Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____ Argued - February 11, 2008

ROBERT A. SPOLZINO, J.P.
ANITA R. FLORIO
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON, JJ.

2005-11030 DECISION & ORDER
2006-03591

Raymond C. Wronka, plaintiff, v GEM Community Management, et al., defendant third-party plaintiffs-respondents-appellants; Farm Family Casualty Insurance Company, third-party defendant-appellant-respondent.

(Index No. 2861/03)

MacVean, Lewis, Sherwin & McDermott, P.C., Middletown, N.Y. (Paul T. McDermott of counsel), for third-party defendant-appellant-respondent.

Pinsky & Skandalis, Syracuse, N.Y. (Lauren M. Miller of counsel), for defendants third-party plaintiffs-respondents-appellants.

In an action to recover damages for personal injuries, and a third-party action, inter alia, for contractual indemnification and to recover the defense costs incurred in the main action pursuant to the terms of a liability insurance policy, (1) Farm Family Casualty Insurance Company appeals from (a) so much of an order of the Supreme Court, Orange County (Slobod, J.), dated September 21, 2005, as granted that branch of the motion of GEM Community Management and Hillside Village Condominium Association which was to direct it to pay, pursuant to the terms of its liability insurance policy, the defense costs incurred in the main action prior to July 6, 2005, and denied its cross motion to dismiss the third-party complaint, and (b) so much of an order of the same court dated March 2, 2006, as, upon granting its motion for leave to reargue that branch of the motion of GEM Community Management and Hillside Village Condominium Association, and its cross motion, adhered to the original determination, and (2) GEM Community Management and Hillside Village Condominium Association cross-appeal from (a) so much of the order dated September 21, 2005, as denied those branches of their motion which were to direct Farm Family

Casualty Insurance Company to pay, pursuant to the terms of its liability insurance policy, the defense costs incurred in the main action after July 6, 2005, and for contractual indemnification in the main action, and denied those branches of their motion which were for leave to amend the third-party complaint to add a cause of action alleging breach of contract, and for summary judgment as to that cause of action, and (b) so much of the order dated March 2, 2006, as, upon granting their cross motion for leave to reargue those branches of their motion which were to direct Farm Family Casualty Insurance Company to pay, pursuant to the terms of its liability insurance policy, the defense costs incurred in the main action after July 6, 2005, and for contractual indemnification in the main action, adhered to the prior determination.

ORDERED that the appeal from the order dated September 21, 2005, is dismissed, without costs or disbursements, as that portion of the order was superseded by the order dated March 2, 2006, made upon reargument; and it is further,

ORDERED that the cross appeal from so much of the order dated September 21, 2005, as denied those branches of the motion of GEM Community Management and Hillside Village Condominium Association which were to direct Farm Family Casualty Insurance Company to defend them, pursuant to the terms of its liability insurance policy, in the main action after July 6, 2005, and indemnify them in the main action, is dismissed, without costs or disbursements, as those portions of the order were superseded by the order dated March 2, 2006, made upon reargument; and it is further,

ORDERED that the order dated September 21, 2005, is reversed insofar as reviewed, on the law, without costs or disbursements, and those branches of the motion of GEM Community Management and Hillside Village Condominium Association which were for leave to amend the third-party complaint to add a cause of action alleging breach of contract, and for summary judgment on that cause of action, are granted; and it is further,

ORDERED that the order dated March 2, 2006, is modified, on the law, without costs or disbursements, by deleting the provision thereof which, upon reargument, adhered to so much of the original determination dated September 21, 2005, as granted that branch of the motion of GEM Community Management and Hillside Village Condominium Association which was to direct Farm Family Casualty Insurance Company to pay, pursuant to the terms of its liability insurance policy, the defense costs incurred in the main action prior to July 6, 2005, and substituting therefor a provision, upon reargument, vacating that portion of the order dated September 21, 2005, and thereupon, denying that branch of the motion; as so modified, the order is affirmed insofar as appealed and cross-appealed from.

The plaintiff slipped on ice on a walkway on property owned by Hillside Village Condominium Association (hereinafter Hillside) and managed by GEM Community Management (hereinafter GEM), and commenced this action against them. GEM and Hillside then commenced a third-party action against Keller Equipment Rental & Sales West, Inc. (hereinafter Keller), the contractor responsible for snow and ice removal on the property, and Keller's insurer, Farm Family Casualty Insurance Company (hereinafter Farm Family), for contractual indemnification and to recover the defense costs incurred in the main action pursuant to the terms of Farm Family's liability

insurance policy. GEM and Hillside are additional insureds on the Farm Family policy. By order dated July 6, 2005, the court granted Keller's motion for summary judgment dismissing the third-party complaint insofar as asserted against it.

The Supreme Court erred in granting that branch of the motion of GEM and Hillside which was to direct Farm Family to pay, pursuant to the terms of its liability insurance policy, the defense costs incurred in the main action prior to July 6, 2005. The claims against Keller have been dismissed. Farm Family may properly deny coverage pursuant to the terms of its liability insurance policy since it has been determined that the injuries did not result from a covered accident (*see Central Gen. Hosp. v Chubb Group of Ins. Cos.,* 90 NY2d 195; *Town of Oyster Bay v Employers Ins. of Wausau,* 269 AD2d 387).

That branch of the motion of GEM and Hillside which was for leave to amend the third-party complaint to add a cause of action alleging breach of contract against Farm Family should have been granted. Leave to amend shall be granted freely upon such terms as may be just (*see* CPLR 3025[b]). Here, GEM and Hillside did not unreasonably delay in seeking leave to amend, and no prejudice to Farm Family has been shown (*see Santori v Met Life,* 11 AD3d 597; *cf. Haller v Lopane,* 305 AD2d 370).

Furthermore, upon amendment of the third-party complaint to assert a cause of action alleging breach of contract, GEM and Hillside were entitled to summary judgment as to that cause of action. Farm Family failed to raise an issue of fact in response to GEM and Hillside's showing of prima facie entitlement to judgment as a matter of law that Farm Family agreed to share the costs of the defense in the main action. When parties enter into a preliminary agreement, anticipating that a more formal contract will be executed later, the contract is enforceable if it embodies all the essential terms of the agreement (*see Pescatore v Manniello,* 19 AD3d 571; *Sabetfard v Djavaheri Realty Corp.,* 18 AD3d 640). Furthermore, an exchange of correspondence between counsel may constitute a binding stipulation pursuant to CPLR 2104 (*see Roberts v Stracick,* 13 AD3d 1208; *Gaglia v Nash,* 8 AD3d 992). Here, the material terms of the stipulation were set forth in a letter from counsel for Farm Family to counsel for GEM and Hillside dated May 4, 2005, and confirmed in a reply from counsel for GEM and Hillside to counsel for Farm Family dated May 26, 2005. Farm Family now seeks to avoid enforcement of the terms that Farm Family itself proposed (*see Stafaniw v Cerrone,* 130 AD2d 483). We conclude that the exchange of correspondence presented here was sufficient to constitute an enforceable stipulation in the third-party action.

The parties' remaining contentions are without merit.

SPOLZINO, J.P., FLORIO, ANGIOLILLO and DICKERSON, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court