

**Bovis Lend Lease LMB, Inc. v Garito Contracting,
Inc.**

2006 NY Slip Op 30307(U)

March 28, 2006

Supreme Court, New York County

Docket Number:

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PART 10

Index No: 103616/2005

BOVIS LEASE LMB

vs GARITO CONTRACTING

Serial Number: 001

SUBJECT: JUDGMENT

INDEX NO. _____
MOTION DATE 2/9/06
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were filed with this motion for _____

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.


FILED

APR 03 2006

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: MAR 28 2006

 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
BOVIS LEND LEASE LMB, INC. and
NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA.,

Plaintiffs,

-against-

GARITO CONTRACTING, INC. and TWIN
CITY FIRE INSURANCE COMPANY
(pertaining to an underlying action entitled
*John Armentano et ano v. Broadway Mall
Properties, Inc. et al.*),

Defendants.
-----X

Decision/Order

Index No.: 103616/05
Seq. No. : 001

Present:
Hon. Judith J. Gisco
J.S.C.

FILED

APR 03 2006

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltfs motion [sj] w/GPD affirm in support, exhs	1
Def Twin City x-motion w/MEP affirm in oppos, exhs	2
Def Garito x-motion w/SMC affirm in support, exhs	3
Def Garito affirm in oppos (LGA) w/exhs	4
Pltfs affirm in reply (GPD) w/exhs	5
Pltfs affirm in oppos to the x-motion (GPD) w/exh	6
Pltfs affirm in reply (GPD) w/exhs	7
Def Twin City affirm in reply (MEP) w/exh	8
Def Garito reply affirm in further support (SMC)	9

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiffs, Bovis Lend Lease LMB, Inc. and National Union Fire Insurance Company of Pittsburgh, PA. ("Bovis" and "National Union" or collectively "plaintiffs"), have brought this action for declaratory judgment. They seek a declaration that defendant, Twin City Fire Insurance Company ("Twin City"), must reimburse plaintiffs

for all their prior expenditures (legal fees, etc.) in connection with separately commenced personal injury action brought against them (Armentano v. Broadway Mall, et. al., Supreme Court, Nassau Co., Index No. 15126/01) ["underlying action"].

Presently before the court is plaintiffs' motion for summary judgment granting them the declaration they seek in the complaint. Twin City has cross moved for summary judgment in their favor, dismissing the complaint. Garito, Twin City's insured, has separately¹ cross moved for summary judgment dismissing the complaint.

Background

In the personal injury, John Armentano (and his wife) ["Armentano"] have sued Bovis (and other defendants) to recover damages for injuries Armentano allegedly sustained while working at a construction site that Bovis managed. Labor Law § 240 (1). Garito was one of Bovis' trade contractors. Garito provided demolition services at the site.

Armentano moved for summary judgment in the personal injury action. Garito cross moved for summary judgment, dismissing the 3rd-party complaint and all cross claims against it. Armentano also cross moved to amend his complaint to directly assert claims against Garito, and Bovis cross moved to assert cross claims against Garito and CCM, another 3rd-party defendant.

The presiding judge, Hon. Burton S. Joseph granted Armentano's motion on the issue of liability against all the defendants. Order, Joseph J., 4/13/05. He found a breach of Labor Law § 240 (1), specifically that the defendants neglected to provide

¹ Twin City and Garito are also separately represented in this action.

proper protection for an open hole in the floor. 12 NYCRR § 23-1.7 (b). The judge noted that since there were a number of defendants, each alleging cross/counter claims against one another, a trial on the damages was necessary. Judge Joseph granted Bovis' motion to assert cross claims against Garito in the 3rd-party action by Broadway Mall (the owner of the site). He also granted plaintiff's motion, allowing it to assert claims against Garito, as a direct defendant on his case. In doing so the court noted that Garito as a 3rd-party defendant it "was aware . . . of the nature of the plaintiff's claims and potential for direct claims against them by the plaintiff."

Plaintiffs in this case (Bovis and National Union) have now moved for summary judgment, seeking a declaration that Twin City has to defend and indemnify Bovis in the Armentano personal injury action. Their claim is, based upon a written contract between Bovis and Garito dated September 21, 1998.

