

J.M. Elec. Corp. v Nationwide Mut. Fire Ins. Co.

2010 NY Slip Op 31332(U)

May 28, 2010

Sup Ct, NY County

Docket Number: 100712/2009

Judge: Jane S. Solomon

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6/1/2010
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5-28-10
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JANE S. SOLOMON

PART 55

Index Number : 100712/2009

Justice

J.M. ELECTRIC CORP.,

INDEX NO. 100712-09

vs.
NATIONWIDE MUTUAL FIRE INSURANCE CO.,

MOTION DATE 11/16/09

SEQUENCE NUMBER : # 001

MOTION SEQ. NO. #001

SUMMARY JUDGMENT

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Noticed & motion
Answering Affidavits — Exhibits

1-4
5-12
13-15

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the aforesaid Memorandum decision, order and declaratory judgment.

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be given hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 144B).

Dated: 5/28/10

JANE S. SOLOMON

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x

J.M. ELECTRICAL CORP.,

Plaintiff,

Index No.: 100712/2009

-against-

DECISION, ORDER, and
DECLARATORY JUDGMENT

NATIONWIDE MUTUAL FIRE INSURANCE
COMPANY,

SOLOMON, J.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk Room
1412).

Defendant Nationwide Mutual Fire Insurance Company
(Nationwide) moves for summary judgment in this action for
declaratory judgment regarding the scope of the insurer's
obligation to pay defense costs. Plaintiff J.M. Electrical Corp.
(JMEC) cross moves for summary judgment. The motions are granted
in part for the reasons below.

JMEC is an electrical contractor. Nationwide issued to
JMEC a commercial general liability insurance policy, which was
in effect from February 19, 2002 to February 19, 2003 (see
Policy, annexed to Notice of Cross Motion, Ex. 4). The Policy
covers bodily injury claims against JMEC, and said coverage
extends to liability to JMEC arising from a contractual
obligation to indemnify another party, provided that the contract
is an "insured contract", and that the bodily injury occurred
subsequent to the execution of the "insured contract." An
"insured contract", as relevant here, is defined as "That part of
any other contract or agreement pertaining to your business . . .

under which you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement."

(Policy, Commercial General Liability Policy Form, Section V - Definitions, paragraph f).

Also, the Policy provides that it covers damages because of bodily injury, subject to certain exclusions (Policy, Commercial General Liability Policy Form, Section I - Coverages). Damages the insured is obligated to pay by reason of the assumption of liability in a contract are excluded, subject to certain limits (*id.*, at paragraph 2[b]). The exclusion does not apply to liability assumed in an "insured contract" (*id.*, at paragraph 2[b][2]). The coverage includes reasonable attorney's fees and litigation expenses.

The Policy further states that if Nationwide defends an insured in a suit, and an indemnitee also is a party to the suit, it will defend the indemnitee if: The suit against the indemnitee seeks damages for which JMEC assumed liability in an "insured contract"; the insurance applies to such liability (e.g., for a bodily injury claim allegedly arising from JMEC's work); the obligation to defend, or the cost of defense, was assumed by JMEC in the same "insured contract"; the allegations in the suit are such that no conflict appears to exist between the interests of

JMEC and the indemnitee¹; and the indemnitee cooperates with Nationwide (Policy, Commercial General Liability Policy Form, Section I - Supplemental Coverages A and B).

The Rockefeller University undertook a renovation project at its Manhattan property, and hired Barr & Barr, Inc. as its general contractor. Barr & Barr entered into a subcontract with Siemens Building Technologies, Inc. (Siemens) to perform electrical work on the project. In turn, Siemens hired JMEC pursuant to a separate subcontract to perform some of its work (see JMEC Subcontract, annexed to Notice of Cross Motion, Ex. 3).

Barr & Barr also hired an HVAC subcontractor to work on The Rockefeller University project.

Article 11 to the JMEC Subcontract requires JMEC to indemnify Siemens from any losses, including reasonable attorneys fees and costs, arising out of JMEC's negligence or violation of any law, regulation or ordinance of any governmental body, including those dealing with health and safety. The JMEC Subcontract has a separate rider, called Exhibit E, that specifies insurance procurement requirements JMEC had to satisfy. Under Exhibit E, JMEC was to procure insurance naming Siemens as an additional insured (Subcontract, Exhibit E, Article 5).

