

**Paramount Bldrs. Contr. Corp. v Nationwide Mut.
Fire Ins. Co.**

2017 NY Slip Op 32417(U)

November 14, 2017

Supreme Court, New York County

Docket Number: 652674/17

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

PARAMOUNT BUILDERS CONTRACTING CORP.,

-against- Plaintiff,

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
RGB GROUP INC., 132W26 OWNER LLC, FLATIRON
REAL ESTATE ADVISORS, LLC, JACK ANCONA and
STEVEN ANCONA,

Defendants.

INDEX NO. 652674/17
MOTION DATE 11-01-2017
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion to dismiss pursuant to CPLR §3211[a][1] and [7], and Insurance Law §3420 to dismiss and for sanctions:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendant Nationwide Mutual Fire Insurance Company's motion, pursuant to CPLR §3211[a][1] and [7], and Insurance Law §3420, for an Order dismissing plaintiff's claim for a declaratory judgment against it and pursuant to 22 NYCRR §130-1.1 for sanctions, costs and reasonable attorney's fees is granted only to the extent of dismissing plaintiff's claims for declaratory relief. The remainder of the relief sought in this motion is denied.

Plaintiff alleges RGB Group Inc. was negligent in the performance of excavation, underpinning and other related construction work during construction of a mixed use building at 132 West 26th Street, New York, New York (hereinafter the "project"). The excavation work on the project, performed by defendant RGB Group Inc., is alleged to have led to movement, settlement, tilting and racking that caused damage to the surrounding structures, including the building and apartments located on a neighboring property located at 130 West 26th Street, New York, New York. On March 26, 2014 a stop work order was allegedly issued to RGB Group Inc. for allegedly defective excavation work. In June of 2015 it is alleged that notices were issued for violation of New York City Administrative Code §3309.4, which imposes absolute liability on damage caused from an excavation. In June of 2015 a stop work order was issued for the entire project.

Effective January 27, 2014 RGB Group Inc. entered into an excavation contract with plaintiff as the "construction manager" for the project. Article 12 of the agreement is titled "Indemnity and General Insurance Requirements." Section 12.1.3 of the contract requires that RGB Group Inc. obtain Commercial General Liability Insurance with a policy limit of not less than \$1,000,000.00 per occurrence, and \$1,000,000.00 per job location, covering the liability of the Owner and Construction Manager for bodily injury and property damage arising as a result of the project, including: "e) Liability arising from explosion, collapse and underground damages" (Opp. Exh. A). Section 12.1.6 of the contract required RGB Group Inc. to provide Umbrella Liability Insurance in excess of the other coverage (Opp. Exh. A).

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

The January 27, 2014 contract included an “Exhibit C” that contains insurance and indemnification provisions requiring, under paragraph 1.4, that RGB Group Inc. provide plaintiff with insurance coverage under a Commercial General Liability policy with a minimum of not less than \$1,000,000.00 each occurrence and \$2,000,000.00 in the aggregate, and an Umbrella policy providing minimum coverage of \$5,000,000.00 with no Residential Project Exclusion (Opp. Exh. C). RGB Group Inc. provided plaintiff with a “Certificate of Liability Insurance” dated February 18, 2014 and June 4, 2014 each bearing disclaimers, and confirming coverage under Nationwide policies (Opp. Exh. E).

Nationwide Mutual Fire Insurance Company (hereinafter referred to as “Nationwide”) issued to defendant RGB Group Inc. Commercial General Liability Policy No. ACP 5406192822 and Commercial Umbrella Policy No. CAF 5406192822, with effective dates of June 1, 2013 to June 3, 2014 (Mot. Fuchs Aff. Exhs. C and D). The Nationwide policies name RGB Group Inc. as the insured, and under the Commercial General Liability policy adds unrelated third parties in specific endorsements as “additional insureds.” The complaint also refers to both the Commercial General Liability and Commercial Umbrella policies under number ACP 5416192822 covering the period of June 3, 2014 through June 3, 2015, and the Commercial General Liability and Commercial Umbrella Policy both under number ACP 5426192822 covering the period of June 3, 2015 through June 3, 2016, alleging plaintiff is an additional insured under all of the Nationwide policies.

