Peckham Rd. Corp. v Ohio Cas. Ins. Co.
2008 NY Slip Op 32548(U)
September 22, 2008
Supreme Court, Albany County
Docket Number: 0088732/0071
Judge: Joseph C. Teresi

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

PECKHAM ROAD CORPORATION and
CONTINENTAL CASUALTY COMPANY,

Plaintiffs,

-against-

THE OHIO CASUALTY INSURANCE
COMPANY,

Defendant.

DECISION and ORDER
INDEX NO. 8873-07
RJI NO. 01-08-093756

Supreme Court Albany County All Purpose Term, September 12, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

On August 17, 2004, Carlos Cunha was working for Garrity Asphalt Reclaiming (hereinafter "Garrity") the subcontractor of Peckham Road Corporation (hereinafter "Peckham"), on a New York State highway construction project. While performing his duties, Mr. Cunha was hit by a tractor trailer and injured. On March 29, 2005, Mr. Cunha commenced a personal injury

action against Peckham, who answered that complaint (hereinafter the "*Cunha* action"). Peckham thereafter sought defense and indemnity from Garrity's insurer, The Ohio Casualty Insurance Company (hereinafter "OCIC"), as an additional insured pursuant to a subcontract agreement between Peckham and Garrity. OCIC defended Peckham in the *Cunha* action from July 20, 2005 until June 13, 2007, when OCIC withdrew its defense, and possible indemnity.

Due to OCIC's refusal to defend or indemnify, plaintiffs commenced this declaratory judgment action to compel OCIC to continue their defense and potentially indemnify them. Issue was joined and discovery is ongoing. Both now bring motions for summary judgment. Because Peckham is an additional insured of Garrity's OCIC insurance policy for the *Cunha* action, plaintiffs' motion for summary judgment is granted.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). On a motion on for summary judgment, the movant must establish by admissible proof, the right to judgment as a mater of law. (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966 [1988]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

"When addressing an insurance coverage dispute, a court looks first to the language of the policy." (Travelers Indem. Co. v. Commerce & Industry Ins. Co. of Canada, 36 AD3d 1121, 1122 [3d Dept. 2007]). "[W]here the language of a contract is clear and unambiguous, the court will construe and discern that intent from the document itself as a matter of law." Dryden Cent.

School Dist. v. Dryden Aquatic Racing Team, 195 AD2d 790 [3d Dept. 1993]; Town of Harrison v National Union Fire Ins. Co., 89 NY2d 308, 316 [1996]). "Unambiguous provisions of a policy are given their plain and ordinary meaning." (Travelers Indem. Co., supra at 1122).

Here the OCIC insurance policy:

> include[s] as an insured any person or organization whom you [Garrity] are required to name as an additional insured on this policy under a written contract or agreement. The written contract or agreement must be currently in effect or becoming effective during the term of this policy and executed prior to the 'bodily injury'.

The term of the insurance policy was from April 1, 2004 through April 1, 2005. The "bodily injury" Peckham seeks coverage for, occurred on August 17, 2004, well within the policy's term. Garrity and Peckham's "written contract" had been "executed" and "became effective" on May 21, 2004, also well within the policy's term and prior to the "bodily injury". The OCIC policy's plain language extends coverage to Peckham, but only if Garrity is "required to name [Peckham] as an additional insured" under their subcontract.

The Garrity - Peckham subcontract, relative to insurance coverage, states:

> [p]rior to the start of Contractor's [Peckham's] Work, subcontractor [Garrity] shall procure and maintain in force for the duration of the Work, Worker's Compensation Insurance, Employer's Liability Insurance, and Comprehensive General Liability Insurance with limits of at least $1 million combined single limit. Only upon request, shall Contractor be named as additional insured on each of these policies except for Worker's Compensation. Subcontractor shall provide proof of such insurance prior to the start of any work. (Emphasis added).

Such provision plainly requires Peckham to be named as an additional insured, upon its request. No time limitations restrict when Peckham must make its request. Nor does the contract's language limit when the coverage is effective, once Peckham makes its request. It merely requires Garrity to add Peckham as additional insured, upon request.

Both the OCIC insurance contact and the Garrity-Peckham subcontracts are unambiguous. The OCIC policy requires a written contract to be executed prior to the "bodily injury" occurrence. The Garrity - Peckham written subcontract was executed (May 21, 2004) prior to the "bodily injury" occurrence (August 17, 2004). The OCIC insurance coverage extends to those Garrity is required to name as additional insured in a written contract, which was "in effect or becoming effective" during the term of the policy. Garrity's requirement to add Peckham as additional insured "became effective" (at the latest September 23, 2004) during the term of the policy (April 1, 2004 through April 1, 2005), when Peckham specifically requested it be named as additional insured in writing. The plain meaning of the terms of both the OCIC insurance contract and Garrity-Peckham subcontract have been fully met by Peckham, which requires that OCIC defend and indemnify them in the *Cunha* action.

Additionally, OCIC's estoppel argument does not compel a different result. Judge Nicolai's June 11, 2008 Order, in the *Cunha* action, specifically excluded the matters addressed herein, and the issues decided on this motion were plainly not "identical to one previously and necessarily resolved" by such Order. Russo v. Irwin, 49 AD3d 1039, 1041 [3d Dept. 2008].

Accordingly, because Peckham met all of its contractual requirements to be named as an additional insured under its contract with Garrity, and the OCIC insurance policy extends to them, Peckham's motion for summary judgment is granted.

Peckham also moved for an award of the attorney's fees and costs it claims to have incurred in its defense of the *Cunha* action. It has long been held that "an insured [is] entitled to recover the expenses of providing a defense to an action which the insurer wrongfully refused to defend, but the insured [can] not recover the expenses of litigating the question of the insurer's

responsibility to defend." (Rekemeyer v. Empire Mut. Ins. Co., 60 AD2d 492 [3d Dept. 1978]). Here, the billings plaintiffs attached to their motion failed to remove all matters related to the prosecution of this action, distinguished from those charges and costs it incurred in its defense of the *Cunha* action. Accordingly, Plaintiffs are granted twenty days from the date of this order to submit an affidavit and itemized billing statements which entirely exclude: (1) all charges not associated with the defense of the *Cunha* action, and (2) all charges in the *Cunha* action they would have paid for even if OCIC had not withdrawn their defense in that action. Such submission shall include the itemized statements submitted on this motion, and itemize those charges plaintiffs removed from such statements. OCIC will then have ten days from their receipt of the plaintiffs' submission to submit opposition papers.

For reasons set forth above, it is hereby:

ORDERED, ADJUDGED, DECLARED AND DECREED that defendant Ohio Casualty Insurance Company is obligated to defend and, if necessary, indemnify Plaintiff Peckham Road Corporation with respect to an action pending in the Supreme Court of the State of New York, County of Westchester, captioned *Carlos Cunha v. Peckham Road Corp., Et. Al.*(Index No. 4682/05), such defense and indemnification to be provided under and pursuant to the policy of insurance issued by said defendant to Garrity, which named plaintiffs as additional insured.

All papers, including this Decision and Order, are being returned to the attorney for the plaintiffs. The signing of this Decision and Order shall not constitute entry or filing under CPLR

§2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED.

Dated: September 22, 2008
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated July 17, 2008, Affirmation of James J. Barriere, dated July 17, 2008, with attached Exhibits 1-16.
2. Notice of Cross Motion, dated August 11, 2008, Affirmation in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment of Avis Spencer Decaire, dated August 11, 2008, with attached Exhibits A-C.
3. Reply Affirmation of James J. Barriere, dated September 5, 2008.