On September 20, 2002, an HVAC worker named Cortese

¹ Presumably, who will pay damages and litigation expenses is not a "conflict" for the purposes of this section, or else it would be nonsensical.

Severo (Severo) tripped over a piece of wire or cable on the floor, sustaining a knee injury. He filed a lawsuit against The Rockefeller University, Barr & Barr and Dooley Electrical Company, Inc., alleging common law negligence and violations of New York Labor Law sections 200, 240 and 241(6) (see Summons and Complaint in *Severo v The Rockefeller University*, N.Y. County Index No. 108138/05, annexed to Notice of Motion at Ex. 1). The Rockefeller University and Barr & Barr commenced a third-party action against the HVAC subcontractors, and later, in February 2007, they filed a third-party action against Siemens. The complaint against Siemens alleges negligence, common law indemnification and contractual indemnification. In May 2007, Siemens filed a third-party action against JMEC on the grounds of negligence, common law contribution and indemnity, contractual indemnification and breach of contract for failing to purchase insurance naming Siemens as an additional insured.

By a letter dated May 21, 2007, counsel for Siemens tendered its defense and indemnity to JMEC and Nationwide, both for contractual indemnification and as an additional insured on the JMEC Policy (Notice of Cross-Motion, Ex. 5.). Nationwide declined coverage in a June 29, 2007 letter, on the grounds that the Policy does not name Siemens as an additional insured, and due to late notice (*id.*). At about the same time as the Siemens tender, JMEC notified Nationwide of the Siemens complaint against

it, and Nationwide responded with a July 6, 2007 letter agreeing to defend and indemnify JMEC up to policy limits (Notice of Cross-Motion, Ex. 6).

In the underlying action, Siemens sought summary judgment against JMEC on its contractual indemnification and breach of contract claims, and JMEC cross-moved for summary judgment in its favor. JMEC argued (1) that Severo's injury did not arise from its work because the cable he fell over was not of the sort JMEC used on the project, and (2) that it did procure insurance with Siemens as an additional insured. The court held that there was a question of fact as to whether JMEC was a source of the offending cable, but that Siemens had established that JMEC breached its contractual obligation to procure insurance because Siemens was not afforded additional insured status under the Nationwide policy (Decision and Order, dated April 14, 2008, annexed to Notice of Motion at Ex. 12 [hereinafter the "Underlying Decision"]). The Underlying Decision quoted Nationwide's letter declining coverage, which states that JMEC's "policy of insurance does not name [Siemens] as an additional insured." (Underlying Decision, 9). The court granted summary judgment to Siemens on that basis only (*id.*).

Severo settled his lawsuit in May 2008 for \$165,000, with Nationwide contributing \$10,000 on JMEC's behalf. Siemens persisted in its claim against JMEC to recover legal fees under

indemnification claim, and that this issue was not presented or determined in the Severo litigation. JMEC further contends that the Policy provides coverage for Siemens's costs and attorney's fees incurred in defending the Severo action. JMEC also argues, citing *Bi-Economy Market, Inc. v Harleystown Ins. Co.*, 10 NY3d 187 (2008), that it is entitled to recover consequential damages it incurred, in the form of attorney's fees, to defend against the Siemens lawsuit. JMEC concedes that, under the Policy, Siemens was not an additional insured, so on this point Nationwide is entitled to a declaration in its favor.

DISCUSSION

Under the doctrine of *res judicata*, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again.

(*In Re Hunter*, 4 NY3d 260, 269 [2004] [citations omitted]).

The Underlying Decision is addressed to the factual circumstances surrounding Severo's accident, and whether JMEC complied with the terms of its subcontract agreement with Siemens. Nationwide was not a party to that action, and although the question of whether Siemens was an additional insured under the Policy was litigated, that issue has been conceded, and no

other issues present here were determined in the Underlying Decision. Nationwide has not met its burden of showing that the present dispute is barred by res judicata.

