

West 64th St., LLC v Axis U.S. Ins.

2008 NY Slip Op 30146(U)

January 17, 2008

Supreme Court, New York County

Docket Number: 0105557/2007

Judge: Barbara Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 12

Justice

Index Number : 105557/2007
WEST 64TH STREET, LLC
vs.
AXIS U.S. INSURANCE
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

INDEX NO. 105557/07
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

are read on this 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

FILED

JAN 22 2008

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 1/17/08



BARBARA R. KAPNICK J.S.C.
J.B.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check it appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X
WEST 64TH STREET, LLC and GLENWOOD
MANAGEMENT,

Plaintiffs,

DECISION/ORDER
Index No. 105557/07
Motion Seq. No. 001

-against-

AXIS U.S. INSURANCE, AXIS SURPLUS
INSURANCE COMPANY, AXIS SPECIALTY
INSURANCE COMPANY, WILSON SILVA,
BLANCA SILVA and MAREK WLODARCZYK
and REMCO MAINTENANCE, LLC,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

This declaratory judgment action arises out of an underlying personal injury (Labor Law) action, Wilson Silva, Blanca Silva and Marek Wlodarczyk v. West 64th Street, LLC and Glenwood Management, Index No. 15485/06, pending in the Supreme Court, Queens County. Plaintiff West 64th Street, LLC ("West 64th") claims herein that it is an 'additional insured' under a policy of insurance issued by defendants Axis U.S. Insurance, Axis Surplus Insurance Company and Axis Specialty Insurance Company (collectively, "Axis") to Remco Maintenance, LLC ("Remco").

Defendant Axis now moves for an order:

(1) pursuant to CPLR § 3211(a)(1) and (7) dismissing the Complaint and any and all cross-claims against them; and

(2) pursuant to CPLR § 3211(c) declaring, pursuant to CPLR § 3001, that Axis has no obligation to defend or indemnify West 64th

and Glenwood Management ("Glenwood"), in connection with the claims asserted in the underlying action.

Under the policy, an "additional insured" is defined as "[a]ny person or organization that the insured is required by written contract to name as an additional insured".¹

Axis contends that West 64th is not an additional insured under the policy because Remco did not agree in a written contract to procure insurance naming West 64th as an additional insured. See, National Abatement Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA, 33 A.D.3d 570 (1st Dep't 2006).

Plaintiffs oppose the motion on the grounds: (i) that it is premature because there has been insufficient discovery; (ii) Axis has never formally disclaimed coverage; and (iii) Axis should be estopped from disclaiming coverage because the Certificate of Liability Insurance written by the Ruben Group, who plaintiffs

¹ Plaintiff speculates that this endorsement may not, in fact, be contained in the subject policy, because a cover sheet erroneously contains the reference number to an alternative endorsement. Axis, however, has submitted a Supplemental Affidavit from Lisa A. Manzer, a Senior Claims Specialist, verifying that the cited endorsement was, in fact, part of the policy. Moreover, there is no evidence that the alternative endorsement referenced on the cover sheet would confer "additional insured" status upon plaintiff.

claim may be revealed during discovery to be Axis' 'agent', names Remco as insured and endorses West 64th and Glenwood as additional insureds.

However, there is no requirement under CPLR § 3420(d) that an insurer timely disclaim coverage where, as here, no coverage exists in the first instance. See, Zappone v. Home Ins. Co., 55 N.Y.2d 131 (1982); National Abatement Corp. v. National Fire Ins. Co. of Pittsburgh, supra at 571.

Moreover, a certificate of insurance, by itself, is insufficient to raise a factual issue as to the existence of coverage. See, American Motorist Ins. Co. v. Superior Acoustics, 277 A.D.2d 97 (1st Dep't 2000).

Finally, "[i]n general, an insurance broker is considered the agent of the insured, not the insurance company". MTO Associates, Ltd. Partnership v. Republic - Franklin Ins. Co., 21 A.D.3d 1008 (2nd Dep't 2005). See also, Temple Const. Corp. v. Sirius America Ins. Co., 40 A.D.3d 1109 (2nd Dep't 2007). In the instant case, there is no indication that Remco's broker acted as the agent for Axis or that it otherwise had the authority to bind the carrier. See, Tribeca Broadway Associates, LLC v. Mount Vernon Fire Ins. Co., 5 A.D.3d 198 (1st Dep't 2004).

Accordingly, based on the papers submitted and the oral argument held on the record on October 17, 2007 and November 7, 2007, Axis' motion is granted, and it is hereby

ORDERED that the Clerk shall enter judgment dismissing the Complaint and all cross-claims against defendants Axis U.S. Insurance, Axis Surplus Insurance Company and Axis Specialty Insurance Company with prejudice and without costs or disbursements, and it is further

ORDERED and DECLARED that Axis U.S. Insurance, Axis Surplus Insurance Company and Axis Specialty Insurance Company have no obligation to defend and/or indemnify West 64th Street, LLC and Glenwood Managment in connection with the underlying action.


FILED

JAN 22 2008

This constitutes the decision and order of this Court.

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 17, 2008



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.