

Great Am. Constr. Corp. v BHS Ins. Agency
2007 NY Slip Op 31340(U)
May 17, 2007
Supreme Court, Queens County
Docket Number: 0011881/2005
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

	x	
GREAT AMERICAN CONSTRUCTION CORP.,		Index Number <u>11881</u> 2005
Plaintiff,		Motion Date <u>March 7,</u> 2007
- against -		Motion Cal. Number <u>11</u>
BHS INSURANCE AGENCY AND JOHN DOE,		Motion Seq. No. <u>3</u>
Defendants.	x	

The following papers numbered 1 to 11 read on this motion by defendant BHS Insurance Agency, Inc. s/h/a BHS Insurance Agency and BHS Ins. Co. (BHS) to dismiss the complaint asserted against BHS Insurance Agency pursuant to CPLR 3211(a)(7) and for summary judgment dismissing the complaint pursuant to CPLR 3212.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-8
Reply Affidavits.....	9-11

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff Great American Construction Corp. (GACC), a general contractor, commenced this action alleging it engaged New Peoples Construction Corp. (New Peoples), a nonparty, as a subcontractor to perform masonry work. Plaintiff GACC allegedly was fraudulently induced to engage New Peoples based upon the misrepresentations of defendant BHS, the insurance broker for New Peoples, and defendant "John Doe," a representative of BHS. According to plaintiff GACC, prior to its entry into a written subcontract with New Peoples, defendants BHS and "John Doe" misrepresented, by means of a certificate of insurance, that New Peoples was insured by Colonial Cooperative Insurance Co. (Colonial), pursuant to a policy of general liability insurance policy, and that GACC was named as an additional insured on the Colonial insurance policy. Plaintiff

GACC alleges that an employee of New Peoples was purportedly injured during the performance of the subcontract work, and subsequently commenced suit against it to recover damages for personal injuries. Colonial allegedly refused to provide a defense and indemnification to plaintiff GACC, because the Colonial insurance policy issued to New Peoples had been terminated prior to the accident date.

Plaintiff GACC alleges that due to Colonial's disclaimer, its own liability carrier has undertaken to provide it with a defense and indemnification in the personal injury action brought by the employee of New Peoples. Plaintiff GACC further alleges that as a result, its carrier established a reserve, in the amount of \$1,000,000.00, for the defense and potential payment of the employee's claim, and increased plaintiff GACC's liability insurance premium by the amount of \$459,500.00 for each of the years 2005-2006 and 2006-2007. Plaintiff seeks to recover \$919,000.00 together with interest, representing the total increased expenses incurred for liability insurance premiums for those two years.

Defendant BHS served an answer denying the material allegations of the complaint, and asserting various affirmative defenses, including lack of privity of contract.

In considering a motion to dismiss a complaint for failure to state a cause of action (see CPLR 3211[a][7]), the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory (see Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Morone v Morone, 50 NY2d 481, 484 [1980]; Rochdale Vil. v Zimmerman, 2 AD3d 827 [2003]). The criterion is whether the proponent of the pleading has a cause of action, not whether it has stated one (see Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]).

It is well established that the 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 Hosp., 68 NY2d 320, 324 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d at 853 [1985]).

Defendant BHS asserts that plaintiff GACC has failed to state a cause of action against it because there was no privity of contract between them, and that plaintiff GACC could not, and did not, justifiably rely upon the certificate of insurance when entering into the subcontract with New Peoples. In support of its motion, defendant BHS offers, among other things, a copy of the pleadings, the purported certificate of liability insurance, disclaimer letters, and transcripts of the deposition testimony of Sharif Sheikh, the president and sole officer of defendant BHS, and Thomas Metallo, the president of plaintiff GACC.

In opposition to the motion, plaintiff GACC concedes that it was not in contractual privity with defendant BHS. Nevertheless, plaintiff GACC contends that defendant BHS still may be held liable to it for misrepresentations. Plaintiff GACC offers, among other things, an affidavit of Samuel G. Gaccione, its vice-president, as evidence that it relied upon the representations in the certificate of insurance, regarding the existence of general liability policy with GACC as a named additional insured, when awarding the subcontract to New Peoples.

Since there admittedly was no privity of contract between plaintiff GACC and defendant BHS, plaintiff GACC cannot recover from defendant BHS for its pecuniary loss "absent evidence of fraud, collusion or other special circumstances" (Calamari v Grace, 98 AD2d 74, 83 [1983]) (see Binyan Shel Chessed, Inc. v Goldberger Ins. Brokerage, Inc., 18 AD3d 590 [2005]; Good Old Days Tavern v Zwirn, 259 AD2d 300 [1999]; Metral v Horn, 213 AD2d 524 [1999]). Nevertheless, "a cause of action sounding in fraud does not require the existence of a relationship of privity or something close to privity between the parties" (Metral v Horn, 213 AD2d at 526) (see Binyan Shel Chessed, Inc. v Goldberger Ins. Brokerage, Inc., 18 AD3d at 592).

