

JLS Indus., Inc. v National Cas. Co.
2009 NY Slip Op 30887(U)
April 14, 2009
Supreme Court, New York County
Docket Number: 600368/05
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN

PART 7

Justice

Index Number : 600368/2005

JLS INDUSTRIES

vs.

NATIONAL CASUALTY

SEQUENCE NUMBER : 003

OTHER RELIEFS

INDEX NO. 600368/2005

MOTION DATE 9/23/08

MOTION SEQ. NO. 003

MOTION CAL. NO. 64

The following papers, numbered 1 to 6 were read on this motion for summary judgment

Amended Notice of Motion— Affidavit — Exhibits A, B
Affidavit— Exhibits C, D; Affirmation — Exhibits E-Q

PAPERS NUMBERED

1-4

Answering Affirmation — Exhibits A-F

5

Replying Affirmation

6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the annexed memorandum decision, order and judgment.

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

Dated: 10/1/09

New York, New York

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

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

-----X
JLS INDUSTRIES, INC. and SIRIUS AMERICA
INSURANCE COMPANY,

Plaintiffs,

-against-

Index No. 600368/05

NATIONAL CASUALTY COMPANY, NATIONAL UNION
FIRE INSURANCE CO., AIG, 111 CHELSEA, LLC,
DOUBLE CLICK, INC., ADCO ELECTRICAL CORP.,
MITCHELL E. SAFT and LORRAINE SAFT,

Decision, Order and
Judgment

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
141B).

Hon. Michael D. Stallman:

In this action involving insurance coverage, defendant
National Casualty Company (NCC) moves for a judgment declaring:
(1) that plaintiff JLS Industries, Inc. (JLS) is not an
additional insured under the policy issued by NCC to defendant
ADCO Electrical Corp. (ADCO) (the NCC/ADCO policy); (2) that
defendant Double Click, Inc. (DC) is not an additional insured
under the NCC/ADCO policy; (3) that NCC was not provided with
timely notice of the underlying occurrence; and (4) that NCC does
not owe any coverage obligations under the policy it issued to
ADCO until the \$100,000 self-insured retention has been
exhausted.

By stipulation dated January 16, 2009, the complaint
and cross claims asserted against Illinois National Insurance Co.
i/s/h/a National Union Fire Insurance Co. were discontinued

without prejudice.

Defendants DC and ADCO have submitted no papers on this motion.

BACKGROUND

Defendant Mitchell E. Saft (Saft), allegedly an ADCO employee at the time, was injured in a construction site accident at premises located at 111 Eighth Avenue, New York, New York on November 21, 2003. DC was the owner of the premises, JLS the construction manager, and ADCO the electrical contractor. A personal injury action (*Saft v 111 Chelsea, LLC*, Index No. 112848/04) arising out of that accident is pending before this court.

Whether JLS and DC Are Provided Coverage Under the NCC/ADCO Policy

The policy and the certificates of insurance that have been submitted on this motion indicate that there are two NCC/ADCO policies to be considered, neither of which provides coverage to JLS or DC for the Saft incident.

The original commercial general liability insurance policy (the original policy), policy RB00000014, as evidenced by the certificate of insurance dated August 6, 2003 (Ex. K to Krebs 7/14/08 Affirm., at 39-41¹), covered the period August 31, 2002

¹Pages of Exhibit K are numbered on the bottom right-hand corner of each page. Because the exhibit contains other documents besides the contract which will be considered in this decision, it is these hand-written page numbers that will be

to August 31, 2003. Saft's accident occurred on November 21, 2003. Thus, the original policy was no longer in force at the time of his injuries, and did not cover Saft's accident.

NCC issued a renewal of the original policy (policy RB00000016, the renewal policy) to ADCO covering the period August 11, 2003 to August 11, 2004 (Ex. A to Marino 7/16/08 Aff.²). Since Saft's accident occurred on November 21, 2003, it fell within the period covered by the renewal policy. However, neither JLS nor DC is named as an additional insured in the renewal policy, and neither JLS nor DC fits within the description of covered parties in the policy's additional insured endorsement.

The renewal policy covers ADCO as a named insured (see Schedule of Named Insureds, UT-SP-1 [8-96], at NatCas 00062), and the additional insured endorsement (UT-3g-01 [3-92], at NatCas 00114) names as additional insureds:

ANY PERSON OR ORGANIZATION THAT THE INSURED
HAS AGREED AND/OR IS REQUIRED BY CONTRACT TO
NAME AS AN ADDITIONAL INSURED, PER SCHEDULE
ON FILE WITH COMPANY

(If no entry appears above, information
required to complete this endorsement will be
shown in the Declarations as applicable to
this endorsement.)

referenced as part of the exhibit, not the page numbers of the contract itself.

²The pages of the renewal policy have been Bates-stamped as "NatCas" followed by a five-digit number.

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule as an insured but only with respect to liability arising out of your operations or premises owned by or rented to you.

