

**LMJ Contr. Inc. v MT. Hawley Ins. Co.**

2011 NY Slip Op 32527(U)

September 17, 2011

Sup Ct, Nassau County

Docket Number: 1065/11

Judge: Roy S. Mahon

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SCAN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ROY S. MAHON**  
**Justice**

**LMJ CONTRACTING INC.,**

**Plaintiff(s),**

**- against -**

**MT. HAWLEY INSURANCE COMPANY, AMELIA  
PINNELLA, SVF 201 MELVILLE, LLC, TLA  
and GBM SERVICES, INC.,**

**Defendant(s).**

**TRIAL/IAS PART 6**

**INDEX NO. 1065/11**

**MOTION SEQUENCE  
NO. 1**

**MOTION SUBMISSION  
DATE: July 6, 2011**

**XXX**

**The following papers read on this motion:**

- |                          |          |
|--------------------------|----------|
| <b>Notice of Motion</b>  | <b>X</b> |
| <b>Affirmation</b>       | <b>X</b> |
| <b>Reply Affirmation</b> | <b>X</b> |
| <b>Memorandum of Law</b> | <b>X</b> |

Upon the foregoing papers, the motion by the plaintiff for an Order for summary judgment declaring that the defendant, Mt. Hawley Insurance Company, is obligated to defend and indemnify the plaintiff in a action pending in the Supreme Court State of New York, County of Nassau, entitled Amelia Pinnella v SVF 201 Melville, LLC v LMJ Contracting Inc. (the Second Third-Party action), under Index No. 3466/2008 and awarding plaintiff with all reasonable defense expenses incurred to date in the foregoing matter, is determined as hereinafter provided:

The plaintiff in the instant action entered into a contract dated May 9, 2007 with the defendant SVF 201 Melville, LLC to act as construction manager for certain renovations that were to be performed at properly located at 201 Old Country Road, Melville, New York. The Court observes that the respective submissions establish that there were various subcontractors working at this location.

On September 13, 2007 an individual named Amelia Pinnella contends that she was caused to slip and fall upon alleged debris on a stairwell. Ms. Pinnella commenced an action filed on February 25, 2008 naming as defendants SVF 201 Melville, LLC and Tomco Construction. Thereafter SVF 201 Melville, LLC commenced a third-party action against GBM Services, Inc., which was filed on April 24, 2009 and then a second third party action against LMJ Contracting Inc., the plaintiff herein was served upon LMJ Contracting Inc. on October 25, 2010. LMJ Contracting, Inc. forwarded a copy of the second third party complaint to its

insurance broker who forwarded the pleadings to the defendant Mt. Hawley Insurance Company which had issued certain policies of insurance insuring the plaintiff herein at the time of the incident involving Ms. Pinnella which was received on October 27, 2010 by Mt. Hawley Insurance Company. Contending that LMJ Contracting Inc. was aware of the underlying incident relatively contemporaneously with the event on September 13, 2007, the defendant Mt. Hawley Insurance Company by correspondence dated November 23, 2010 declined coverage. The plaintiff thereafter commenced the instant declaratory judgment action.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

In support of the plaintiff's application the plaintiff, amongst other things, submits an affidavit of Mark Seiden, the plaintiff's President and an affidavit of Matt Borowski, the plaintiff's job supervisor for the work being performed at 201 Old Country Road, Melville, NY. In pertinent part, Mr. Seiden sets forth:

"3. Initially, a brief history of the events which lead up to the instant matter is required.

4. On or about May 9, 2007 LMJ entered into a contract with SVF 201 Melville, LLC, ("SVF") for the purpose of performing certain renovations to 201 Old Country Road, Melville, New York (the "Property"). (A copy of the contract is annexed hereto and made a part hereof as Exhibit "P").

5. At all times hereinafter mentioned, the Defendant, Mt. Hawley Insurance Company ("Mt. Hawley") issued a general liability policy (MGL0147977) and commercial excess liability policy (MXL0366046) of insurance to LMJ (hereinafter referred to as the "Policies") which were in effect and covered the type of loss alleged in the Pinnella Action.

6. LMJ acted as the construction manager for SVF with regard to the renovations. This involved LMJ entering into various subcontracts with regard to the renovations. LMJ did not perform any of the actual work itself. There were no employees fo LMJ performing any of the renovations at the Property. In fact, the only person working at the Property on behalf of LMJ was Mr. Matt

Borowski, LMJ's "Job Supervisor."

