

<b>Sirius Am. Ins. Co. v Bethel Gen. Contr., Inc.</b>
2008 NY Slip Op 31622(U)
June 11, 2008
Supreme Court, New York County
Docket Number: 0103111/2007
Judge: Shirley W. Kornreich
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PART 54

JUDGE SHIRLEY WERNER KORNREICH  
 Index Number : 103111/2007  
**SIRIUS AMERICA INS. CO.**  
 VS.  
**BETHEL GENERAL CONTRACTING,**  
 SEQUENCE NUMBER : 001  
 DISMISS ACTION

INDEX NO. \_\_\_\_\_  
 MOTION DATE 4/3/08  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 5 were read on this motion to/for dismiss

PAPERS NUMBERED
<u>1-2</u>
<u>3</u>
<u>4-5</u>

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
 Answering Affidavits — Exhibits \_\_\_\_\_  
 Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.**

**FILED**

JUN 13 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

FOR THE FOLLOWING REASON(S):

Dated: 6/11/08

[Signature]  
**HON. SHIRLEY WERNER KORNREICH**  
J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
SIRIUS AMERICA INSURANCE COMPANY,

Plaintiff,

-against-

BETHEL GENERAL CONTRACTING, INC. and J. JUHN  
ASSOCIATES, WALTER SINCHI, SOHO NEW YORK  
LODGING, LLC, COLGATE SCAFFOLDING CORP.,  
COLGATE SCAFFOLDING & EQUIPMENT CORP.,  
K&S FOUNDATION WORKS INC.,

Defendant.  
-----X

BETHEL GENERAL CONTRACTING, INC.,

Third-Party Plaintiff,

-against-

TUDOR INSURANCE COMPANY, SIRIUS AMERICA  
INSURANCE COMPANY, K & S FOUNDATION WORKS  
INC., & SOLOMON AGENCY CORP.,

Third-Party Defendants.  
-----X

**KORNREICH, SHIRLEY WERNER, J.:**

In this declaratory judgment action, Tudor Insurance Company (Tudor) moves to dismiss the third-party action against it by Bethel General Contracting, Inc. (Bethel), and for a declaration that Tudor is not obligated to defend and insure Bethel in the underlying personal injury action. The issue before the court is whether the general contractor, Bethel, was an additional insured under a policy issued by Tudor to K&S Foundation Works, Inc. (K&S), Bethel's subcontractor. Defendant Tudor has moved to dismiss the third-party

Index No.:103111/07

**DECISION and  
ORDER**

**FILED**

JUN 17 2008

COUNTY CLERK'S OFFICE  
NEW YORK

[\* 3 ]

complaint, pursuant to CPLR 3211(a)(1) and (7), based upon the terms of the Tudor insurance policy. In the alternative, Tudor asks the court to elect to treat the motion as one for summary judgment, pursuant to CPLR 3211(c), and declare that Tudor has no obligation to defend and indemnify Bethel in the Sinchi Action. Bethel opposes the motion solely on the ground that Tudor failed to submit proof in evidentiary form that the policy attached to its moving papers is the applicable insurance contract because it was annexed to the affirmation of Tudor's attorney, who lacks personal knowledge. The motion to dismiss is granted for the reasons that follow.

*Procedural and Factual Background*

The underlying personal injury action is entitled *Walter Quisi Sinchi v. Soho New York Lodging, LLC, Bethel General Contracting, Inc., et al.*, Sup. Ct., Bronx Co., Index No. 7251/06 (Sinchi Action). The complaint in the Sinchi Action alleges that Walter Sinchi (Sinchi), an employee of K&S, was injured on December 23, 2005, when he fell off a scaffold and down an elevator shaft during construction, due to the defendants' negligence. Bethel interposed a third-party complaint against K&S in the Sinchi Action for common law indemnification, contractual indemnification, contribution and failure to procure insurance. Bethel's general liability insurance provider, Sirius Insurance Company (Sirius), commenced this declaratory judgment action against Bethel, who impleaded Tudor. Annexed to the moving affirmation of Tudor's attorney is a general liability policy issued to K&S covering the period March 24, 2005 through March 24, 2006.

