

Tower Ins. Co. of N. Y. v Joseph T. Reilly Co., Inc.

2008 NY Slip Op 31178(U)

April 21, 2008

Supreme Court, New York County

Docket Number: 0110479/2006

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Tower Insurance

INDEX NO. 110479/06

MOTION DATE 1/29/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Reilly, Joseph T.

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 _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
APR 23 2008
COUNTY CLERK'S OFFICE
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by Libardi Service Agency, Inc. to dismiss the third-party complaint is granted, and the third-party complaint is dismissed; and it is further

ORDERED that Libardi Service Agency, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that plaintiff shall file the note of issue no later than May 2, 2008.

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 4/21/08

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 35

TOWER INSURANCE COMPANY OF NEW YORK,

Index No. 110479-2006

Plaintiff,

-against-

DECISION/ORDER

JOSEPH T. REILLY COMPANY, INC. JOHN J. REILLY,
JULIO ECHEGARAY AND MARIE VEGA ECHEGARAY,
QUEEN OF THE MOST HOLY ROSARY ROMAN
CATHOLIC CHURCH AT ROOSEVELT, and ROMAN
CATHOLIC DIOCESE OF ROCKVILLE CENTRE,

Defendants.

-----X
QUEEN OF THE MOST HOLY ROSARY ROMAN
CATHOLIC CHURCH, at ROOSEVELT AND ROMAN
CATHOLIC DIOCESE OF ROCKVILLE CENTRE,

Index No. 590829-2007

Third-party plaintiffs,

-against-

LIBARDI SERVICE AGENCY, INC.

Third-party defendant.
-----X

FILED
APR 23 2008
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

In this action for breach of contract and contractual indemnification, third-party defendant Libardi Service Agency, Inc. ("Libardi") moves pursuant to CPLR 3211 (a)(7) to dismiss the third-party complaint of Queen of the Most Holy Rosary Roman Catholic Church at Roosevelt ("Most Holy Rosary") and Roman Catholic Diocese of Rockville Centre ("Diocese of Rockville Centre") (collectively, "third-party plaintiffs").¹

¹ Although Libardi moves for pre-answer dismissal pursuant to CPLR 3211(a)(7), the motion later seeks summary judgment.

Third-party plaintiffs allegedly own and operate a Catholic church located at 196 West Centennial Avenue, Roosevelt, New York (the "premises"). According to their third-party complaint, Julio and Marie Vega Echegaray (the "Echegarays") commenced an action against Most Holy Rosary, Diocese of Rockville Centre and Reilly for injuries Julio Echegaray sustained on February 22, 2006 in an accident on the premises (the "underlying complaint"). In the underlying complaint, the Echegarays allege that third-party plaintiffs hired defendant Joseph T. Reilly Company, Inc. ("Reilly") as the general contractor/construction manager for work to be performed at the premises. In turn, Reilly hired subcontractor Jade Exterior Cleaning Inc., Julio Echegaray's employer, to do various construction work, including painting at the premises. Julio Echegaray was allegedly injured at the premises when he fell from a ladder while working at the premises.

After the Echegarays commenced their action against third-party plaintiffs, Most Holy Rosary tendered coverage to Tower Insurance, which had issued an insurance policy to Reilly in connection with the premises (third-party complaint, ¶¶11, 17). Tower Insurance denied coverage, claiming that Holy Rosary and Diocese of Rockville Centre were not named as insureds on the policy's declaration pages, and that they did not otherwise qualify as insureds under the policy (third-party complaint, ¶17).

