

Guevara v Dormitory Auth. of the State of N.Y.
2009 NY Slip Op 30814(U)
April 6, 2009
Supreme Court, New York County
Docket Number: 103715/07
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

RUDOLFO GUEVARA

Plaintiff,

- v -

DORMITORY AUTHORITY OF
THE STATE OF New York, et al
Defendant.

INDEX NO.: 103715/07

MOTION DATE:

MOTION SEQ. NO.: 004

MOTION CAL. NO.:

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — 1

Answering Affidavits — Exhibits _____

Replying Affidavits _____

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is consolidated for determination with motion sequence no. 005 And the consolidated motions are determined in accordance with the annexed decision and order.

Dated: April 6, 2009

[Signature]
J.S.C.

Check one: [] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
RODOLFO GUEVARA,

Plaintiff,

INDEX NO. 103715/07

-against-

DORMITORY AUTHORITY OF THE STATE OF
NEW YORK and LEFKAS CONSTRUCTION CORP.,

Defendants.

-----X
DORMITORY AUTHORITY OF THE STATE OF
NEW YORK and LEFKAS CONSTRUCTION CORP.,

Third-Party Plaintiffs,

-against-

TCL ENVIRONMENTAL CORP. and HUDSON
INSURANCE COMPANY,

Third-Party Defendants.

-----X
JOAN A. MADDEN, J.:

UNFILED JUDGMENT
This judgment has not been entered with the County Clerk and notice of entry cannot be given to any person. To obtain entry, counsel must file a copy of this judgment with the County Clerk.

Defendants/third-party plaintiffs Dormitory Authority of the State of New York (“Dormitory Authority”) and Lefkas Construction Corp. (“Lefkas”) move for an order pursuant to CPLR 3001, 3017(b) and 3212, granting them summary judgment on their third-party claim against TCL Environmental Corp. (“TCL”) for breach of TCL’s contractual obligation to procure insurance, and seek to “compel” TCL to “fully indemnify Lefkas for all costs and expenses heretofore incurred in this action or that will be incurred by Lefkas defending and resolving this and the underlying action, whether by settlement, verdict, motion or otherwise” (motion sequence no. 004). Third-party defendant Hudson Insurance Co. moves for an order pursuant to

CPLR 3211 and 3212 dismissing the third-party complaint, all claims and cross-claims asserted against it, on the ground that it has no duty to defend or indemnify Lefkas or Dormitory in the underlying action (motion sequence no. 005).¹

The underlying complaint in this action alleges that plaintiff Rodolfo Guevara, an employee of TCL, was injured on December 23, 2005 when he was “struck by falling bricks and other objects,” while working at a construction project at City College of New York on Convent Avenue in Manhattan. It is not disputed that at the time of the accident, Dormitory Authority had a contract with Lefkas for Lefkas to perform certain construction services at the project, that Lefkas subcontracted with TCL for asbestos abatement work at the project, and that TCL was insured under a policy issued by Hudson Insurance Company. It is also undisputed that the subcontract between Lefkas and TCL required TCL to “provide Lefkas Contracting Corp. with workmen’s compensation and public liability insurances and hold Lefkas Contracting Corp. harmless against any claims.”

On July 1, 2006, an investigator for Lefkas’ insurer, wrote to TCL that the contract between Lefkas and TCL “requires that you [TCL] provide public liability insurance and hold our insured [Lefkas] harmless against any and all claims. In accordance with that contract, we hereby tender this claim to you for handling.” By letter dated September 11, 2006, Hudson, TCL’s insurer, responded that “it has no obligation to defend or indemnify neither TCL nor LLC [Lefkas]” and stated the following reasons:

¹Motion sequence nos. 004 and 005 are consolidated for the purpose of determination. Originally, TCL also made a motion (motion sequence no. 003) to vacate its default in answering the third-party complaint. In an order dated June 5, 2008, that motion was granted. Thus, any issues raised in the motion papers as to TCL’s default and the vacatur of that default, are now moot.

Given that your tender request is made pursuant to an indemnification agreement between LLC [Lefkas] and TCL, and involves bodily injuries purportedly sustained by an employee of the insured, we have concluded that the terms and conditions of the above-referenced policy provisions operate to bar and preclude in its entirety availability of insurance coverage for the present claim under the CGI [Commercial General Liability] portion of the Hudson Policy No.: FEC6102242 to TCL and/or LLC [Lefkas] for the present claim.

* * *

As stated above, the terms and conditions of the CPL [Contractors Pollution Liability] portion of the Hudson Policy No. FEC6102242 require that there be a Pollution Condition in order for coverage to apply. As the present claim does not arise from any Pollution Condition, as that term is defined in the Policy, Hudson respectfully disclaims availability of any insurance coverage under the CPL portion of Hudson Policy No.: FEC6102242.

