

Macklowe Org. v K.G. Mech. Inc.

2008 NY Slip Op 32897(U)

October 20, 2008

Supreme Court, New York County

Docket Number: 104429/07

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

Index Number : 104429/2007
MACKLOWE ORGANIZATION
vs
K.G.MECHANICAL INC.
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. 104429/07
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

is motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-G
Cross-Motion
Answering Affidavits — Exhibits _____
Replying Affidavits Exch. H-J
Reply ~~A~~ Exch. on cross-motion
Cross-Motion: Yes No

PAPERS NUMBERED	
1	_____
2,3	_____
4,5	_____
6	_____

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

Upon the foregoing papers, it is ordered that this motion and cross-motion are
decided in accordance with the attached decision
and order.

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OCT 23 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: October 20, 2008

MARTIN SHULMAN J.S.C.

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Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
THE MACKLOWE ORGANIZATION, THATCH
RIPLEY & CO., LLC, and GOTHAM GREENWICH
CONSTRUCTION COMPANY, LLC,

Plaintiffs,

-against-

Index No. 104429/07

K.G. MECHANICAL INC., GREAT AMERICAN
E&S INSURANCE COMPANY, ROBERT AMITRANO
and ANDREA AMITRANO, W & W GLASS
SYSTEMS, INC., W & W GLASS, LLC, and SORBARA
CONSTRUCTION CORP.,

Defendants.

MARTIN SHULMAN, J.:

Plaintiffs The Macklowe Organization ("Macklowe"), Thatch, Ripley & Co., LLC ("Thatch") and Gotham Greenwich Construction Company, LLC ("Gotham") (collectively "plaintiffs") move, pursuant to CPLR 3212, for an order granting summary judgment compelling defendant Great American E&S Insurance Company ("Great American") to provide a defense and indemnification to the plaintiffs under a policy of insurance issued to defendant KG Mechanical, Inc. ("KG Mechanical"). Great American opposes the motion and cross-moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint against it.

Plaintiffs Macklowe and Thatch were the owners of a building under construction. Plaintiff Gotham was the construction manager. A non-party, Trystate Mechanical, Inc. ("Trystate") was the HVAC subcontractor for the project. Pursuant to a written sub-subcontract with Trystate, KG Mechanical was installing pipe risers in the building when one of KG Mechanical's employees, defendant Robert Amitrano ("Amitrano"), was

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injured in a trip and fall accident. In this declaratory judgment action, plaintiffs seek a defense and indemnification from Great American in an underlying Labor Law personal injury action Amitrano commenced against plaintiffs.

In support of their motion for summary judgment, plaintiffs argue that the subject policy's additional insured endorsement includes as an insured any entities that KG Mechanical has agreed to name as such, and that the sub-subcontract between KG Mechanical and Trystate expressly provides that KG Mechanical name the contractor and the owner as additional insureds. In opposition to the motion for summary judgment, and in support of its cross motion for summary judgment, Great American argues that because the plaintiffs are not in direct privity of contract with KG Mechanical, they cannot qualify as additional insureds under the Great American policy (citing Linarello v City University of New York, 6 AD3d 192 [1st Dept 2004]).

Part A, section II of the Great American policy's additional insured endorsement defines an additional insured as:

. . . any person or organization for whom you are performing operations, **when you and such person or organization have agreed in writing in a contract or agreement** that such person or organization be added as an additional insured on your policy. . . (Emphasis added)

As Great American correctly notes, Linarello v City University of New York, *supra*, involved interpretation of an additional insured endorsement identical to the one contained in Great American's policy with KG Mechanical.

There, the First Department affirmed an award of summary judgment in favor of two insurance carriers, declaring that they were not obligated to defend or indemnify a construction manager where their insureds had written contracts only with the site

[* 4]

owner. The fact that the contracts between the site owner and insured subcontractors required them to name as additional insureds anyone designated by the site owner was of no moment given the policy's plain language.

As the lower court noted in Linarello, an insurer is not bound by the terms of its insured's contracts with third parties. To find otherwise would in effect rewrite the terms of the insurance policy. The language in the subject policy does not provide insurance coverage for anyone for whom the insured is required to obtain additional insured coverage. Rather, the policy clearly restricts coverage to those with whom the insured has a written contract.

Insurance Corp. of New York v Central Mut. Ins. Co., 47 AD3d 469 (1st Dept. 2008), which plaintiffs rely upon to refute the holding in Linarello, is inapplicable to this analysis. There, the court did not interpret the policy's definition of an additional insured, but rather found that an issue of fact existed as to whether the contract between a general contractor and a subcontractor required the subcontractor to name the general contractor and site owner as additional insureds.

For the above reasons, plaintiffs cannot qualify as additional insureds under the terms of Great American's policy with KG Mechanical and as such, plaintiffs' motion for summary judgment is denied and Great American's cross-motion for summary judgment dismissing the complaint as against it is granted. Given the foregoing determination, the court need not address the parties' claims with respect to the sub-subcontract's insurance requirements. Accordingly, it is

ORDERED that the motion is denied and the cross motion is granted; and it is further

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ORDERED that the Clerk is directed to enter judgment dismissing the complaint as against defendant Great American E&S Insurance Company; and it is further

ORDERED that the action is severed and continued as to the remaining defendants.

Counsel for plaintiffs and the remaining defendants are directed to appear for a preliminary conference on November 25, 2008 at 9:30 a.m., 111 Centre Street, Room 1127B, New York, New York. Plaintiffs' counsel is directed to notify the remaining defendants who have appeared in this action of the scheduled conference date forthwith.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for plaintiffs and Great American.

Dated: New York, New York
October 20, 2008



Hon. Martin Shulman, J.S.C.

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