

Katz v Jae Moon Kim
2008 NY Slip Op 33734(U)
September 8, 2008
Supreme Court, New York County
Docket Number: 112747/2005
Judge: Karen S. Smith
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----X
MICHAEL KATZ and TANYA KATZ,

Plaintiff,

-against-

Index No.: 112747/2005
Motion Seq.: 005
Motion Date: 08/08/2008

JAE MOON KIM, ATLANTIC HEYDT CORP and THE
CITY OF NEW YORK, PAVARINI MCGOVERN and
RC DOLNER, INC.,

Defendants.

DECISION AND ORDER

-----X
ONE HAND REALTY, LLC,

Defendant/Second Third-Party Plaintiff,

-against-

ZURICH AMERICAN INSURANCE COMPANY,

Second Third-Party Defendant
-----X

FILED
SEP 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

PRESENT: KAREN S. SMITH, J.S.C.:

Third-Party Plaintiff, One Hand Realty, LLC ("One Hand")'s motion for summary judgment declaring that Third-Party Defendant, Zurich American Insurance Company ("Zurich") is liable to defend and indemnify One Hand in the underlying action, captioned above, and Zurich's cross-motion for summary judgment declaring that it has no liability to defend or indemnify One Hand, are both denied.

This case involves an underlying personal injury action brought by plaintiffs to recover for injuries allegedly sustained on March 30, 2005 when Michael Katz ("Katz") tripped and fell over a piece of slate in front of property which was then owned and being developed by One Hand. RC Dolner LLC ("Dolner") was One Hand's general contractor for the project. Pursuant

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to the contract between them, One Hand was to be named as an additional insured on Dolner's liability Insurance Policy. Zurich was Dolner's insurer. Dolner's insurance policy contained a blanket provision adding, as an additional insured, any entity which Dolner was obligated to insure pursuant to written contract. However, Dolner's policy contained a provision establishing the condition that such insurance was only effective; "...with respect to liability arising out of your [Dolner's] ongoing operations performed for that insured." (See Exhibit H to One Hand's moving papers, Form CG 20 10 10 01). When One Hand received the summons and complaint in the underlying personal injury action, it forwarded them to Zurich and sought defense and indemnity from Zurich. Zurich denied coverage arguing that Katz's accident was not the result of Dolner's "ongoing operations" at the property because, prior to the accident, One Hand notified Dolner that One Hand had decided to sell the project rather than complete it and Dolner was to discontinue operations at the property. One Hand brought a third-party action against Zurich seeking a declaration that Zurich is obligated to defend and indemnify One Hand in the underlying personal injury action and to reimburse it for legal fees it incurs until Zurich assumes One Hand's defense.

One Hand now moves for summary judgment on the issue of Zurich's obligation to defend One Hand in the underlying litigation. Zurich cross-moves for summary judgment dismissing the third-party action against it arguing it has no obligations to defend or indemnify One Hand. However, neither movant has met its burden of establishing their entitlement to judgment as a matter of law by providing the court with evidence, in admissible form, to make a *prima facie* showing that no triable questions of fact exist.

While both One Hand and Zurich acknowledge that the piece of slate was the alleged

cause of Katz's injuries in the underlying action, neither of the movants establishes whether or not the piece of slate had anything to do with Dolner's or one of its subcontractors' work at the subject premises. As One hand has not made a *prima facie* showing that the potential liability arises out of Dolner's operations, a question of fact exists and One Hand cannot prevail on its motion. It must be noted in this regard that the court is not making a determination that this is the sole question of fact in the instant matter but is merely finding that there is a question of fact sufficient to preclude the grant of summary judgment to One Hand.

Dolner's insurance policy with Zurich does state that One hand is an additional insured only with respect to Dolner's "ongoing operations" on behalf of One Hand. However, the policy does not specifically define the term "ongoing operations". Nevertheless, it does contain an exclusion providing that the additional insured coverage; "...does not apply to 'bodily injury' or 'property damage' occurring after; (1) All work, including materials, parts or equipment furnished in connection with such work, on the project ... to be performed by or on behalf of the additional insured(s) at the site of the covered operations has been completed..." In the absence of a clear definition of "ongoing operations", the court would be need to construe Dolner's policy giving consideration to this exclusion. Unfortunately, it is apparent that the work to be completed by Dolner on behalf of One Hand was never completed so that the exclusion may not apply. Additionally, the insurance policy does not appear to contain a provision governing the rights and obligations of the parties in the event that contracted work is not completed because the additional insured, owner, allegedly directed the contractor to discontinue operations at the site.

It is also significant that the parties to the instant matter dispute when One Hand gave

Dolner the direction to discontinue operations. Zurich contends the direction was given prior to Katz's accident and One Hand contends it did not decide to discontinue operations or sell the property until after the accident. The depositions of One Hand and Dolner are inconsistent on this point and, therefore, subject to the need for an assessment of the credibility of the testifying witnesses by a finder of fact.

Zurich attempts to bolster the deposition testimony of Dolner's representative by relying on an unsigned letter, dated a week before Katz's accident, allegedly sent by One Hand to the New York City Department of Transportation ("DOT"), advising DOT that Dolner would no longer be responsible for DOT permits at the property involved in this matter and supplying DOT with the name of the new responsible entity. One hand's counsel argues that this document was a draft letter, was never sent and was only turned over in discovery in response to a broad discovery demand for "all documents" relating to this action. Assuming *arguendo* the allegedly "draft letter" constitutes some evidence of First Hand's intent, it was not directed to Dolner and, without some explanatory testimony, it does not establish a date of notification to Dolner to discontinue operations.

More importantly, the actual date of the discontinuation of "ongoing operations" at the site is more relevant than the date of the notification to discontinue operations. Based upon the exclusionary provision quoted above, it may well be that operations are deemed to continue until all materials, parts or equipment furnished by Dolner are removed from the site regardless of when Dolner was first notified to discontinue operations. Neither First Hand nor Zurich has submitted any evidence to establish whether or not such removal had occurred prior to Katz's accident. Thus, Zurich has failed to make a *prima facie* showing that it was not still responsible

to defend and indemnify First Hand as an additional insured on Dolner's insurance policy at the time of Katz's accident. Therefore, Zurich's cross-motion for summary judgment dismissing this action is also denied. Accordingly, it is;

ORDERED that First Hand's motion, in this third-party, insurance coverage, declaratory judgment action, seeking summary judgment on the issue of Zurich's liability to defend First Hand in Katz's underlying personal injury action, is denied, and Zurich's cross-motion in the same action, seeking summary judgment dismissing the action, is also denied.

The foregoing constitutes the decision and order of this court.

Dated: September 8, 2008

ENTER:



Hon. Karen S. Smith, J.S.C.

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NEW YORK