In this instance, plaintiff GACC has stated a cause of action against defendant BHS based upon fraudulent misrepresentations found in the certificate of insurance (CPLR 3211[a][7]; Binyan Shel Chessed, Inc. v Goldberger Ins. Brokerage, Inc., 18 AD3d 590). Thus, that branch of the motion by defendant BHS seeking to dismiss the complaint asserted against it based upon failure to state a cause of action is denied.

With respect to that branch of the motion by defendant BHS for summary judgment dismissing the complaint, plaintiff GACC alleges New Peoples delivered a "certificate of liability insurance" to it stating that New Peoples had liability insurance with Colonial and that plaintiff GACC was an additional insured. The certificate was dated June 1, 2001, and stated that the policy number was 277021794

with a policy term running from June 7, 2001, until June 7, 2002. The certificate further stated that it was "ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW." The certificate is signed on the signature line below the designation "AUTHORIZED REPRESENTATIVE."

The disclaimer letter dated February 27, 2002, of York Claims Service (York), the representative of Colonial, to New Peoples indicated that the claimed date of loss was January 18, 2002, the policy issued to New Peoples under policy No. 277021794, with effective dates from June 7, 2000 to February 3, 2001, was previously cancelled on February 3, 2001 for nonpayment of premium and never reinstated by Colonial, and no policy of insurance under policy No. 277021794 existed for the period from June 7, 2001 to June 7, 2002. In addition, the letter indicated that a review of the underwriting file of New Peoples failed to reveal any additional assureds to the Colonial policy prior to its cancellation. By separate letter, dated February 27, 2002, York informed Empire Insurance Group (Empire), GACC's insurance carrier, that Colonial rejected Empire's demand that Colonial provide a defense and indemnification for GACC, on the ground that the Colonial insurance policy was not in effect on the date of loss, and additionally noting that the certificate of insurance, appearing to name GACC as an additional insured, presented to York was "totally invalid."

Mr. Sheikh testified at his deposition that the certificate of insurance purportedly relied upon by defendant GACC, was executed by one "Shaid Hasan," an employee of defendant BHS, who lacked authority to sign it on behalf of defendant BHS. Mr. Sheikh also testified that the insurance policy mentioned on the certificate, in fact, did not exist, and that Shaid Hasan had altered some document to make it appear as if contractual liability was included. Mr. Sheikh further testified that he fired Shaid Hasan when Mr. Sheikh discovered Hasan had been selling insurance certificates "for money under the table." Mr. Sheikh opined that Mr. Hasan may have prepared the certificate of insurance for New Peoples in return for a personal favor which had been performed by one "Hameed Hasan," the president of New Peoples, for Shaid Hasan.

Defendant BHS has failed to demonstrate that it did not fraudulently misrepresent that a general liability insurance policy was in effect for New Peoples and that GACC was an additional insured on such policy. It, therefore, has failed to establish its prima facie entitlement to judgment as a matter of law (see Alvarez v Prospect Hosp., 68 NY2d at 324). Thus, it is unnecessary to consider the sufficiency of plaintiff GACC's opposition papers,

including whether Mr. Gaccione has personal knowledge regarding the matters detailed in his affidavit (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

Furthermore, that the certificate at issue herein includes the statement that it "CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER," does not warrant a dismissal of the fraud claim (see e.g. Binyan Shel Chessed, Inc. v Goldberger Ins. Brokerage, Inc., 18 AD3d 590). Mr. Metallo testified at his deposition that such language is the same language which appears on all of the "ACORD" certificates, and the company has relied upon such certificates of insurance when awarding subcontracts over the years. Mr. Metallo also testified at his deposition that he relied upon the certificate of insurance at issue herein, when agreeing to enter into the subcontract with New Peoples, and that he looked for "additional insured on the policy" language in the certificate when doing so. Although he further testified that he was unsure when the contract with New Peoples was actually signed, and whether it was signed by both parties at the same time, Mr. Metallo also testified that typically, the subcontractor would sign the subcontract and then present the certificate of insurance to plaintiff GACC. He further stated that it was only then, upon being assured that there was contractual liability coverage, would GACC award the subcontract. Therefore, that the date set forth on the New Peoples subcontract is before the date set forth on the certificate of insurance, without more, is insufficient to find a lack of reasonable reliance by plaintiff GACC on the representations therein.

Under such circumstances, that branch of the motion by defendant BHS for summary judgment is denied.

Dated: 5/17/07

J.S.C.