Defendants Lefkas and Dormitory Authority subsequently commenced the third-party action against TCL and Hudson, seeking declaratory relief and monetary damages. The third-party complaint asserts that: 1) TCL breached its obligation under the subcontract to procure “public/comprehensive general liability insurance for the benefit” of Lefkas and Dormitory Authority”; 2) TCL breached the subcontract by failing to hold harmless Lefkas and Dormitory; 3) the policy issued by Hudson to TCL provides additional insured benefits to Lefkas and Dormitory; and 4) Hudson is obligated to defend and indemnify Lefkas and Dormitory in the underlying action. TCL answered the third-party complaint and asserts a cross-claim that Hudson owes TCL a contractual duty of defense and indemnification.

Lefkas and Dormitory are now moving for summary judgment on their third-party claim against TCL for breach of its contractual obligation to procure insurance. Hudson is also moving for summary judgment dismissing the third-party complaint, all claims and cross-claims asserted against it. The court will consider Hudson’s motion first, as the outcome of that motion affects the determination of the motion by Lefkas and Dormitory.

The court finds that Hudson is entitled to summary judgment declaring that it has no obligation to provide coverage for Lefkas, Dormitory or TCL in the underlying action. It is not disputed that neither Lefkas nor and Dormitory is listed as an additional insured under the policy Hudson issued to TCL. Moreover, since the subcontract between TCL and Lefkas did not require TCL to name Lefkas or Dormitory as additional insureds, they are not afforded additional insured status under TCL's policy with Hudson. See Illinois National Insurance Co. v. American Alternative Insurance Corp., 58 AD3d 537 (1st Dept 2009); Alib, Inc. v. Atlantic Casualty Insurance Co., 52 AD3d 419 (1st Dept 2008); Kassis v. Ohio Casualty Insurance Co., 51 AD3d 1366 (4th Dept 2008); Nicotra Group, LLC v. American Safety Indemnity Co., 48 AD3d 253 (1st Dept 2008).

The blanket additional insured endorsement of the policy provides that it covers “[a]ny person or organization whom the Named Insured agrees, in a written contract, *to name as an additional insured*” (emphasis added). Here, the “written contract” is the subcontract between Lefkas and TCL. The subcontract is silent as to Dormitory. As to Lefkas, the subcontract contains a provision in which TCL agreed to “provide Lefkas Contracting Corp. with workmen’s compensation and public liability insurances and hold Lefkas Contracting Corp. harmless against any claims.” By its express terms, the subcontract does not require TCL to name Lefkas as an additional insured on any policy of insurance TCL may have. The policy on the other hand, unambiguously provides that the written subcontract between TCL and Lefkas must require TCL to name Lefkas as an additional insured, and the subcontract clearly does not do so. Under these circumstances, neither Lefkas nor Dormitory is an additional insured as that term is defined in the policy, and Hudson is not obligated to defend or indemnify them. See Illinois National Insurance

Co. v. American Alternative Insurance Corp., *supra*; Alib, Inc. v. Atlantic Casualty Insurance Co., *supra*; Kassis v. Ohio Casualty Insurance Co., *supra*; Nicotra Group, LLC v. American Safety Indemnity Co., *supra*.

In opposition to Hudson's motion, Lefkas and Dormitory Authority submit a certificate of insurance relating to the Hudson policy at issue, which TCL allegedly provided to the Dormitory Authority as the certificate holder. Even though the certificate states, *inter alia*, that "Lefkas Contracting and The Dormitory Authority of the State of NY are named as additional insureds," the certificate also contains the following disclaimer: "This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below." Based on this disclaimer, the certificate of insurance is insufficient to establish that Lefkas or Dormitory Authority is an additional insured under the policy Hudson issued to TCL. See Nicotra Group, LLC v. American Safety Indemnity Co., *supra*; Moleon v. Kreisler Borg Florman General Construction Co., Inc., 304 AD2d 337 (1st Dept 2003).

Hudson likewise has no obligation to defend or indemnify TCL. The policy Hudson issued to TCL contains an employee exclusionary clause, which expressly excludes coverage for bodily injury of an insured's employee arising out of, and in the course of, his employment by the insured. See Sixty Sutton Corp. v. Illinois Union Insurance Co., 34 AD3d 386 (1st Dept 2006); Bassuk Bros, Inc. v. Utica First Insurance Co., 1 AD3d 470 (2nd Dept 2003), *lv app dism* 3 NY3d 696 (2004); A.J. McNulty & Co., Inc. v. Lloyds of London, 306 AD2d 211 (1st Dept 2003). Based on that employee exclusion, TCL, as the insured, is not entitled to coverage, since plaintiff Guevera alleges that he was injured during the course of his employment for TCL. Notably,

Hudson's September 11, 2006 disclaimer letter, specifically relies on the policy's employee exclusion, as one of the grounds for denying coverage to TCL and Lefkas.

