

DeLeonardo v Atlantic Cas. Ins. Co.

2007 NY Slip Op 32136(U)

July 9, 2007

Supreme Court, New York County

Docket Number: 0604093/2006

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 604093/2006

DELEONARDO, ROSS

vs

ATLANTIC CASUALTY INS. CO.

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

FILED DATE _____

FILED SEQ. NO. _____

FILED CAL. NO. _____

The following papers, numbered 1 to _____ were filed in _____ 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 *is denied as*

attached

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

FILED
JUL 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/9/07

[Signature]
EMILY JANE GOODMAN *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 : IAS PART 17

-----X
ROSS DELEONARDO and SANDRA DELEONARDO,

Plaintiffs,

-against-

ATLANTIC CASUALTY INSURANCE CO.
Defendant.

FILED
JUL 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

INDEX NO. 604093/06

-----X
EMILY JANE GOODMAN, J.S.C.:

Defendant Atlantic Casualty Insurance Co. (Atlantic) moves to dismiss the complaint of plaintiffs Ross Deleonardo and Sandra Deleonardo on the basis of lack of standing.

Plaintiffs' complaint alleges that they entered into a contract with Rudolf J. Masi (Masi) to renovate their apartment, that the work performed by Masi was improperly done, that during the construction work, Masi improperly disposed of construction materials, thereby damaging the plumbing in the building, and that Masi failed to complete the work agreed to, essentially abandoning the contract. Pursuant to the renovation contract, Masi was required to and did purchase liability insurance of \$1,000,000. Plaintiffs have sued Atlantic, Masai's insurance carrier, for their damages pursuant to the insurance contract.

Citing *Lang v Hanover Ins. Co.* (3 NY3d 350 [2004]), defendants argue that, because plaintiffs have failed to obtain a judgment against Masi, they have no standing to sue Atlantic, and the complaint must be dismissed. In *Lang*, the Court of Appeals explained that, under common law, an injured person has no

common-law right to sue the insurer of a tortfeasor, because of a lack of privity of contract. *Id.* at 353. In order to ameliorate the hardship caused when an injured party obtained a judgment against a tortfeasor and the insured failed to satisfy the judgment, the legislature enacted Insurance Law § 3420 (b) (1), which authorizes "any person who ... has obtained a judgment against the insured ... for damages for injury sustained or loss or damage occasioned during the life of the policy or contract" to bring an action against the insurance company if the judgment has not been paid within 30 days. Thus, a judgment against the tortfeasor is a condition precedent for a lawsuit against the insurance company, and where no such judgment has been obtained, the action against the insurer must be dismissed. *Id.* at 354-355.

Plaintiffs contend that they are "additional insureds" on the policy and that, therefore, they have standing to sue the insurer. In support of their argument, they submit a Certificate of Insurance from Fairmont Insurance, an insurance broker, listing them as additional insureds. They also note that Masi paid an advance premium of \$1100 for additional insureds. Finally, plaintiffs' attorney states that he spoke with a claim investigator with Fairmont Insurance, who indicated that the insurer's agent and underwriter had sent an e-mail to Fairmont confirming that plaintiffs are additional insureds under the

Endorsement to the policy.

The Endorsement regarding additional insureds states in pertinent part:

Who Is An Insured is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization **have agreed in writing in a contract or agreement** that such person or organization be added as an additional insured on your policy (emphasis added).

Commercial General Liability Coverage, Policy L035003208,
Additional Insured Endorsement, CG 20 33 10 01.

Plaintiffs attempt to gloss over the fact that there is no writing designating them as additional insureds in their contract with Masi, by pointing out that the contract requires Masi to carry liability insurance.¹ However, this requirement cannot be read as satisfying the writing requirement for an additional insured designation. See *Trapani v 10 Arial Way Assoc.*, 301 AD2d 644, 647 (2d Dept 2003) ("[C]ontract language that merely requires the purchase of insurance will not be read as also requiring that a contracting party be named as an additional insured").

Although the Certificate of Insurance submitted by plaintiffs states that they are additional insured, that certificate also states:

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION
ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER.

¹Plaintiffs do not maintain that the Additional Insured Endorsement is satisfied by an oral agreement that plaintiffs be added as an additional insured.

THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE
COVERAGE AFFORDED BY THE POLICIES BELOW.

Certificate of Liability Insurance.

Where, as here, the Certificate of Insurance states that it is for information only, it confers no rights on the certificate holder. *Progressive Cas. Ins. Co. v Yodice*, 276 AD2d 540, 542 (2d Dept 2000); see also *American Motorist Ins. Co. v Superior Accoustics Inc.*, 277 AD2d 97 (1st Dept 2000). Plaintiffs cannot, therefore, rely on the statement in the Certificate of Insurance as a basis to sue Atlantic directly without having first obtained a judgment against Masi, as required by Insurance Law § 3420.

Finally, the double hearsay statement by plaintiffs' attorney, that a Fairmont Insurance Company claim investigator told him that the insurer's agent sent an e-mail to Fairmont confirming that plaintiffs are additional insured, is not sufficiently probative to establish standing for plaintiffs as additional insureds.

Defendant's motion to dismiss the action on the basis of lack of standing is, therefore, granted, and the court need not reach defendant's additional arguments asserting that there is no coverage for the type of damages alleged by plaintiffs.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court on submission of an

appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This Constitutes the Decision and Order of the Court.

Dated: July 9, 2007

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
JUL 17 2007
NEW YORK
COUNTY CLERK'S OFFICE