

**Caliche Realty Estates, Inc. v Travelers Indemnity  
Company**

2003 NY Slip Op 30136(U)

September 25, 2003

Supreme Court, New York County

Docket Number: 0602908/2002

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARCY S. FRIEDMAN

PART 57

Justice

Caliche Realty Estates  
- v -

Travelers Indemnity Corp

INDEX NO.

602908/02

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

*Notice of Cross-Motion*

Answering Affidavits — Exhibits

1  
2, 3  
4, 5, 6, 7  
8, 9, 10, 11

Replying Affidavits

*Memo of Law 1c, 5c*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*these* are decided in

*accordance with accompanying decision order dated 9/25/03.*

**SCANNED**

OCT 02 2003

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/25/03

*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

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CALICHE REALTY ESTATES, INC., IG  
 SECOND GENERATION PARTNERS, L.P., I  
 BLDG CO.,

*Plaintiffs,*

- against -

THE TRAVELERS INDEMNITY COMPANY,  
 BLEECKER STREET JEWELRY, INC., AJI, INC.,  
 and GLOBAL COVERAGE, INC.

*Defendants.*

Index No.: 602908/02

DECISION/ORDER

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In this declaratory judgment action, plaintiffs Caliche Realty Estates, Inc. (“Caliche”), IG Second Generation Partners, L.P., and I Bldg Co. seek judgment declaring that defendants The Travelers Indemnity Company (“Travelers”), Bleecker Street Jewelry, Inc. (“Bleecker”) and AJI, Inc. (“AJI”) are liable to defend and indemnify them in an underlying personal injury action against them for damages sustained at Caliche’s premises. Defendant Travelers moves, and defendant Bleecker cross-moves, for summary judgment dismissing the complaint. Defendant AJI cross-moves for summary judgment dismissing the complaint and cross-claims against it.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing

party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).” (Zuckerman v. City of New York, *supra*, at 562.)

The relevant facts are undisputed. Caliche was the owner, AJI was a tenant, and Bleecker was AJI’s subtenant of a premises located at 338 Bleecker Street in Manhattan. In the underlying personal injury action, brought by Norma Kraus against plaintiffs herein, Kraus alleges that on April 15, 1997 she tripped and fell at the premises, sustaining injuries. Pursuant to the lease between Caliche and AJI, AJI was required to obtain a general liability insurance policy naming Caliche and other named individuals and entities as additional insureds. The sublease agreement between AJI and Bleecker required Bleecker to perform all obligations of AJI under the over-lease, including obtaining insurance adding Caliche and others as additional insureds. (Sublease, ¶¶ 5.02, 10.) Bleecker purchased a commercial general liability policy of insurance from Travelers for the policy period from August 28, 1996 through August 28, 1997. The policy named Bleecker as the insured, but did not name any additional insureds. However, defendant Global Coverage, Inc. (“Global”), Travelers’ agent, issued a certificate of insurance naming Caliche as an additional insured on Bleecker’s policy. After the underlying action was commenced, Caliche’s insurer, Gerling America Insurance Co. (“Gerling”) tendered the defense and indemnification to Travelers. In response, by letter dated June 2, 1998, Travelers’ representative, Mike Azzarelli, stated that Caliche was an additional insured under Bleecker’s policy. However, Travelers never assumed the defense of the underlying action, and it appears to be undisputed that Gerling represented Caliche in that action. A verdict was rendered for plaintiff in the underlying action in April 2002. By letter dated April 11, 2002, Travelers advised Gerling that Mr. Azzarelli was mistaken, and that Caliche was not named as an

additional insured on Bleecker's policy.

### Travelers Motion

Travelers moves for summary judgment dismissing the complaint on the ground that Caliche was not an additional insured on the policy it issued to Bleecker. Plaintiffs oppose the motion on the ground that the certificate of insurance named Caliche and, in the alternative, that Travelers is estopped from denying coverage.

Plaintiffs fail to raise a triable issue of fact on their claim that they were covered by the policy. A certificate of insurance "is evidence of the insurer's intent to provide coverage, but it is not a contract to insure \* \* \*, nor is it conclusive proof, standing alone, that such a contract exists." (Buccini v 1568 Broadway Assocs., 250 AD2d 466,469 [1<sup>st</sup> Dept 1998].) A triable issue of fact as to coverage is not raised where, as here, the policy does not name or designate a party as an additional insured, and the certificate of insurance, which does name the party as an additional insured, states that it is "a matter of information only and confers no rights" upon the certificate holder. (Id. at 470.)

Plaintiffs also fail to raise a triable issue of fact on their claim of coverage by estoppel. It is a "well-recognized rule that the doctrines of waiver or estoppel may not be invoked to create coverage where none exists under the policy as written." (Sena Nationwide Mut. Fire Ins. Co., 224 AD2d 513, 514 [2d Dept 1996][internal citations and quotation marks omitted]; American Ref-Fuel Co. v Resource Recycling, Inc., 248 AD2d 420 [2d Dept 1998].) However, it is also well settled that equitable estoppel may be asserted against the insurer "in an appropriate case, such as where an insurer, though in fact not obligated to provide coverage, without asserting policy defenses or reserving the privilege to do so, undertakes the defense of the case, in reliance

on which the insured suffers the detriment of losing the right to control its own defense. In such circumstances, though coverage as such does not exist, the insurer will not be heard to say so.” (American Trans. Ins. Co. v Mendon Leasing Corp., 241 AD2d 436,437 [1<sup>st</sup> Dept 1997] [quoting Albert J. Schiff Assocs.. Inc. v Flack, 51 NY2d 692 [1980].)

