

Bovis Lend Lease LMB, Inc. v Garito Contr., Inc.

2008 NY Slip Op 30902(U)

March 26, 2008

Supreme Court, New York County

Docket Number: 0103616/2005

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Boris kend lease LMB
et al
- v -
Garito Contracting
et al

INDEX NO.

103616/05

MOTION DATE

MOTION SEQ. NO.

002

MOTION 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 _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED
FILED
MAR 3 1 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: March 26 2008

Check one: ^{EK} FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
BOVIS LEND LEASE LMB, INC. and
NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA.,

Plaintiffs,

-against-

GARITO CONTRACTING, INC. and TWIN
CITY FIRE INSURANCE COMPANY
(*pertaining to an underlying action entitled
John Armentano et ano v. Broadway Mall
Properties, Inc., et al.*),

Defendants.
-----X

Decision/Order

Index No.: 103616/05
Seq. No. : 002, 003

Present:
Hon. Judith J. Gische
J.S.C.

FILED

MAR 31 2008

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Twin City n/m RR w/MEP affirm, exhs and exhs (sep back)	1, 2
Pltfs' opp w/HBA affirm, exhs	3
Twin City reply w/MEP affirm, exhs	4
Garito n/m renew/join w/LGA affirm, exhs	5
Pltfs' opp to Garito n/m w/HBA affirm, exhs	6
Garito reply w/LGA affirm	7
Transcript 9/20/07	8
Order, Gische J., 10/18/08	9

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for a declaratory judgment. The court has before it a motion by each named defendant. Defendant Twin City Fire Insurance Company ("Twin City") seeks to renew and reargue the court's prior decision dated March 28, 2006 whereas Garito Contracting, Inc. ("Garito"), the named insured/policy holder seeks to renew.

Plaintiffs Bovis Lend Lease LMB, Inc. ("Bovis") and their insurer, National Union Fire Insurance Company of Pittsburgh, PA., ("National Union") (collectively "plaintiffs") oppose both motions in their entirety.

At the outset, the court denies Twin City and Garito's motion insofar as they seek to reargue the prior motions and the court's prior decision/order. Not only have they failed to set forth any errors of law or fact by the court, this court's decision was affirmed on appeal [Bovis Lend Lease LMB, Inc., et al v. Garito Contracting, Inc., et al, 38 A.D.3d 260 (1st Dep't 2007) ("the appellate decision")]. See: CPLR § 2221 [d][2]; Foley v. Roche, 68 AD2d 558, 567 (1st Dept. 1979).

Twin City has, however, set forth new facts not available at the time of, and therefore, not offered in connection with its prior motion. These new facts present a colorable argument for why their present motion to renew should be considered by the court. See: Foley v. Roche, 68 AD2d 568, 569 (1st Dep't 1979); James v. Nester, 120 AD2d 442 (1st Dep't 1986). Although plaintiff argues that Garito's motion to "renew" is not properly before the court because they raise completely new arguments, like Twin City's motion, it will be considered since Garito presents similar arguments to Twin City based on new facts. Furthermore, although plaintiffs object to the motion for procedural reasons, they have nonetheless addressed both motions on the merits. There is, therefore, no prejudice to plaintiff for the court to consider the motions.

The court's prior decision/ order

The court previously granted plaintiffs' motion for summary judgment on their claims against Twin City. Twin City cross moved for summary judgment, dismissing the plaintiffs' complaint against them. Garito separately cross moved for summary

judgment dismissing the complaint on the basis that plaintiffs' motion was premature, and there was another action pending involving the same disputes. Then, as now, Garito and Twin City are separately represented, although Garito is Twin City's named insured/ policy holder.