In its opposing papers, Bethel does not refute that it is not an insured, either named or additional, under the terms of Tudor policy. Bethel does not deny the validity or completeness of the policy presented to the court. Its sole defense is that the affirmation of

[\*4]  
Tudor's attorney, to which the policy is annexed, is insufficient evidence of the terms of the policy.

*Conclusions of Law*

In considering a motion to dismiss pursuant to CPLR 3211, the court must accept as true all facts alleged in complaint, as well as all reasonable inferences that may be gleaned from those facts. *Rovello v. Orofino Realty*, 40 NY2d 633 (1976). Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted "resolves all factual issues and conclusively disposes of the plaintiff's claims as a matter of law." *Wright v. Evanston Insurance Company*, 14 AD3d 505 (2<sup>nd</sup> Dept 2005). The policy submitted by Tudor meets this burden.

It is well settled that "[w]here the terms of an insurance policy are clear and unambiguous, interpretation of those terms is a matter of law for the court." *Town of Harrison v. National Union Fire Ins. Co.*, 89 NY2d 308 (1996) ("The four corners of an insurance agreement govern who is covered and the extent of the coverage..."); *Sixty Sutton Corp. v. Illinois Union Ins. Co.*, 34 AD3d 386 (1<sup>st</sup> Dept 2006).

The unambiguous terms of the Tudor policy establish that it did not insure Bethel. In plain language, the contract provides that an insured must either be named on the declarations page, or listed on the additional insured endorsement, Form WW180, as an "additional insured." Bethel's name does not appear in either of these two places.

Nor is there potential coverage under the blanket insured section of the Tudor Policy. Section I, paragraph 2(b)(2), of the policy contains a blanket additional insured section for liability assumed in an "insured contract." However, K&S opted out of the only definition of "insured contract" contained in Section V, paragraph 9(f), that arguably could have

applied to an entity not named in the declarations or additional insured endorsement. Paragraph 9(f) defined “insured contract” to include “[t]hat part of contract ... 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.” The Tudor policy contains an exclusion and limitation endorsement (WW203B, p. 2), which eliminates subsection 9(f) from the definition of an “insured contract.”

Finally, contrary to Bethel’s assertion, the affirmation of an attorney without personal knowledge is an appropriate vehicle for submitting documentary evidence to the court. *Zuckerman v. City of NY*, 49 NY2d 557, 563 (1980). The case cited by Bethel, *Key Bank of Maine v. Lisi*, 225 AD2d 669 (2<sup>nd</sup> Dept 1996), is inapposite because there the affirmation of the attorney, who lacked personal knowledge, was offered in opposition to a promissory note placed into evidence by the moving party. A contract, like the insurance agreement submitted by Tudor, is the very type of document that may support dismissal under CPLR for a 3211(a)(1). *Goldman v. Metro. Life Ins. Co.*, 5 NY3d 561 (2005); *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 AD2d 248 (1<sup>st</sup> Dept 1995). In any event, in reply, Tudor submitted an affidavit from a senior claims adjuster to authenticate the policy.

Although Tudor is entitled to dismissal, it is not entitled to summary judgment declaring the rights of the parties absent notice from the court that it is electing to treat the motion as one for summary judgment. CPLR 3211(c). As dismissal with prejudice of the third-party complaint as against Tudor will accomplish the same result, the court will not elect to treat the motion as one for summary judgment. Accordingly, it is

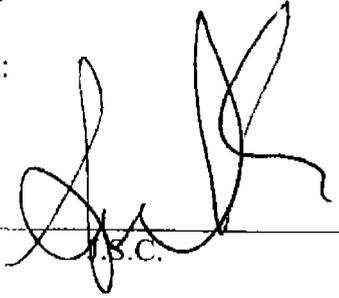
ORDERED that the second cause of action in the third-party complaint by Bethel General Contracting, Inc., against third-party defendant Tudor Insurance Company is hereby

dismissed with prejudice; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly and to sever the remainder of the action, which shall continue.

Dated: June 11, 2008

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**  
JUN 17 2008  
COUNTY CLERK'S OFFICE  
PUNJAB