While this is not a case in which Travelers is estopped from denying coverage by virtue of an act such as the undertaking of Caliche’s defense, Caliche argues that Travelers is estopped by virtue of its issuance of the certificate of insurance, as well as its 1998 representation to Gerling, Caliche’s insurer, that Caliche was Travelers’ additional insured.

There is conflicting authority among the Departments as to whether estoppel may be based on the issuance of a certificate of insurance naming a party as an insured. (Compare Bucon, Inc. v Pennsylvania Mfg. Assn. Ins. Co., 151 AD2d 207 [3d Dept 1989][finding estoppel] with American Ref-Fuel Co., 248 AD2d 420, supra [rejecting estoppel based on issuance of certificate].) Although the issue does not appear to have been finally resolved in this Department, the Appellate Division has recently held, approvingly citing American Ref-Fuel Co. that where “certificates of insurance contain disclaimers that they are for information only, they may not be used as predicates for a claim of negligent misrepresentation.” (Benjamin Shapiro Realty Co., LLC v Kemper Natl. Ins. Cos., 303 AD2d 245 [1<sup>st</sup> Dept 2003], lv denied 2003 NY Lexis 1753.)

It is not necessary for this court to reach the issue, however, as there is no competent evidence on this record that Caliche relied on the issuance of the certificate of eviction. On the contrary, the undisputed evidence is that Caliche was represented in the underlying personal injury action by its own insurer, Gerling. Moreover, the complaint, although verified, contains

wholly conclusory allegations as to reliance (see Complaint, ¶¶ 22-24), and plaintiffs do not submit a factually specific affidavit by anyone with personal knowledge attesting that they relied in any respect on the certificate of insurance.

The court further finds that the 1998 letter of Travelers' representative, Mike Azzarelli, is also insufficient to raise a triable issue as to estoppel. Representations of an insurance agent as to the existence of coverage are ineffective to create coverage by estoppel. (See Dedvukaj v Allstate Ins. Co., 80 NY2d 843 [1992], revg 175 AD2d 1.) There is also no evidence that Caliche relied on the 1998 letter.

Moreover, plaintiffs may not avoid summary judgment based on a claimed need for discovery, as they make no showing that discovery may lead to relevant evidence. (See (Harris v. Alcan Aluminum Corp., 91 AD2d 830, 831 [4<sup>th</sup> Dept 1982], affd for reasons stated below 58 NY2d 1036 [1983].)

Travelers' motion to dismiss the complaint must accordingly be granted.

#### Bleecker's Cross-Motion

Bleecker moves for summary judgment dismissing the complaint on the ground that it fulfilled its obligation to procure premises liability insurance. However, as held above, a certificate of insurance is not a contract to insure, and it is undisputed that although Bleecker procured the certificate, it did not procure a policy which in fact named Caliche as an additional insured. Bleecker's motion to dismiss the complaint in its entirety must accordingly be denied.

In the alternative, Bleecker seeks to dismiss the claims of plaintiffs IG Second Generation Partners, L.P., and I Bldg Co. on the ground that it was not in privity with these parties.

Bleecker's assertion as to lack of privity is supported by AJI's lease to which Bleecker was

subject. AJI's lease named the owner as Caliche Realty Estates, Inc., and provided for AJI as tenant to procure insurance naming as additional assureds Caliche Realty Estates, Inc., Bristol Management Co., and Irving and Lloyd Goldman, "or upon notice from Landlord, their successors in interest." (Lease Rider ¶ 45[e].) In opposition, plaintiff makes no showing that IG Second Generation Partners, L.P., and I Bldg Co. were the successors to any of these named parties. This branch of Bleecker's motion should therefore be granted.

#### AJI's Motion

AJI moves for summary judgment dismissing the complaint and all cross-claims against it on the grounds that the complaint and cross-claims are barred by res judicata. Specifically, AJI alleges that after a trial in the underlying personal injury action in which AJI, Bleecker, and plaintiffs herein were parties, the court (Tolub, J.) granted AJI's motion for a directed verdict and dismissed all the claims and cross-claims against it.

It clearly appears, based on the trial transcript submitted by plaintiffs, that the court dismissed the direct claims against AJI for negligence, but not the contractual indemnification claims. AJI's motion for summary judgment should accordingly be denied, except to the extent it seeks dismissal of the claims of IG Second Generation Partners, L.P., and I Bldg Co.

It is accordingly hereby ORDERED as follows:

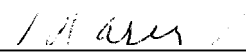
Travelers' motion is granted to the extent of awarding Travelers judgment dismissing the complaint against it, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the motions of Bleecker and AJI for summary judgment are granted only to the extent of dismissing the claims of IG Second Generation Partners, L.P., and I Bldg Co.; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 57 of this Court on October 9, 2003 at 11:30 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York  
September 25, 2003

  
\_\_\_\_\_  
MARCY FRIEDMAN, J.S.C.