

A&C Constr., Inc. of N.Y. v Flanagan

2007 NY Slip Op 33249(U)

September 21, 2007

Supreme Court, Queens County

Docket Number: 0022329/2004

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA PART 17
Justice

	x	
A&C CONSTRUCTION, INC. OF NEW YORK		Index Number <u>22329</u> 2004
- against -		Motion Date <u>July 11,</u> 2007
RICHARD J. FLANAGAN, et al.		Motion Cal. Numbers <u>1, 2, 3</u>
	x	Motion Seq. Nos. <u>3, 4, 5</u>

The following papers numbered 1 to 20 read on this motion by third-party defendants Clarendon National Insurance Company and NCMIC Insurance Company for an order dismissing the third-party complaint on the grounds of failure to state a cause of action, pursuant to CPLR 1010 and 3211(a)(7); dismissing the third-party complaint on the grounds of documentary evidence, pursuant to CPLR 3211(a)(1); dismissing the third-party complaint, pursuant to CPLR 3126(3) on the grounds that third-party plaintiff filed said complaint without leave of court, in violation of two prior orders of the court; and in the alternative severing the third-party action from the main action. Third-party defendants A Preferred Professional Liability Enterprise, Inc., and Susan Eppner separately move for an order severing the third-party action from the main action, and in the alternative seek an order striking the note of issue and setting forth a schedule for the remainder of discovery. Third-party defendant BCS Insurance Company separately moves for an order dismissing the third-party complaint pursuant to CPLR 1010 and 3211(a)(7) on the grounds of failure to state a cause of action, and failure to identify or include the particular contractual terms of conditions upon which the claims are based; and dismissing the third-party complaint, pursuant to CPLR 3126(3) on the grounds that third-party plaintiff filed said complaint without leave of court, in violation of two prior orders of the court; and in the alternative severing the third-party action from the main action.

	<u>Papers Numbered</u>
Notice of Motion-Affidavit-Exhibits (A-G).....	1-4
Opposing Affirmation.....	5-6
Reply Affidavit- Exhibit (A).....	7-9
Memorandum of Law.....	
Memorandum of Law.....	
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Memorandum of Law.....	
Reply of Memorandum of Law.....	

Upon the foregoing papers these motions are consolidated for the purpose of a single decision and are determined as follows:

Plaintiff A&C Construction, Inc. of New York commenced an action on October 8, 2004 to recover damages from defendants Richard J. Flanagan, Flanagan Cooke & French, LLP and Flanagan & Associates, PLLC for legal malpractice. The complaint alleges that the plaintiff retained the defendants in October 2000 in an action against the New York City Housing Authority, which had declared it in default of a construction/renovation contract. Defendants filed an Article 78 petition on behalf of A&C Construction, Inc. of New York on August 9, 2001, which was denied on March 28, 2002 on the grounds that the proper form of redress was a plenary action for breach of contract. Defendants commenced a plenary action in April 2002 on behalf of their client, which was dismissed in February 2003 on the grounds that the complaint did not comply with the requirements of Public Housing Law § 157. Plaintiff alleges five causes of action for legal malpractice and seeks to recover \$2,215,895.40. Defendants have served an answer, a Preliminary Conference Order was issued on October 27, 2005, and a Compliance Conference Order was issued on June 28, 2006. Plaintiff filed a note of issue on September 28, 2006.

The Preliminary Conference Order of October 27, 2005 provided, in pertinent part, that all parties were to appear for examinations before trial on or before December 15, 2005, and that after the expiration of 60 days following said depositions, third-party actions could not be commenced without permission of the court. The Compliance Conference Order of June 28, 2006 provided that all parties were to appear for a deposition on September 7, 2006 and provided that third-party actions were to be promptly commenced upon the discovery of the identity of third-party defendants, but

no later than thirty days after the completion of depositions, unless for good cause shown.

Defendants commenced the third-party action on October 24, 2006 against BCS Insurance Company, Clarendon National Insurance Company (CNIC) and NCMIC Insurance Company for declaratory judgment on the issue of insurance coverage; against A Preferred Professional Liability Enterprise, Inc. (APPLE), and Susan Eppner for the failure to properly procure insurance and breach of fiduciary duty; and against Cooke & French LLP, Joseph J. Cooke and Joseph A. French for negligence, professional malpractice, breach of fiduciary duty, fraud and gross negligence and intentional tort.

The court, in an order dated February 23, 2007, vacated the September 28, 2006 note of issue.

This court, in an order dated July 27, 2007, directed Richard Flanagan to comply with the Preliminary Conference Order, Compliance Conference Order, plaintiff's demand and the stipulation dated March 9, 2007, to provide all discovery and responses on or before August 22, 2007, directed the parties in the main action to conduct all examinations before trial on or before September 26, 2007, and directed the parties to appear at a status conference on October 3, 2007.

In view of the fact that the parties in the main action did not complete all depositions on or before the dates set forth in the Preliminary Conference Order and Compliance Conference Order, leave of the court was not required in order to commence the third-party action. Therefore, that branch of the motions by CNIC and NCMIC Insurance Company, and by BCS Insurance Company for an order dismissing the third-party complaint pursuant to CPLR 3126(3) on the grounds that third-party plaintiff filed the complaint without leave of court, in violation of the prior orders of the court, are denied.