Hudson, therefore, is entitled to summary judgment. Since the third-party claims and the cross-claim against Hudson seek a declaratory judgment as to insurance coverage, the appropriate relief is a declaration in favor Hudson, as opposed to dismissal of the third-party complaint and the cross-claim. See 200 Genesee St. Corp. v. City of Utica, 6 NY3d 761, 762 (2006).

In view of the foregoing determination that TCL's policy with Hudson provides no coverage for Lefkas, the court concludes that third-party plaintiffs are entitled to summary judgment against TCL for breach of its contractual duty to procure insurance. Contrary to TCL's assertion, summary judgment is not premature, as TCL offers no evidentiary basis to suggest that discovery would lead to relevant evidence.² See Lopez v. WS Distribution, Inc., 34 AD3d 759 (2nd Dept 2006); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 (1st Dept 2004). Moreover, TCL fails to raise a material issue of fact sufficient to deny such relief, and its reliance on CPLR 1004 is without merit. While TCL argues that Lefkas' insurer, and not Lefkas, is the real party in interest, "neither the case law nor the statute requires that the insurance company be substituted as the plaintiff under such circumstances." CNA Insurance Co. v. Carl R. Cacioppo Electrical Contractors, Inc., 206 AD2d 399 (2nd Dept 1994); see also Augello v. Koenig-Rivkin, 56 AD3d 503 (2nd Dept 2008).

Finally, the court must address the issue of damages. Where as here, Lefkas admits that

²Lefkas and Dormitory Authority argue that Hudson's summary judgment motion is premature. That position, however, would appear to be inconsistent with their own motion for summary judgment on their claim that TCL breached its contractual duty to procure insurance. For example, if coverage exists for Lefkas under TCL's policy with Hudson, then TCL would not be in breach of its agreement to procure insurance for Lefkas.

it has its own insurance coverage,³ the proper measure of damages for TCL's breach of its contract to procure insurance is not the costs of defending the underlying action, or the amount of any judgment or settlement resolving that action. See Inchaustegui v. 666 5th Avenue Ltd Partnership, 96 NY2d 111 (2001); International Couriers Corp. v. North River Insurance Co., 44 AD3d 568 (1st Dept 2007); Wong v. New York Times Co., 297 AD2d 544 (1st Dept 2002). Rather, Lefkas' recovery for such breach is limited to its out-of-pocket expenses in obtaining and maintaining such insurance, i.e. the premiums and any additional costs incurred such as deductibles, co-payments and increased future premiums. See Inchaustegui v. 666 5th Avenue Ltd Partnership, *supra*; International Couriers Corp. v. North River Insurance Co., *supra*; Wong v. New York Times Co., *supra*.⁴

Accordingly, it is hereby

ORDERED that the motion by third-party defendant Hudson Insurance Company for summary judgment is granted; and it is further

ADJUDGED AND DECLARED that third-party defendant Hudson Insurance Company is not obligated to provide the Dormitory Authority of the State of New York, Lefkas

³In their response to the court's preliminary conference order, defendants/third-party plaintiff's states that Lefkas "was insured for \$1,000,000 by Aspen Specialty Insurance under policy number GL000224 with effective dates from March 22, 2005 to March 22, 2006."

⁴Citing Kinney v. G.W. Lisk Co., Inc., 76 NY2d 215 (1990), Dormitory and Lefkas argue that TCL is liable for the resulting damages, which include "the aggrieved party's liability to the injured plaintiff." They state that Kinney v. G.W. Lisk Co., Inc. "remains controlling law." That statement is misleading in light of the Court of Appeals subsequent decision in Inchaustegui v. 666 5th Avenue Ltd Partnership, which clarified Kinney, by explaining that the "question of whether resulting damages could be minimized by any insurance the general contractor had obtained was not raised by the parties or considered by the Court [in Kinney]." Inchaustegui v. 666 5th Avenue Ltd Partnership, *supra* at 115.

Construction Corp., or TCL Environmental Corp., with a defense or indemnification in the underlying action; and it is further

ORDERED that motion by defendants/third-party plaintiffs Dormitory Authority of the State of New York and Lefkas Construction Corp. for summary judgment against third-party defendant TCL Environmental Corp. on their claim for breach of the contractual duty to procure insurance, is granted only to the extent of liability, and the amount of damages as indicated above shall be determined at the trial of this action.

DATED: April 6, 2009

ENTER:



J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be given until it is so. To obtain entry, counsel or plaintiff's representative must appear in person at the Judgment Clerk's Desk (Room 1415).