

**Sirius Am. Ins. Co. v Bethel Gen.
Contr., Inc.**

2009 NY Slip Op 30580(U)

March 16, 2009

Supreme Court, New York County

Docket Number: 103111/2007

Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Justice

Index Number : 103111/2007

SIRIUS AMERICA INS. CO.

vs.

BETHEL GENERAL CONTRACTING,

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 12/4/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-2

3-4

5

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

FILED

MAR 19 2009

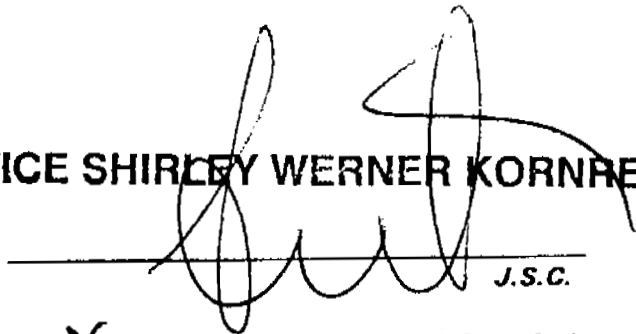
COUNTY CLERK'S OFFICE

NEW YORK

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

JUSTICE SHIRLEY WERNER KORNREICH

Dated: 3/16/09



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
SIRIUS AMERICA INSURANCE COMPANY,

Plaintiff,

-against-

**DECISION
& ORDER**

Index No.: 103111/2007

BETHEL GENERAL CONTRACTING, INC. AND
J. JUHN ASSOCIATES WALTER SINCHI, SOHO
NEW YORK LODGING, LLC, COLGATE
SCAFFOLDING CORP., COLGATE SCAFFOLDING
& EQUIPMENT CORP., K & S FOUNDATION
WORKS, INC.,

Defendants.

-----X
BETHEL GENERAL CONTRACTING, INC.,

Third-Party Plaintiff,

-against-

TUDOR INSURANCE COMPANY, SIRIUS AMERICA
INSURANCE COMPANY, K & S FOUNDATION
WORKS, INC. & SOLOMON AGENCY CORP.,

Third-Party Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.

FILED
MAR 19 2009
COUNTY CLERK'S OFFICE
NEW YORK

In this declaratory judgment action, third-party defendant Solomon Agency Corp. (Broker) moves for summary judgment dismissing the third cause of action in the third-party complaint asserted by Bethel General Contracting, Inc. (Bethel). The third cause of action seeks recovery against the Broker on the theories of negligence, breach of contract and fraud. The gravamen of the claim is that, on April 11, 2005, the Broker issued a certificate of insurance (Certificate) that listed Bethel as an additional insured under a general liability policy issued by

Tudor Insurance Company (Tudor) to K & S Foundation Works, Inc. (K&S). The motion is granted for the reasons that follow.

Background

The following facts are undisputed. K&S asked the Broker to obtain a general liability policy naming Bethel as an additional insured. The Broker placed the policy with Tudor. The Broker was not Bethel's insurance broker. As a result of the request by K&S, the Broker issued the Certificate that contained a disclaimer stating that it was "issued for information only" and conferred "no right upon the certificate holder." Bethel was listed as the certificate holder.

On April 15, 2005, four days after the Certificate was issued, the Broker sent a facsimile to K&S, which stated:

PLEASE DISREGARD THE CERTIFICATE DATED 04/11/2005 NAMING BETHEL GENERAL CONTRACTING, INC. AS ADDITIONAL INSURED

PER CONVERSATION WITH CARRIERS WE CANNOT ADD A GENERAL CONTRACTOR AS ADDITIONAL INSURED ON YOUR POLICY. THEREFORE, THE CERTIFICATE IS VOID/NULL AND ANY CLAIMS AGAINST/FROM GENERAL CONTRACTORS WILL NOT BE COVERED.

Approximately two months later, in June 2005, Bethel entered into an agreement with Soho Lodging, LLC, in which Bethel agreed to be the general contractor on a project located at 151 East Houston Street, New York, NY (Project). In August 2005, Bethel entered into a subcontract for scaffold erection with K&S. K&S had obtained a general liability policy of insurance from Tudor for the period March 24, 2005 through March 24, 2006, which did not name Bethel as an additional insured.

On or about January 26, 2006, Walter Sinchi, filed a complaint (Underlying Action) against Bethel (among others). It alleged that, on December 23, 2005, Sinchi, an employee of

KNS Foundation, Inc., was injured in a fall from a scaffold while working on the Project, due to Bethel's negligence and violations of the Labor Law.

