

M E M O R A N D U M

SUPREME COURT: QUEENS COUNTY
IA PART: 18

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NATURAL STONE INDUSTRIES, INC.,
et al.

INDEX NO. 18528/03

BY: HART, J.

- against -

DATED: NOVEMBER 8, 2004

UTICA NATIONAL ASSURANCE COMPANY,
et al.

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Defendant Transcontinental Insurance Company has moved for summary judgment dismissing the complaint against it. Plaintiff Natural Stone Industries, Inc. has cross-moved for summary judgment declaring that defendant Transcontinental is obligated to defend and indemnify it in Karim v. Natural Stone Industries (Queens County, Index No. 6031/03) and Sattar v. Natural Stone Industries, Inc. (Queens County, Index No. 1241/02).

Plaintiff Natural Stone Industries, Inc., which has its place of business at 343 Stagg Street, Brooklyn, New York, entered into a contract with Star Structural, Inc. whereby the latter promised to fabricate and erect steel columns, beams, and plates for a roof. Although, the one page written contract between the parties dated May 6, 2001, does not obligate Star Structural to procure insurance for plaintiff Natural Stone, Simon Cohen, the president of plaintiff Natural Stone, swears that he and Abdul Sattar, the president of Star Structural, reached an oral agreement whereby the latter company obligated itself to procure insurance coverage for the former company.

Defendant Transcontinental issued a policy of insurance to Star Structuralists which contains a Contractor's Blanket Insurance Additional Insurance Endorsement which provides in relevant part: "A. Who is an Insured (Section II) is amended to include as an insured any person or organization (called an additional insured) whom you are required to add as an additional insured on this policy under: 1. A written contract or agreement; or 2. An oral contract or agreement where a certificate of insurance showing that person or organization as an additional insured has been issued ***." Star Structuralists procured a Certificate of Liability Insurance dated June 28, 2001 which identifies the producer as National Insurance Brokerage of N.Y., the insured as Star Structuralists, and in a box above which is written "Certificate Holder" "Additional Insured; Insurer Letter" gives the name National (sic) Stone, Ind."/ 343 Stagg Street, Brooklyn, NY 11206." (The parties do not dispute that the document should read "Natural Stone.") Two small, unmarked boxes separate the term "Certificate Holder" from the terms "Additional Insured; Insurer Letter."

Frank Cormio, the president of National Insurance Brokerage of N.Y., the agency which procured the relevant policy for Star Structuralists, acknowledges that on June 28, 2001, the brokerage issued a certificate of insurance naming plaintiff Natural Stone as a certificate holder. However, he alleges that the "certificate of insurance does not identify Natural Stone as an additional insured ***. It is, and has always been, National Insurance's standard practice to identify a party as an additional

insured either by (I) marking the box to the left of the notation "Additional Insured; Insurer Letter" with an "X" or (II) filling in the paragraph above that notation entitled "Description of Operations/Locations [etc]" with a statement to that effect. Neither was done in this case and therefore it was not National Insurance's intention to identify Natural Stone as an additional insured on the Transcontinental policy issued to Star Structural. On the other hand, plaintiff Natural Stone contends that the certificate of insurance is ambiguous and that the company relied on it before allowing Star Structural to work on the project.

On July 7, 2001, Ian Karim and Abdul Sattar, employees of Star Structural, allegedly sustained personal injury during the course of the construction, and there are now two underlying actions pending in the New York State Supreme Court, County of Queens: Karim v. Natural Stone Industries (Index No. 6031/03) and Sattar v. Natural Stone Industries, Inc. (Index No. 1241/02). Defendant Transcontinental disclaimed coverage for plaintiff Natural Stone on the ground that "the certificate of insurance does not show Natural Stone as an additional insured, but merely as a certificate holder." This action for, inter alia, a judgment declaring the rights and obligations of the parties under the insurance policy ensued.

That branch of the motion by the defendant insurer which is for summary judgment against plaintiff Cosim Realty Corp. is granted. Plaintiff Cosim concedes that defendant Transcontinental does not owe coverage to it.

That branch of the motion by the defendant insurer which is for summary judgment against plaintiff Natural Stone is denied. The motion by plaintiff Natural Stone for summary judgment on its causes of action for a declaratory judgment against the defendant insurer is granted. "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***." (Alvarez v. Prospect Hospital, 68 NY2d 320, 324.) In the case at bar, plaintiff Natural Stone, not the defendant insurer, successfully carried this burden. "Insurance policies are, in essence, creatures of contract, and accordingly, subject to principles of contract interpretation ***." (In re Estates of Covert, 97 NY2d 68, 76; see, Throgs Neck Bagels, Inc. v. GA Ins. Co. of New York, 241 AD2d 66.) "Under New York law, 'a paper referred to in a written instrument and sufficiently described may be made a part of the instrument as if incorporated into the body of it.'" (PaineWebber Inc. v. Bybyk, 81 F3d 1193, 1201, quoting Jones v. Cunard S.S. Co., 238 App Div 172, 173; see, Kenner v. Avis Rent A Car System, Inc., 254 AD2d 704.) Ambiguities in an insurance policy are construed in favor of the insured and against the insurer. (Mostow v. State Farm Ins. Companies, 88 NY2d 321; see, Matter of United Community Ins. Co. v. Mucatel, 69 NY2d 777.) The test to determine whether an insurance contract is ambiguous focuses on the reasonable expectations of the average insured. (See, Mostow v. State Farm Ins. Companies, supra.) In the case at bar, the certificate of insurance relied upon by

Natural Stone is ambiguous. The name "National Stone Ind." [sic: Natural Stone Industries] is contained in a box directly above which the words "Additional Insured," among others, is written. Moreover, the boxes between the words "Certificate Holder" and "Additional Insured" are of uneven, small size, incompletely drawn (at least in the copy of the document provided to the court), and share one common side, all of which makes the boxes not apparent as such. The average individual shown the Certificate of Insurance would have to notice the inconspicuous boxes, guess that they are boxes, and guess that coverage would not be in effect unless the boxes were appropriately marked. In reasonableness and fairness, the court cannot place this burden upon plaintiff Natural Stone. The average person shown the relevant certificate of insurance would reasonably expect coverage. Moreover, the defendant insurer is responsible for the ambiguity because the insurance policy that it wrote made the Certificate of Insurance the determinant of coverage. The court declares that defendant Transcontinental Insurance Company is obligated to defend and indemnify plaintiff Natural Stone Industries in the underlying personal injury actions.

Settle order making the appropriate declarations.

J.S.C.