7. As the Job Supervisor Mr. Borowski would report to the Property each day that LMJ's subcontractors were at the Property working. His responsibilities were to act as a liaison between, LMJ, the subcontractors and the property manager, Mr. Jon Brengel. This would include, among other things, the scheduling of subcontractors to ensure there was minimal disruption and/or inconvenience to the tenants, addressing any issues/complaints that may arise during the renovations, and reporting any accidents/occurrences related to the renovations to me.

8. If there were any accidents/occurrences that were related to the renovations, they would have been brought to Mr. Borowski's attention, who in turn, would have notified me. At no time did Mr. Borowski, or, for that matter, anyone else, ever relay any such information to me.

9. It should also be noted that I believe that the renovations at the Property may have been completed before September 13, 2007, the date of Ms. Pinnella's incident. The basis of my belief is the fact that there was a "walk through" performed at the Property on August 30, 2007, that resulted in a "punch list." A "punch list" represents the minimal "finishing, touch-up" work that remains and is generally completed within two weeks of the walk through. Annexed hereto and made a part hereof as Exhibit "N" is a copy of the punch list.

10. At no time prior to the service of the Second Third-Party Complaint did LMJ receive any complaints with regard to the renovations being performed at the Property, more specifically, that there was any construction debris in any of the stairwells in the Property. LMJ was never notified that there was any occurrence at the Property that might even remotely involve LMJ and/or its subcontractors.

11. It is also important to point out that, there were no renovations being performed in any of the stairwells at the Property by LMJ or any of our subcontractors and that all the subcontractors used the service elevator when going from one floor to another.

12. The first notice that I received with regard to the occurrence that gave rise to the Pinnella Action was my receipt of the Second Third-Party Complaint, on October 25, 2010. I can state without reservation that, prior to my receipt of the foregoing legal papers, I had absolutely no knowledge or notice of either the occurrence or the lawsuit.

13. Upon my receipt of the Second Third-Party Complaint I immediately forwarded it to our broker, B & G Group, which is my common practice upon receipt of such papers. B & G Group, then forwarded same to Mr. Hawley seeking a defense and indemnification on LMJ's behalf pursuant to the Policies. Mt. Hawley acknowledged receiving the Second Third-Party Complaint on October 27, 2010 within two days of my receipt of same.

14. In addition, after receiving the Second Third-Party Complaint, I called Mr. Brengel to ascertain any information I could regarding the claims being made. He advised me that a woman had fallen in the stairwell in the Property, but that the claim was without merit, because the stairwell was clean and the woman had apparently, "just" lost her balance. I was told that SVF's insurance company recommended the action taken, to wit: the commencement of the Second Third-Party Action.

15. Shortly after Mr. Hawley's receipt of the papers, I received a call from Mr. Robert Buzzelli, of Mt. Hawley. He called to question me about the occurrence alleged in the Pinnella Action. I advised Mr. Buzzelli that I had no information concerning the occurrence alleged therein. I told him that prior to my receipt of same, as far as I knew, the renovations at the Property were completed without incident, as nothing had been brought to my attention by either Mr. Borowski, Mr. Brengel, or for that matter anyone else.

16. I also advised Mr. Buzzelli that since I didn't know anything about the incident, I had called Mr. Brengel to find out what I could and relayed to Mr. Buzzelli what Mr. Brengel had told me. I fully cooperated with Mr. Buzzelli and gave him all the information that I had. This included providing him with the name and phone number for Mr. Borowski my Job Supervisor, as well as the contact information for Mr. Brengel.

Mr. Borowski sets forth in his affidavit:

"3. In or about May 2007, LMJ Contracting, Inc. entered into a contract with SVF 201 Melville, LLC (hereinafter referred to as "SVF") for the purpose of performing certain renovations to the Property.

4. LMJ acted as the construction manager, subcontracting out the renovations to the appropriate trade and did not actually perform any of the renovations itself. I was the only representative of LMJ at the Property during the renovations.

5. As the Job Supervisor, I would report to the Property each day that there were renovations being performed by LMJ's subcontractors. My responsibilities as job Supervisor were to act as a liaison between, LMJ, the subcontractors and the property manager, Mr. Jon Brengel. This would include, among other things, the scheduling of subcontractors to ensure there was minimal disruption and/or inconvenience to the tenants, addressing any issues/complaints that may arise during the renovations and reporting any accidents/occurrences related to the renovations to Mark Seiden (LMJ's president).