As set forth below, it cannot be said that the DC/ADCO contract requires ADCO to procure additional insured coverage for JLS or DC. In addition, no entry appears "above" on the additional insured endorsement. The Declarations page of the renewal policy lists ADCO as the named insured, as well as "SEE SCHEDULE OF NAMED INSUREDS" (at NatCas 00060). The Schedule of Named Insureds (at NatCas 00062) does not contain any reference to JLS or DC. There is also no evidence that this schedule, or any schedule of insureds, is on file with ADCO.

In his affidavit, Joseph Marino, an underwriter employed by NCC, attests that he searched NCC's files for documents relating to the underwriting of the policy, but that he found no document which might indicate that JLS is an additional insured under the policy (Marino 7/16/08 Aff., ¶ 3).

In sum, there is no evidence that either JLS or DC is an additional insured under the renewal policy. Thus, they are not entitled to coverage under it (see e.g. *Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004] ["a party that is not named an insured or an additional insured on the face of the policy is not entitled to coverage"]; *Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337,

339 [1st Dept 2003] [same]).

Nevertheless, three distinct certificates of insurance have been posited as indications that JLS and DC are or are not additional insureds under the renewal policy. Each of the certificates of insurance (Ex. K to Krebs 7/14/08 Affirm., at 31-32 and 39-41; Ex. B to O'Malley 8/28/08 Affirm.) indicates, at the top right of the document:

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.

It is well-settled that such a certificate of insurance confers neither coverage nor status as an additional insured. It is "insufficient to raise an issue of fact as to the existence of the alleged insurance coverage" (*Halmar Bldrs. of N.Y., Inc. v Team Star Contrs., Inc.*, 13 AD3d 581, 582 [2d Dept 2004]; see also *Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d at 339 [such certificate was insufficient to establish that party was an additional insured where policy itself made no provision for coverage]; *American Motorist Ins. Co. v Superior Acoustics*, 277 AD2d 97, 98 [1st Dept 2000] [such certificate was insufficient to raise a triable issue of fact as to whether party had been named as additional insured under policy]; *American Ref-Fuel Co. of Hempstead v Resource Recycling*, 248 AD2d 420, 423 [2d Dept 1998] [such certificate was insufficient by itself to

establish that party was insured under policy)).

Be that as it may, a certificate of insurance is "evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists" (*Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d at 200; see also *Kermanshah Oriental Rugs, Inc. v Gollender*, 47 AD3d 438, 440 [1st Dept 2008], quoting *Tribeca Broadway Assoc.; Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 469 [1st Dept 1998]).

The first certificate of insurance is a "SAMPLE" certificate ("SAMPLE" is stamped four times down the center of the document; Exhibit K, at 31-32; the sample certificate). The sample certificate shows no "Producer Insurance Company Name," no "Insured Company Name," and no "Insurers Affording Coverage." The certificate is undated and unsigned, and provides no policy number or coverage term. Under "Type of Insurance," "Contractual Liability" has been hand-written in, with monetary limits of certain coverages in the far-right column of the page. The sample certificate holder is non-party Taconic Management Company LLC, and JLS has been hand-written in as the last entity listed in the "DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS" box. DC is not listed at all. With no indication whatsoever that this sample certificate has anything at all to do with the original or

renewal policy, it cannot be said that the sample certificate indicates that JLS or DC is an additional insured under either.

The second certificate of insurance (Exhibit K, at 39-41; the second certificate) is dated August 6, 2003, and shows ADCO as the insured and NCC as the first insurer affording coverage. According to this certificate, policy RB0000014 [sic] "Includes: Blanket Additional Insured as required by contract, Endt. No. UT-3G-01 (3/92) No Endt. required." Endorsement UT-3g-01 (3/92) (at NatCas 00114) is quoted above, and, as discussed below, does not evidence any coverage for JLS or DC because the DC/ADCO contract does not require ADCO to purchase additional insured coverage for either. JLS is listed last in the "DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS" box. While the second certificate is dated August 6, 2003, it shows RB0000014 [sic], the original policy which provided coverage for August 31, 2002 to August 31, 2003, as the policy and term to which the certificate pertains. Thus, the policy to which this certificate refers was not in full force or effect on the date of Saft's accident, November 21, 2003. As set forth above, the second certificate of insurance includes the disclaimer that it does not "amend, extend or alter the coverage afforded" by the policy. In such a case, the certificate can neither create nor confer insurance coverage where none exists, nor extend coverage which

[*9]
has expired.

The third certificate of insurance (Ex. B to the O'Malley 8/28/08 Affirm.; the third certificate) shows ADCO as the named insured and NCC as the first insurer affording coverage. The third certificate, dated August 28, 2003, refers to the renewal policy, number RB0000016 [sic] for the term August 31, 2003 to August 1, 2004. According to this certificate, "RB0000016 [sic] Includes Blanket Additional Insd. as required by Contract No scheduled Endt. required." Thus, any additional insured coverage afforded must be "as required by Contract."

In the DC/ADCO contract (Ex. K to Krebs 7/14/08 Affirm.), section 10 pertains to insurance, in particular, section 10.1, which says, "Please see attached Exhibit D" (DC/ADCO Contract, § 10.1, at 20). Page 34 of Exhibit K, entitled "Exhibit D (Insurance)," is an otherwise blank page.

