Robinson v Friedman Mgt. Co.
2007 NY Slip Op 31510(U)
May 11, 2007
Supreme Court, New York County
Docket Number: 0120495/2003
Judge: Michael D. Stallman
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SCANNED ON 5/21/2007

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. MICHAEL D. STALLMAN, Justice — PART 7

E.C. ROBINSON III,
Plaintiff,

- v -

FRIEDMAN MANAGEMENT CO. et al.,
Defendants.

(And a third-party action with an additional counterclaim defendant)

INDEX NO. 120495/03

MOTION DATE 1/12/07

MOTION SEQ. NO. 004

MOTION CAL. NO. ______

The following papers, numbered 1 to 7 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibits A-Q	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits	4
Supplemental Affidavit & Affirmation	5-6
Supplemental Reply	7

FILED
MAY 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with annexed memorandum decision and order.

FILED
MAY 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

Dated: 5/11/07

J.S.C.

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______ J.S.C.
DATED:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

---X

E.C. ROBINSON, III,

Plaintiff,

-against-

Index No. 120495/03

Decision and Order

FRIEDMAN MANAGEMENT CO., 281 WEST 11TH STREET OWNERS CORP., PENMARK REALTY CORP., SIRA PROPERTIES, an Unincorporated Business Entity, JUDITH BLOOMFIELD, ADELE COHEN, MAY COHEN, THOMAS A. POLLAK, BRYAN CANNIFF, DENISE CANNIFF, and JONATHAN GLYNN,

Defendants.

---X

FRIEDMAN MANAGEMENT CO., 281 WEST 11TH STREET OWNERS CORP., PENMARK REALTY CORPORATION, and SIRA PROPERTIES, an Unincorporated Business Entity,

Third-Party Plaintiffs,

-against-

THOMAS A. POLLAK,

Third-Party Defendant.

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FILED
MAY 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

THOMAS A. POLLAK,

Third-Party Counterclaiming Defendant,

-against-

ATLANTIC MUTUAL INSURANCE COMPANY,

Additional Counterclaim Defendant.

---X

MICHAEL D. STALLMAN, J.:

Plaintiff E.C. Robinson, III brings this action for personal injuries and property damage

arising out of demolition and renovations at 281 West 11th Street, a New York County cooperative apartment building. Defendants/third-party plaintiffs Friedman Management Corp., 281 West 11th Owners Corp., Penmark Realty Corporation, and Sira Properties (collectively, the Friedman defendants) seek indemnification and contribution from Thomas A. Pollak (sued herein as Thomas A. Pollack), who was retained to perform renovation work in unit L-C. Pollak, in turn, asserted counterclaims against the Friedman defendants and against their insurer, Atlantic Mutual Insurance Company (Atlantic).

Atlantic moves (seq. no. 004) for summary judgment declaring that it is not obligated to defend or indemnify Pollak in the main action, contending that he is not covered as an additional insured because he is not an employee of the Friedman defendants. Atlantic also seeks summary judgment dismissing the second, third, fourth, and fifth counterclaims asserted against it.

BACKGROUND

Plaintiff claims that Friedman Management Corp. (Friedman) and Penmark Realty Corporation (Penmark) manage the building at 281 West 11th Street. 281 West 11th Owners Corp. is the owner of the building. Sira Properties (Sira) is allegedly the cooperative sponsor.

It is undisputed that in December 2000, defendant Jonathan Glynn entered into a contract of sale with Sira to purchase a certain number of shares allocated to unit L-C. Under that contract, certain renovation work was to be performed under the auspices of Sira in order to avoid the need to seek board approval. Pollak performed the work in that unit. Plaintiff claims, among other things, that dust, debris and noxious materials created by the work entered his apartment through the building's ventilation system, causing his injuries.

