

Tiffany St. L.L.C. v Hayden Bldg. Maintenance Corp.
2005 NY Slip Op 30616(U)
September 6, 2005
Supreme Court, New York County
Docket Number: 112804/2004
Judge: Rosalyn H. Richter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 24

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TIFFANY STREET L.L.C. and UNITED
STATES FIRE INSURANCE COMPANY,

Plaintiffs,

-against-

DECISION & ORDER
Index No. 112804/2004
Motion Seq. 1

HAYDEN BUILDING MAINTENANCE
CORPORATION and ADMIRAL INSURANCE
COMPANY

FILED

Defendants.

SEP 08 2005

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RICHTER, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Hayden Building Maintenance Corporation ("Hayden") moves to dismiss the complaint pursuant to CPLR 3211(a)(4) because there is another action pending in Supreme Court, Bronx County between the same parties concerning the same cause of action. In the alternative, defendant Hayden seeks to dismiss the fifth cause of action or stay this action until the underlying action has been resolved. Plaintiffs Tiffany Street LLC ("Tiffany Street") and its insurer United States Fire Insurance Company (U.S. Fire Insurance) commenced this declaratory judgment action seeking a determination of the scope and nature of the obligations of defendants Hayden and Admiral Insurance Company ("Admiral Insurance") to plaintiffs under an insurance policy issued by Admiral Insurance to Hayden.

Plaintiff Tiffany Street and defendant Hayden are two of four defendants in an underlying negligence action *Halpern v. Tiffany Street LLC, et al.* (Index No. 27649/02), which is pending in Supreme Court, Bronx County. That action was commenced on October 17, 2002 for injuries sustained on July 22, 2002. In the underlying action, Tiffany Street's cross-claim against Hayden

alleges that if plaintiff sustained injuries, they were caused by Hayden's "intentional torts and/or negligence" and that Tiffany is entitled to common-law and/or contractual indemnification.

Hayden argues that the present declaratory judgment action seeks the same relief as Tiffany Street's cross claim. Here, the verified complaint alleges five causes of action. The first four are against defendant Admiral Insurance for declaratory judgment, breach of contract, waiver and estoppel, and quantum meruit/unjust enrichment. The fifth cause of action alleges breach of contract against Hayden. Specifically, the complaint alleges that pursuant to a contract to perform certain roof-related work, Hayden agreed to and failed to procure a policy of commercial liability insurance naming Tiffany Street as an additional insured with respect to any personal injury claims.

Dismissal is appropriate where there is "substantial identity" between the parties in the two actions and "the relief sought must be the same or substantially the same." *White Light Productions, Inc. v. On the Scene Productions, Inc.*, 231 A.D.2d 90, 93-94 (1st Dept. 1997). As to the parties, "substantial identity" is "generally present when at least one plaintiff and one defendant is common in each action." *Proietto v. Donohue*, 189 A.D.2d 807, 808 (2nd Dept. 1993). Here, there are no plaintiffs in common. U.S. Fire Insurance is not a party to the Bronx case and Tiffany Street, a plaintiff in this action, is a defendant in the underlying Bronx action. This action also concerns the rights and obligations of defendant Admiral insurance, who is also not a party to the underlying action. Although defendant Hayden argues that Tiffany Street "wears the hat" of a plaintiff through its cross-claim in the underlying action, defendant does not cite any case law, nor has the Court found any, where a "substantial identity" between parties was held to exist in this situation.

Although there is similarity between the present action for breach of contract and the cross-claim for contractual indemnification, there is not identity. *See Forget v. Raymer*, 65 A.D.2d 953, 954 (4th Dept. 1978) (“If the parties are not the same and even though plaintiffs seek much the same end by their actions, the subsequent action should not be dismissed”); *see also Schroeder v. Ziring*, 265 A.D. 1058 (2nd Dept. 1943). Defendant Hayden cites several cases for the proposition that “the policy in this States has been to deny declaratory judgment where the matter in dispute can be determined in the basic negligence action but to permit the action when the dispute is such that it depends on matters outside of the negligence action or will not arise in the negligence action as part of the lawsuit.” *Allstate Ins. Co. v. Santiago*, 98 A.D.2d 608 (1st Dept. 1983)(citations and internal quotations omitted). The question of whether Hayden was contractually obligated to procure insurance for Tiffany Street and name it as an additional insured will not be reached in the litigation before the Bronx Court. Also, the instant action concerns four other causes of action aside from a declaration of coverage which concern the rights and obligations of U.S. Fire Insurance and Admiral Insurance, who are not parties to the Bronx action. *See Zirmak Investments, L.P. v. Miller*, 290 A.D.2d 552 (2nd Dept. 2002); *see also Mullins v. Saul*, 130 A.D.2d 634, 636 (2nd Dept. 1987). Furthermore, an action for indemnification and contribution is not the same as one claiming a breach of contract for failure to defend and procure insurance. *Morgulas v. J. Yudell Realty, Inc.*, 161 A.D.2d 211, 212-213 (1st Dept. 1990). The fact that Tiffany Street has the option to amend its cross-claim against Hayden to include a claim for failure to procure insurance, and therefore, “that there *could* be such a cause of action there is not a sufficient basis upon which to justify dismissal.” *Id.*

In conclusion, defendant Hayden’s motion to dismiss the complaint in its entirety is

denied because there is not a “substantial identity” between the parties and the actions.

Defendant Hayden’s motion to dismiss the fifth cause of action is also denied because this issue will not be determined at present in the underlying negligence action. Defendant’s request to stay this action until the underlying action is resolved is denied because “in the absence of an identity of parties or causes of action, no right to a stay has been demonstrated.” *Morgulas v. J. Yudell Realty, Inc.*, 161 A.D.2d at 214.

September 6, 2005


Justice Rosalyn Richter

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