SCANNED ON 9/6/2006

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

PRESENT: BARBARA R. KAPNICK PART 12

Index Number : 122538/2000

RAMIREZ, FELICITO

VS

WILLOW RIDGE COUNTRY CLUB

Sequence Number : 007

DISMISS

INDEX NO. 122538/00

MOTION DATE

MOTION SEQ. NO. 007

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

and cross-

MOTION ~~IS~~ are DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

SEP 06 2006

COUNTY CLERK'S OFFICE NEW YORK

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

Dated: 8/31/06

J.S.C.

BARBARA R. KAPNICK

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

---------------------------------------X

FELICITO RAMIREZ,

Plaintiff,

-against-

WILLOW RIDGE COUNTRY CLUB, INC. and E.W. HOWELL CO., INC.,

Defendants.

---------------------------------------X

WILLOW RIDGE COUNTRY CLUB, INC. and E.W. HOWELL CO., INC.,

Third-Party Plaintiffs,

-against-

FALCON INDUSTRIES, INC. and ALAN FREEMAN & ASSOCIATES,

Third-Party Defendants.

---------------------------------------X

DECISION/ORDER
Index No. 122538/00
Motion Seq. Nos. 007 and 008

Third-Party Index No. 590774/01

FILED
SEP 06 2006
COUNTY CLERK'S OFFICE
NEW YORK

BARBARA R. KAPNICK, J.:

Motion Sequence Numbers 007 and 008 are consolidated for disposition.

This is an action pursuant to Labor Law §§ 240(1), 241(6) and 200 and for common law negligence.

Plaintiff Felicito Ramirez, a laborer, seeks to recover damages for personal injuries he sustained on September 19, 2000, during the course of his employment with third-party defendant Falcon Industries, Inc. ("Falcon"), a demolition subcontractor.

[* 3]

Defendant/third-party plaintiff E.W. Howell Co., Inc. ("Howell") was the general contractor for the project.

Defendants/third-party plaintiffs Willow Ridge Country Club, Inc. ("Willow Ridge") and Howell have asserted claims against third-party defendant Falcon for contractual and common law indemnification, as well as for breach of its agreement to procure insurance naming them as 'additional insureds'.

Defendants/third-party plaintiffs have also asserted claims against Falcon's insurance broker, Alan Freeman & Associates ("Freeman"), claiming that it failed to procure the proper insurance naming them as 'additional insureds', and misrepresented in a Certificate of Insurance that they were, in fact, named as 'additional insureds'.

Defendants/third-party plaintiffs were apparently not specifically named in the general liability policy issued by Lexington Insurance Company to Falcon, which was, in any event, cancelled effective July 31, 2000 based on Falcon's failure to pay its premiums.

Third-party defendant Freeman now moves (under motion sequence number 007) for summary judgment dismissing any and all claims and cross-claims against it.

[* 4]

Third-party defendant Falcon cross-moves for summary judgment dismissing the third-party complaint and all cross-claims against it.

Defendants/third-party plaintiffs Willow Ridge and Howell move (under motion sequence number 008) for summary judgment on their third-party claims against Falcon.

Third-party defendant Freeman argues that the third-party complaint against it must be dismissed on the grounds that:

(1) there is no privity between third-party plaintiffs and Freeman;

(2) under New York law, third-party plaintiffs may not rely on a certificate of insurance to support a claim against an insurance broker;

(3) third-party plaintiffs, who were covered under their own insurance policy, have not sustained any actual damages in this case;

(4) Falcon's failure to pay its premiums for the policy at issue was a superseding cause of third-party plaintiffs' purported damages, and would have caused a lack of additional insured coverage regardless of any actions or inactions of Freeman; and

(5) even if the general liability policy at issue was in force and third-party plaintiffs were named as additional insureds, the policy would not provide coverage for the claims herein, because it excluded coverage for employees of the insured (i.e., Falcon).

[* 5]

Defendants/third-party plaintiffs argue in opposition to this portion of the motion that there is a question of fact as to whether Freeman failed to procure the proper insurance and intentionally, willfully, negligently and/or carelessly made material misrepresentations that Falcon procured the proper insurance.

They further claim that they may assert a claim against Freeman, because (a) a special relationship exited between Freeman and the third-party plaintiffs so as to approach that of privity; and (b) Freeman did not merely represent in the Certificate of Insurance that they were 'additional insureds' but also so represented in numerous oral statements to Howell. Defendants/third-party plaintiffs thus seek to recover the costs and disbursements of this action and any expenses incurred herein, including attorneys' fees, the premiums it paid for its own insurance, any out-of-pocket costs that may have been incurred incidental to the policy, and any increase in future insurance premiums resulting from the present liability claim.

However, the Appellate Division, First Department held in Greater New York Mut. Ins. Co. v. White Knight Restoration, Ltd., 7 A.D.3d 292, 293 (1st Dep't 2004), an action seeking, inter alia, damages for failure to procure coverage naming the property owner and the contractor as additional insureds, and for producing certificates of insurance that incorrectly indicated they had been so named, that "summary judgment was properly granted to the

[* 6]

subcontractor's insurance broker, ... dismissing the claims for breach of contract and negligence, since the broker was under no duty to the property owner and contractor". The court further found that

> [r]egardless of whether the broker acted recklessly, the causes of action for fraud and negligent misrepresentation, based on the inaccurate certificates, were properly dismissed because it was unreasonable to rely on them for coverage in the face of their disclaimer language and, with respect to the negligent misrepresentation claim, because of the absence of a relationship approximating privity (see *Benjamin Shapiro Realty Co. v Kemper Natl. Ins. Cos.*, 303 AD2d 245 [2003], *lv denied* 100 NY2d 573 [2003]).

Greater New York Mut. Ins. Co. v. White Knight Restoration, Ltd., supra at 293.

Accordingly, based on the papers submitted and the oral argument held on the record on June 28, 2006, that portion of third-party defendant Freeman's motion seeking to dismiss the third-party complaint against it is granted.

That portion of third-party defendant Freeman's motion seeking to dismiss Falcon's cross-claims against it on the ground that any losses resulting from the cancellation of this policy are a direct result of Falcon's own failure to pay its premium is granted without opposition.

That portion of the cross-motion by third-party defendant Falcon seeking to dismiss the third-party claim for common law indemnification on the ground that it is barred by Workers' Compensation Law § 11 is granted as there is no dispute that plaintiff did not sustain a 'grave injury'.

That portion of the cross-motion seeking to dismiss the third-party claim for contractual indemnification on the ground that no valid contract existed between Howell and Falcon at the time of plaintiff's accident, and the motion by defendants/third-party plaintiffs for summary judgment on their third-party claim against third-party defendant Falcon for contractual indemnification and breach of contract for failure to procure insurance are denied, as this Court finds that there are issues of fact as to whether Howell and Falcon intended the Contract (and specifically, the indemnification and insurance procurement provisions) executed after plaintiff's accident, to be applied retroactively (see, Pena v. Chateau Woodmere Corp., 304 A.D.2d 442 [1st Dep't 2003], app. dism'd, 2 A.D.3d 1488 [1st Dep't 2003]; Stabile v. Viener, 291 A.D.2d 395 [2nd Dep't 2002], lv. dism'd, 98 N.Y.2d 727 [2002]), including whether the Letter of Intent signed on September 15, 2000, four days prior to plaintiff's accident, included Riders that specifically dealt with the insurance requirements and indemnification provisions.

This constitutes the decision and order of this Court.

Dated: August 31, 2006

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.