

Malmon v East 84th St. Apt. Corp.

2008 NY Slip Op 32891(U)

October 15, 2008

Supreme Court, New York County

Docket Number: 106213/05

Judge: Louis B. York

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

PRESENT: **LOUIS B. YORK**
J.S.C.

PART 2

Index Number : 106213/2005

MALMON, ANDRZEJ

vs.

EAST 84TH ST. APARTMENTS

SEQUENCE NUMBER : 006

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his 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

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

FILED

OCT 22 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/15/08

LOY
LOUIS B. YORK 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: I.A.S. PART 2

-----X
ANDRZEJ MALMON and TERESA MALMON,

Plaintiffs,

Index No.
106213/05

-against-

EAST 84TH ST. APARTMENTS CORP., CONCORD
RESTORATION, INC. AND HALSTEAD
MANAGEMENT COMPANY, LLC.

Defendants.

-----X
CONCORD RESTORATION, INC. and LIBERTY
INTERNATIONAL a/s/o CONCORD RESTORATION,
INC.,

Third-party plaintiff,

Index No.
590229/06

-against-

MARBLE UNIQUE, LLC, HARTFORD INSURANCE
COMPANY OF THE MIDWEST, HI-TECH
RESTORATION, LLC, and SCOTTSDALE
INSURANCE COMPANY,

Third-party defendants.

-----X
EAST 84TH ST. APARTMENTS CORP., and
HALSTEAD MANAGEMENT COMPANY, LLC,

Second third-party plaintiff,

FILED
OCT 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

-against-

MARBLE UNIQUE CORP., and HI-TECH
RESTORATION, LLC.,

Second third-party defendants.

-----X

LOUIS YORK, J.:

* 3] .

Motion Sequence Nos. 006 and 008 are consolidated for disposition. In Motion Sequence No. 006, third-party and second third-party defendant Marble Unique Corp. moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all cross claims against it. Defendant/third-party plaintiff Concord Restoration, Inc. (Concord) cross-moves, pursuant to CPLR 3211 and 3212, for an order (1) declaring that third-party defendant Marble must defend, indemnify and hold harmless Concord against the claims of the plaintiffs in the main action; (2) declaring that Hartford Insurance Company of the Midwest (Hartford) must defend and indemnify Concord against the claims of the plaintiffs in the main action; and (3) declaring that Marble has breached its contractual obligation to procure insurance naming Concord as an additional insured and is liable for all resultant damages.

In Motion Sequence No. 008, Hartford moves, pursuant to CPLR 3212, for summary judgment dismissing the severed action against Hartford, and declaring that Hartford has no duty to Concord under the Commercial General Liability policy issued to Marble. Concord cross-moves for similar declaratory relief to that which it sought in Motion Sequence No. 006, together with a request for reimbursement of all costs incurred in the defense of

the underlying action.

In 2004, defendant East 84th St. Apartments Corp. (East 84th Street), the owner of 444 East 84th Street, New York, New York (the Subject Premises), entered into a contract with Concord Restoration, Inc. (Concord) to perform exterior restoration work at the Subject Premises (the Project). The restoration work was performed by subcontractors, Marble Unique Corp. (Marble) and Hi-Tech Restoration LLC (Hi-Tech).

Plaintiff Andrzej Malmon (Malmon) commenced the underlying action to recover for personal injuries he allegedly sustained on March 22, 2005, as a result of a fall from a ladder at the Project, while working as an employee of Marble. He brought the action against East 84th Street, Concord and Halstead Management Company, LLC, the alleged managing agent for the Subject Premises. Concord and Liberty International a/s/o Concord (Liberty) subsequently commenced a third-party action against Marble, Hi-Tech, Hartford (Marble's insurance carrier), and Scottsdale Insurance Company (Hi-Tech's alleged insurance carrier). Another third-party action was commenced by East 84th Street and Halstead against Marble and Hi-Tech.

Hi-Tech has not appeared in the third-party action, and by previous order of this court, the third-party complaint was

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dismissed as against Scottsdale (Hartford's Exhibit D, Order dated 9/29/06). The third-party action against Hartford was severed (Hartford's Exhibit C, Order dated 9/5/07).

In Motion Sequence No. 006, Marble moves for summary judgment, pursuant to CPLR 3212, dismissing the third-party complaints and all cross claims against it. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]).

In support of its motion, Marble argues that its proffered evidence, consisting of, inter alia, the pleadings in the underlying action and the third-party actions, the parties' depositions, and purchase orders and invoices produced by Dominick Fusco, Concord's President, at his deposition, demonstrates that it had completed its work on the Project on August 20, 2004, approximately seven months prior to plaintiff's

alleged accident, and that the alleged accident occurred at the time and in furtherance of a contract between Concord and Hi-Tech.