As per the court's decision/order dated March 28, 2006 ("the prior decision/order"), this court decided that plaintiffs had proved Bovis and Garito had a contract and that among its terms a provision that Garito had to obtain insurance for Bovis, as additional insured. The court also decided issues related to the timeliness of defendant Twin City's disclaimer. Specifically, the court decided and declared that: a) Bovis is an additional insured under the policy that Twin City issued to its policy holder, defendant Garito; b) the policy affords Bovis primary coverage in connection with claims against it in an underlying personal injury action [Armentano v. Broadway Mall, et. al., Supreme Court, Nassau Co., Index No. 15126/01] ("underlying action"); and c) Twin City is obligated to defend, etc., Bovis in that underlying action as well. The court denied Twin City and Garito's cross motions for summary judgment dismissing the complaint. In support of its cross motion, not only had Garito argued that Bovis' motion was premature, but it also denied that it had a contract with Bovis containing the defense/ indemnification provisions plaintiffs asserted it had.

In May 2007, after that prior decision was made and affirmed on appeal, the underlying personal injury action was tried before a jury¹. The jury found that Bovis was

¹Justice Burton Joseph, the judge presiding over the underlying action had granted plaintiff summary judgment against the construction manager and the subcontractor. That decision, however, was reversed on appeal. Armentano v. Broadway Mall Properties, Inc., 30 A.D.3d 450 (2nd Dept. 2006). That decision by the

negligent and that its negligence was a substantial factor in the happening of Mr. Armentano's accident. The jury also found Garito was negligent, but decided that its negligence was not a substantial factor in causing the accident.

Arguments Presented

Based upon the jury's verdict, Twin City now moves for this court's reconsideration of its prior order. Twin City contends that because Garito proved at trial that it was not responsible for providing temporary coverage for open holes at the construction site and Mr. Armentano fell into an open, uncovered hole at the work site, his accident did not "arise from the work performed or to be performed" by Garito for Bovis.

Garito joins in Twin City's motion, arguing that the court's prior decision was "wrong." Garito contends further that the court should not have decided, as it did, that there was a contract between Bovis and Garito, or that Bovis was entitled to defense and indemnification under Twin City's policy. Garito argues that the court's decision caused it substantial prejudice at trial because Bovis sought to preclude Garito from presenting any evidence that he had not agreed, was not paid, nor had any obligation to, provide temporary protections for holes, even though the principal admitted he created the hole (a removed garbage chute) that Mr. Armentano fell into.

Plaintiffs argue, in opposition to both motions, that defendants now seek to circumvent the Appellate Division's decision, and thereby obtain a better result than they have thus far achieved. Plaintiffs contend that although the jury found that Garito's

Appellate Division, Second Department was rendered before the Appellate Division, First Department affirmed this court's decision.

[* 6]

negligence was not a "substantial factor" in the happening of Mr. Armentano's accident, Garito was, nonetheless, found to be negligent. Although neither Twin City nor Garito disagree that Garito was found negligent (the jury verdict sheet is provided), they contend that because Garito's work for Bovis did not include covering holes, but only demolition work, the accident did not "arise from or out of " work that Garito did for Bovis on this project. Thus, they urge the court to reverse itself, and deny plaintiffs' motion for summary judgment because Bovis is not entitled to defense and indemnification.

Plaintiff opposes both motions, on the basis that they are procedurally deficient and on the merits. On the merits, they contend that the issue of whether Garito was or was not responsible for covering holes it made was never decided by this court, relying upon the following language in the court's decision: "the court does not reach the issue of whether the contract contained such a term . . . it is more properly resolved in the underlying personal injury action." They contend further that Garito has no reason to reargue the court's decision because there is no judgment against it since the jury did not render a verdict against it.

Plaintiff also distinguishes between "risk coverage" and "negligence" in their arguments. They contend that nothing in Garito's policy with Twin City limits coverage to instances where Garito is the sole cause of an accident or injury.

Finally, plaintiffs provides copies of some of the submissions that were before the Appellate Division on the appeal. Some of those arguments are identical, or indistinguishable, from those now being made in these motions.

In further support and in reply, Twin City raises other claims, including that this

court erred in deciding that Bovis was an additional insured under Twin City's policy because with it came the (erroneous) decision that the policy affords primary coverage.

