SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No. 103545/06
Motion No.:005

LANE-VALENTE INDUSTRIES GENERAL REPAIR & MAINTENANCE, INC.,

Plaintiff

against

PENNSYLVANIA LUMBERMENS MUTUAL INSURANCE COMPANY,
QUALITY WOODWORKING CORP.,
MARIA ROLLER, ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS OF CARMEN DEVITO, DECEASED
SEARS, ROEBUCK & CO.,
GENERAL GROWTH PROPERTIES, INC.,
KONE, INC., and
DINETTO CONTRACTING INC.,

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of this motion for summary judgment.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendant moves for summary judgment pursuant to CPLR § 3212 at the direction at the direction of this court's October 2, 2008 decision and order. Defendant's motion is granted.

Facts

The plaintiff, Lane-Valente Industries General Repair & Maintenance ("LVI"), entered into a contract with defendant, Sears, Roebuck & Company ("Sears") to replace escalators at the Sears location in the Staten Island Mall. In turn, LVI entered into a sub-contract with Quality Woodworking Corporation, ("Quality"). The General Contract Agreement executed by Quality and LVI contemplates the purchasing of an insurance policy by Quality naming LVI as an

insured. The contract states:

> **Insurance.** Five days prior to the commencement of work and as a condition of commencement, the Contractor shall furnish LVI with certificates of insurance naming LVI as an additional insured as follows: Workmen's Compensation insurance, public liability insurance not less than $1,000,000.00 contractual liability insurance not less than $2,000,000.00, property damage liability insurance of not less than $2,000,000. The insurance shall apply as primary insurance with respect to any other insurance or sel-insurance programs afforded to or maintained by LVI. The Contractor agrees to indemnify and hold harmless LVI and its affiliates, or any other third party, against loss or damages incurred by reason of the liability imposed upon LVI, its affiliates or any other third party by law and by the contract documents, arising from the work because of bodily injuries including death at any time resulting therefrom, sustained by any person or persons, and injuries to or destruction of property due to any act or omission of the Contractor, its Subcontractors, their employees, invitees or agents thereof.

The contract between LVI and Quality does not reference a particular work site where Quality is to perform. However, in connection with the General Contract Agreement Quality executed an endorsement with its insurance carrier, Pennsylvania Lumbermens Mutual Insurance Company, ("Pennsylvania Lumbermens") amending its commercial general liability coverage. According to the endorsement LVI is named as an additional insured. The endorsement states:

> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> **SCHEDULE**
>
> **Name of Person or Organization:** L.V.I. CONTRACTING
> 855 CONKLIN STREET
> FARMINGDALE, NY 11735
>
> JOB: SEARS,

111 FRANKLIN
AVENUE, GARDEN
CITY, NY 11530

A. **Section II–Who Is An Insured is** amended to include as an insured the person organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.

On or about January 1, 2005 Carmen DeVito alleged that she sustained personal injuries as a result of a slip and fall at a work site in the Sears at the Staten Island Mall.

On July 25, 2008 the defendant Pennsylvania Lumbermens moved this court for an order granting its motion for summary judgment dismissing the plaintiff's complaint. By a decision and order of this court dated October 2, 2008 this court denied Pennsylvania Lumbermens' motion based on its failure to annex a full copy of the insurance policy in question. This court found that this was a procedural error and directed Pennsylvania Lumbermens to ". . . re-serve its motion so the issues can be resolved on the merits."

Pennsylvania Lumbermens renews its motion for summary judgment arguing that the insurance policy's coverage is limited only to incident's occurring in connection with a project located at the Sear's in Garden City, New York. LVI disputes this contention and argues further that Pennsylvania Lumbermens' motion must fail due to its failure to formally disclaim coverage to LVI.

Discussion

Contrary the contentions of LVI, the decision and order of this court dated October 2, 2008 allowed Pennsylvania Lumbermens to make the within motion for summary judgment. As this court articulated in that decision and order, public policy favors the resolution of disputes on

the merits rather than on procedural defects.[1] Hence, this court will consider Pennsylvania Lumbermens' summary judgment motion on the merits. The issue before the court is whether the limitation of a job location in the endorsement modifying Quality's commercial general liability coverage should be extended beyond the particular address listed on the endorsement.

Summary judgement is a drastic remedy that will only be awarded when there is no triable issue of fact and the court can render a decision as a matter of law.[2] The function of summary judgment is issue-finding, not issue-determination. On such a motion the court should draw all reasonable inferences in favor of the nonmoving party.[3]

A movant for summary judgment must demonstrate entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issue of fact.[4] In this case, the movant proffers Quality's commercial general liability policy as well the endorsement amending that policy.