Thereafter, Tower Insurance commenced the instant action against third-party plaintiffs, seeking a declaration that it is not obligated to defend or indemnify Most Holy Rosary, Diocese of Rockville Centre or Reilly in the underlying action. Tower Insurance claims, *inter alia*, that (1) Most Holy Rosary and Diocese of Rockville Centre are not named as insureds on the policy; (2) although the endorsement to the policy names Diocese of Rockville Centre as an additional

insured, coverage only extends with respect to liability arising out of the ownership, maintenance or use of certain properties listed on a schedule attached to the policy and the accident location is not listed on the schedule; and (3) the additional insured coverage does not apply to liability arising from a duty imposed on the additional insured by statute, ordinance or law (third-party complaint, ¶¶ 17-19). In turn, Most Holy Rosary and Diocese of Rockville Centre impleaded Reilly's insurance broker, Libardi, for breach of contractual indemnification and for Libardi's failure to procure general liability insurance for Reilly naming Most Holy Rosary "as a primary additional insured for the benefit of" Most Holy Rosary. Third-party plaintiffs allege that Reilly contracted with Libardi to procure general liability insurance and Workers' Compensation insurance naming Most Holy Rosary as an additional insured.

Instant Motion

Libardi argues that the claims against it must be dismissed because there was no privity between Holy Rosary and Libardi, and therefore, Libardi did not owe a duty to Holy Rosary. Although Libardi was the insurance broker for Reilly, Libardi was not the insurance broker for Holy Rosary. Further, an insurance broker's duty runs to its client, and not to any potential additional insured.

In support, Libardi's principal, William Libardi, attests that shortly following Echegaray's accident, Reilly first requested a certificate of insurance with Holy Rosary being included as an additional insured on the policy through Tower Insurance. The policy change request form dated February 23, 2006 reflects the request of Reilly made after the underlying accident. At no time did Libardi have any contact with Holy Rosary or Diocese of Rockville Centre. At no time did Libardi procure coverage for such entities or have any relationship with them in the procurement

of coverage. Libardi procured coverage for its customer, Reilly, and at no time was either Most Holy Rosary or Diocese of Rockville Centre a customer of Libardi.

Furthermore, under New York caselaw, Most Holy Rosary is not considered an intended beneficiary to the agreement between Libardi and Reilly, again due to the lack of privity. And, the certificate of insurance does not make Most Holy Rosary a third-party beneficiary to the brokerage agreement as a matter of law. Libardi points out that the certificate of insurance here contains a disclaimer stating that it was issued for information only and did not confer any rights on the certificate holder. Thus, Most Holy Rosary's reliance on the certificate of insurance is unreasonable as a matter of law, and such reliance cannot be used as a basis for a claim against Libardi.

Opposition

Reilly opposes the motion, arguing that discovery may reveal that privity exists between Libardi and Most Holy Rosary, and that Libardi owes a duty to Most Holy Rosary. Reilly believes that Tower Insurance issued a certificate of liability insurance to Most Holy Rosary and Reilly, stating that they were insured under the policy, and identifying Most Holy Rosary as the certificate holder. "Upon information and belief" Most Holy Rosary detrimentally relied on the certificate of insurance and the assertion that insurance had been issued. Reilly further believes that Catholic Diocese of Rockville Centre was an additional insured under the policy.

Reilly also claims that "[u]pon information and belief" Tower Insurance failed to disclaim coverage in a proper manner against Most Holy Rosary, Diocese of Rockville Centre and Reilly. Thus, based on Tower Insurance and Libardi's failure to properly disclaim coverage, they are estopped from disclaiming coverage at this time.

Reilly attests that he and Mr. Libardi held conversations wherein Mr. Libardi indicated that Reilly and "any sub or independent contractors and the Church and Diocese I was working in was fully covered." Libardi was fully aware that Reilly dealt almost exclusively with churches and predominantly with Diocese of Rockville Centre. Further, Reilly's request for the insurance certificate after the job and the accident was to reflect the policies already in existence. In response to Reilly's request, Mr. Libardi stated that it was "not a 'big deal'" and that Reilly and its subcontractors were still covered even if a certificate had not been issued.

Reilly argues that it was Reilly's understanding that the policy covered any subcontractor or independent contractors, Most Holy Rosary and Diocese of Rockville Centre.

