

St. Paul Travelers v Insurance Co. of N.Y.

2009 NY Slip Op 30094(U)

January 12, 2009

Supreme Court, New York County

Docket Number: 601426/08

Judge: Martin Shulman

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

MARTIN SHULMAN
J.S.C.

PRESENT: _____

PART 1

Justice

Index Number : 601426/2008

ST. PAUL TRAVELERS

vs.

INSURANCE CORP. OF NEW YORK

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 601426-08

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

_____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ ~~Order to Show Cause~~ - Affidavits - Exhibits A-J

~~Notice of Cross-Motion +~~
Answering Affidavits - Exhibits A-K

Replying Affidavits + Exhibits A-C

1
2
3

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

and cross-motion are decided in accordance with the attached decision and order.

FILED

JAN 20 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: JAN 12 2009

MARTIN SHULMAN

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: IAS PART 1

-----X
ST. PAUL TRAVELERS and CAULDWELL WINGATE
COMPANY, INC.,

Plaintiffs,

-against-

THE INSURANCE COMPANY OF NEW YORK,
NOVAPRO RISK SOLUTIONS, LP, and
UNITY ELECTRIC COMPANY, INC.,

Defendants.
-----X

Index No. 601426/08

Motion Seq. 001

FILED
JAN 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

MARTIN SHULMAN, J.:

In this motion, plaintiffs seek summary judgment, declaring that defendants are obligated: (1) to defend and indemnify Cauldwell Wingate Company Inc. ("Cauldwell") in the Kings County action entitled *Aspromonte v Tishman Construction Corp. of New York* (the "underlying action"),¹ and (2) to reimburse plaintiff St. Paul Travelers ("St. Paul") for all expenses that St. Paul expended to defend Cauldwell in the underlying action.

Defendant Insurance Corporation of New York ("INSCORP") cross-moves for summary judgment declaring that: (1) Cauldwell was not an additional insured under INSCORP policy # DGL 900279 (the "policy"), and (2) INSCORP is not obligated to defend or indemnify plaintiffs in the underlying action. Alternatively, INSCORP cross-moves for a declaration that St. Paul and INSCORP are coinsurers respecting coverage for Cauldwell in the underlying action. Finally, INSCORP seeks to have the contractual

¹ *Aspromonte v Tishman Construction Corp. of New York* (Index # 34923/04) was a Kings County action that was settled by stipulation on July 16, 2008.

indemnification clause of the September 1, 2001 contract between Cauldwell and defendant Unity Electric Company Inc. ("Unity") declared unenforceable as it violates the provisions of the General Obligations Law ("GOL") § 5-322.1.

Background

Plaintiffs in the underlying action alleged that, on October 23, 2001, Frank Aspromonte ("Aspromonte"), a Unity employee, slipped and fell at a construction site on the 44th floor of 277 Park Avenue, New York, New York. Those plaintiffs sought to recover monetary damages for Aspromonte's injuries in Kings County Supreme Court. Pursuant to an agreement dated July 16, 2008, Cauldwell settled Aspromonte's claims for \$205,000 and Unity's for \$50,000.

Plaintiffs herein allege that, pursuant to a contract dated September 1, 2001 (the "contract"), Cauldwell, as general contractor, engaged Unity to perform electrical work at said construction site. Section 7.3 of the contract states that Unity: "agrees to indemnify, hold harmless and defend [Cauldwell] from and against any claim, cause of action, liability, loss or expense resulting from ... [a]ny claim, demand, cause of action, loss, or expense or liability on account of injury to or death of persons (including the employees of [Cauldwell or Unity]) arising directly or indirectly out of the acts or omissions to act of [Unity] in the performance of the work." See Plaintiffs' Notice of Motion, Exh. B; *see also* Defendants' Notice of Cross Motion, Exh. B.

The contract additionally required Unity to procure certain insurance, which was to be spelled out in "Exhibit 'B' Attached." *Id* at Section 6. Although the words "Exhibit B" do not appear on the top of the page entitled "Cauldwell-Wingate J.P. Morgan Chase

Insurance Specifications for Sub-Contractors," all parties agree that these provisions are applicable. The insurance specifications require that Cauldwell be named as an additional insured on a "Commercial Liability and/or Contractors Liability" policy with limits of \$1,000,000 per occurrence and \$1,000,000 aggregate. Also required was an excess or umbrella policy of \$10,000,000 on top of the \$1,000,000 primary coverage. See Plaintiffs' Notice of Motion, Exh. C.

Plaintiffs proffer several other documents, including a September 17, 2001 signed Purchase Order, a September 4, 2001 Pricing Breakdown, a September 4, 2001 Document List and a September 6, 2001 Certificate of Insurance to show that Unity was required by a contract entered into before Aspromonte's accident to obtain insurance for Cauldwell.