Plaintiffs insist that Exhibit D of the contract is a two-page document, the blank Exhibit D page (Exhibit K, at 34), and the sample certificate of insurance (*id.* at 31-32) (see O'Malley 8/28/08 Affirm., ¶ 7). Neither of these documents sets forth any party's obligation to provide any coverage of any kind or amount for any other party.

Section 10.2 of the DC/ADCO contract requires ADCO to deliver certificates of insurance to DC (the owner) and JLS (the construction manager) which indicate that the required insurance

coverages are in full force and effect, and the premiums paid (see Ex. K, at 20-21). Although plaintiffs maintain that the sample certificate of insurance is the second page of Exhibit D, it neither complies with the requirements of section 10.2 of the DC/ADCO contract, nor indicates in any way that JLS or DC is an additional insured under the renewal policy.

A certificate of insurance is "only evidence of a carrier's intent to provide coverage" (*Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d at 200). It presupposes that some prospective insured has requested coverage for itself and possibly for others. In the case of the third certificate, additional insured coverage may be provided "as required by Contract." "A provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated'" (*Empire Ins. Co. v Insurance Corp. of N.Y.*, 40 AD3d 686, 688 [2d Dept 2007], quoting *Trapani v 10 Arial Way Assoc.*, 301 AD2d 644, 647 [2d Dept 2003]). As is evident, the DC/ADCO contract does not "expressly and specifically" require the procurement of any insurance, let alone additional insured coverage. Section 10.2 of the contract, which indicates that evidence of insurance coverage of some kind is required, does not establish that the DC/ADCO contract requires ADCO to purchase commercial general liability insurance which would benefit JLS

and DC as additional insureds.

The evidence demonstrates that the DC/ADCO contract does not contain a provision requiring ADCO to purchase additional insured coverage for JLS or DC. Thus, the renewal policy, which mandates such coverage if "required by Contract," does not afford JLS or DC additional insured coverage.

The court has considered the parties' other arguments pertaining to whether JLS or DC is covered as an additional insured under the renewal policy and finds them either irrelevant or unpersuasive.

Because no coverage for JLS or DC exists, the court need not address the part of NCC's motion which seeks a declaration that NCC was not provided with timely notice of the underlying occurrence.

Whether NCC Owes Any Coverage Obligations Under the NCC/ADCO Policy Until ADCO's Self-Insured Retention Has Been Exhausted

The renewal policy (Ex. A to Marino 7/16/08 Aff.) contains an endorsement called the "Self-Insured Retention Endorsement Loss Adjustment Expense Included in Retention Unlimited Reporting" (GL-156s [12-98], at NatCas 00104-00105). Paragraph 1 of the endorsement provides that NCC's limit of liability "will apply in excess of the Self-Insured Retention (as stated in this endorsement) Our obligation under the policy applies only to the amount excess of the Self-Insured

Retention" (*id.* at NatCas 00104).

NCC avers that, pursuant to its practice with ADCO, either ADCO, or someone on its behalf, will contact NCC when the self-insured retention is nearly exhausted. Once the self-insured retention is actually exhausted, ADCO, or someone on its behalf, will request that NCC provide coverage for the claim (Maciel 7/15/08 Aff., ¶ 8). NCC maintains that its coverage of ADCO under the renewal policy has not yet been triggered because ADCO has not yet informed NCC that the self-insured retention amount has been exhausted.

ADCO has submitted no papers on this motion, and does not contest NCC's assertions.

JLS opposes this part of NCC's motion, claiming that the exhaustion of the self-insured retention is not a condition precedent to JLS's entitlement to coverage under the NCC/ADCO policy. It also claims that the endorsement's language raises a question of fact with respect to whether the provision applies to additional insureds.

JLS's opposition to this part of NCC's motion is meritless. "A SIR [self-insured retention] differs from a deductible in that a SIR is an amount that an insured retains and covers before insurance coverage begins to apply. Once a SIR is satisfied, the insurer is then liable for amounts exceeding the retention, less any agreed deductible." In re September 11th

[*13]

Liability Ins. Coverage Cases, 333 F Supp 2d 111, 124 n 7 (SD NY 2004) (citing Ostrager & Newman, Handbook on Insurance Coverage Disputes § 13.13[a]). JLS is not an additional insured under the NCC/ADCO policy, and is not entitled to any coverage under it.

Therefore, this part of NCC's motion is granted.

CONCLUSION

Accordingly, it is


ORDERED that the motion for summary judgment by defendant National Casualty Insurance is granted; and it is further

ADJUDGED and DECLARED that JLS Industries, Inc. and Double Click, Inc. are not additional insureds under the policy issued by National Casualty Company to ADCO Electrical Corp.; and it is further

ADJUDGED and DECLARED that National Casualty Company does not owe any coverage obligations under the policy it issued to ADCO Electrical Corp. until the \$100,000 self-insured retention has been exhausted.

Dated: April 14, 2009
New York, New York

ENTER:



J. S. C.

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 141H).