

Admiral Ins. Co. v Northland Ins. Co.
2007 NY Slip Op 33078(U)
September 12, 2007
Supreme Court, New York County
Docket Number: 0111422/2005
Judge: Rolando T. Acosta
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT. **HON. ROLANDO T. ACOSTA**

PART 61

Index Number : 111422/2005

ADMIRAL INSURANCE

NO. _____

vs

NORTHLAND INSURANCE

DN DATE _____

Sequence Number : 002

DN SEQ. NO. _____

DISMISS

DN CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

611
attached

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

SO ORDERED

Dated: 9/14/07

[Signature]

ROLANDO T. ACOSTA s.c.
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

Admiral Insurance Company & Ryder
Construction, Inc.,

Plaintiffs,

– against –

Northland Insurance Company, CGU Insurance
Co., Koenig Ironworks, Inc., and Urban Foundation/
Engineering, LLC (pertaining to an underlying
Action styled Janet Herman v. Street Retail, Inc., et. al)

Defendants.

DECISION/JUDGMENT

Index No. 111422/05

Seq. No. 3

Present:

Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing Northland Insurance Company's motion for an order dismissing the complaint and all cross-claims against it and a declaration that Northland has no obligation to i) defend or indemnify Ryder Construction, Inc. in a related underlying personal injury action; and/or ii) reimburse any settlement payments made or cost incurred by Ryder or its carrier Admiral Insurance Company in said action:

Papers	Numbered
Notice of motion, Affirmation & Memorandum of Law	1-2 (Exhibits A-J)
Affirmation in Opposition	3
Reply Affirmation & Memorandum of Law	4-5 (Exhibits 1-3)

Background

In January 200, Ryder Construction, Inc. ("Ryder"), the general contractor on the Fresh Meadows Retail Center construction project, subcontracted with Urban Foundation/Engineering, LLC ("Urban") to perform excavation and concrete work. Northland Insurance Company ("Northland") issued a commercial general liability ("CGL") policy to Urban. The CGL form was modified by the "Endorsement-Self-Insured Retention Form (the "SIR

form”), which provides that “[i]n the event of conflict of this endorsement with any provision elsewhere in the coverage form, the provisions of this endorsement will control the application of insurance to which the coverage applies.” The SIR form further provided that Northland’ liability under the policy would apply in excess of Urban’s self-insured retention limit of \$25,000 (including loss and/or legal expenses) per occurrence. The SIR did not obligate it to provide for an insured’s defense. Rather, it gave Northland the “right and opportunity to associate with an insured in the defense . . . of any ‘suit’ seeking damages arising out of ‘an occurrence’ to which this coverage part applies.”

The policy also contained a Blanket Additional Insured Endorsement, which amended the definition of insured to include Ryder (by virtue of Urban’s contract with Ryder),¹ but “[o]nly for liability arising out of the premises or operations of the named Insured”; and “[n]ot for broader coverage than that provided to the Named Insured under this policy.”

On February 1, 2001, Janet Herman was injured when she tripped and fell over a metal grate at the construction site. Herman sued Ryder (Queens Index No. 1175/04) and Urban was subsequently impleaded into the underlying action. The parties to the underlying action settled with Herman in March 2006 for \$125,000. Ryder paid \$7,500 towards the settlement and reserved its right to seek contractual indemnification from Urban. Urban contributed \$1,000 from its \$25,000 self-retain limit towards the settlement.

Urban and Ryder then moved/cross-moved for summary judgment on the contractual indemnification claim. On December 22, 2006, Justice Brathwaite Nelson granted Urban’s motion in its entirety and denied Ryder’s motion. The Court held that

the proof in the record . . . establishes that Urban and its subcontractor, Recine, were not responsible for, or involved in, the fabrication, installation, maintenance, inspection or repair of the grating on which plaintiff tripped. Thus, plaintiff’s claim

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1. Article 4.6.1 of the Ryder/Urban Contract provided in relevant part:

To the fullest extent permitted by law, [Urban] shall indemnify, and hold harmless . . . [Ryder] . . . from and against claims, damages, losses and expenses, including but not limited to attorney’s fees, arising out of or resulting from performance of the Subcontractor’s work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury or to destruction of tangible property (other than work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor’s Sub-contractors . . . (emphasis added).

for bodily injuries did not arise out of the performance of Urban's work under the subcontract or result from negligent acts or omission of Urban . . .

Northlands Exhibit E (emphasis added).