Atlantic issued a commercial general liability insurance policy covering the building for the

period January 1, 2001 through January 1, 2002. The Friedman defendants were named insureds under the policy. Pursuant to the policy, the Friedman defendants' employees were additional insureds, but only for acts within the scope of their employment. The policy also provided that Atlantic would defend any suit seeking damages because of bodily injury or property damage.

Pollak alleges in his answer to the third-party complaint that during this period, he was an employee of Friedman and Sira. Pollak claims that he received directions from Terri Friedman-Feinan, a Friedman employee and either an employee or representative of Sira, as to what was to be done to the apartment, and did not do any work under Glynn's direction. According to Pollak, he received payment directly from Friedman. He did not hold himself out as an independent contractor and did not advertise his services to the public. Pollak further alleges that he was not required to obtain insurance.

After being sued herein, Pollak claims that he made a timely demand for a defense by Atlantic. Atlantic did not disclaim coverage, but refused to provide a defense.

Pollak's counterclaims against Atlantic are as follows: (1) common-law indemnification and contribution (second counterclaim); (2) breach of contract (third counterclaim); (3) bad faith failure to investigate and settle claims (fourth counterclaim); and (4) a declaration that Pollak is entitled to defense and indemnification under the policy (fifth counterclaim).

DISCUSSION

It is well settled that the movant on 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]). Failure to make such a showing requires denial of the motion (*id.*). Once this showing has been

made, the burden shifts to the nonmovant to demonstrate that a genuine material issue of fact exists, requiring a trial of the action (*id.*).

Atlantic's Duty to Defend and Indemnify Pollak – Fifth Counterclaim

Atlantic argues that Pollak is not an additional insured under the policy issued to the Friedman defendants, as he is undisputedly not their employee, but rather was Glynn's independent contractor. According to Atlantic, only Glynn, the purchaser of apartment L-C, had the authority to supervise and control Pollak's renovation work. Atlantic further contends that the Friedman defendants' sole role was to disburse funds received from Glynn to Pollak.

Pollak argues in opposition that Atlantic's motion should be denied, because it is not supported by an affidavit from an individual with personal knowledge of the events and all of the pleadings.[1] These arguments have no merit. Where, as here, an attorney's affirmation is based on documentary evidence in his or her possession, submitted on the motion, it is sufficient for purposes of a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). Atlantic has also supplied the remaining pleadings in a supplemental affirmation.

Pollak also contends that Atlantic admitted, in its response to his notice to admit, that whether Pollak was an employee was a disputed issue of fact. A notice to admit is designed to elicit

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[1] Pollak also initially opposed the motion on the ground that facts essential to justify opposition existed but could not then be stated, since he had not deposed Claudia Shapiro, a former Friedman employee, and had not received a copy of a voicemail message from Ms. Shapiro, which was ordered to be produced by plaintiff. With respect to the deposition, Ms. Shapiro was deposed between the submission of Pollak's opposition and supplemental papers, and Pollak submits portions of her examination before trial in further opposition to Atlantic's motion. Atlantic also represents that it has provided all required discovery. Thus, there is no basis for denying summary judgment under CPLR 3212 (f) (*see Global Mins. and Metals Corp. v Holme*, 35 AD3d 93, 103 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]).

admissions on matters which the requesting party "reasonably believes there can be no substantial dispute" (CPLR 3123 [a]; *see also National Union Fire Ins. Co. of Pittsburgh, Pa. v Allen*, 232 AD2d 80, 85 [1st Dept 1997]). Where a notice to admit seeks admissions on material or ultimate issues in the case, it is improper (*National*, 232 AD2d at 85). Pollak's notice to admit requested admissions as to whether the Atlantic policy provided coverage for defense of employees of the Friedman defendants, not whether Pollak in particular was an employee. Even if it did, the notice would have been improper because it would have requested an admission as to the heart of the dispute between Atlantic and Pollak.

