

Diontech Consulting Inc. v Underwriters at Lloyd's
2009 NY Slip Op 30531(U)
February 27, 2009
Supreme Court, Richmond County
Docket Number: 101964/08
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

DCM PART 3

DIONTECH CONSULTING INC.

**Index No. 101964/08
Calendar No: 2737-001
115-002
322-003**

Plaintiff,

-against-

**DECISION AND ORDER
HON. JOSEPH J. MALTESE**

**UNDERWRITERS AT LLOYD’S, AMERICAN
INTERNATIONAL GROUP, INC., EVEREST
NATIONAL INSURANCE COMPANY, THE
SYNERGY ADJUSTING CORPORATION, UTC
RISK MANAGEMENT SERVICES, INC., and
COSMOS INSURANCE BROKERAGE, INC.**

Defendants.

The following papers numbered 1 to 6 were submitted on this motion the 30th day of January, 2009:

	Papers Numbered
Notice of Motion to Dismiss by Defendant Cosmos Insurance Brokerage, Inc., with Supporting Papers and Exhibits (dated August 27, 2008).....	1
Affirmation in Opposition by Plaintiff, with Supporting Papers and Exhibits (dated November 3, 2008).....	2
Notice of Cross Motion for Summary Judgment by Plaintiff against Underwriters at Lloyd’s, with Supporting Papers and Exhibits (dated November 3, 2008).....	3
Notice of Cross Motion for Summary Judgment by Defendants Underwriters at Lloyd’s and Synergy Adjusting Corporation, with Supporting Papers, Exhibits and Memorandum of Law (dated January 7, 2009).....	4
Affirmation in Support of Cross Motion of Defendants Underwriters at Lloyd’s and Synergy Adjusting Corporation and in Opposition to Plaintiff’s Cross Motion for Summary Judgment, with Supporting Papers and Exhibits (dated January 5, 2009).....	5

Reply Affirmation by Defendant Cosmos Insurance Brokerage, Inc. (dated January 16, 2009).....	6
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Upon the foregoing papers, the motion and cross motion to dismiss (Seq. Nos. 001 and 002) by defendant Cosmos Insurance Brokerage, Inc. (hereinafter “Cosmos”) and defendants Underwriters at Lloyd’s and Synergy Adjusting Corporation (hereinafter “Lloyd’s” and “Synergy”, respectively) are granted; plaintiff’s cross motion for summary judgment (Seq. No. 003) is denied.

Insofar as it appears, plaintiff Diontech Consulting, Inc. (hereinafter “Diontech”) and nonparty Summerfield Developers Inc. entered into a construction contract on or about July 15, 2005 for the construction of a residential building in Brooklyn, New York (Plaintiff’s Exhibit “A”). Diontech then subcontracted the work to various subcontractors, among whom was nonparty Helios Renovation Corporation (hereinafter “Helios”), a masonry subcontractor (Plaintiff’s Exhibit “C”). To the extent relevant, Helios was required by its subcontract to purchase and maintain liability insurance coverage for the duration of the construction project naming Diontech as an additional insured (*id.*).

It is undisputed that on or about March 14, 2006, a Helios employee sustained personal injuries while cutting a piece of wood (EBT of Esteban Vara, p 41). As a result, said employee commenced an action entitled Vara v. Diontech Consulting, Inc., et. al. (hereinafter “the Vara action”), which is currently pending in the Supreme Court, Richmond County under Index Number 101530/07. On or about February 21, 2008, Diontech tendered its defense of this lawsuit to defendant Lloyd’s, the general liability carrier for Helios. Approximately one month later Lloyd’s denied coverage through its third-party administrator, co-defendant Syngery (Plaintiff’s Exhibit “D”; Lloyd’s Exhibits “E”, “F” attached to Affidavit of Stewart Roche), whereupon Diontech commenced the instant declaratory judgment action to determine whether it was owed a defense and indemnification in the Vara personal injury action (1) by Lloyd’s as an additional insured under the Helios policy, (2) by co-defendant American International Group (hereinafter “AIG”) and/or (3) co-defendant Everest National Insurance Company. In the alternative, Diontech asserts a claim for negligent procurement of liability insurance against Helios’ insurance broker, defendant Cosmos.

In moving to dismiss the amended complaint as against it pursuant to CPLR 3211(a), defendant/broker Cosmos contends that said pleading is legally insufficient to state a cause of action,

and must be dismissed for the failure to allege privity between itself and Diontech. Defendant Cosmos additionally claims that it had no contractual relationship with Diontech as the putative additional insured on the Helios liability insurance policy issued by co-defendant Lloyd's. The Court agrees.