Reply

In reply, Libardi contends that Most Holy Rosary and Diocese of Rockville Centre agreed to discontinue its action against it. A determination by this Court on the merits is still warranted, however, since the discontinuance was without prejudice, in the event there is a change in the law. In light of its discontinuation, Most Holy Rosary concedes that it lacks privity, warranting dismissal of the third-party complaint. Based on the uncontested lack of privity, Reilly lacks standing to oppose the motion. And, the claim that discovery will reveal privity between Most Holy Rosary and Libardi lacks merit, in light of the discontinuance and Libardi's affidavit.

Further, Reilly's affidavit does not assert that it requested additional insured coverage for Most Holy Rosary. Apparently, no specific request for coverage was made by Reilly to add Most Holy Rosary as an additional insured. Libardi concedes that the request for the certificate of insurance was made after the job and after the incident. Libardi does not assert that Most Holy Rosary had any relationship with Libardi or made any requests for coverage with Libardi.

Nowhere in Libardi's affidavit is there an indication that any relationship between Most Holy Rosary and Libardi existed, which is the focus of the inquiry.

Analysis

To determine whether dismissal under CPLR 3211(a)(7), the Court must determine whether “within the four corners of the complaint, any cognizable cause of action has been stated” (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 183, 726 NYS2d 60 [1st Dept 2001], *affd as modified* 98 NY2d 314, 746 NYS2d 858 [2002]). The pleading should be construed liberally, and the facts as alleged in the complaint are presumed to be true and are accorded the benefit of every possible favorable inference (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, *supra*, citing *CPLR 3026; Rovello v Orofino Realty Co.*, 40 NY2d 633, 634, 389 NYS2d 314, 357).

Looking within the four corners of the third-party complaint, the Court determines that third-party plaintiffs failed to state a contractual indemnification and breach of contract claim against Libardi. Paragraphs 1 through 3 provide procedural history of the underlying complaint and the nature of Julio Echegaray’s accident. Paragraphs 4 through 9 address jurisdiction over Libardi, and allege Libardi’s connection to New York State. Paragraphs 10 through 12 allege the relationship between Libardi, Julio Echegaray, Jade Exterior Cleaning, Inc. and Most Holy Rosary’s relationship to the work being performed at the premises.

Throughout paragraphs 13 through 19, only one factual allegation is mentioned with respect to the procurement of coverage under the policy: “That . . . JOSEPH T. REILLY AND COMPANY, INC. contracted with the third-party defendant, LIBARDI SERVICE AGENCY, INC. for the procurement of general liability insurance and Workers’ Compensation insurance wherein the third-party plaintiff, QUEEN OF THE MOST HOLY ROSARY ROMAN

CATHOLIC CHURCH at Roosevelt be named as a primary additional insured.” The balance of the third-party complaint discusses the duty arising therefrom, Tower Insurance’s position with respect to coverage, and the two causes of action asserted against Libardi.

Based on a reading of the third-party complaint, as discussed above, there is no indication that any contractual relationship existed between third-party plaintiffs and Libardi. The only contractual relationship mentioned in the complaint is that between Reilly and Libardi, created when Reilly entered into a contract with Libardi for a policy that, allegedly, would name Most Holy Rosary as an additional insured. "It is well settled that the duty of an insurance broker runs to its customer and not to any additional insureds, since there is no privity of contract for the imposition of liability" (*Arredondo v City of New York*, 6 AD3d 328 [1st Dept 2004]; *see also*, *St. George v Barney*, 270 AD2d 171 [1st Dept 2000]). There is no indication that third-party plaintiffs communicated with or had any relationship with Libardi, so as to create privity or render Most Holy Rosary or Diocese of Rockville Centre a customer of Libardi. Further, it is uncontested that the policy does not identify Most Holy Rosary or Diocese of Rockville Centre as insureds. And, no contractual relationship existed between third-party plaintiffs and Libardi (*Benjamin Shapiro Realty v Kemper Natl. Ins. Cos.*, 303 AD2d 245 [1st Dept 2003]). Therefore, the third-party complaint fails to allege sufficient facts indicating that Libardi owed any duty to third-party plaintiffs to procure insurance naming either of them as additional insureds.