The Court of Appeals articulated the standard in evaluating insurance coverage:

> [i]n determining a dispute over insurance coverage, we first look to the language of the policy. We construe the policy in a way that affords a fair meaning to all the language employed by the parties in the contract and l eaves no provision without force and effect. . . We well 'not disregard clear provisions which the insurers inserted in the policies and the insured accepted, and equitable considerations will not allow an extension of coverage beyond its fair intent and meaning in order to obviate objections which might have been foreseen and guarded against.[5]

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[1] *See, Eckna v. Kesselman,* 11 AD3d 507, [2d Dep't 2004]; *See also, Sessa v. Buena Vida Corp.*, 15 AD3d 643, [2d Dep't 2005].

[2] *Barclay v Denckla*, 182 AD2d 658, [2d Dep't 1992].

[3] *Pantote Big Alpha Foods, Inc. v. Schefman,* 121 AD2d 295, [1st Dep't, 1986].

[4] *Washington v. Community Mutual Savings Bank*, 308 AD2d 444, [2d Dep't, 2003].

[5] *Raymond Corp. v. Nat'l Union Fire Ins. Co. Of Pittsburgh, PA*, 5 NY3d 157 [N.Y.].(internal citations omitted).

The language of the endorsement is clear. The schedule to the endorsement indicates that LVI is an additional insured and includes limiting language as to location by adding "Job: Sears, 111 Franklin Avenue, Garden City, NY 11530." Quality attempts to find ambiguity in the plain language by asserting that the paragraph following the schedule that amends the "Who is an Insured" section of the commercial general liability policy does not limit the insured to a job location. This court cannot accept this interpretation. The paragraph in question incorporates the organization in the schedule by reference into those that are insured under the policy. The language of the schedule is unambiguous as it specifically limits LVI coverage to a specific job at a particular location.[6]

Since the underlying claim for personal injuries occurred at the Staten Island Mall and not at 111 Franklin Avenue, Garden City, New York 11530 the policy did not cover LVI.

It is well settled that once a party moving for summary judgment has made a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact, 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.[7]

LVI attempts to find an issue of fact in that Pennsylvania Lumbermens failed to disclaim coverage pursuant to Insurance Law § 3420(d). This argument is unpersuasive. In *National Union Fire Insurance Company of Pittsburgh, Pa. v. Utica First Insurance Company*, the Appellate Division, Second Department held that a disclaimer pursuant to Insurance Law § 3420(d) is not required when the claim falls outside the policy's coverage.[8] In so holding the court reasoned that requiring an insurance company to pay on a claim due to failure to timely

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[6] *See, Sixty Sutton Corp. v. Illinois Union Ins. Co*., 34 AD3d 386, [1st Dep't 2006].(The four corners of an insurance agreement govern who is covered and the extent of the coverage.)

[7] *See, Prince v. DiBenedetto*, 189 AD2d 757, [2d Dep't 1993].

[8] *National Union Fire Ins. Co. Of Pittsburgh, Pa. v. Utica First Ins. Co.*, 6 AD2d 681 [2d Dep't 2004].

disclaim where a claim is outside the scope of the insurance policy's coverage would ". . . create coverage where it never existed."[9] In this case, the language of the schedule clearly limits LVI's coverage under Quality's insurance policy to the Sears location at 111 Franklin Avenue, Garden City, New York. Hence, it was not necessary for Pennsylvania Lumbermens to disclaim coverage on the basis that it was outside the scope of the endorsement to Quality's policy.

Conclusion

In this case the movant satisfied its burden of demonstrating a *prima facie* entitlement to summary judgment. The plaintiff failed to offer admissible proof to rebut the presumption of this entitlement. The court therefore concludes that LVI is not entitled to insurance coverage from Pennsylvania Lumbermens as a matter of law.

Accordingly, it is hereby:

ORDERED, that the motion for summary judgment is granted and the complaint is hereby severed and dismissed against defendant Pennsylvania Lumbermens Mutual Insurance Company, and the Clerk is directed to enter judgment in favor of said defendant; it is further

ORDERED, that the remainder of the action shall continue; and it is further

ORDERED, that the remaining parties return to DCM Part 3 on Thursday, January 29, 2009 at 9:30 A.M. for a compliance conference.

ENTER,

DATED: December 15, 2008

Joseph J. Maltese

[9] *Id.*

Justice of the Supreme Court