"Collateral estoppel bars relitigation of an issue which has been decided in a prior action and is decisive of the present action if there has been a full and fair opportunity to contest the decision now said to be controlling" (*Tydings v Greenfield, Stein & Senior, LLP*, 11 NY3d 195 [2008], quoting *Buechel v Bain*, 97 NY2d 295, 303-304 [2001]). The Underlying Decision was decisive on the issue of whether JMEC adhered to the terms of its contract with Siemens to make it an additional insured on JMEC's insurance policy, but not on the issue of whether their contract was an "insured contract" under the Policy, or whether Nationwide was obligated to pay defense costs. Contrary to Nationwide's argument, the Underlying Decision did not state that Nationwide has no duty to defend Siemens (Reply Aff. of Joseph E. Kelly, Jr., para. 25), rather it held JMEC responsible to Siemens because the Policy did not meet the requirements set forth in Exhibit E to the JMEC Subcontract. The Underlying Decision did not exculpate Nationwide of its obligations to JMEC. Accordingly, Nationwide's motion for summary judgment is denied.

The cross-motion is granted because the JMEC Subcontract is an "insured contract". The indemnification clause

[* 9]

in the JMEC Subcontract applies to claims by The Rockefeller University and Barr & Barr that Siemens had tort liability for an injury, such as that claimed by Severo, allegedly arising from the negligent performance of work under the contract between Barr & Barr and Siemens. This liability, if proven, would be imposed by law in the absence of a contract, and is "tort liability" as defined in the Policy. Therefore, under the circumstances presented, the JMEC Subcontract is an "insured contract" within the Policy definition, and is not subject to any Policy exclusion.

In opposing the cross-motion, Nationwide contends that even if the JMEC Subcontract is an "insured contract," and Siemens could have been afforded coverage under the Policy, coverage was properly declined due to late notice of the claim from Siemens. This argument fails, however, because there is no evidence showing that Siemens was dilatory in giving notice. It sent a tender letter to Nationwide on or about May 21, 2007. The summons and complaint against it is dated February 22, 2007, but there is no proof showing when the papers were received by Siemens.

Finally, JMEC is entitled to summary judgment on its claim for consequential damages arising from Nationwide's breach of contract (as opposed to damages arising from coverage issues). The party breaching a contract is liable for those risks foreseen

or foreseeable at the time the contract was made (*Ashland Mgmt. v Janien*, 82 NY2d 385 [1993]). The nonbreaching party may recover general damages which are the natural and probable consequence of the breach (*Bi-Economy Market, Inc. v Harleysville Ins. Co. Of New York*, 10 NY3d at 192, quoting *Kenford Co. v County of Erie*, 73 NY2d 312 [1989]). Here, the legal fees incurred by JMEC defending against Siemens's breach of contract claim are a foreseeable consequence of Nationwide's refusal to pick up Siemens's defense in the Underlying Action, having learned that JMEC was contractually obligated to indemnify Siemens pursuant to a contract, and that litigation against Siemens and JMEC was already underway. Moreover, Nationwide's declination of coverage referenced only Siemens's claim for coverage as an additional insured, and ignored the claim that it was JMEC's indemnitee under a contract (see, Notice of Cross-Motion, Ex. 5).

It hereby is

ORDERED that the motions by Nationwide and cross-motion by JMEC are granted in part in accordance with the foregoing; and it further is

ADJUDGED and DECLARED that Nationwide was and is obligated to defend and indemnify Siemens in the *Severo v The Rockefeller University* action (New York County index number 108138/05, and third-party index number 590203/07) under the Policy, and must reimburse JMEC \$60,000 paid to settle Siemens's

[*11]

indemnification claim on account of legal fees and costs, plus interest at the statutory rate from October 16, 2008, and the Clerk of the Court shall enter judgment accordingly; and it further is

ADJUDGED and DECLARED that Siemens was not and is not an additional insured under the Policy; and it further is

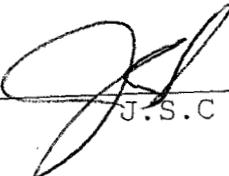
ORDERED that JMEC is granted summary judgment on its breach of contract claims for the \$60,000 paid to Siemens, and summary judgment is granted as to liability for JMEC's legal fees and costs incurred defending itself from Siemens's claim in the underlying action, and the issue of the amount of reasonable attorney's fees and costs incurred by JMEC, together with interest thereon, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it further is

ORDERED that entry of a money judgment, and entry of a final judgment hereon, is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it further is

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Special Referee (Room 119) to arrange a date for the reference to a Special Referee.

Dated: May 28, 2010

ENTER:



J.S.C

JAMES S. SOLOMON

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).