In August 2005, Admiral Insurance Company ("Admiral") (Ryder's insurer) and Ryder sued Northland, Urban and others seeking, among other things, a declaration that Northland is obligated to defend and indemnify Ryder in the underlying action. On September 30, 2006, plaintiffs discontinued their claims against CGU Insurance Co. and Koenig Ironworks, Inc. Northland now moves for summary judgment dismissing the complaint and all cross-claims against it.

Analysis

It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (C.P.L.R. §3212[b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor. Bush v. St. Claire's Hospital, 82 N.Y.2d 738, 739 (1993); Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). This standard requires that the proponent of the motion "tender[] sufficient evidence to eliminate any material issues of fact from the case," id., "by evidentiary proof in admissible form." Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions." C.P.L.R. §3212(b).

Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so. Vermette v. Kenworth Truck Company, 68 N.Y.2d 714, 717 (1986); Zuckerman v. City of New York, supra, 49 N.Y.2d at 560, 562. Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist. Id. at 562.

Here, Northland has established its prima facie entitlement to summary judgment. Ryder is covered under Northland's policy through the Blanket Additional Insured Endorsement but "[o]nly for liability arising out of the . . . operations of [Urban]." When the issue of contractual indemnification was litigated in Queens between Ryder and Urban, however, the Court ruled in favor of Urban. Accordingly, Ryder is collaterally estopped from seeking coverage under the Northland policy.

To invoke collateral estoppel, there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling. Lumbermens Mut. Cas Co. v. 606 Rest. Inc., 31 A.D.3d 334 (1st Dept. 2006). Ryder, who was represented in the underlying action by the same counsel as in the instant action, moved for summary judgment against Urban based on the indemnification provision of the Ryder/Urban contract, which provided that “[Urban] shall indemnify, and hold harmless . . . [Ryder] . . . from and against claims, damages, losses and expenses, including but not limited to attorney’s fees, arising out of or resulting from performance of the Subcontractor’s work under this Subcontract.” In ruling in favor of Urban, the Court held that “plaintiff’s claim for bodily injuries did not arise out of the performance of Urban’s work under the subcontract or result from negligent acts or omission of Urban.” This determination similarly precludes any coverage under the Northland Policy’s Blanket Additional Insured Endorsement, which provides coverage to Ryder only for liability arising out of Urban’s operations. Harriman Estate Development Corp. v. General Accident Insurance Co., 309 A.D.2d 575 (1st Dept. 2003). Furthermore, Ryder had a full and fair opportunity to litigate whether Herman’s injuries arose out of Urban’s work. Lumbermens Mut. Cas Co. v. 606 Rest. Inc., *supra*, 31 A.D.3d at 335.

Moreover, although the duty to defend is much broader than the duty to indemnify and it “arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy, Fitzpatrick v. American Honda Motor Co., 78 N.Y.2d 61 (1991), there was never any duty on Northland to defend Ryder in the underlying action. According to the express language of the SIR form, Northland did not have a duty to defend, but rather the “right and opportunity to associate with an insured in the defense . . . of any ‘suit’ seeking damages arising out of ‘an occurrence’ to which this coverage part applies.” Even if it had a duty to defend, inasmuch as Urban has not exceeded its self-retained limit of \$25,000 (it only paid \$1,0000), Northland has no obligation to any insured until and unless the remaining \$24,000 is exhausted.

Northland having established its prima facie entitlement to summary judgment dismissing the complaint and all cross-claims asserted against it, the burden shifted to plaintiffs to raise triable issues of fact. Contrary to plaintiffs’ assertions, Northland has not waived its coverage defense. Worcester Ins. Co. v. Bettenhauser, 95 N.Y.2d 185 (2000)(disclaimer is unnecessary when a claim does not fall within the coverage of a policy). Moreover, the fact that there is pending discovery does not do away with the fact that plaintiffs are estopped from re-litigating indemnification. Last, this Court does not find Northland’s policy to be ambiguous.

Accordingly, based on the foregoing it is hereby

ORDERED that Northland Insurance Company's motion for an order dismissing the complaint and all cross-claims against it is granted; and it is further

ADJUDGED and DECLARED that Northland Insurance Company has no obligation to i) defend or indemnify Ryder Construction, Inc. in a related underlying personal injury action (Queens Index No. 1175/04); and/or ii) reimburse any settlement payments made or cost incurred by Ryder or its carrier Admiral Insurance Company in said action.

This constitutes the Decision, Judgment and Order of the Court.

Dated: September 12, 2007

ENTER

SO ORDERED



Rolando T. Acosta, J.S.C.
ROLANDO T. ACOSTA
J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).