the documents reviewed, or did not testify about the relevant contract terms.
2. A movant may not rely on evidence submitted for the first time in reply to establish its prima facie entitlement to summary judgment.
3. A party moving for summary judgment on a failure-to-procure-insurance claim must establish that a contract provision required procurement of insurance and that the provision was not complied with; an insurer's agreement to participate in prorated defense-cost sharing may undermine that prima facie showing.

KEY QUOTATIONS

> *"A party moving for summary judgment on its claim for failure to procure insurance meets its prima facie burden by establishing that a contract provision requiring the procurement of insurance was not complied with"* ([*2])

FACTUAL BACKGROUND

Defendants sought summary judgment against Penava on claims for contractual defense and indemnification and failure to procure insurance. They relied on purchase orders, subcontracts, indemnity agreements, and management or construction contracts, but several documents were not properly authenticated or were submitted for the first time in reply. Defendants also submitted an insurer's letter agreeing to participate in prorated defense-cost sharing under a blanket additional-insured endorsement, which undermined their prima facie showing that Penava failed to procure required insurance.

PROCEDURAL HISTORY

Supreme Court, New York County, denied the defendants' motion for summary judgment on their contractual defense and indemnification and failure-to-procure-insurance claims against Penava. The Appellate Division, First Department unanimously affirmed the order with costs because defendants failed to establish prima facie entitlement to judgment through admissible evidence.

DISPOSITION

affirmed

CASES CITED

- Hammer v ACC Constr. Corp., 193 AD3d 455, 457 [1st Dept 2021]
- Migdol v City of New York, 291 AD2d 201, 201 [1st Dept 2002]
- Pullman v Silverman, 28 NY3d 1060, 1062 [2016]
- Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]
- Benedetto v Hyatt Corp., 203 AD3d 505, 506 [1st Dept 2022]
- DiBuono v Abbey, LLC, 83 AD3d 650, 652 [2d Dept 2011]
- Payne v NSH Community Servs., Inc., 203 AD3d 546, 548 [1st Dept 2022]
- Perez v Morse Diesel Intl., Inc., 10 AD3d 497, 498 [1st Dept 2004]