Significantly, Bovis has not moved for summary judgment against Garito, but only against Twin City. Garito, however, joins Twin City in opposing Bovis' motion, in addition to cross moving for its own relief against the plaintiffs.

Background

None of the parties to this action can locate the executed original or even a copy of the trade contract between Bovis and Garito for demolition work at the Broadway Mall. Thus, on this motion Bovis seeks to establish the material terms of their contract through the use of extrinsic evidence, including deposition testimony in the underlying personal injury action by Mr. Garito, principle of Garito Contracting Inc. In this action, Garito admits there was a contract between Bovis and itself. It denies, however, that the contract required it to provide coverage for holes in the floor.

In support of its motion, and to establish the contract, plaintiffs present a document that they claim is part of the actual contract. This document, which is 12 pages long, is unsigned. It is, however, identified as "Exhibit B" to "J.C. Penney-Hicksville job # 112853.01." This is an apparent reference to the J.C. Penney store being built at the Broadway Mall, the location where Armentano was injured. This document is dated September 21, 1998. It discusses the scope of work to be performed "under this contract." It refers to the "Contract," "Construction Manager," and "Contractor" throughout. It details the contractor's duties at the job site, followed by an almost six (6) page description of "Specific Work Items" that the contractor must furnish, install, provide at the work site.

The document requires (¶ 47) that the contractor "shall deliver to the Construction Manager all required bonds, if any, along with the required proof of insurance set forth in Exhibit 'C'." It also provides that failure to provide such proof "will delay payment of money due the Contractor for Work performed." Finally, the document also refers to an Exhibit "A" and something else known as "General Conditions."

Plaintiffs also provide the affidavit of Mr. Cottone, Bovis' Senior Vice President. Mr. Cottone represents that every Bovis trade contract with a trade contractor who worked on the Broadway Mall project has identical provisions in it, except for certain job specific variations, like diagrams, the trade code, etc. Mr. Cottone further contends that each trade contract has various exhibits attached to it, along with a document called "Lehrer McGovern Bovis Inc. General Conditions." He maintains that the Bovis contract with Garito was dated September 21, 1998 and that it includes the document identified

as "Exhibit B," (which has been produced), Exhibit C ("Insurance Requirements"), Exhibit F ("Bonding Requirements and Required Bond Forms") and the General Conditions, the latter three of which neither Bovis nor Garito can locate in their files.

In further support of its motion, Bovis provides Garito's application for payment on six (6) separate occasions. Each application was approved and payment made.

Each payment application references a contract dated September "31," 1998. Garito acknowledged at his deposition that there are only 30 days in September, and that this date was probably a typographical error.

Bovis also provides and relies on two "change orders" both dated December 7, 1998. Each references a contract dated September 21, 1998.

Finally, Bovis relies upon Mr. Garito's own EBT testimony in the personal injury action:

"Q: To your knowledge, the work that you had set forth in the proposal of August 31st of 1998, was that work the subject of the contract that was ultimately entered into on September 21st of 1998?

A: Yes, that should have been to [sic] the original contract."

To further support their argument, not only that there was a contract between itself and Garito, but that Garito complied with its obligation under it to have Bovis named an additional insured on Garito's comprehensive general liability policy, Bovis provides a certificate of insurance identifying Bovis² as the certificate holder and "an additional insured." The certificate, dated November 12, 1998, is signed by an

²At that time Bovis was known as "Lehrer McGovern Bovis."

authorized representative of Twin City (Mr. Fitzgerald). The certificate refers to the same job at Broadway Mall (e.g. # 112853.01).

Twin City opposes plaintiffs' motion for summary judgment, and cross moves for summary judgment dismissing plaintiffs' complaint and this action. Twin City maintains there is no proof Bovis is actually an additional insured under its insured's (Garito's) commercial liability policy in the absence of the production of an actual trade contract between Bovis and Garito. Alternatively, Twin City maintains that Bovis is trying to establish the contract between itself and Garito through extrinsic evidence; therefore there are factual disputes that must be tried.

Twin City argues further that even were Bovis ultimately able to prove there was a contract between itself and Garito, and that it was an additional insured, Bovis failed to provide timely notice (a "tender letter") of its claim to Twin City. The personal injury action was commenced October 4, 2001. Garito was brought in as a 3rd-party defendant on July 2, 2003. Bovis' insurer (National Union), sent its tender letter to Twin City on April 2, 2004.

