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

PRESENT: HON. EILEEN A. RAKOWER PART 5

Justice

Index Number : 402067/2008
CITY OF NEW YORK
VS.
MOHAWK MILLING & SWEEPING CORP.,
SEQUENCE NUMBER : # 001
SUMMARY JUDGMENT

INDEX NO. 402067-08
MOTION DATE
MOTION SEQ. NO. #007
MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3,4
Replying Affidavits	5,6,7

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
MAR 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3/18/09

EILEEN A. RAKOWER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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THE CITY OF NEW YORK,

Plaintiff,

- against -

MOHAWK MILLING & SWEEPING CORPORATION,

Defendant.

----------X

Index No.
402067/08
ORDER AND DECISION
Mot. Seq.: 001

EILEEN A. RAKOWER, J.S.C.

Plaintiff the City of New York ("City") brings this action to recover damages for an alleged breach of contract by defendant Mohawk Milling and Sweeping Corporation ("Mohawk"). Mohawk opposes and cross-moves for summary judgment. The subject contract, Number HW2CR02A, was entered into between the City's Department of Design and Construction Division of Infrastructure ("DDC") and Mohawk on November 9, 2001 for "Grinding Existing Asphaltic Concrete Wearing Course in Preparation of Resurfacing Thereon by Others at Designated Locations as Required, Boroughs of Brooklyn and Staten Island for the agreed contract amount of $10,748,711.00. On August 6, 2003 and pursuant to the contract, City issued a Street Opening Permit, valid from August 9, 2003 through November 9, 2003, to Mohawk for the purpose of "Grinding Asphaltic Concrete" on Cortelyou Road between Rugby Road and Marlborough Road in Brooklyn.

The instant action was brought against Mohawk after City was sued in an underlying personal injury action commenced by Glenda Metiver against City and Consolidated Edison in Kings County on August 12, 2004. Ms. Metiver states in her bill of particulars that she tripped and fell "upon a certain crosswalk which went from the southwest corner of Cortelyou Road and Marlborough Road to the southeast corner of Cortelyou Road and Marlborough, the County of Kings, City and State of New York and more particularly approximately 8-10 feet east of the southwest corner in the said crosswalk" on September 10, 2003. In that action, it is alleged that City "their servants, agents, contractors, sub-contractors, permittees and/or employees

created and maintained a dangerous, defective, hazardous, unguarded, unsupervised, unprotected and unsafe condition upon said public streets, roadways, pedestrian crosswalk and work site located at the intersection of Cortelyou Road and Marlborough Road . . ." Mohawk is not a defendant to the underlying action. Nor has City impleaded Mohawk.

On August 19, 2008, City brought the instant action against Mohawk[1], alleging, among other things, that Mohawk: "breached the Contract by failing to provide the City with the required general liability insurance coverage . . . breached its contractual obligations under the Permit to provide City with the required insurance coverage sufficient to protect City against all claims arising out of Mohawk's operation or its completed work ." City also alleges in the complaint that as a result of Mohawks's breach, the City will sustain damages in having to defend the Metiver action itself and will be forced to incur the cost of any settlement or judgment because Mohawk failed to obtain the requisite insurance coverage.

City, in support of its motion, submits: a copy of the contract, a copy of a document titled "Commercial General Liability Coverage Form;" a copy of a document titled "Additional Insured-Designated Person or Organization;" a copy of a document titled "Schedule 'A' of the General Conditions; a Street Opening Permit, issued August 6, 2003; a copy of a document titled " Highway Rules; a copy of Liberty Insurance Underwriters Inc.'s ("Liberty") "Declaration Extension Schedule;" a copy of the summons and complaint in the action titled Glenda Metiver v. The City of New York and Consolidated Edison Company of New York, Inc., Index Number 25692/04; a letter from City to Mohawk, dated November 29, 2004; a letter written to City from the Claims Service Bureau of New York, Inc.("CSB"), dated December 7, 2004; a copy of the summons and complaint in the instant action; a copy of Mohawk's answer; a demand for a bill of particulars; and Mohawk's response to the demand for bill of particulars.

City argues that, as a party to the above contract, Mohawk was obligated to obtain a commercial general liability insurance policy. Specifically, City asserts that

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[1] City initially commenced a declaratory judgment action as against Liberty on April 4, 2006, but discontinued that action on February 27, 2007. City also brought an action, alleging identical claims to the ones brought here, against Mohawk in Kings County on June 18,2007. That action was marked disposed on May 5, 2008.

the policy was to cover claims for property damage and/or bodily injury which may arise under the contract which was "at least as broad as that provided by Insurance Services Office ("ISO") Commercial General Liability Form CG0001." City claims that Mohawk also agreed to obtain an insurance policy naming City as an additional insured with coverage as least as broad as ISO form CG 2026 and must have obtained coverage in the amounts set forth in Schedule "A" of the general conditions. Schedule "A" requires Mohawk to obtain insurance in the amount of $3,000,000.00 per occurrence. After it was served with the Metiver complaint, City forwarded a copy of the summons and complaint to Mohawk, requesting that Mohawk defend and indemnify City. On December 7, 2004 CSB, writing on behalf of Mohawk and Liberty, responded to City's request, claiming that it could not undertake City's defense. City represents that Liberty's disclaimer was based on that portion of its policy, which states:

> (1) The insured has the duty to defend any "suit" and investigate any claim.
>
> > The insured's duty to defendant and investigate shall be terminated only by (i) our exercise of our right to assume control of the defense or investigation of any specific claim or "suit" as set forth in paragraph (2) below; or (ii) the settlement, final adjudication or other termination of such claim or "suit"; or (iii) the assumption of the defense or investigation by another insurer or any other entity or person.