An insurer's duty to defend its insured is broader than its duty to indemnify. Indeed, the duty to defend is triggered when the allegations in the underlying complaint suggest a "reasonable possibility of coverage" (*see Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal quotation marks omitted]). If the claim, liberally construed, falls within the policy, the insurer must defend its insured (*id.*; *see also BP A.C. Corp. v One Beacon Ins. Group*, 33 AD3d 116, 120 [1st Dept 2006]). An insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993]).

In contrast, the duty to indemnify is determined by the actual basis for the insured's liability to a third person (*see Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424 [1985]). Stated otherwise, the duty to indemnify does not turn on the pleadings, but rather on whether the loss, as established by the facts, is covered under the policy (*Atlantic Mut. Ins. Co. v Terk Techs. Corp.*, 309 AD2d 22, 28 [1st Dept 2003]).

When construing an insurance contract, the court is guided by the rules of insurance contract construction, including the rule that the four corners of the contract govern who is covered and the extent of coverage (*Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, 388 [1st Dept 2006]; *Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 33 [1st Dept 1979], *affd* 49 NY2d 924 [1980]). Where a third party seeks the benefit of coverage, the terms of the contract must clearly evince such coverage (*Stainless*, 69 AD2d at 34). Furthermore, the terms of an insurance policy are to be given their ordinary and plain meaning (*Town of Harrison v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 NY2d 308, 316 [1996], *rearg denied* 89 NY2d 1031 [1997]).

The insurance policy at issue provides that employees of the Friedman defendants are additional insureds for acts committed within the scope of their employment (Wolff Affirm., Exh. B, § II.2.a). The term "employee" is not defined, and, thus, must be given its plain meaning (*see Curry v Atlantic Mut. Ins. Co.*, 283 AD2d 937, 938 [4th Dept], *lv denied* 96 NY2d 721 [2001] ["employee" was given its plain meaning where term was not defined]).

Generally speaking, an employee is someone who works for another subject to substantial control, while an independent contractor is one who works for another subject to less extensive control (*O'Brien v Spitzer*, 7 NY3d 239, 242 [2006]). Courts find an employer-employee relationship to exist when the evidence demonstrates that the employer exercised exclusive control over the results produced or over the means and methods used to achieve the results (*Matter of Hertz Corp. [Commr. of Labor]*, 2 NY3d 733, 735 [2004]; *Matter of Ted Is Back Corp. [Roberts]*, 64 NY2d 725, 726 [1984]; *Matter of 12 Cornelia St., Inc. [Ross]*, 56 NY2d 895, 897 [1982]). Control over the means is the more important factor to be considered (*Matter* of *Ted Is Back Corp.*, 64 NY2d at 726). The issue of control is typically a question of fact (*Melbourne v New York Life Ins. Co.*, 271

AD2d 296, 297 [1st Dept 2000]).

Other recognized tests, none of which are controlling, include the following: (1) employment by the contractor of assistants, with the right to supervise their activities; (2) the contractor's obligation to furnish necessary tools and equipment; (3) the method of compensation; (4) the independent nature of the business; and (5) the power to terminate the contract (*see Leon v Newman*, 23 AD3d 882, 883 [3d Dept 2005]; *Szabados v Quinn*, 156 AD2d 186 [1st Dept 1989]).

As for the most important factor, control over the means and methods, Atlantic points to the contract of sale between Glynn and Sira, to show that Pollak was not an employee of any of the Friedman defendants. Pursuant to that contract, Glynn agreed to deliver to Sira an additional deposit in the amount of $18,636 to fund the renovations, which were described in a rider to the contract (Wolff Affirm., Exh. C., § 45 [a]). Sira was to use these funds to pay for the renovations to Glynn's *designated contractor* (*id.*, § 45 [b] [emphasis supplied]). Sira was to disburse the funds from the deposit upon receipt of written invoices from the contractor and approval by Glynn or his designated agent, Margaret O'Rourke (*id.*). Glynn also agreed to pay all amounts in excess of the deposit to the contractor for the renovations (*id.*, § 45 [c]). Further, Glynn was required to defend, indemnify and hold harmless Sira from any claims, demands, liability, loss, damage, costs and expenses arising from or in connection with any accident, injury or damage occurring in or about the unit during the renovations (*id.*, § 45 [d]). Pollak's proposal for the renovations, which was forwarded to and acknowledged by Glynn, was also incorporated as a rider to the contract (*id.*). The rider provided that Pollak was required to demolish "every inch of the apartment" to expose the pipes in order to ensure that they were in proper working order (*id.*). It also detailed the labor and materials to renovate the entire apartment, including the main room, kitchen, and bathroom (*id.*). Although a