Garito joins Twin City in opposing plaintiffs' motion. It separately cross moves for dismissal of the complaint on the basis that there is another action pending for the same relief, between the same parties (e.g. the personal injury action.) Garito contends that these same disputes about insurance are before Judge Joseph. Like Twin City, Garito contends there is material, factual dispute about the terms of the contract that plaintiffs seek to enforce; therefore plaintiffs' motion for summary judgment should be denied.

On these motions each proponent seeking summary judgment bears the burden of proving that it is entitled to summary judgment as a matter of law. Only if each one meets its initial burden, will it then shift to the opponent who must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial. Zuckerman v. City of New York, 49 NY2d 557 (1980). The disputed issues must be real and not just shadowy semblances, which is why summary judgment requires parties to lay bare its proof. SJ Capelin v. Globe, 34 NY2d 338 (1974). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 NY2d 395 (1957).

Discussion

Despite vigorous arguments by Twin City, that without a copy of the contract, there is no proof that Bovis is an additional insured, Twin City has failed to prove any factual dispute about whether such contract existed. In the underlying action, and in this action, Garito has never asserted that there is no contract. At all times it has conducted itself in a manner consistent with the contract that plaintiffs have proved through extrinsic evidence. Garito's sole dispute regarding the contract is whether it was obligated to provide temporary coverage over open holes. Bovis has provided is proof of the disputed term. However, since there is no motion for summary judgment against Garito before the court at this time, the court does not reach the issue of whether the contract contained such a term. Moreover, it is more properly resolved in the underlying personal injury action. Plaintiffs have, however, met their burden of proving there is a contract between itself and Garito.

Plaintiffs have proved that Garito's contract with Bovis, as with all the other trade contracts for the Broadway Mall construction, required Garito to name Bovis as an additional insured. This requirement, alluded to in Exhibit B, is contained in Exhibit C to the contract which, itself, which plaintiffs have proved, and Twin City has not disproved. Twin City concedes that it issued a commercial general liability insurance policy to Garito (# KI-000-127), which was effective from May 1, 1998 to May 1, 1999, naming Garito as the insured. Twin City further acknowledges that under the "blanket additional insureds" endorsement in its Garito policy, an insured is any party, person, etc., to whom Garito is obligated to by virtue of a "written contract or agreement."

Twin City claims that the certificate of insurance is not proof of coverage, or that Bovis is an additional insured. Twin City offers no explanation for why the certificate would have been issued by its agent, if not because Garito notified Twin City of Bovis' status as an additional insured. Twin City provides no affidavit by its agent (Mr. Fitzgerald) to raise factual disputes that must be tried. Nor does Garito argue that it did not comply with the insurance requirements of its trade contract with Bovis. In fact, Garito later notified Twin City of its insurance modifications for the second phase of the project (Exhibit Q to plaintiff's reply affirm). There is, therefore, no factual dispute presented whether Twin City issued the certificate in error, or because of the Bovis/Garito trade contract. Consequently, Bovis has proved it is an additional insured under Garito's comprehensive general liability policy.

Twin City, on the other hand, has not sustained its burden on its own cross-motion for summary judgment, which is disprove a contract between Bovis or Garito, or at a minimum, prove a factual dispute that any contract they did have did not require

Garito to name Bovis as an additional insured. Neither Twin City or Garito's argument, that the absence of a true copy of the signed contract frames a triable factual dispute for trial, is persuasive. Bovis has met its burden of proving the existence and terms of its contract with Garito. Eden Temporary Services, Inc. v. House of Excellence Inc., 270 AD2d 66 (1st dept. 2000). At best, Twin City has only asserted arguments that merely create "shadowy semblance" of issues, but do not defeat plaintiffs' motion. S.J. Capelin v. Globe, *supra*.

Since additional insureds under a policy are entitled to the same coverage as the named insureds, Twin City's policy with Garito is "primary coverage." Pecker Iron Works of New York v. Travelers's Insurance Company, 99 NY2d 391 (2003).

This frames the next issue raised by Twin City in its cross-motion, which is the timeliness of Bovis' claims, the timeliness of Twin City's disclaimer, and whether either lateness (if proved) affects the claims by either party before the court.