Accepting as true the facts alleged in support of the causes of action asserted in the amended complaint against Cosmos, and according plaintiff the benefit of every favorable inference, said causes of action are not sufficiently pleaded to withstand dismissal (*see Griffin v. DaVinci Dev, LLC.*, 44 AD3d 1001 [2nd Dept 2007]). Here, there are no facts supportive of privity between plaintiff and Cosmos, and the former has failed to set forth sufficient allegations of “fraud, collusion, or other special circumstances” (*id.* at 1002 [internal quotation marks omitted]) to entitle it to recover monetary damages as a result of the alleged breach of the contract to procure insurance by Helios (*see Superior Ice Rink, Inc. v. Nescon Contr Corp.*, 40 AD3d 963, 965 [2nd Dept 2007]). Moreover, plaintiff has failed to set forth sufficient factual allegations in support of its position that it was an intended third-party beneficiary of the contract between Cosmos and Helios¹ (*see Griffin v. DaVinci Dev, LLC.*, 44 AD3d at 1003; *Superior Ice Rink, Inc. v. Nescon Contr Corp.*, 40 AD3d at 965). Under these circumstances, Cosmos' motion for summary judgment is granted.

In opposition, Diontech's assertion of a dispute as to whether Vara was employed by Helios is irrelevant to the instant motion. So is Diontech's submission of a copy of an insurance certificate naming it as an “additional insured” under the Helios policy (Plaintiff's Exhibit “C”) sufficient to avoid dismissal. It is well settled that a certificate of insurance which expressly states, as does the certificate in this case, that it is “a matter of information only and confers no rights upon the certificate holder” is insufficient, by itself, to raise a triable issue that such insurance has been purchased (*see Cendant Car Rental Group v. Liberty Mut Ins Co*, 48 AD3d 397 [2nd Dept 2008]; *Trapani v. 10 Arial Way Assn*, 301 AD2d 644, 647 [2nd Dept 2003]).

¹While a plaintiff may, in opposition to a motion to dismiss, submit “any evidence that would properly be considered on a motion for summary judgment” (CPLR 3211[c]), the conclusory allegation of Dennis Mihalatos, the owner of Diontech, in his affidavit in opposition, that his company was a third-party beneficiary of the relevant Cosmos-Helios contract, is insufficient to cure this pleading defect. While an insurer's duty to defend is exceedingly broad, it will not be called upon to provide a defense where there are insufficient factual allegations in the complaint to suggest a reasonable possibility of coverage (*cf. City of New York v. Philadelphia Indem Ins Co*, 54 AD3d 709 [2nd Dept 2008]).

Turning to Diontech's cross motion for summary judgment against Lloyd's, it is plaintiff's position that the aforementioned copy of an insurance certificate naming Diontech as an additional insured is sufficient to demonstrate that Lloyd's is required to provide it with a defense in the Vara action. Diontech further asserts that Lloyd's erroneously denied coverage based on certain policy exclusions (Plaintiff's Exhibit "D"). In this regard, Diontech maintains that Vara was performing construction work on the interior walls at the time of his injury, an activity covered under the Lloyd's policy.

In response, defendant Lloyd's maintains that it has no obligation to defend or indemnify Diontech and cross-moves for summary judgment dismissing the complaint against itself and Synergy on the ground that (1) the policy does not provide coverage to Diontech as an "additional insured"; (2) coverage in the Vara action is precluded by the policy's Employee Exclusion; and (3) Helios was not performing operations that were within the policy's Classification Limitation Endorsement at the time Vara was injured. In support of this position, Lloyd's submits a copy of the policy issued to Helios (hereinafter the "policy"), including the declarations page and copies of the various endorsements (Lloyd's Exhibit "A" attached to affidavit of Stewart Roche). According to Lloyd's these documents prove that there is no "additional insured" endorsement in the Helios policy, nor any other terms extending coverage to any party as an additional insured. Therefore, Lloyd's claims that it has established, prima facie, that Diontech is not entitled to coverage as an additional insured under the Helios policy (*see Home Depot U.S.A., Inc. v. National Fire & Marine Ins Co*, 55 AD3d 671, 673 [2nd Dept 2008]). Lloyd's further maintains, as previously discussed, that the certificate of insurance proffered by Diontech is insufficient to establish coverage, or raise a triable issue of fact thereon (*see Cendant Car Rental Group v. Liberty Mut Ins Co*, 48 AD3d 397, *supra*; *Trapani v. 10 Arial Way Assn*, 301 AD2d at 647).