Discussion

The court, in its prior order, recognized that issues of negligence and liability are regularly decided separately from the issues of indemnification. *For example: Trustees of Congregation Shearith Israel in City of New York v. Admiral Ins. Co.*, 10 Misc3d 1057 (A) (N.Y. Sup. 10/7/05); *City of New York v. Con Edison Co.*, 238 AD2d 119 (1st dept. 1997); *Town of Oyster Bay v. Employers Ins. of Wausau*, 269 AD2d 387 (2nd dept. 2000); *Royal Indem. Co. v. Salomon Smith Barney, Inc.*, 4 Misc3d 1006 (A) (N.Y. Sup. 2004). This approach is sanctioned by the Court of Appeals and the Appellate Division, First Department. *B.P. Air Conditioning Corp v. One Beacon Insurance Corp.*, 8 N.Y.3d 708 (2007); *Bovis Lend Lease LMB, Inc., et al v. Garito Contracting, Inc., et al*, 38 A.D.3d 260 (1st Dep't 2007). This is because "the duty to defend an insured is derived from the allegations of the complaint and the terms of the policy; if a complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend." *B.P. Air Conditioning Corp v. One Beacon Insurance Corp.*, 8 N.Y.3d at 305.

In affirming this court's prior decision, the Appellate Division, First Department, agreed with this court's analysis and findings:

"It is undisputed that there was a trade contract between defendant Twin City's insured (Garito) and plaintiff Bovis Lend Lease. Although the contract was lost, Bovis properly established, through extrinsic evidence, that it required Garito to procure insurance coverage on its behalf [internal citations omitted]. . ."

38 A.D.3d at 260

* 8]
The Appellate Division further held that:

"Having thus satisfactorily proven the existence of such a contract, plaintiffs were properly awarded summary judgment and a declaration that they are covered under the policy. Contrary to defendants' contentions, coverage is the only issue herein. The liability issues raised in the underlying personal injury action need not be determined for the purpose of determining coverage"
Id.

The arguments now presented by Twin City and Garito were raised on appeal in their briefs. The only "new" fact is really that there is now a jury verdict. Bovis and Garito were each found negligent. The jury, however, found that Bovis' negligence was a substantial factor in the happening of Mr. Armentano's accident, but Garito's negligence was not.

When the Appellate Division rendered its decision in this case, it did not know what the jury's verdict would be, but this uncertainty was specifically factored into, and did not deter, the Appellate Division from deciding that Bovis is an additional insured, and therefore entitled to defense under Garito's policy. The court wrote that: "[t]he liability issues raised in the underlying personal injury action need not be determined for the purpose of determining coverage."

Having found that: 1) Bovis had proved its trade contract with Garito, 2) its terms included an indemnification agreement in favor of Bovis, 3) Garito had a policy in effect with Twin City at the time of the accident, and 4) the allegations against Garito arose from the work that Garito had been hired to do for Bovis, the Appellate Division concluded that all the necessary elements were present to trigger Twin City/ Garito's contractual obligation/duty to defend Bovis as an additional insured Garito's policy with

Twin City. Not one of these elements has changed since then, despite the jury's verdict.

The duty of an insurer to defend is broader than its duty to indemnify. Agoado Realty Corp. v. United Intl Ins Co., 95 NY2d 141 (2000). Additional insurance coverage is not contingent upon a liability finding and the insurer's obligation to defend an additional insured exists to the same extent as it does to the policy holder. B.P. Air Conditioning Corp. v. One Beacon Insurance Corp., 8 NY3d at 711. Therefore, an insurer may be called upon to defend whenever the allegations of the complaint suggest "a reasonable possibility of coverage", or the claims are "potentially within the protections purchased." B.P. Air Conditioning Corp. v. One Beacon Insurance Corp., 8 NY3d at 714.