contract between parties to which Pollak was not a party is not dispositive, it may be considered as part of the larger context in which the work was performed.

Atlantic also relies on evidence indicating that no one from Friedman or Penmark supervised or inspected Pollak's work in any way, and that the renovations were to be performed to Glynn's satisfaction (Feinan EBT, at 12-13; Glynn EBT, at 120).

None of the complaints in this consolidated action alleges that Pollak is an employee of the Friedman defendants. However, Pollak has raised an issue of fact as to whether the Friedman defendants exercised sufficient control over his work to create an employer-employee relationship. Pollak states that Terri Friedman-Feinan, who he claims was an employee of Friedman and Sira, hired him in her office and told him that if anyone asked who he worked for, to say that he worked for her (Pollak 7/28/06 Aff., ¶¶ 9, 10). He avers that he took directions from Ms. Friedman-Feinan, and from Claudia Shapiro, the building manager (*id.*, ¶ 11). For example, Ms. Friedman-Feinan told him to stop work and to contact her if he saw asbestos wrapped around the building pipes inside the walls. She also gave him directions concerning removal of pipes that led to a retired boiler on the lower lobby level. In addition, Ms. Friedman-Feinan gave him instructions about other parts of the building, including the building's water meter, which was located inside unit L-C. Ms. Friedman-Feinan also told him when to be at the building (*id.*, ¶ 12). Viewed in the light most favorable to Pollak, this evidence suggests that Friedman or Sira had more than general supervisory authority to ensure that the job was properly done, and actually controlled the details of his work. Thus, it cannot be said here as a matter of law that Pollak was an independent contractor (*see Patrick Butler Gen. Contr., Inc. v Rocco*, 281 AD2d 527, 529 [2d Dept 2001]; *Polipo* v *Sanders*, 227 AD2d 256, 257 [1st Dept], *lv denied* 88 NY2d 812 [1996]; *Malamood v Kiamesha Concord, Inc.*, 210 AD2d 26 [1st Dept

1994]; *cf. Lazo v Mak's Trading Co., Inc.*, 199 AD2d 165, 167 [1st Dept 1993], *affd* 84 NY2d 896 [1994]).

That Pollak never completed a W-4 form and never received W-2 or 1099 forms does not require a contrary result (Pollak EBT, at 48, 154). An individual's treatment for tax purposes is only one factor to be considered (*see Gagen v Kipany Prods., Ltd.*, 289 AD2d 844, 846 [3d Dept 2001]; *Cosmopolitan Med. Acupuncture Servs., P.C. v Allstate Ins. Co.*, 12 Misc 3d 145 [A], *1 [App Term, 1st Dept 2006]). Neither is it dispositive that he purchased materials with his own personal credit card (Pollak EBT, at 78). This too is just one factor to be taken into account with all of the rest (*see Leon*, 23 AD3d at 883).

Therefore, Atlantic's motion for summary judgment is denied as to this counterclaim.

Common-Law Indemnification and Contribution – Second Counterclaim

Turning to the counterclaim for indemnification and contribution, Atlantic contends that this counterclaim is untenable, because Atlantic undisputedly had no role in causing any of plaintiff's injuries or property damage. Pollak has not opposed dismissal of this counterclaim.