In *St. George v Barney Corp.* (270 AD2d 171 [1st Dept 2000]), plaintiff commenced a personal injury action against the general contractor of a work-site at which plaintiff was injured. The general contractor, in turn, impleaded one of the subcontractors, Kurtz Steel Corp. ("Kurtz") for defense and indemnification. Kurtz then commenced a third-party action against its

subcontractor, Crest Steel Co. ("Crest"), who was obligated to have Kurtz named as an additional insured on its policy. Kurtz also named Crest's insurance broker, The Schaefer Agency ("Agency"), and Crest's insurer, Home Indemnity Co. as additional third-party defendants. Like the certificate of insurance in this case, the certificate of insurance in *St. George* contained a disclaimer that it was issued for information only, that it did not confer any rights on the certificate holder, and that it did not extend or amend the policy's coverage. The certificate of insurance, as the certificate herein, also stated that the insurance afforded by the policy listed on the certificate "is subject to all terms, exclusions and conditions of such policies."

The Court in *St. George* held that while Schaeffer may have breached its duty to its client, Crest, "it could not be held liable to Kurtz, the additional insured, to whom it owed no duty." The Court also held that Schaeffer, Crest's insurance broker, was entitled to summary judgment, on the ground that the certificate of insurance was not a contract to insure and was not conclusive proof, standing alone, that such a contract existed.

Likewise here, the certificate of insurance, in and of itself, is insufficient to raise an issue of a fact as to whether Tower Insurance owed a duty to defend and indemnify Most Holy Rosary or Diocese of Rockville Centre. Thus, third-party plaintiffs failed to raise an issue of fact as to coverage under the policy, and Tower Insurance is entitled to dismissal of the third-party complaint (*see Glynn v United House of Prayer for All People*, 292 AD2d 319 [1st Dept 2002] [where purported additional insured was presented with a certificate of insurance by contractor's broker, a certificate of insurance, by itself, is insufficient to raise a factual issue as to the existence of coverage, particularly where the policy itself makes no provision of coverage]).

Nor is there any basis for coverage based on the theory of negligent representation to

Reilly (*see Glynn v United House of Prayer, supra* [broker entitled to summary judgment where on negligent misrepresentation, since it had no contractual relationship with claimant, and not having any privity with claimant, was under no duty to claimant that might serve as a predicate for such claim]).

Furthermore, to the extent that third-party plaintiffs claim rights as a third-party beneficiary, such claim lacks merit. Unless it is established that there is an intention to benefit the third party, the third party will be held to be a mere incidental beneficiary, with no enforceable rights under the contract. The intention to benefit the third party must appear from the four corners of the instrument. The terms contained in the contract must clearly evince an intention to benefit the third person who seeks the protection of the contractual provisions (*Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 418 NYS2d 76 [1st Dept 1979]). The third-party complaint's conclusory allegation that Reilly contracted with Libardi for coverage naming third-party plaintiffs as additional insured is insufficient. Nor does Reilly's allegation that Reilly intended the policy to name Most Holy Rosary as an additional insured suffice, since the intent of both parties to the insurance contract, *to wit*: Reilly and Libardi is be required to confer third-party beneficiary status upon third-party plaintiffs. Both parties to the contract must so intend third-party beneficiary rights, and *must indicate that intention in the contract. . . .*" (*Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, *supra*) (emphasis added).

