

Gillispie v Insitu, LLC
2009 NY Slip Op 30626(U)
March 23, 2009
Supreme Court, New York County
Docket Number: 116186/07
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 : 116186/2007
GILLESPIE, NOREEN
VS.
INSITU
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
 MOTION DATE 1/8/09
 MOTION SEQ. NO. 1
 MOTION CAL. NO. _____

this motion to/for Dismiss

PAPERS NUMBERED
<u>1</u>
<u>2-3</u>
<u>4-5</u>

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

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

FILED
 MAR 25 2009
 COUNTY CLERK'S OFFICE
 NEW YORK
 JUSTICE SHIRLEY WERNER KORNREICH
 J.S.C.

Dated: 3/23/09

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: PART 54

-----X
NOREEN GILLESPIE,

Plaintiff,

-against-

INSITU, LLC and LEEANN MARTYN,

Defendant.

-----X
INSITU, LLC and LEEANN MARTYN,

Third-Party Plaintiffs,

-against-

MARINO COVERAGE GROUP, INC., and
MARY JEAN MARINO,

Third-Party Defendants.

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

Index No.: 116186/07

DECISION
and ORDER

Index No.: 590750/08

FILED
MAR 25 2009
COUNTY CLERK'S OFFICE
NEW YORK

In this third-party action, defendant/third-party plaintiffs Insitu, LLC and Leeann Martyn (hereinafter "Insitu") seek indemnification from third-party defendants Marino Coverage Group, Inc. and Jean Marino (hereinafter "Marino") against any judgment recovered by the plaintiff in the underlying action. The main action alleges that on or about October 19, 2007, Insitu was negligent in applying hair color and other hair related services to Ms. Gillespie. Here, Marino seeks an order: (i) dismissing the third-party action pursuant to CPLR § 3211(a)(1) and (7); or (ii) in the event dismissal is denied, severing the third-party action from the main action pursuant to CPLR § 603. Insitu and Ms. Gillespie oppose.

I. Background

In 2003, Insitu maintained an insurance policy for its hair salon with Fireman's Fund.

Around June of 2003, Insitu contacted Marino to procure another insurance policy. On or about August 15, 2003, Insitu signed a Business' Owners Insurance Application with Nationwide Mutual Insurance Company (Nationwide). The application did not provide for professional liability coverage. Nationwide issued Insitu Business' Owners Insurance Policy No. 66B0611-518-3001L (Policy) effective August 15, 2003, through August 15, 2004. Section B(1)(j) of the Policy contained the following provision:

B. Exclusions

1. Applicable to Business Liability Coverage

This insurance does not apply to

j. Professional Services

"Bodily injury," "Property damage," "personal injury" or "advertising injury" due to rendering or failure to render any professional service. This includes, but is not limited to...

(6) Any service, treatment, advice or instruction for the purpose of appearance or skin enhancement, hair removal or replacement or personal grooming.

The Policy was subsequently renewed by Insitu in 2005, 2006 and 2007. It was in effect on the date of Ms. Gillespie's injury. On or about December 18, 2007, Nationwide disclaimed coverage on the ground that the Policy did not cover personal injuries associated with Insitu's professional services.

II. *Conclusions of Law*

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Skillgames, L.L.C. v. Brody*, 1 A.D.3d 247, 250 (1st Dept. 2003) citing *McGill v. Parker*, 179 A.D.2d 98, 105 (1992); see also *Cron v. Harago Fabrics*, 91 N.Y.2d 362, 366 (1998); *Monroe v. Monroe* 50 N.Y.2d 481, 484 (1980). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint

states the elements of a legally cognizable cause of action. *Id.* citing *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Id.* citing *Caniglia v. Chicago Tribune-New York News Syndicate*, 204 A.D.2d 233 (1994). Dismissal may be granted where submitted documentary evidence decisively establishes a defense to the asserted claim as a matter of law. *Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561, 571 (2005).

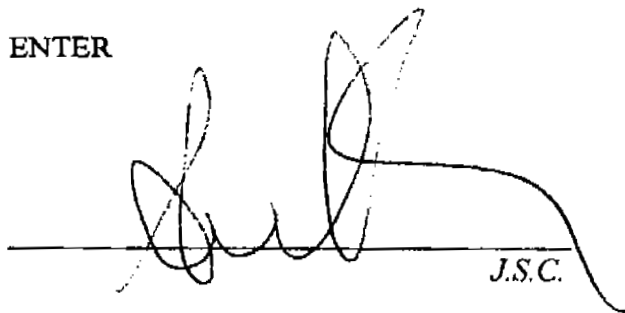
In the third-party complaint, Insitu alleges that it requested Marino to procure an insurance policy containing professional liability coverage. Insitu also claims that it was its “understanding...belief...[and] impression” that the Policy contained professional liability coverage and that Marino failed to fully explain what was actually in the Policy. Marino denies these facts. However, even assuming these facts to be true, Insitu’s claim fails as a matter of law. In New York, “an insured has an obligation to read his or her policy and is presumed to have consented to its terms.” *The Beekman Regent Condo. Assoc. v. Greater New York Mut. Ins. Co.*, 2007 NY Slip Op 8363; 45 A.D.3d 311 quoting *Katz v. American Mayflower Life Ins. Co.*, 14 A.D.3d 195, 198 (1st Dept 2004); *Stone v. Rullo Agency, Inc.*, 2007 NY Slip Op 3820; 40 A.D.3d 1185 (3d Dept 2007). When the Policy was issued in 2004, it contained provision B(1)(j) which clearly stated that it did not provide professional liability coverage. Insitu then renewed the Policy, containing the same clause, in 2005, 2006 and 2007. This language is clear, unambiguous and must be enforced according to its terms without the aid of extrinsic evidence. *Katz*, 14 A.D.3d at 200. Insitu’s assertions as to its interpretation of the Policy cannot defeat dismissal. *Goldman*, 5 N.Y.3d at 571 (mere assertion by a party that policy language means

something to him where it is otherwise clear, unequivocal and understandable when read in connection with whole policy, is not enough to raise a triable issue). Accordingly, it is

ORDERED that the motion is granted and the third-party complaint is dismissed with costs and disbursements to third-party defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

ENTER



A handwritten signature in black ink, appearing to be 'J.S.C.', written over a horizontal line. The signature is stylized and cursive.

DATE: March 23, 2009
New York, NY

FILED
MAR 25 2009
COUNTY CLERK'S OFFICE
NEW YORK