While Twin City and Garito contend that Garito was not hired to provide hole protection, Garito was hired, and had a trade contract to perform, demolition work. The claims by plaintiff in the underlying action were that the defendants were negligent in failing to cover a hole created by Garito when it removed what was once a garbage chute. Any argument that the allegations against Garito did not "arise from" their work is sophistry. The terms "arising out of" and "arising from" is contractual language, standing apart from the principles applicable to negligence actions and issues of liability. See: Dayton Beach Park No. 1 Corp. v. National Union Fire Insurance Co., 175 AD2d 854 (2nd dept. 1991); United States Fire Ins. Co. v. New York Marine & General Ins. Co., 268 AD2d 19 (1st dept. 2000). Moreover, the allegations against Garito were squarely within the risk of loss undertaken by Twin City. It is unimportant whether the complaint has merit, or even whether the allegations are baseless because

the insurance company has provided the insureds with "litigation insurance." B.P. Air Conditioning Corp. v. One Beacon Insurance Corp., 8 NY3d at 714.

Defendants argue that an insurance company has no obligation to defend and indemnify an insured who is found negligent. The cases cited for this proposition are either completely inapplicable or misconstrued. Harriman Estates Dev Corp. v. General Accident Insurance Co., 309 AD2d 55 (1st Dept 2003) (injuries did not "arise from" insured's work for contractor; injured worker was working on an entirely different project); City of Niagara Falls v. Merchants Insurance Grp., 34 AD3d 1263 (4th Dept 2006) (additional insured absolved all liability; duty to defend ended when order to that effect issued). Garito was not found free from negligence (not negligent). In any event, even a complaint that is ultimately defeated has to be defended by the insured. Therefore, absolution from liability is "immaterial to the issue of the insurer's duty to provide a defense." City of New York v. Consolidated Edison Co. of New York, Inc., 238 A.D.2d 119, 121 (1st Dept. 1997).

This court has already decided that Garito's policy with Twin City affords Bovis primary coverage on the claims by Armentano in the underlying action. Defendants argue that the court erred in making that decision, although affirmed on appeal. For this proposition, defendants rely on the recent decision in BP Air Conditioning Corp. v. One Beacon Insurance Corp., 8 NY3d 708 (2007) (hereinafter "BP Air"). In BP Air, the Court of Appeals decided that priority of coverage cannot be decided unless all the relevant insurance policies are before the court, and the other insurance carriers are parties to the action. 8 NY3d at 716. Those requirements were met in this action because Twin City and National Union are parties to this action and the policies were

before the court. There is no distinction between the rights of a named insured and an additional insured under an insurance policy. Pecker Iron Works v. Traveler's Insurance Co., 99 NY2d 391 (2003); BP Air Conditioning v. OneBeacon Insurance Group, BP Air Conditioning , Index No. 0400941/2003, 9/24/04 (Trial Decision), 2004 WL 5359452. Consequently, having proved its status as additional insured, Bovis has the same rights as Garito has under the Twin City policy. Pecker Iron Works v. Traveler's Insurance Co., 99 NY2d 391 (2003).

The parties have presented (or refuted) a number of arguments, each of which has been considered, but are now collectively rejected, by the court. Among these arguments are whether there is another policy "that recently came to [Twin City's] attention" or that the price paid to Garito on the trade contract was too low, and even that Twin City/Garito is considering whether to seek permission for further appeals. Not one of these arguments would result in a different decision by this court.

Twin City also raises entirely new arguments that were not the subject of any of the motions the court previously had before it. Moreover, these arguments, all relating to indemnity and indemnification, are first raised in its reply. They are, therefore, not properly before the court. To the extent, however, that Twin City argues that the court did not decide, and should not have decided, that Bovis is an additional insured, and therefore entitled to the same coverage rights as its named insured (Garito), this argument has already been considered and decided, as addressed earlier in this decision.

Conclusion

The motions by the defendants are hereby granted only to the extent that the

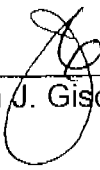
court has allowed them to put forth new facts before the court. However, even with the new facts, the court adheres to its prior decision/order of March 28, 2006.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 26, 2008

So Ordered:



Hon. Judith J. Gische, J.S.C.

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