Nor is there any indication that third-party plaintiffs were third-party beneficiaries to the insurance contract. In order for a third party to enforce an insurance policy, third party must demonstrate that the parties to the insurance policy intended to insure the interest of him who seeks to recover on the policy (*Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 418

NYS2d 76 *supra*, citing *Flemington Bank v Domler Corp.*, 65 AD2d 29, 410 NYS2d 75; *Kornblut v Chevron Oil*, 62 AD2d 831, 407 NYS2d 498; *Bernal v. Pinkerton's, Inc.*, 52 AD2d 760, 382 NYS2d 769, *affd* 41 NY2d 938, 394 NYS2d 638; *MacKendrick v Newport News Shipbuilding and Drydock Co.*, 40 AD2d 798, 338 NYS2d 41, *affd* 35 NY2d 681, 361 NYS2d 158; *Cerullo v Aetna Cas. & Sur. Co.*, 41 AD2d 1, 341 NYS2d 767; *Ramos v Shumavon*, 21 AD2d 4, 247 NYS2d 699, *affd* 15 NY2d 610, 255 NYS2d 658; 10 N.Y.Jur., Contracts, s 239).

“The intention to cover the third party must be that of both parties to the insurance contract, as observed in 18 Couch on Insurance 2d s 74:330:

“Where it clearly appears that a bond was given for the benefit of a third party, he may maintain an action on it in his own name. But in order for a third party to maintain an action against an insurer, an intent to make the obligation inure to the benefit of such person must clearly appear in the contract of insurance, and if any doubt exists, the contract should be construed against such intent.

“In order to be a third-party beneficiary entitled to recover on an insurance contract, it is not enough that it be intended by one of the parties to the contract and the third person that the latter should be a beneficiary” (*Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, *supra*).

Here, it is uncontested that the subject policy did not name either Most Holy Rosary or Diocese of Rockville Centre as insureds or additional insureds. And, the sole, conclusory allegation that the Reilly contracted with Libardi for such insurance, does not amount to an allegation that an insurance contract containing Most Holy Rosary is an additional insured exists. Nor would any allegation by Reilly that Reilly intended the policy to name Most Holy Rosary as an additional insured suffice, since the intent of both parties to the insurance contract, *to wit*: Reilly and Tower Insurance, would be required to confer third-party beneficiary status upon third-party plaintiffs.

Finally, Reilly's contention that "upon information and belief" Tower Insurance failed to disclaim coverage in a proper manner as to Most Holy Rosary and Diocese of Rockville Centre, the doctrine of estoppel cannot be invoked to create coverage in favor of Most Holy Rosary and Diocese of Rockville Centre, where none exists (*see American Ref-Fuel Co. of Hempstead v Resource Recycling*, 248 AD2d 420 [2d Dept 1998]; *Tribeca Broadway Associates, LLC v. Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 774 NYS2d 11 [1st Dept 2004] ["Insofar as the claim fell outside of the policy's coverage, the carrier was not required to disclaim as to coverage that did not exist]).

Third-party plaintiffs failed to raise an issue of fact as to whether any relationship existed between third-party plaintiffs and Libardi, and third-party plaintiffs failed to identify any discovery that would be necessary to raise an issue of fact. Other than the bald allegation in the complaint that there was an agreement among the parties for Libardi to obtain coverage for Reilly naming third-party plaintiffs as additional insureds, there are no specific allegations that third-party plaintiffs spoke or had any communications with Libardi for additional insured status. Nor is there any written agreement to this effect. Instead, Reilly submits a certificate of insurance, which, as stated above, is insufficient in and of itself to indicate that third-party plaintiffs are additional insureds under the policy.

The Court notes that third-party plaintiffs did not submit any opposition to third-party defendants' motion to dismiss their complaint.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by Libardi to dismiss the third-party complaint is granted, and the third-party complaint is dismissed; and it is further

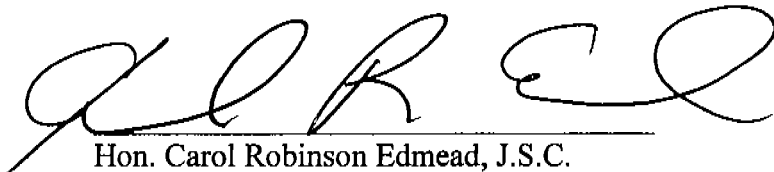
ORDERED that Libardi Service Agency, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that plaintiff shall file the note of issue no later than May 2, 2008.

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: April 21, 2008



Hon. Carol Robinson Edmead, J.S.C.

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