Defendant and third-party Richard J. Flanagan alleges that he was the senior partner of a law firm known as Flanagan & Cooke, PC, for a period of approximately 14 years, until it merged into a new firm known as Flanagan, Cooke & French, LLP in April 2000. Mr. Flanagan further alleges that on June 30, 2002, he formed a new law firm known as Flanagan & Associates, PLLC, and that Joseph J. Cooke and Joseph A. French together formed a new firm known as Cooke & French, LLP, which operated from July 1, 2002 to December 31, 2004.

Third-party defendant CNIC issued a professional liability policy to the law firm of Cooke & French, LLP with an inception

date of May 1, 2003. The 2003 application for coverage included an Insured Supplement, and under the section entitled "Predecessor Firms," said law firm requested predecessor coverage for Flanagan & Cooke, and listed the attorneys in the predecessor firm as Richard J. Flanagan and Joseph J. Cooke. However, as only Joseph J. Cooke was now an attorney with the law firm of Cooke & French, and as the insurer required that 51% or more of the attorneys affiliated with the prior entity be affiliated with the new entity, Flanagan & Cooke did not qualify as a predecessor firm, and was not listed on the declarations page of the 2003 policy.

On March 15, 2004 Cooke & French submitted a renewal application to CNIC, who then issued a Lawyers Professional Insurance Policy to the law firm of Cooke & French, LLP under policy number LLP 200203257, which was written on a claims-made basis, for the period of May 1, 2004 to May 1, 2005. On January 14, 2005 Cooke & French LLP became known as Joseph A. French & Associates. CNIC listed each lawyer, by name and social security number, who was covered under the professional liability policy, but did not list any predecessor law firm. Neither Richard J. Flanagan, nor the law firms of Flanagan Cooke & French, LLP and Flanagan & Associates, PLLC were named as insureds under the CNIC policy or endorsements, and they were not named in either the April 2003 or March 2004 applications for insurance. The named insured under the CNIC policy, Cooke & French, LLP and the successor firm Joseph A. French and Associates, as well as the individually identified partners or associates, are not named as defendants in the main action. Richard J. Flanagan does not claim that he was a former partner or associate of the named insured, Cooke & French, LLP, or that he was a former partner or associate of the successor firm, Joseph A. French and Associates.

The documentary evidence presented here conclusively establishes that none of the third-party plaintiffs are insured under the CNIC policy (CPLR 3211[a][1]). Third-party plaintiffs had the burden of establishing that they are named insureds, or additional insureds, under the CNIC policy, and failed to do so (see Sixty Sutton Corp. v Illinois Union Ins. Co., 34 AD3d 386 [2006]; Moleon v Kreisler Borg Florman Gen. Constr. Co., Inc., 304 AD2d 337, 339 [2003]). The four corners of an insurance agreement govern who is covered and the extent of coverage (Stainless Inc. v Empl. Fire Ins. Co., 69 AD2d 27, 33 [1979], affirmed 49 NY2d 924 [1980]). In addition, where a third party seeks the benefit of coverage, the terms of the contract must clearly evince such intent (Stainless, supra). Here, the unambiguous language of the CNIC policy comports with CNIC and NCMIC's position that third-party plaintiffs Richard J. Flanagan, Flanagan Cooke & French, LLP and Flanagan & Associates, PLLC were

not covered, either as a named or additional insureds, or as a predecessor law firm, under the policy. Contrary to third-party plaintiffs' assertions, discovery is not necessary, as the terms of the insurance policy are not at issue. Therefore, that branch of defendants CNIC and NCMIC Insurance Company's motion to dismiss the third-party complaint, is granted.

Third-party defendant BCS Insurance Company issued a professional liability policy (Policy No. BCS0107420) to Cooke & French, with a policy period of May 1, 2001 to May 1, 2003. This policy contains an endorsement setting forth a change in the named insured to Flanagan, Cooke & French, LLP, effective May 1, 2002. The policy specifically provides that it is a claims-made policy, and only provides coverage for certain claims made and reported during the policy period. It is well settled that under a claims-made policy, there is coverage only when a claim is made within the policy period (see John Paterno, Inc. By and Through Paterno v Curiale, 88 NY2d 328, 331 [1996]; see also Gomez v Feder, Connick & Goldstein, P.C., 260 AD2d 348 [1999]; Kleyman v Cont'l Cas. Co., 2007 U.S. Dist. LEXIS 247 [2007]). Third-party plaintiffs do not dispute the fact that they did not make a claim during the policy period. Rather, third-party plaintiffs' claim is based upon the action commenced by A&C Construction, Inc. of New York on October 8, 2004, which was well after the policy period ended. Contrary to third-party plaintiffs' assertions, discovery is not warranted here, as it cannot serve to alter the fact that the underlying claim was not made or reported during the policy period. Therefore, that branch of BCS Insurance Company's motion which seeks to dismiss the third-party complaint is granted.

Third-party defendants APPLE and Susan Eppner's motion to sever the third-party action is granted. Severance of the legal malpractice action from the third-party action which involves questions of insurance procurement, and the alleged negligent removal of Flanagan from an insurance policy, is warranted, and no basis exists for delaying such relief (see Hoffman v Kew Gardens Hills Assocs., 187 AD2d 379 [1992]).

In view of the foregoing, third-party defendants Clarendon National Insurance Company and NCMIC Insurance Company and BCS Insurance Company's motions to dismiss the third-party complaint is granted.

Third-party defendants A Preferred Professional Liability Enterprise, Inc., and Susan Eppner's motion to sever the third-party action is granted, and the severed action shall be continued as an action in chief. Since an index number fee has been paid pursuant to CPLR 306-a, the plaintiff in the now severed

action shall contact the County Clerk in order to obtain an index number for said action.

Dated: September 21, 2007

J.S.C.