Thus, City argues, not that Mohawk failed to procure insurance at all, but that the "insured has the duty to defend" portion of the policy is not as broad as that of the ISO Form CG0001.

Mohawk, in opposition and in support of its cross-motion, submits, the following, not duplicative of City's submissions: a copy of the bill of particulars in the underlying action; a copy of a summons and complaint titled: *The City of New York v. Liberty Mutual Insurance Company and Liberty International Underwriters*, Index Number 10625/06; a printout from "Elaw" listing the Liberty action as being discontinued; a print out from "Ecourts" showing that the Liberty action was disposed as of February 26, 2007; a copy of a summons and compliant titled *The City of New York v. Mohawk*, Index Number 21867/07; a print out from "Ecourts" showing that

the 2007 case against Mohawk was disposed as of May 5, 2008; an affidavit by John Ostuni, an President of Mohawk; and a copy of the "Daily Milling Log Report;"

Mohawk argues that it is entitled to summary judgment because it has complied with the terms and conditions of the contract and permit by purchasing $3,000,000.00 of liability coverage running to the benefit of the City. However, Mohawk claims, such coverage is only triggered if the bodily injury is a result of Mohawk's work, and that the instant accident did not arise as a result of any work performed by Mohawk. Specifically, Mohawk points to the affidavit of Mr. Ostuni, who attests that the work performed by Mohawk was not done in the crosswalk and that , in any event, Mohawk is not responsible for an area beyond a period of 15 days after its work is completed and approved by the City. According to the milling report, the work on Cortelyou road was performed on August 22, 2003, 19 days before plaintiff's accident. Mohawk argues that the instant action is merely a last ditch effort by City to recoup its costs.[2]

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

City does not allege that Mohawk failed to purchase liability insurance or that it failed to name City as an additional insured of that policy. Rather, City's allegation is that the insurance procured by Mohawk was not "at least as broad as that provided by Insurance Services Office General Liability Form CG0001. Section I (A) (1) (a)

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[2]Mohawk submits the summons and complaint in an action commenced by City against Liberty in a declaratory judgment action which was commenced by City but was ultimately discontinued. Mohawk asserts that if City had issues with Liberty's policies and procedures, then it should have proceeded with the declaratory judgment action.

of CG0001 states, in relevant part:

> Coverage A. Bodily Injury and Property Damage Liability.
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" . . . we will have the right and duty to defend the insured against any "suit" seeking those damages . . .

The portion of Liberty's policy that City claims is not in conformity with CG0001 states, in relevant part:

> Section II-Defense, Settlement and Investigation of Claims and "Suits."
>
> (1) The *insured* has the duty to defend any "suit" and investigate any claim. (emphasis added).

It is well settled that "a contractor that breaches its agreement to procure insurance covering an owner is liable for damages resulting from that breach." (*Figueroa v. New York City Housing Authority*, 236 AD2d 154, 156[1st Dept. 1994]). However, where there is no showing that the breach resulted in losses to the owner, summary judgment has been found to be premature. The court in *Bachrow v. Turner Construction Corp.*, 46 AD3d 388[1st Dept. 2007], denied the contractor's summary judgment motion in the event that the plaintiff/contractor could not prove that it had suffered damages as a result of the breach. There, the court affirmed the lower court's finding that the subcontractor breached the agreement because it purchased a policy that covered only its own acts of negligence but failed to procure the requisite insurance that provided coverage for both its negligence and any acts of negligence by the contractor. Accordingly, the court found that the contractor was entitled to recover any losses caused by the breach of contract. Despite finding that a breach occurred, the court held that the motion for summary judgment was nevertheless premature, "as it has yet to be determined that [the subcontractor's] failure to procure the agreed-upon insurance caused [the contractor] any losses. Such causal relationship would be lacking in the event the declaratory judgment action determines that [the insurer] was not given timely notice of the claim"(*Id.*)

Here, City has likewise failed to make a connection between the disclaimer by CSB and any losses it may suffer as the result of having to defend the action. The disclaimer letter issued by the Claims Services Bureau, writing on behalf of Mohawk and Liberty, states:

> Please be advised, our insured checked their records and determined that they last worked in the general area on August 22, 2003. In other words, Mohawk . . . last worked at the site 19 days prior to the accident.
>
> We are also enclosing a copy of the contract . . . which states that Mohawk . . . is only responsible for the site for a period not beyond 15 days, from the completion of work. After this period of 15 days, the maintenance of the area is the responsibility of others.
>
> In view of the above, we can only conclude that Mohawk . . . is only responsible for the site of a period of not beyond 15 days from the completion of the work . . .
>
> In view of the above, we can only conclude that Mohawk . . . was not responsible for this accident and therefore, we cannot undertake the defense of the City in this action.

Although the policy purchased by Mohawk does not conform with the insurance coverage required by the contract, there is no evidence to support City's allegation that the basis for CSB's denial of its claim was "that the Policy explicitly provides that it is the responsibility of each insured to defend itself" against lawsuits. Indeed, CSB is clear in its letter of disclaimer that it will not undertake City's defense because "Mohawk . . . was not responsible for th[e] accident." Thus, City has not made the requisite causal link between the failure to procure the agreed upon insurance and the losses it may incur as a result of having to defend the Metiver action.

Finally, the cross-motion is also denied as Mohawk fails to sustain its burden of stating a prima facie case of entitlement to judgment as a matter of law. The Liberty policy, on its face, is inconsistent with the insurance procurement clause of the agreement between Mohawk and City.

Wherefore it is hereby

ORDERED that the City of New York's motion for summary judgment is denied; and it is further

ORDERED that defendant Mohawk Milling and Sweeping Corporation's cross-motion is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: March 18, 2009

EILEEN A. RAKOWER, J.S.C.