The complaint seeks a declaration that Nationwide has breached its insurance contract and is obligated under the policies to provide indemnification and a defense on all claims asserted against plaintiff in at least six other actions.

Nationwide’s motion seeks an Order pursuant to CPLR §3211[a][1],[7] and Insurance Law §3420, dismissing plaintiff’s declaratory judgment claims asserted against Nationwide and for sanctions pursuant to 22 NYCRR §130-1.1.

Nationwide argues that plaintiff is not named as either an “insured” or “additional insured” under any endorsement in the policies and as such is a stranger to the policies. It is further alleged that as a mere stranger to the policies and due to the lack of a judgment against the named insured, plaintiff’s claims asserted directly against Nationwide for declaratory relief are barred by Insurance Law §3420.

A motion to dismiss pursuant to CPLR §3211[a][1] requires that the party seeking dismissal produce documentary evidence that “utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y. 2d 314, 774 N.E. 2d 1190, 746 N.Y. 2d 858 [2002]).

The “Contractor’s Enhancement Plus Endorsement” of Nationwide’s Commercial General Liability Policy No. ACP 5406192822. At pages 2 through 6 of 6, CG73 67 11 11, titled “Additional Insured - When Required in an Agreement or Contract With You Primary and Non-contributory,” the policy specifically states:

“Any person(s) or organization(s) with whom you have agreed in a valid written contract or written agreement that such person or organization be added as an additional insured on your policy during the policy period shown in the Declarations. Such person or organization is an additional insured only with respect to liability for...“property damage.

The person or organization added as an insured by this endorsement is an insured only to the extent you are held liable due to:

...d. Owners Lessees, or Contractors

... “property damage” caused in whole or in part by:

(1) Your acts or omissions, or

- (2) The acts or omissions of those acting on your behalf, ...in the performance of your ongoing operations performed for that additional insured, whether the work is performed by you or on your behalf.” (Mot. Exh. C)

The enhancement endorsement by its language requires that Nationwide’s coverage exist for plaintiff only when RGB Group is “held liable.” Plaintiff’s reliance on the enhancement endorsement in the Nationwide Commercial General Liability Policy No. ACP 5406192822 and on the Certificate of Liability Insurance” dated February 18, 2014 and June 4, 2014, each bearing disclaimers, does not establish it is an additional insured under Nationwide’s policies (*West 64th Street, LLC v. Axis U.S. Ins.*, 63 A.D. 3d 471, 882 N.Y.S. 2d 22 [1st Dept.2009] and *Three Boroughs, LLC v. Endurance American Specialty Insurance Company*, 143 A.d. 3d 480, 38 N.Y.S. 3d 421 [1st Dept. 2016]).

Dismissal pursuant to CPLR §3211[a][7] requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and is properly pled. A cause of action has to present facts so that it can be identified and establish a potentially meritorious claim (*Leon v. Martinez*, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Pleadings that consist of bare legal conclusions and factual assertions which are clearly contradicted by evidence will not be presumed to be true and are susceptible to dismissal (*Dragon Head LLC v. Elkman*, 102 A.D. 3d 552, 958 N.Y.S. 2d 134 [1st Dept., 2013]).

Nationwide provides proof that the Commercial General Liability and Commercial Umbrella policies under ACP 5416192822 covering the period of June 3, 2014 through June 3, 2015 were cancelled as a result of their expiration, and subsequent renewal policies were not issued (Reply Jensen Aff., Exhs. H and I). The Commercial General Liability and Commercial Umbrella Policy under number ACP 5426192822 covering the period of June 3, 2015 through June 3, 2016 do not exist, and plaintiff’s claims concerning those policies are dismissed.

