S. Macedo Constr. Corp. v New York Cas. Ins. Co.
2008 NY Slip Op 30936(U)
March 25, 2008
Supreme Court, New York County
Docket Number: 0100934/2004
Judge: Herman Cahn

[* 1]

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

PRESENT: Cahn PART 49

Index Number : 100934/2004

S. MACEDO CONSTRUCTION

VS

CASUALTY INSURANCE

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

C

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED

APR 01 2008

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

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

Dated: March 25 2008

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: I.A.S. PART 49

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S. MACEDO CONSTRUCTION CORP., ET AL.,

Plaintiff,

-against- Index No. 100934/04

NEW YORK CASUALTY INSURANCE CO.,

Defendant.

----------X

HERMAN CAHN, J:

This action was commenced by S. Macedo Construction Corporation (Macedo) and State National Insurance Company (State National), who are seeking a defense and indemnification from defendant New York Casualty Insurance Company (New York Casualty) in an underlying action entitled *Hornedo v Electric Realty Company, LLC* (Civ Ct. Kings County, Index No. 48-KTS-2004) (the *Hornedo* action).

Defendant New York Casualty has moved for summary judgment dismissing the action. Macedo and State National have cross-moved for reformation of New York Casualty's insurance policy, a declaration that plaintiff's policy is excess to defendant's policy and summary judgment.

The facts in the record are fairly straightforward: Macedo, a general contractor, was named as a defendant in the underlying personal injury action, which was commenced by a subcontractor's employee, Edwin Hornedo (Hornedo). Hornedo was employed by Concord Painting, Inc. (Concord) on June 19, 2000, the date of the alleged injury. Concord had entered into a painting contract with Europadisk, Ltd., the owner of 24-02 Queens Plaza South, Long

Island City, New York, the subject premises. Hornedo's action for personal injuries alleges Labor Law violations against Macedo and one other defendant.

New York Casualty issued a general liability insurance policy to Concord under policy number CB 5D7804, effective April 26, 2000 to April 26, 2001, which policy was in full force and effect on the date of Hornedo's alleged accident.

On June 5, 2000, Concord's insurance broker, Levitt-Fuirst, issued a certificate of liability insurance to New York Casualty showing that Macedo was to be provided additional-insured coverage under Concord's policy.

State National, Macedo's insurer, has been defending Macedo in the *Hornedo* action. State National and Macedo now seek a defense and indemnification from New York Casualty based on Macedo's claimed status as an additional insured.

In the four causes of action alleged in the present proceeding, plaintiffs allege claims based on New York Casualty's failure to disclaim coverage as soon as reasonably possible, as well as equitable estoppel against New York Casualty. Plaintiffs also seek a declaration that the coverage provided by State National is excess to the coverage provided by New York Casualty.

Plaintiffs' application for summary judgment on the third cause of action, for equitable estoppel, raises threshold issues which are dispositive. Macedo claims to have forwarded a letter tendering the defense in the *Hornedo* action to New York Casualty on March 1, 2001. On September 9, 2003, New York Casualty, through its agent, Harleysville, denied coverage to Macedo. The denial letter stated that, despite the fact that Macedo was named as an additional insured in the certificate of insurance, it was not listed as an additional insured on the policy, and the defense tender was denied.

"The party claiming insurance coverage has the burden of proving entitlement to that coverage." *Moleon v Kreisler Borg Florman General Construction Co.*, 304 AD2d 337, 339 (1st Dept 2003). A party who has not been named as an insured or as an additional insured on the face of a policy is not entitled to coverage. *Id.*

"A certificate of insurance is only evidence of a carrier's intent to provide coverage." *Tribeca Broadway Assocs. LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 (1st Dept 2004). It is not a contract to insure, "nor is it conclusive proof, standing alone, that such a contract exists." *Id.* at 200. A carrier will not be estopped from denying coverage based on the terms of a certificate of insurance where it was issued by a broker who was not an agent for the carrier. *Id.* Where a claim falls outside of a policy's coverage, the carrier is not required to disclaim coverage that does not exist in the first place. *Worcester Ins. Co. v Bettenhauser,* 95 NY2d 185 (2000).

Where a certificate of insurance contains an adequate disclaimer, limiting its purpose to "for information only," summary judgment dismissing coverage claims against a carrier will be granted. *St. George v W.J. Barney Corp.*, 270 AD2d 171 (1st Dept 2000). While a failure to name an additional insured in the insurance policy may constitute a breach of contract with its insured, the carrier will not be held liable to the additional insured in contract since no duty was owed to the unnamed additional insured. *Id.*

New York Casualty has established a prima facie case of entitlement to summary judgment dismissing the complaint through proof of the disclaimer contained in the certificate of insurance, along with evidence that Macedo was never named as an additional insured under Concord's policy of insurance. Campbell Aff, Exhs C, D. The disclaimer in the certificate of

insurance states:

> This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below.