Indemnity affords relief to a party who is compelled to pay for a loss caused by another wrongdoer (*see Trump Vil. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept], *lv denied* 1 NY3d 504 [2003]). "Since the predicate of common-law indemnity is vicarious liability without actual fault on the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*Trustees of Columbia Univ. v Mitchell/Giurgola Assocs.*, 109 AD2d 449, 453 [1st Dept 1985]).

Contribution is generally available when two or more tortfeasors share in responsibility for

an injury, where liability is apportioned among the tortfeasors (*Trump*, 307 AD2d at 896). The critical requirement for contribution is that "'the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought'" (*id.*, quoting *Raquet v Braun*, 90 NY2d 177, 182-183 [1997]).

Inasmuch as it is undisputed that Atlantic, as the Friedman defendants' insurer, had no involvement in the activities that lead to plaintiff's injuries or property damage, and merely refused to provide a defense to Pollak, this counterclaim must be dismissed.

Breach of Contract – Third Counterclaim

Atlantic also seeks dismissal of the counterclaim for breach of contract. Pollak bases this counterclaim on allegations that he was entitled to a defense under the policy. Because there are issues of fact as to whether Pollak was covered as an additional insured, Atlantic's motion is denied with respect to this counterclaim.

Bad Faith Failure to Investigate and Settle Claims – Fourth Counterclaim

Atlantic argues that the fourth counterclaim is merely a restatement of the breach of contract claim, and thus fails to state a cause of action. In this counterclaim, Pollak alleges that Atlantic, "motivated by malice," refused in bad faith to investigate and settle the claims concerning the dust and debris that entered plaintiff's apartment in December 2000 (Answer, ¶¶ 77, 89). Pollak seeks punitive damages (wherefore clause, ¶ 2) on his counterclaims.

An insurer's failure to make payments or provide benefits in accordance with an insurance contract is merely a breach of contract, which is remedied by contract damages (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 615 [1994]). Since the duty of good faith is

implicit in any contract, an insurer's bad faith denial is not recognized as an independent cause of action (*id.*). It is undisputed that Atlantic never exercised any control over settlement of the claims against Pollak. Thus, Pollak's allegation that Atlantic refused in bad faith to settle these claims is legally insufficient (*see Royal Indem. Co. v Salomon Smith Barney, Inc.*, 308 AD2d 349, 350 [1st Dept 2003]). Likewise, Pollak's claim that Atlantic failed to adequately investigate his claim "'amounts to nothing more than a claim based on the alleged breach of the implied covenant of good faith and fair dealing'" (*Bettan v Geico Gen. Ins. Co.*, 296 AD2d 469, 470 [2d Dept], *lv dismissed* 99 NY2d 552 [2002], quoting *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 319-320 [1995]). Therefore, this counterclaim fails to state a cause of action.

In *Rocanova*, *supra*, the Court of Appeals held that punitive damages stemming from a breach of contract are recoverable where the conduct is aimed at the public generally, involves a high degree of moral culpability, and rises to a level of "such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Rocanova*, 83 NY2d at 613). Pollak's remaining counterclaims against Atlantic are for breach of contract and a declaration that he is entitled to a defense and indemnification under the policy. Neither of these two claims warrants an award of punitive damages. Thus, Pollak's request for punitive damages on his counterclaims is dismissed.

CONCLUSION

Accordingly, it is

ORDERED that the motion (seq. no. 004) by additional counterclaim defendant Atlantic Mutual Insurance Company for summary judgment is granted to the extent of dismissing the counterclaims for common-law indemnification and contribution (second counterclaim) and bad faith failure to investigate and settle claims (fourth counterclaim) and the request for punitive

damages, and is otherwise denied.

This constitutes the decision and order of the Court.

Dated: 5/11/07
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

FILED
MAY 21 2007
NEW YORK
COUNTY CLERK'S OFFICE