This action was commenced by Sirius America Insurance Company (Sirius), which issued a general liability coverage policy to Bethel. Sirius seeks a declaration that it is not required to provide coverage to Bethel in the Underlying Action due to Bethel's failure to obtain appropriate contractual liability coverage. Bethel impleaded the Broker.

The third-party action against the Broker was commenced on September 10, 2007. The Broker answered the third-party complaint on or about November 30, 2007. A preliminary conference was held in April, 2008. In support of the motion, the Broker submits the affidavit of its Vice President, Christian Pak.

In opposition to the motion, Sirius claims that the motion should be denied because it has not had a sufficient opportunity to conduct disclosure. Specifically, Sirius' counsel states that it is necessary to depose the Broker's Vice-President, Mr. Pak, regarding the facsimile abrogating the Certificate because the dates are confusing. Bethel also asserts that this motion should be denied as premature because Mr. Pak has not been deposed.

Bethel also opposes the motion on the ground that there is an issue of fact as to whether there was a special relationship approaching privity between Bethel and the Broker, who knew that the Certificate was intended for Bethel, who relied upon it. Bethel has submitted only an attorney's affirmation supporting this contention. Bethel's attorney further states that K&S has two principals, a husband and wife; that the wife has been ill; and that K&S assigned their claims under the Tudor policy to Bethel.

In reply, the Broker's attorney states that neither Bethel nor Sirius has served discovery

demands and that Bethel has not responded to the Broker's demands.

Discussion

A certificate of insurance, by itself, is insufficient to raise a factual issue as to the existence of coverage, especially where, as here, the policy itself does not confer coverage. *Glynn v. United House of Prayer for All People*, 292 A.D.2d 319, 322 (1st Dep't 2002). A broker cannot be held liable for negligent misrepresentation in an insurance certificate to a party who had no contract and was not in privity with the broker. *Id.* at 322-323; *Greater N.Y. Mut. Ins. Co. v. White Knight Restoration, Ltd.*, 7 A.D.3d 292, 293 (1st Dep't 2004); *St. George v. W.J. Barney Corp.*, 270 A.D.2d 171, 171-172 (1st Dep't 2000). Where the certificate of insurance contains disclaimer language which negates reasonable reliance upon its contents, a broker cannot be held liable for fraud or negligent misrepresentation in issuing an erroneous certificate. *Greater N.Y. Mut. Ins. Co. v. White Knight Restoration, Ltd.*, *supra.*; *St. George v. W.J. Barney Corp.*, 270 A.D.2d 171, 171-172 (1st Dep't 2000); *St. George v. W.J. Barney Corp.*, *supra.*

Here, there is no evidence that the Broker had a contract or was in privity with Bethel, and the Certificate contains a disclaimer. The Certificate could not confer coverage on Bethel. Therefore, the Broker cannot be held liable to Bethel for breach of contract, fraud or negligent misrepresentation in issuing the Certificate.

The motion need not be denied due to lack of disclosure. CPLR §3212(f) provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had...." The party opposing the motion must demonstrate that needed proof is within exclusive knowledge of the

moving party, that its claims in opposition are supported by more than hope or conjecture and that the party has made an attempt to discover facts. *Voluto Ventures, LLC v. Jenkins & Gilchrist Parker Chapin LLP*, 44 A.D.3d 557 (1st Dep't 2007).

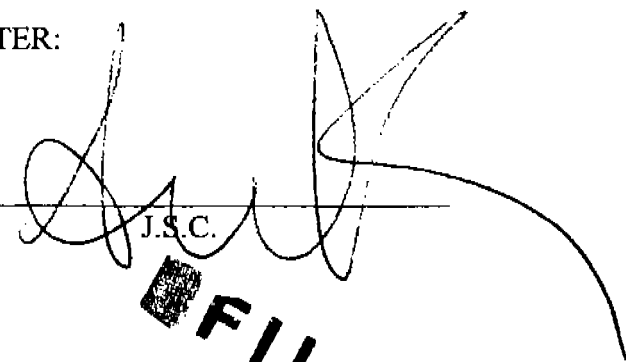
In this case, Bethel and Sirius have not alleged that facts in exclusive possession of the Broker are needed or that they have attempted to obtain disclosure from the Broker. The date on which the revocation of the Certificate was faxed is irrelevant as Bethel was not entitled to rely upon it as proof of coverage. The request for discovery is not supported by more than hope or conjecture. Accordingly, it is

ORDERED that the motion of Solomon Agency Corp. for summary judgment dismissing the third cause of action in the third-party complaint of Bethel General Contracting, Inc., is granted and said cause of action is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly and to sever the remainder of the action, which shall continue.

Dated: March 16, 2009

ENTER:



J.S.C.

FILED
MAR 19 2009
COUNTY CLERK'S OFFICE
NEW YORK