Moreover, even if there was coverage under the Helios policy, Lloyd's disclaimer was proper under the clause entitled "Exclusion of Injury to Employees, Contractors, and Employees of Contractors"² (Lloyd's Exhibit "A" attached to the affidavit of Stewart Roche; *see Makan Exports*

²Lloyd's further contends that a disclaimer of liability lies under an additional policy exclusion, i.e. that the Helios policy only covered the classifications of work described on the declarations page, to wit: "Painting-Interior" and "Drywall or Wallboard Hanging & Taping - No Asbestos Removal or Insulation Work". Accordingly, Lloyd's maintains that "masonry" work is not a covered activity. However, Lloyd's has failed to submit a copy of the "Classification Limitation Endorsement" to substantiate its assertion (*cf. Fontanelli v. Hanover Ins Co*, 48 AD3d 413 [2nd Dept 2008]).

Inc. v. U.S. Underwriters Ins. Co., 43 AD3d 883, 885 [2nd Dept 2007]; *cf. ALIB, Inc. v. Atlantic Cas Ins Co*, 52 AD3d 419 [1st Dept]). In this regard, Lloyd's has submitted a copy of a Workers' Compensation Board's Notice of Decision which found that Vara was employed by Helios at the time of the accident, and awarded him benefits on that basis which he accepted (Lloyd's Exhibit "B" attached to the affidavit of Stewart Roche). While Diontech objects that the deposition testimony of Vara himself demonstrates an issue of fact as to whether he was employed by Helios or another entity (nonparty Pessada Painting Corp.), the resolution of the question of whether a particular person is an employee within the meaning of the Workers' Compensation Law is usually held to present a question of fact for resolution by the Workers' Compensation Board, which has "primary jurisdiction with respect to [such] determinations" (*Nunes v. Window Network, LLC*, 54 AD3d 834, citing *Botwinick v. Ogden*, 59 NY2d 909 [2nd Dept 2008] [internal quotation marks omitted]). Thus viewed, Vara's self-serving identification of himself at his deposition as an employee of a third-party is insufficient to raise a triable issue (*id.*).

On like grounds, defendant Synergy's unopposed cross motion for summary judgment is granted,³ and plaintiff's cross motion for summary judgment against Lloyd's is denied.

Finally, so much of Diontech's motion as seeks leave to amend the caption to substitute the "Delos Insurance Company f/k/a Sirius America Insurance Company" for the "Everest National Insurance Company" is denied without prejudice to the service of a supplemental summons and amended complaint as hereinafter provided (*see DiBetta v. Silberberg*, 51 AD3d 967 [2nd Dept 2008]; *Miller v. Farina*, 58 AD2d 731 [4th Dept 1977]). Plaintiff has failed to establish that it served a person authorized to be served on behalf of the newly-designated defendant and thereby gained jurisdiction over it (*see Ito v. Marvin Windows of N.Y., Inc.*, 54 AD3d 1002 [2nd Dept 2008]; *cf. Tricoche v. Warner Amex Satellite Entertainment Co.*, 48 AD3d 671 [2nd Dept 2008]).

Accordingly, it is hereby:

ORDERED that the motion to dismiss by defendant Cosmos Insurance Brokerage, Inc. is granted; and it is further

ORDERED that the complaint any cross claims against this defendant are hereby severed and dismissed; and it is further

³Defendants Lloyd's and Synergy are both represented by the same attorneys.

ORDERED that the cross motion for summary judgment dismissing the complaint as against defendants Underwriters at Lloyd's and Synergy Adjusting Corporation are granted; and it is further

ORDERED that the complaint and any cross claims against said defendants are hereby severed and dismissed; and it is further

ORDERED that plaintiff's cross motion, inter alia, for summary judgment is denied without prejudice to the service of a supplemental summons and amended complaint naming the "Delos Insurance Company f/k/a Sirius America Insurance Company" as a party defendant in the place and stead of "Everest National Insurance Company"; and it is further

ORDERED that said Supplemental Summons and Amended Verified Complaint shall be served, if at all, upon defendant Delos Insurance Company f/k/a Sirius America Insurance Company and all of the other parties to the action within twenty (20) days from the service upon plaintiff of a copy of this Decision and Order with Notice of Entry; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

ENTER,

DATED: February 27, 2009

Joseph J. Maltese
Justice of the Supreme Court