In opposition, Concord, East 84th Street and Halstead maintain that there is evidence in the record that disputes Marble's supporting arguments, thus precluding its application for summary judgment.

Here, Marble's counsel argues that the invoices identified by Fusco, during his deposition, reflect that payment was requested and made to Marble for work performed from May 10, 2004 through August 20, 2004, thus demonstrating that Marble's work was completed in August 2004. As noted by Concord, such argument is disputed by the deposition of Miroslaw Krulasik, the sole shareholder of Marble and Hi-Tech, who testified that Marble continued to perform work on the Project subsequent to August 2004 (Concord's Exhibit G, Krusalik's deposition held on 11/1/07, at 88-89), and was "on the job since 2004 through 2006" (id. at 88). Krulasik further testified that he was not certain whether the invoices identified by Fusco consisted of all the invoices submitted by him to Concord for payment for Marble's services (id. at 85).

Additionally, Marble's counsel maintains that Marble

could not have been working at the Project on the day of plaintiff's alleged accident, since Fusco's deposition and the contract documents indicated that the work being undertaken in March of 2005 was balcony restoration work, work that had been contracted to Hi-Tech and not Marble. The record, however, again reflects Krusalik's testimony, wherein he stated that both Marble and Hi-Tech did work on the balconies at the Project (id. at 94).

Therefore, since the arguments set forth by Marble's counsel's in support of Marble's application are factually contradicted by the record, Marble fails to demonstrate its entitlement to summary judgment (Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, supra). Marble's application for summary judgment is, thus, denied.

In Motion Sequence 006 and 008, Hartford and Concord respectively move and cross-move for declaratory relief with respect to Hartford's duty to defend and indemnify Concord in the underlying action. Hartford denies that it has an obligation to defend or indemnify Concord in the underlying action, while Concord claims that it does.

The duty to defend is broader than the duty to indemnify and "arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable

[* 8] .

possibility of recovery under the policy" (Fitzpatrick v American Honda Motor Co., 78 NY2d 61, 65 [1991]). This standard applies equally to additional insureds and named insureds (see BP A. C. Corp. v One Beacon Ins. Group, 8 NY3d 708 [2007]).

Under the Hartford Policy, "Who is an Insured" includes an "additional insured by contract, agreement or permit" defined as:

"any person or organization with whom you agreed, because of a written contract or agreement or permit, to provide insurance such as is afforded under the Business Liability Form, but only with respect to your operations, 'your work' or facilities owned or used by you".

(Concord's Exhibit I to its cross motion, The Hartford Policy, Business Coverage Liability Form, § C [2] [f]). "Your work" is defined as "(1) work or operations performed by you or on your behalf; and (2) materials, parts or equipment furnished in connection with such work or operations." It is undisputed that the purchase order/contract between Marble and Concord required Marble to procure commercial general liability insurance naming Concord as additional insured on a primary basis (Hartford's Exhibit A, purchase order/contract between Concord and Marble dated 7/1/5/04).

[*9] .

Further, here, in the underlying complaint, plaintiff seeks recovery for personal injuries sustained, as an employee of Marble, while working at the Project. Thus, these allegations are sufficient to trigger the terms of the Hartford Policy, and bring plaintiff's claim "potentially within the protection purchased" (Technicon Elecs. Corp. v American Home Assur. Co., 74 NY2d 66, 73 [1989]).

An insurer may be relieved of its duty to defend only if it "bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision" (Frontier Insulation Contrs. v Merchants Mut. Ins. Co., 91 NY2d 169, 175 [1997]).

Here, Hartford does not dispute that plaintiff's claims as alleged in the underlying complaint fall within the scope of the Hartford Policy, nor does it allege that an exclusion exists. Instead Hartford relies on a determination by the Workers Compensation Board (the Board) filed 10/19/07, and the testimony given by Fusco before the Board, to support its argument that

there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision. Specifically, it maintains that, since the Board determined that plaintiff was the employee of Hi-Tech and not Marble, Concord, under the doctrine of collateral estoppel, is precluded from asserting that Marble performed any work at the Project on the date of plaintiff's alleged accident, and that the contract between Concord and Marble is in any way applicable to plaintiff's loss.

In opposition, Concord argues that the doctrine of collateral estoppel does not apply in this action, since it was not a party to the proceeding, did not conduct any cross-examinations at the hearing, and did not have a full and fair opportunity to contest the Board's determination.

Collateral estoppel "bars a party from relitigating in a subsequent proceeding an issue clearly raised in a prior proceeding and decided against that party where the party to be precluded had a full and fair opportunity to contest the prior determination" (Weiss v Manfredi, 83 NY2d 974, 976 [1994]). This doctrine has been held to be applicable to quasi-judicial determinations of administrative agencies, such as the Workers' Compensation Board (Rigopolous v American Museum of Natural

History, 297 AD2d 728 [2d Dept 2002]).