An insurer is not obligated to pay for the loss of its insured in the absence of a timely notice in accordance with the terms of the policy. Security Mutual Insurance Co. v. Acker-Fitzsimons Corp., 31 NY2d 436 (1972). Twin City contends that plaintiffs did not timely notify them of their claims, therefore they properly disclaimed coverage. Twin City, however, has no proof of that it disclaimed coverage because Bovis made a late notice of claim. Twin City has provided the affidavit of Melina F. Kuflik, who avers she sent a letter on April 20, 2004 in response to Bovis' April 2, 2004 tender letter. This letter has been lost, however, and Ms. Kuflik's affidavit attests to its contents. Even accepting her letter as an accurate rendition of what the lost letter contained, she did not deny/ disclaim insurance coverage on behalf of her client based upon late notice.

By failing to do so, Twin City waived its affirmative defense of late notice. Firemen's Fund Ins. Co. of Newark v. Hopkins, 98 NY2d 836 (1996); Halali v. Evanston Ins. Co., 8 AD3d 431 (2nd dept. 2004); Consolidated Edison Co. of New York, Inc. v. U.S. Fidelity and Guar. Co., 263 AD2d 380 (1st dept. 1999).

Twin City has not provided case law to support any (implied) argument by it that a later letter from Ms. Kuflik, dated February 22, 2005, revived that waived defense. Therefore, Twin City's motion for summary judgment dismissing the complaint based upon its defense of "late notice" must be denied and that defense is stricken.

Based upon the foregoing conclusions of law, Bovis is entitled to summary judgment on its 1st cause of action against Twin City and a declaration that Twin City is required to afford primary coverage for Bovis for defense, etc., in the underlying personal injury action.

The balance of Garito's cross-motion is that the claims asserted by plaintiffs in this case are identical to those asserted by Bovis against Garito in the underlying personal injury action. Thus, Garito argues that upon application of CPLR § 3211 (a) (4), this case should be dismissed.

CPLR § 3211 (a) (4) provides that dismissal is appropriate when there is another action pending "between the same parties for the same cause of action." There is a distinction between an agreement to purchase insurance and agreement to indemnify. Kinney v. G.W. Lisk Co., 76 NY2d 215, 218 (1990). As a condition of the trade contract, Garito is obligated to do both.

It is not uncommon for insurance claims to be the subject of a separate plenary action, indeed it has become almost routine. *For example:* Trustees of Congregation

Shearith Israel in City of New York v. Admiral Ins. Co., 10 Misc3d 1057 (A) (N.Y. Sup. 10/7/05); City of New York v. Con Edison Co., 238 AD2d 119 (1st dept. 1997); Town of Oyster Bay v. Employers Ins. of Wausau, 269 AD2d 387 (2nd dept. 2000); Royal Indem. Co. v. Salomon Smith Barney, Inc., 4 Misc3d 1006 (A) (N.Y. Sup. 2004).

The issues presented in this case are not identical to those in the personal injury action; nor are the parties identical. In this action plaintiffs seek a declaration of rights under an insurance policy. Consequently, there is no legal (or practical) basis to dismiss this case. Therefore, Garito's cross-motion for summary judgment dismissing this action upon application of CPLR § 3211 (a) (4) (another action pending) is hereby denied.

Conclusion

Plaintiffs' motion is granted. They have proved their entitlement to summary judgment on their 1st cause of action against Twin City Fire Insurance Company and their "first cause of action against all defendants" insofar as it states claims against Twin City only. Thus, the court makes the following declarations:

- a) Bovis is an additional insured under the policy issued by Twin City covering Garito
- b) The policy affords Bovis primary coverage on the claims by Armentano in the underlying action
- c) Twin City is obligated to defend, etc., Bovis in the underlying action.

Twin City's cross-motion for summary judgment dismissing the complaint against it is denied.

Garito's cross-motion dismissing the complaint upon application of CPLR § 3211

(a) (4) is also denied.

The parties shall appear for a preliminary conference on **May 4, 2006 at 9:30 a.m.** in Part 10, 80 Centre Street, Room 122.


Any relief not expressly addressed has nonetheless been considered and is

hereby denied) or rights

This shall constitute the decision and order of the Court.

Dated: New York, New York
March 28, 2006

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

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