Plaintiffs have failed to come forward with material evidence raising a triable issue of fact.

Macedo argues that if it has not been named as an additional insured in the New York Casualty policy, this was a mistake on the part of the insurance company. Because of this alleged mistake, Macedo claims that the policy should be reformed by the court to include plaintiff as an additional insured. Macedo also argues that New York Casualty should be estopped from denying coverage because Macedo relied on the certificate of insurance issued by Levitt-Fuirst. According to Macedo, Levitt-Fuirst was an agent of New York Casualty and any statement as to coverage made by Levitt-Fuirst should be found to be binding on New York Casualty. Macedo further claims estoppel, since it allowed Concord to work at the site in reliance on the terms of the certificate of insurance. Finally, Macedo claims that New York Casualty's underwriting practices and testimonial admissions preclude it from failing to endorse the policy with coverage for Macedo.

The estoppel claim rests on the testimony of the employee at Levitt-Fuirst who performed the clerical tasks required for issuing a certificate of insurance. Macedo claims this witness testified that the certificate of insurance was intended to represent that Macedo was "included as [an] additional insured" on Concord's insurance policy. Seltzer Aff, Exh S. In fact, all this witness testified to is that the purpose of forwarding a copy of the certificate of insurance to the insurer is "to show them a record of what [the broker] issued." *Id.* at 22. This statement, and

this witness' deposition testimony, fail to create insurance coverage based on the terms of the certificate of insurance where the additional insured was never added to the policy by the carrier. Nor does said testimony raise an issue of fact.

Macedo refers to Levitt-Fuirst as the agent for New York Casualty, implying that Levitt-Fuirst's issuance of a certificate of insurance naming Macedo as an additional insured is binding on New York Casualty. Macedo's failure to offer a copy of the agreement between Levitt-Fuirst and New York Casualty constitutes another fatal omission in the proof of its claim against New York Casualty. Macedo's interpretation of the facts on this issue goes beyond the actual record. For example, a reference in a letter from New York Casualty to Concord stating that they "appreciate the opportunity to partner with York International Agency, Inc., your insurance agent," fails to create a question of fact as to whether York, a corporate affiliate of Levitt-Fuirst, was a partner with New York Casualty with respect to the issuance of the insurance policy, since this evidence would not be admissible at trial on the issue of the existence of a partnership between these entities. Nor did this letter redirect all of Concord's insurance-related questions from New York Casualty to Levitt-Fuirst, as if the broker were the carrier's agent, as Macedo would have the court believe. Similarly, language contained in a "binder" between non-party York International, Inc. and Concord, to the effect that Levitt-Fuirst had the authority to bind New York Casualty, was a unilateral statement offered without proof of a meeting of the minds between the broker and the carrier. This document, which corrected a scrivener's error in the original policy, issued in 1996, has no relevance to the issue of Levitt-Fuirst's authority to bind coverage for New York Casualty.

Although Levitt-Fuirst had a contractual relationship with New York Casualty, this

contract was only used in order to establish the relationship between the parties and the financial arrangement between the two separate entities. The record is clear, and undisputed, that Levitt-Fuirst did not have any authority to bind New York Casualty to the terms of a certificate of insurance, or to unilaterally alter or amend a policy issued by New York Casualty.

Macedo complains that the policy, offered as an exhibit to New York Casualty's motion papers, has not been properly authenticated and is therefore inadequate proof of the coverage in effect on the date in question. However, it is Macedo which bears the burden of proof on the issue of coverage under the policy. Without an offer of proof as to actual coverage, Macedo's motion for summary judgment fails, as a matter of law.

Macedo has failed to establish a prima facie case of its entitlement to reformation of the insurance policy based on New York Casualty's alleged mistake. "[A] claim for reformation must be based on either mutual mistake or fraudulently induced unilateral mistake." *Fresh Del Monte Produce N.V. v Eastbrook Caribe A.V.V.*, 44 AD3d 551, 553 (1st Dept 2007). A mutual mistake will be found where the parties have reached an agreement but, due to a scrivener's error, the agreement does not reflect their mutual understanding. *Chimart Assocs. v Paul*, 66 NY2d 570 (1986). "Where there is no mistake about the agreement and the only mistake alleged is in the reduction of the agreement to writing, such mistake of the scrivener, or of either party, no matter how it occurred, may be corrected." *Ebasco Constructors, Inc. v Aetna Ins. Co.*, 260 AD2d 287, 298 (1st Dept 1999) (*internal quotations and citations omitted*).

Macedo does not claim a mutual error due to a scrivener's mistake, but rather a unilateral mistake on the part of New York Casualty. Without an allegation of fraud, however, this claim of unilateral mistake must fail, as a matter of law.

Accordingly, it is

ORDERED that the plaintiff's motion is denied; and it is further

ORDERED that the cross motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 25, 2008

ENTER:

J.S.C.