Defendants contend, however, that there is no coverage for Cauldwell under the policy because no written contract was signed prior to Aspromonte's accident. Additionally, defendants assert that although Cauldwell maintains that its first notice was a Second Third-Party Complaint in the underlying action, dated June 21, 2006, defendants have proffered proof otherwise. Defendants also claim that even if Cauldwell did not receive notice until the end of June 2006, it did not give notice of the potential claim to INSCORP until September 19, 2006, which was late as a matter of law. Plaintiffs aver that defendants waived any objection they had to plaintiffs' alleged late notice, by responding to their notice of claim with an untimely disclaimer. Finally, defendants contend that the indemnification clause in Section 7.3 of the contract violates GOL § 5-322.1.

Discussion

Procedural Issues

Defendants assert that, pursuant to CPLR 3212, plaintiffs' motion for summary judgment is premature, as issue had yet to be joined. *See Manhattan Real Estate Equities Group LLC v Pine Equity NY, Inc.*, 27 AD3d 323 (1st Dept 2006); *see also Valentine Transit, Inc. v Kernizan*, 191 AD2d 159 (1st Dept 1993). In fact, Unity had served and filed its answer, and as to it, issue has been joined. However, as to INSCORP, an answer was not served until June 27, 2008, several days after the instant motion was served and filed. Thus, as to INSCORP, this motion is denied as premature.

Summary Judgment

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. *See Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). "[I]t must clearly appear that no material and triable issue of fact is presented". (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *see also Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Although plaintiffs seek a declaration that defendants are obligated to defend and indemnify them in the underlying action, only such claims as against Unity will be addressed here.

General Obligations Law § 5-322.1

Defendants contend that Unity is not obligated to defend and indemnify Cauldwell, because the indemnification paragraph of Section 7.3 violates GOL § 5-322.1. That section of the General Obligations Law states as follows:

[a] covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, ... purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable.

Contracts between a contractor and an owner that contain indemnification clauses relating to construction come within the purview of GOL § 5-322.1. See *Gomez v Nat'l Ctr. for Disability Services, Inc.*, 306 AD2d 103 (1st Dept 2003). As between contractors and subcontractors, indemnification clauses in which contractors recover for their own negligence violate the General Obligations Law. See *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 (1997); see also *Brown v Two Exchange Plaza Partners*, 76 NY2d 172 (1990). However, when the general contractor and subcontractor are joint tortfeasors, the GOL "does permit a partially negligent general contractor to seek contractual indemnification from its subcontractor so long as the indemnification provision does not purport to indemnify the general contractor for its own negligence." *Brooks v Judlau Contracting, Inc.*, 11 NY3d 204, 207 (2008).

To determine whether or not the indemnification provisions of the contract "purport to indemnify the general contractor for its own negligence," this court must look beyond Section 7.3 of the contract to Section 7.5 to find whether the provision at issue

purports to indemnify Cauldwell for its own negligence. Under that section, the contract states: "[Unity's] indemnification obligations ... shall apply regardless of whether the party to be indemnified was concurrently negligent, whether actively or passively, but shall not apply where the injury or death of persons or damage to or loss of property was caused solely by the negligence or willful misconduct of the party to be indemnified."

A careful reading of the section does purport to indemnify Cauldwell for its own negligence when Cauldwell is not solely negligent or engages in willful misconduct. Additionally, there is no provision in the contract that provides for indemnification "only to the fullest extent permitted by law."

To declare an indemnification provision void and unenforceable, not only must the provision purport to indemnify a party if it is negligent, that party must be found to actually be negligent. See *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, *supra*; see also *Brown v Two Exchange Plaza Partners*, *supra*.

It has come to this court's attention that Cauldwell has contributed the largest portion of the settlement in the underlying action. However, there has been no finding of negligence as of this date. Therefore, because there are material questions of fact regarding whether or not Cauldwell was negligent in Aspromonte's accident, that portion of defendants' cross motion that seeks a declaration that the indemnification provision is void and unenforceable is denied. Additionally, that portion of plaintiffs' motion seeking an order declaring plaintiffs are entitled to defense and indemnification as against Unity is denied. Accordingly, it is hereby

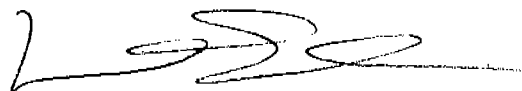
ORDERED that plaintiffs' motion is denied; and it is further

ORDERED that defendants' cross-motion is denied.

Counsel for the parties are directed to appear for a preliminary conference on February 10, 2009 at 9:30 a.m. at I.A.S. Part 1, 111 Centre Street, Room 1127B, New York, New York.

The foregoing constitutes this court's Decision and Order. A copy of this Decision and Order has been sent to counsel for the parties.

Dated: January 12, 2009



Martin Shulman, J.S.C.

FILED
JAN 20 2009
COUNTY CLERK'S OFFICE
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