The language of the enhancement provisions permitting plaintiff to be an additional insured provides coverage “only to the extent that you [RGB Group Inc.] are held liable” and “property damage” caused in whole or in part by your acts or omissions...” (Mot. Exh. C). There has been no determination of RGB Group Inc.’s negligence or liability, a condition precedent to coverage, and as such it cannot at this time be determined whether plaintiff’s claim falls within the enhancement endorsements (See *Burlington Ins. Co. v. NYC Transit Authority*, 29 N.Y. 3d 313, 79 N.E. 3d 477, 57 N.Y.S. 3d 85 [2017] and *Crespo v. City of New York*, 303 A.D. 2d 166, 756 N.Y.S. 2d 183 [1st Dept., 2003]).

Nationwide has met its burden on a motion to dismiss by showing that plaintiff is not a specifically named insured under the policies. The lack of a judgment on liability against RGB Group Inc., renders plaintiff’s claims asserted directly against Nationwide for declaratory relief premature and barred pursuant to Insurance Law §3420.

The purpose of Insurance Law § 3420 [d] is to protect the insured, injured party or any other claimant that has an interest in the outcome from prejudice resulting from a delayed denial of coverage (*Admiral Ins. Co. v. State Farm Fire & Cas. Co.*, 86 A.D. 3d 486, 927 N.Y.S. 2d 629 [1st Dept., 2011]). Insurance Law § 3420 grants plaintiff the right to sue Nationwide but only under limited circumstances, plaintiff must first obtain a judgment against RGB Group, Inc., seek payment and wait for 30 days, before bringing a direct action (*Lang v. Hanover Insurance Co.*, 3 N.Y. 3d 350, 820 N.E. 2d 855, 787 N.Y.S. 2d 211 [2004]).

Plaintiff does not refer to any judgment in the six pending actions against RGB Group Inc. and under the plain language of the Nationwide insurance policies is not

entitled to a defense or indemnification at this time, warranting dismissal of the claims asserted against Nationwide for failure to state a cause of action. Plaintiff has not established a basis to deny the declaratory relief sought.

22 N.Y.C.R.R. §130-1.1[a] allows the Court in its discretion to impose costs and sanctions for frivolous conduct. "Frivolous conduct can be defined in any of three manners: [1] The conduct is without legal merit, or [2] is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another, [3] or asserts material factual statements that are false" (Levy v. Carol Mgt. Corp., 260 A.D.2d 27, 698 N.Y.S.2d 226 [1st Dept., 1999]). Frivolous conduct requires the court to consider "the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis for the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel" (Borstein v. Henneberry, 132 A.D. 447, 17 N.Y.S. 3d 414 [1st Dept., 2015]).

The enhancement provisions of Nationwide's policies include plaintiff as an additional insured under limited circumstances. Plaintiff brought this action for coverage and clarification of its rights, if any, to indemnification and contribution under the policies. This conduct is not frivolous or sanctionable.

Accordingly, it is ORDERED that defendant Nationwide Mutual Fire Insurance Company's motion, pursuant to CPLR §3211[a][1] and [7], and Insurance Law §3420, for an Order dismissing plaintiff's claim for a declaratory judgment against it and pursuant to 22 NYCRR §130-1.1 for sanctions, costs and reasonable attorney's fees is granted only to the extent of dismissing plaintiff's claims for declaratory relief, and it is further,

ORDERED that plaintiff's causes of action for a declaratory judgment against Nationwide Mutual Fire Insurance Company are severed and dismissed, and it is further,

ORDERED that this action continues as to the claims asserted against the remaining defendants, and it is further,

ORDERED that the remainder of the relief sought in this motion pursuant to 22 NYCRR §130-1.1 for sanctions, costs and reasonable attorney's fees is denied, and it is further,

ORDERED that Nationwide Mutual Fire Insurance Company serve a copy of this Order with Notice of Entry on all parties, the County Clerk and the Trial Support Clerk located in the General Clerk's Office, who are directed to dismiss the claims asserted against Nationwide Mutual Fire Insurance Company in this action, and it is further,

ORDERED that the remaining parties are directed to appear in IAS Part 13, at 71 Thomas Street, Room 210, on December 20, 2017, at 9:30 a.m. for a preliminary conference.

ENTER:



MANUEL J. MENDEZ,
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Dated: November 14, 2017

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE