

Crescent St. Constr. Corp. v Mt. Hawley Ins. Co.

2023 NY Slip Op 34687(U)

January 20, 2023

Supreme Court, Queens County

Docket Number: Index No. 713054/2017

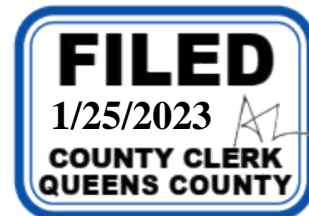
Judge: Mojgan C. Lancman

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY



PRESENT: HONORABLE MOJGAN C. LANCMAN

IAS Part 20

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CRESCENT STREET CONSTRUCTION
CORPORATION,

Index No.: 713054/2017

Plaintiff,

Motion Seq. Nos.: 2, 3 and
4

-against-

Motion Date: 9.7.2022

MT. HAWLEY INSURANCE COMPANY and
QUEENS MEDALLION BROKERAGE CORP.,

Motion Cal. No.: 3, 4 and
5

Defendants.
-----X

The motions filed in this cause bearing sequence numbers 2, 3 and 4 are consolidated for disposition.

The plaintiff, Crescent Street Construction Corporation (the "Plaintiff" or "Crescent"), filed motion sequence number 2 seeking, *inter alia*, summary judgment against the defendant Mt. Hawley Insurance Company ("Mt. Hawley"). The e-filed papers bearing NYSCEF document numbers 40-70, 138-146, 180-192 and 197-199 were read on the subject motion.

The defendant Queens Medallion Brokerage Corp. ("Queens Brokerage") filed motion sequence number 3, seeking summary judgment dismissing the amended complaint. The e-filed papers bearing NYSCEF document numbers 71-88, 140, 147-162 and 193 were read on said motion.

Mt. Hawley filed motion sequence number 4, seeking summary judgment, declaring that it has no duty to defend or indemnify Crescent in an underlying bodily injury action. The e-filed papers bearing NYSCEF document numbers 89-136, 141, 163-179 and 194-196 were read on this motion.

Crescent seeks declaratory relief against Mt. Hawley. In essence, Crescent alleges that the insurer is obligated to defend and indemnify it with respect to an underlying bodily injury action entitled *Pacheco v 32-42 55th Street Realty LLC, et al.*, which is pending in this Court under index number: 722277/2020 (the "Underlying Action").

Crescent is a third-party defendant in the Underlying Action. Mt. Hawley has disclaimed coverage as to it. The insurer is thus not defending or indemnifying Crescent in the Underlying Action.

Crescent sues Queens Medallion, its insurance broker, alleging that the latter failed to obtain the proper insurance policy, *i.e.*, an insurance policy that should have provided it coverage in the Underlying Action.

Presently before the Court are three motions for summary judgment. Each party moves for dispositive relief. The Plaintiff seeks summary judgment declaring that Mt. Hawley is required to defend and indemnify it in the Underlying Action. In the alternative, the Plaintiff seeks summary judgment against Queens Medallion. Mt. Hawley and Queens Medallion seek, respectively, summary judgment dismissing the amended complaint. In addition, Mt. Hawley seeks a declaration that it is not obligated to defend or indemnify Crescent in the Underlying Action. For the following reasons, all motions are denied.

I. Introduction

With respect to the prayers for declaratory relief, the principal issue is whether an exclusion (the “Exclusion”) contained in the insurance policy issued by Mt. Hawley to the Plaintiff (the “Policy”) is applicable. This Exclusion states that there is no coverage for bodily injuries with respect to: “[a]ll work/projects over 3 stories, either ground-up or exterior whether by you or others.”

The Underlying Action arose on June 16, 2014 when Galo Pacheco (“Pacheco”) fell from a scaffold while performing construction work at a building located at 32-42 55th Street in Queens New York (the “Building”).

The dispute between the Plaintiff and Mt. Hawley is how many stories the Building consists of. The Plaintiff argues that because the lower level of the Building is a “cellar,” it is not a “story.” If this argument is correct, the Building consists of 3 stories, and the Exclusion would be inapplicable.

Mt. Hawley contends that the lower level of the Building is a “basement” and thus counts as a “story.” The insurer also argues that because the lower level was to be utilized as residential living space it is a “story.” Lastly, Mt. Hawley argues that whether the lower level is a “cellar” or a “basement,” it is a “story.” If these arguments are correct, *i.e.*, the lower level is a “story,” the Building consists of 4 stories and the Exclusion would apply.

With respect to the claims against Queens Medallion, an insurance broker, the Plaintiff contends, in effect, that if the Exclusion is applicable, it is entitled to damages from Queens Medallion because it did not procure the correct or proper insurance policy, *i.e.*, a policy that provided the Plaintiff with coverage relative to the Underlying Action. Queens Medallion contends, in essence, that it procured the insurance policy that was requested.

II. Factual Background

The uncontroverted facts are set forth here. The factual disputes are addressed within the context of the Court's discussion of the issues presented.

The Plaintiff is an entity that performs construction work. It was the general contractor on a construction project (the "Project") at a property located 32-42 55th Street in Queens, New York (the "Property"). The Property was owned by non-party 32-42 55th Street Realty LLC.

Construction started in the spring of 2013. The Project involved the construction of Building. There was to be one apartment on the lower level, two apartments on the first floor, two apartments on the second floor and two apartments on the third floor.

On June 16, 2014, Pacheco was injured while working on the Project (the "Accident"). Pacheco was employed by non-party R&S Construction Corp ("R&S") as a laborer. He alleges that the Accident took place when he fell off a scaffold while performing masonry work.

On June 26, 2014, Pacheco commenced the Underlying Action against 32-42 55th Street Realty LLC ("32-42 55 Street Realty") and B. Green Construction Corp. ("Green Construction") seeking damages for personal injuries sustained in the Accident.

After Pacheco commenced the Underlying Action, a third-party action was filed by 32-42 55 Street Realty against Crescent (the "Third-Party Action").

At the time of the Accident, Crescent was insured by Mt. Hawley under the Policy, which incepted on November 30, 2013 and expired on November 30, 2014.

Queens Medallion had serviced Crescent's insurance needs for several years prior to procurement of the Policy and had procured various insurance policies for Crescent's operations, including the Policy.

The Policy provided, *inter alia*, that Mt. Hawley would pay those sums that Crescent becomes legally obligated to pay as damages because of bodily injury or property damage.

Crescent placed Mt. Hawley on notice of the Underlying Action. By letter, dated September 3, 2014, Mt. Hawley disclaimed coverage stating that *inter alia*, that:

the project in connection with the suit [the Underlying Action] involves the ground up construction of a four (or five) story apartment building. The policy does not provide coverage for "bodily injury" or "property damage" arising out of all work/projects over 3 stories, either ground-up or exterior whether by you or others regardless of whether such operations are conducted by you or on your behalf or whether the operations are conducted for yourself or for others. MTH disclaims coverage since the project in connection with the suit is over 3 stories.

Thereafter, in June 2016, Crescent caused Mt. Hawley to be notified of the Underlying Action and requested that it defend and indemnify it in connection therewith. By letter, dated March 16, 2016, Mt. Hawley adhered to its coverage position, contending that there was no coverage because the Project involved a Building was over three stories, and again disclaimed coverage.

I. Discussion

A. The Branch of the Plaintiff's Motion for Summary Judgment Against Mt. Hawley and Mt. Hawley's Motion for Summary Judgment

The law relative to the motions filed by the Plaintiff's and Mt. Hawley is marshaled below.

“An insurance agreement is subject to principles of contract interpretation” (*Burlington Ins. Co. v NYC Transit Auth.*, 29 NY3d 313, 321 [2017], quoting *Universal Am. Corp. v Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015]) [internal quotation marks omitted]. “As with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court” (*Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177 [2008], quoting *White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007] [internal quotation marks omitted]).

“[C]ourts should read a contract as a harmonious and integrated whole to determine and give effect to its purpose and intent” (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Cap., Inc.*, 30 NY3d 572, 581 [2017] [internal quotation marks and citations omitted]). “Courts may not, through their interpretation of a contract, add or excise terms or distort the meaning of any particular words or phrases, thereby creating a new contract under the guise of interpreting the parties' own agreements” (*see id.*) [citations omitted]. “In that regard, a contract must be construed in a manner which gives effect to each and every part, so as not to render any provision meaningless or without force or effect (*see id.*), quoting *Ronnen v Ajax Elec. Motor Corp.*, 88 NY2d 582, 589 [1996]).

“If, however, the language in the insurance contract is ambiguous and susceptible of two reasonable interpretations, the parties may submit extrinsic evidence as an aid in construction” (*State v Home Indem. Co.*, 66 NY2d 669, 671 [1985] [citation omitted]; *Southwest Marine and General Ins. Co v Preferred Contractors Ins. Co.*, 143 AD3d 577 [1st Dept 2016]).

An ambiguity in an insurance policy may be resolved by the Court as a matter of law against the drafter where: (1) extrinsic evidence is not submitted (*see New York State Ins. Fund v Everest Natl. Ins. Co.*, 125 AD3d 536, 537 [1st Dept 2015]; *State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]; (2) the extrinsic evidence is conclusory or sheds little light on the ambiguity (*see State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]; or (3) the extrinsic evidence resolves the ambiguity in favor of one party (*see Fairchild v Genesee Patrons Coop. Ins. Co.*, 238 AD2d 841 [3d Dept 1997]).

However, if the admissible extrinsic evidence addresses but does not resolve the ambiguity, the resolution of the ambiguity is for the trier of fact (*see Nova Cas. Co. v Peter Thomas Roth Labs, LLC*, 178 A.D.3d 468 [1st Dept 2019]; *Heartland Brewery, Inc. v Nova Cas. Co.*, 149 AD3d 522, 523 [1st Dept 2017]; *Demetrio v Stewart Tit. Ins. Co.*, 124 AD3d 824, 826 [2d Dept 2015]).

Although Mt. Hawley disclaimed coverage on various grounds, its submissions on the present motion practice indicate that the declination of coverage is now based on only one exclusion, which is entitled **EXCLUSION-DESIGATED ONGOING OPERATIONS**, and reads, in relevant part, as follows:

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description of Designated Ongoing Operation(s):

All work/projects over 3 stories, either ground-up or exterior whether by you or others.

Specified Location (If Applicable):

All locations.

The term “story” is not defined by the Policy. The terms “cellar” and “basement are also not defined by the Policy.

In seeking summary disposition, the Plaintiff contends that the Building consists of 3 three stories. Here, the Plaintiff alleges that the lower level of the Building is partially above-ground and partially below-ground, and that “more than one-half of its clear height (measured from finished floor to finished ceiling) is below grade plane ...” Thus, the Plaintiff argues, the lower level is a “cellar” and is thus not to be counted as a “story.” The Plaintiff therefore maintains that the Building is 3 stories; that the Exclusion is inapplicable; and that a declaration should be issued that Mt. Hawley is obligated to defend and indemnify it in the Underlying Action.

Factually, the Plaintiff relies upon, among other things, the following: the deposition testimony of one of its owners, Steve Varkaris (“Varkaris”); the deposition testimony of Chris Bournias (“Buornias”), a former employee of Queens Medallion; the affidavit of Amalia Bournias, a registered architect licensed in New York (“Architect Bournias”); and provisions of the New York City Building Code.

Not surprisingly, Mt. Hawley’s coverage position runs in diametric opposition to the one espoused by the Plaintiff. Mt. Hawley contends that the lower level of the Building is a “basement”

and thus counts as a “story.” The insurer also argues that because the lower level was to be utilized as residential living space, it is a “story.” Lastly, Mt. Hawley argues that irrespective of whether the lower level is a “cellar” or a “basement,” it is a “story.” The insurer thus maintains that the Building consists of 4 stories and that the Exclusion applies.

Factually, Mt. Hawley relies, *inter alia*, upon: documents for the Project; documents from the New York City Department of Buildings; provisions of the New York City Building Code; the affidavit of Howard L. Zimmerman, a registered architect licensed in the State of New York (“Architect Zimmerman”); and the deposition testimony and affidavit of A. Russell Sutherland (“Sutherland”), a Technical Claims Manager for Mt. Hawley.

The familiar standards with respect to summary judgment motions are summarized below.

The proponent of a summary judgment motion bears the burden of: (1) showing that there are no material issues of fact in dispute; and (2) demonstrating that it is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, [1986]). The movant bears a “heavy” burden, and the facts “must be viewed in the light most favorable to the nonmoving party” (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 NY3d 470, 475 [2013]).

“A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2022]).

Lastly, “[t]he function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist” (*see Charlery v Allied Tr. Corp.*, 163 AD3d 914, 915 [2d Dept 2018] [internal quotation marks omitted]).

The Exclusion is ambiguous because it does not define “story.” As noted, extrinsic evidence may be utilized to resolve this ambiguity. Both the Plaintiff and Mt. Hawley have availed themselves of this right by submitting extrinsic admissible evidence in support of their respective motions and in opposition to one another’s motion (*see State v Home Indem. Co.*, 66 NY2d 669; *Southwest Marine and General Ins. Co v Preferred Contractors Ins. Co.*, 143 AD3d 577).

For the following reasons, the Court concludes that the extrinsic evidence submitted by the Plaintiff and Mt. Hawley does not resolve the ambiguity contained in the Exclusion.

First, as evidenced by the deposition testimony relied upon by the parties, there are conflicting issues of fact. Here, for example, the testimony of Varkaris and Bournias relied upon by the Plaintiff and the testimony of Sutherland relied upon by Mt. Hawley conflict materially.

Second, the affidavit of Architect Bournias submitted by the Plaintiff and the affidavit of Architect Zimmerman submitted by Mt. Hawley also conflict with one another on the issue of whether the Building is 3 stories or over 3 stories. Where, as here, the opinion[s] of ... expert[s]

... [are] squarely opposed by the opinion of the ... expert [of another party], the court is presented with a classic battle of the experts that is properly left to a jury for resolution (*John Mezzalingua Associates, LLC v Travelers Indemnity Company*, ___ AD3d ___, 2022 NY Slip Op 07354, *2 [4th Dept 2022] [internal quotation marks, brackets and citations omitted]).

Therefore, the record does not resolve the issue of whether the lower level of the Building is a cellar and thus not a “story,” as the Plaintiff suggests, or, as Mt. Hawley suggests, the lower level is a “story.” The motions for summary judgment filed by the Plaintiff and Mt. Hawley are thus denied and the trier of fact shall resolve the ambiguity in the Exclusion (*see Nova Cas. Co. v Peter Thomas Roth Labs, LLC*, 178 AD3d 468; *Heartland Brewery, Inc. v Nova Cas. Co.*, 149 AD3d 522; *Demetrio v Stewart Tit. Ins. Co.*, 124 AD3d 824).

B. The Branch of the Plaintiff’s Motion for Summary Judgment Against Queens Medallion and the Summary Judgment Motion of Queens Medallion

The Plaintiff also moves, in effect, for alternative relief: summary judgment against Queens Medallion if Mt. Hawley is granted summary disposition on the basis of the Exclusion. Queens Medallion has filed a motion for summary judgment dismissing the amended complaint as to it.

As to Queens Medallion, the amended complaint is grounded in negligence, breach of contract and breach of a special duty of care.

The law with respect to negligence and breach of contract causes of action as to an insurance broker or agent is settled:

An insurance agent or broker has a common-law duty to obtain requested coverage for a client within a reasonable amount of time, or to inform the client of the inability to do so. Generally, to set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy. Thus, the duty is defined by the nature of the client's request (*Copacabana Realty, LLC v A.J. Benet, Inc.*, 199 AD3d 633, 634 [2d Dept 2021] [internal brackets, quotation marks and citations omitted]).

With respect to the special duty of care or special relationship claim, New York law is clear that:

A special relationship may exist where there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on. This notice may be established through evidence that the broker received compensation for its insurance advice apart from the payment of premiums, that the client delegated his or her insurance decision making to the broker, or that there was some interaction regarding a question of coverage with the insured relying on the expertise of the agent (*Lehneis v Neill*, 117 AD3d 993, 994 [2d Dept 2014] [internal marks and citations omitted]).

“Where a special relationship develops between the broker and client, the broker may be liable, even in the absence of a specific request, for failing to advise or direct the client to obtain additional coverage” (*see MAAD Construction, Inc. v Cavallino Risk Management, Inc.*, 178 AD3d 816, 819 [2d Dept 2019]).

The record reveals that the applications of the Plaintiff and Queens Medallion for summary judgment must be denied as to the negligence and breach of contract causes of action because of triable issues of fact.

The Plaintiff is not entitled to summary disposition on its negligence and breach of contract causes of action because Queens Medallion submits evidence, including deposition testimony, that it procured the coverage that the Plaintiff requested; that the Plaintiff was aware before the Accident that the policy contained the Exclusion; and that the Plaintiff did not seek an endorsement for work involving over 3 stories.

Queens Medallion is not entitled to summary judgment because there are triable issues of fact as to whether it obtained the proper coverage. Here, among other things, the Plaintiff submits the affidavit of Bournias (the “Bournias Affidavit”), a former Queens Medallion employee. He avers that: (1) prior to procuring the Policy, he was advised by the Plaintiff that it would be “involved in the construction of a three (3) story apartment building with a basement level (which includes an apartment) that is partially above grade”; (2) that 2 prior policies issued by Mt. Hawley to the Plaintiff issued for the 2 policy periods immediately prior to the inception of the Policy contained an Exclusion - Designated Ongoing Operations for work performed over seven (7) stories; (3) that he “did not advise CCSC [Crescent] that the Exclusion - Designated Ongoing Operations (the “Exclusion”) changed in the Policy such that it applied to work performed over three (3) stories; and (4) that to the extent that the lower level of the Project “is deemed a “basement” as defined by the New York City Building Code (the “Code”) and thus a “story” pursuant to the Code, [he] did not advise CSCC [Crescent] that there would be no insurance coverage under the Policy for the work performed on the Project due to the Exclusion in the Policy.”

Although Queens Medallion challenges the truth of several statements contained in the Bournias Affidavit, the function of the Court on a summary judgment motion is not to resolve issues of fact or determine matters of credibility (*see Charlery v Allied Tr. Corp.*, 163 AD3d 914).

With respect to the special duty of care or special relationship theory of liability, the Plaintiff indicates that it seeks recovery on two grounds: (1) that it delegated its insurance decision making to the Queens Medallion; and (2) that there was some interaction regarding a question of coverage between it and Queens Medallion, with the former relying on the expertise of the latter. Triable issues of fact exist with respect to these theories of liability. The parties present conflicting evidence on these issues, including but not limited to, e-mails submitted by Queens Medallion and the Bournias Affidavit from the Plaintiff. Neither party is entitled to summary judgment with respect to said claims.

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that Plaintiff's motion for summary judgment (sequence number: 2) is denied; and it is further,

ORDERED, that the summary judgment motion of Queens Medallion (sequence number: 3) is denied; and it is further,

ORDERED, that the summary judgment motion of Mt. Hawley (sequence number: 4) is denied; and it is further,

ORDERED, that the Plaintiff shall serve a copy of this Order with Notice of Entry by March 10, 2023.

The Clerk of the Court is directed to close the motions bearing sequence numbers 2, 3 and 4.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
January 20, 2023



MOJGAN C. LANCMAN, J.S.C.