Here, the board's determination that Hi-Tech was plaintiff's employer at the time of his alleged accident (Hartford's Exhibit E, the Board's decision filed on 10/19/07) would be binding as between the employee and the employer (see Dupkanicova v James, 17 AD3d 627 [2d Dept 2005]), and would preclude an action by plaintiff against Hi-Tech (O'Connor v Midiria, 55 NY2d 538, 541 [1982]).

However, under the present circumstances, the doctrine of collateral estoppel does not bar Concord from litigating this issue, or any of the other issues claimed by Hartford, since there is no indication in the record that Concord had the right to cross-examine any witnesses that appeared before the Board, or had a full and fair opportunity to litigate the issues in that proceeding (see Caiola v Allcity Ins. Co., 257 AD2d 586 [2d Dept 1999]). The only transcript submitted from the proceeding before the Board was that of the day of Fusco's testimony. Further, in the absence of the administrative record or any statements in the Board's decision reflecting its basis for its determination, Hartford's contention that the Board's decision was based on Fusco's testimony is without basis. In any event, a review of Fusco's testimony discloses that his statements, as to which

entity he believed was plaintiff's employer on the day of his loss, was based on the type of work being performed at the time, i.e, balcony restoration work, and the entity that was contracted to do that type of work. However, as previously noted, conflicting evidence has been submitted by the parties, consisting of, inter alia, the deposition of Marble's sole shareholder, which raise issues of fact, including the type of work Marble did at the Project, and whether Marble was present at the Project on the date of the plaintiff's accident. Thus, as a matter of fairness, under all of the circumstances of this action, this court declines to give conclusive effect to the Board's determination (see Vera v NYC Partnership Hous. Dev. Fund Co., 40 AD3d 472 [1st Dept 2007]; Caiola v Allcity Ins. Co., 257 AD2d 586, supra).

Further, Hartford maintains that, based on Fusco's testimony, the underlying loss did not arise out of or in any way occur as a result of Marble's operations, work or in respect to any facility owned by or used by Marble, as required for coverage under the policy. However, since, as previously discussed, there are factual disputes which can potentially establish that plaintiff's alleged injuries arose out of Marble's operations, work or facilities, Hartford fails to establish, as a matter of

law, that there is no possible factual or legal basis upon which [it would] be held obligated to indemnify the insured under any policy provision" (see Frontier Insulation Contrs. v Merchants Mut. Ins. Co., 91 NY2d at 175). Hartford is, thus, obligated to defend Concord in the underlying action (see City of New York v Certain Underwriters at Lloyd's of London, England, 15 AD3d 228 [1st Dept 2005]).

Therefore, Hartford's motion, in Motion Sequence No. 008, for dismissal of Concord's declaratory judgment action against it and for declaratory relief in its favor, is denied. Concord's cross motions, in Motion Sequence No. 006 and 008, for a judgment declaring that Hartford must defend Concord in the underlying action is granted. In view of the foregoing, Concord's request for reimbursement of attorneys' fees, costs, disbursements and other expenses incurred in the defense of the underlying action to date is granted (see Sandy Cr. Cent. School Dist. v United Natl. Ins. Co., 37 AD3d 812 [2d Dept 2007]).

Further, Concord's request for alternate relief for a judgment declaring that Marble breached its contractual obligation to procure insurance naming Concord as an additional insured is denied as moot.

Concord also cross-moves, in Motion Sequence 006 and

008, for a declaration that Hartford and Marble are obligated to indemnify Concord and Liberty. In view of the factual issues, it is premature to conclude that Concord is entitled to indemnification against any liability it may incur to plaintiff in the underlying action (see id.). Therefore, this branch of Concord's request is denied.

Accordingly, it is

ORDERED that in Motion Sequence No. 006, the motion by third-party and second third-party Marble Unique Corp. for summary judgment dismissing the third-party complaint and all cross claims against it is denied; and it is further

ORDERED that in Motion Sequence No. 008, the motion by third-party defendant Hartford Insurance Company for summary judgment dismissing the declaratory judgment action against it and declaratory relief in its favor is denied; and it is further

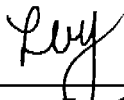
ORDERED that in Motion Sequence No. 006 and 008, the cross-motions by Concord Restoration Inc. and Liberty International a/s/o Concord Restoration Inc. for summary judgment is granted to the extent that it is

ADJUDGED AND DECLARED that Hartford Insurance Company is obligated to defend Concord and Liberty International a/s/o Concord Restoration Inc in the underlying action and to reimburse

them for the costs incurred to date in connection with the defense of that action.

Dated: 10/15/08

ENTER:



J. S. C.

LOUIS B. YORK
J.S.C.

FILED
OCT 22 2008
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NEW YORK