6. From the time that the renovations commenced at the Property until they were completed, I was in regular contact with Mr. Brengel. At no time, through the completion of the renovations being performed at the Property, did Mr. Brengel, or for that matter, any of the tenants or anyone else, make and/or relay any complaints to me with regard to the existence of any construction debris in any of the stairwells in the Property, or notify me that

anyone had fallen in a stairwell.

7. Had there been any such complaints and/or accidents/occurrences that involve the work associated with the renovations, they would have been brought to my attention by Mr. Brengel or the tenant directly and reported to Mr. Seiden.

8. It is also important to note that, there were no renovations being performed in the stairwells by any of LMJ's subcontractors at the Property. In fact, all of the subcontractors used the service elevator.

9. Upon information and belief, the renovations at the Property were completed on or before the middle of September 2007. More importantly, by the time the renovations were completed, I had never been informed nor did I have any knowledge of any accident occurring at the Property, much less than a woman allegedly fell in the stairwell.

10. The first indication that I received that there was any occurrence whatsoever at the Property was in or about November 2010. At about that time I was contacted by an individual named "Mike". He called me indicating that he was from the insurance company for LMJ and wanted to meet with me to discuss a lawsuit against LMJ. He agreed to meet me at my place of employment, LS Steel, in Ronkonkoma, New York.

11. Initially when we met, I started discussing an "incident" that had occurred at a different job, as that was the only incident that I was aware of. It was at this point, that "Mike" advised me that he was there in inquire about an occurrence alleged to have taken place in a stairwell at the Property.

12. He asked if I knew anything about an occurrence at the Property involving a Ms. Pinnella, to which I responded that I did not. I did tell him that there were no renovations being performed in any of the stairwells, which might explain my lack of knowledge of the incident, and that my meeting with him was the first I heard of the alleged occurrence. Shortly after I indicated that I had no knowledge of the occurrence that he was talking about our interview was concluded.

13. The attorneys for LMJ have advised that, LMJ's insurance company has refused to defend LMJ for the occurrence that gave rise to the Pinnella Action, alleging that LMJ had "notice" of the occurrence and failed to notify them.

14. I can unequivocally state that, at no time prior to meeting with "Mike" did I have any knowledge that any occurrence had taken place at the Property. Likewise I can unequivocally state that, no one ever notified me that an occurrence had taken place. In light of the fact that I had no knowledge of the alleged occurrence, there was nothing for me to report to Mr. Seiden. In fact, I called Mr. Seiden to ascertain if he any knowledge of the occurrence, to which he indicated he didn't, and that is why he provided the insurance company with my contact information."

In opposition to the plaintiff's requested relief, the defendant Mt. Hawley Insurance Company contends that an unnamed investigator for said defendant conducted an investigation of the location property manager Jon Brengel who the defendant maintains provided notice to representatives of the plaintiff in September, 2007. The Court observes that while the defendant has included a copy of the transcript of the alleged interview, that the transcript is not in admissible form nor is there a submission from the unnamed investigator nor Mr. Brengel in admissible form to substantiate the defendant's contention as to notice. While the defendant Mt. Hawley Insurance Company has additionally submitted in opposition various e-mails and correspondence, none of these are in admissible form sufficient to defeat the plaintiff's requested relief.

Based upon the foregoing, the plaintiff has established that its first knowledge of the incident in issue involving Ms. Pinnella was when it was served with the second third party complaint on October 25, 2010. In light of the fact that the defendant Mt. Hawley Insurance Company acknowledged receipt of said second third party complaint two days later on October 27, 2010, the plaintiff provided prompt notification to the insurer as required by the policy. As such, the defendant did not have a basis to decline coverage and the plaintiff's application for an Order for summary judgment declaring that the defendant, Mt. Hawley Insurance Company, is obligated to defend and indemnify the plaintiff in a action pending in the Supreme Court State of New York, County of Nassau, entitled Amelia Pinnella v SVF 201 Melville, LLC v LMJ Contracting Inc. (the Second Third-Party action), under Index No. 3466/2008 and awarding plaintiff with all reasonable defense expenses incurred to date in the foregoing matter, is granted.

SO ORDERED.

DATED: 9/17/2011

*Rays. Mahon*  
..... J.S.C.

**ENTERED**  
SEP 22 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE