

**Blue Ridge Ins. Co. v Empire Contr, & Sales
Co., Inc.**

2009 NY Slip Op 31296(U)

May 21, 2009

Supreme Court, Suffolk County

Docket Number: 01-20117

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

P R E S E N T :

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 11-14-08
ADJ. DATE 2-11-09
MNEMONIC: # 001 - MG; CASEDISP

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BLUE RIDGE INSURANCE COMPANY, :
:
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Plaintiff, :
:
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- against - :
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:
EMPIRE CONTRACTING AND SALES CO. :
INC , WAYNE J. PATENAUDE, MARSHALL :
BROTHERS AND CAROLYN GARCIA :
BROTHERS, AND MITCHELL JUNEAU, :
:
Defendants. :
-----X

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Upon the following papers numbered 1 to 25 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 16 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 17-19 ; Replying Affidavits and supporting papers 20-21 ; Other Arcuri Suppl. Aff. 22-24; Juneau Mem/Law 25; and after hearing counsel in support and opposed to the motion it is,

ORDERED that this motion (001) by the defendant, Mitchell Juneau (hereinafter Juneau), pursuant to CPLR §3212 for an order granting summary judgment is granted and it is declared that the policy of Blue Ridge Insurance Company (hereinafter Blue Ridge) is operative with respect to Juneau's cross-claim for common-law indemnification against Empire Contracting and Sales Co., Inc. (hereinafter Empire) in the underlying negligence action for personal injury (hereinafter underlying action), **Patenaude v Empire Contracting and Sales Co., Inc. et al**, pending in Supreme Court of the State of New York, Clinton County under Index No. 01-0349 (hereinafter Clinton County).

This is an action by Blue Ridge wherein it seeks judgment declaring that it has no obligation to defend or indemnify Empire for the claims of Wayne J. Patenaude (hereinafter Patenaude) in the underlying action entitled, **Patenaude v Empire Contracting and Sales Co., Inc. et al**, Index No. 01-0349.

On or about April 10, 2001, Patenaude commenced an action in Clinton County premised upon the defendants' alleged violation of Labor Law §240 arising out of his fall from a roof causing him to sustain personal injury while performing construction work at an apartment building. Patenaude states that he was an independent contractor hired to work as a roofer for the defendants who directed and controlled his work. The apartment building is alleged to be owned by Juneau and is located at 23 Pearl Street, Rouses Point, Clinton County, New York. The complaint in that action states that the co-defendants Empire, Marshall Brothers and Carolyn Garcia Brothers were the general contractors for the renovations and improvements performed at the premises.

In Juneau's response to Blue Ridge's notice to admit in the underlying action, Juneau admitted that he never served a cross-claim against Empire in the underlying action; that he never notified Blue Ridge of any claim by him in the underlying action; and never notified Kelly, Luglio & Arcuri, LLP¹ of any claim by him in the underlying action. However, in reviewing the answer served by Juneau in the underlying action, the Court finds as a matter of law that Juneau asserted a cross-claim against the co-defendants, Empire, Marshall Brothers and Carolyn Garcia Brothers, asserting that if the plaintiff recovers in any amount from Juneau, then Juneau is entitled to full or partial indemnification and/or contribution over and against the co-defendants.

Blue Ridge claims that Empire had notice of Patenaude's alleged accident on or about October 26, 2000, the date the accident is said to have occurred, and that Empire failed to timely notify Blue Ridge of the accident in violation of the terms of the insurance policy it had with Blue Ridge. Consequently, Blue Ridge denied insurance coverage to Empire relative to the accident suffered by Patenaude and it commenced the instant action seeking a declaration that it is not obligated to defend and indemnify Empire for the claims of Patenaude.

Juneau now seeks summary judgment declaring that Blue Ridge's policy is operative with respect to Juneau's cross-claim for indemnification in the underlying action.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (**Sillman v Twentieth Century-Fox Film Corporation**, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of

¹Kelly, Luglio & Arcuri, LLP are the attorneys appearing in this action on behalf of Blue Ridge

proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters stated in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of this motion, Juneau has submitted copies of the pleadings and answers for both actions; an attorney’s affirmation; affidavit of Juneau; disclaimer letter, dated May 30, 2001, from Blue Ridge to Empire; a copy of the Order Terminating Automatic Stay, dated May 22, 2003 (Littlefield, J.), in Empire’s bankruptcy action; a copy of motion made in Clinton County, returnable July 25, 2008 for summary judgment regarding Juneau’s claim for common law indemnification against Empire; and a copy of the Blue Ridge policy. In opposing this motion, Blue Ridge has submitted an attorney’s affirmation; a copy of the agreement, dated August 13, 2000, between Juneau and Empire; and a copy of Juneau’s response to notice to admit, dated September 26, 2006.

Blue Ridge opposes this motion by Juneau because Juneau seeks to impose, without any legal authority, an obligation by Blue Ridge to defend and indemnify Juneau, and that Juneau has not proffered any evidence that he was listed as an insured or additional insured, or that Juneau is entitled to insured status pursuant to a contractual agreement Juneau had with Empire. Blue Ridge further argues that it disclaimed coverage in the underlying action by letter, dated May 30, 2001, that Juneau did not serve an answer in the underlying action until June 25, 2001, after the disclaimer was sent to Empire, and that, therefore, there was no basis for requiring a disclaimer as to Juneau.

Juneau argues that because he was being sued as the “owner” under Labor Law §240, that Blue Ridge had an obligation to serve Juneau with a disclaimer and failed to do so and, therefore, must indemnify Juneau for any recovery that may be obtained against Juneau in the underlying action.

Indemnity has been defined as one’s obligation to make good or to make reimbursement for any loss or damage another has incurred while acting at his request or for his benefit,

or any loss or damage resulting from the conduct of one of the parties or of some other person or from a specified contingency. Whether express or implied, most claims for indemnification arise out of contract law. The right to indemnification may arise from contractual relations or from the status of the parties as a matter of law, or it may be imposed by statute. By virtue of an express agreement to indemnify, a party may insulate itself against loss resulting from its own liability for negligence. Parties to an agreement (subject to certain public policy exclusions), may agree to a total shifting of economic loss resulting from the negligence of one of the parties. Thus, assuming a valid contract to indemnify and its applicability to the particular loss at issue, the indemnitee may normally enforce said contract notwithstanding his own conduct (*Trznadel v E.W. Howell Corp.*, 112 Misc2d 244; 446 NYS2d 861 [Supreme Court of New York, Trial Term, Nassau County 1981]).

Common-law indemnification is the rule of law under which a person found negligent is charged with the responsibility for his wrongful act, not only directly to the person injured, but indirectly to a person who is legally liable therefor. In the latter case the wrongdoer stands in the relation of the indemnitor to the person who has been held legally liable, and the right to indemnity rests upon the principle that every one is responsible for the consequences of his own wrong, and if another person has been compelled to pay the damages which the wrongdoer should have paid the latter becomes liable to the former. Thus, unlike the case of an express contract to indemnify, the indemnitee seeking indemnification upon a common-law theory must have been, legally, only passively liable to the injured party, and the indemnitor must be the actual or actively negligent party (*Trznadel v E.W. Howell Corp.*, supra).

While contractual indemnification is permissible where there is no finding of negligence on the part of the owner or general contractor, the right to contractual indemnification depends upon the specific language of the contract (*Gillmore et al v Duke/Fluor Daniel et al*, 221 AD2d 938; 634 NYS2d 588 [4th Dept 1995]; see General Obligations Law §5-322.1; *Parelli et al v Talbot Store, et al*, 308 AD2d 569; 165 NYS2d 372 [2nd Dept 2003]).

In reviewing the agreement, dated August 13, 2000, entered into between Empire and Juneau concerning construction work to be performed at the site of the accident, the Court finds as a matter of law that the agreement does not provide for Empire to provide contractual indemnification on behalf of Juneau, or to hold Juneau harmless for any negligence of Empire, as the agreement is silent on the issue. The agreement between Juneau and Empire does not require Empire to procure insurance naming Juneau as an additional insured under the policy.

In reviewing the policy of insurance (CCOOO426-Account number 11062) issued by Blue Ridge to Empire for the policy period March 12, 2000 to March 12, 2001, the Court finds that this policy submitted in support of the instant action for summary judgment encompasses the date of the accident, October 26, 2001. However, it does not indicate that Juneau is listed

as an insured or an additional insured under the policy. The agreement between Juneau and Empire does not provide for contractual indemnification either.

Accordingly, Juneau's claim for indemnification is based upon the theory of common-law indemnification.

A party held strictly liable under Labor Law §240 may seek common-law indemnification from the party or parties actually responsible for the injured plaintiff's work and supervision thereof, provided that the one seeking indemnity is not guilty of some negligence beyond the strict statutory liability (*Gulotta et al v Bechtel Corporation et al*, 245 AD2d 75; 664 NYS2d 801 [1st Dept 1997]). An owner who is only vicariously liable under Labor Law may obtain full indemnification from the actor who caused the accident and, where the cause is shared, contribution (*Young et al. v Casabonne Brothers, Inc.*, 145 AD2d 244; 538 NYS2d 348 [3rd Dept 1989]; see also, *Carro v Lyons Falls Pulp & Paper, Inc. et al*, 56 AD3d 1276; 867 NYS2d 646 [4th Dept 2008]; *Brickel et al v Buffalo Municipal Housing Authority et al*, 280 AD2d 985; 720 NYS2d 671 [4th Dept 2001]).

A court may render a conditional judgment on the issue of indemnity pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed provided that there are no issues of fact concerning the indemnitee's active negligence (see, *Gil v Manufacturers Hanover Trust Co.*, 39 AD3d 703; 832 NYS2d 455 [2nd Dept 2007]; *State of New York v Travelers Prop. Cas. Ins. Co*, 280 AD2d 756; 720 NYS2d 589 [3rd Dept 2001]). As there has been no determination of apportionment of fault, if any, as between the defendants, and there has been no final judgment in the underlying action, it is premature to make a determination as to whether or not Juneau will be entitled to indemnification from Empire in the underlying action. Counsel for Juneau asserts that a motion for summary judgment is pending against Empire on Juneau's common-law indemnification cross-claim in the underlying action premised upon Labor Law §240 on the basis that Empire had control over the work site and that Juneau, as owner, had no involvement in the work. Therefore, there are factual issues concerning liability and whether Juneau will be found to be liable at all, which issues preclude a conditional judgment on the issue of indemnity .

However, Juneau seeks an order granting summary judgment as a matter of law that Blue Ridge's policy is operative with respect to Juneau's cross-claim for indemnification in the underlying personal injury action. Juneau argues that if a judgment is obtained against Juneau that Blue Ridge must indemnify Juneau because Blue Ridge never served Juneau with a disclaimer of insurance despite Blue Ridge's knowledge of the cross-claim served with the plaintiff's answer, dated June 20, 2001. Therefore, the issues which must be decided are whether or not Blue Ridge should have served a disclaimer of coverage upon Juneau after receiving Juneau's cross-claim for common-law indemnification, and whether the failure to do so renders Blue Ridge's policy operative with respect to Juneau's claim for indemnification in

Insurance Law §3420 (3) provides that “A provision that notice given by or on behalf of the insured, or written notice by or on behalf of the injured person or any other claimant, to any licensed agent of the insurer in this state, with particulars sufficient to identify the insured, shall be deemed notice to the insurer.” Subsection (4) provides, “A provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured, an injured person, or any other claimant, if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible thereafter. Subsection (5) provides, that “A provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured, injured person, or any other claimant, unless the failure to provide timely notice has prejudiced the insurer,”

The purpose of Insurance Law §3420(d) is to assist a consumer or claimant in obtaining an expeditious resolution to liability claims by requiring insurance companies to give prompt notification when a claim is being denied, **Yoda, LLC, Riverhead Pooh, LLC, and United National Insurance Company v. National Union Fire Insurance Company of Pittsburgh, PA et al**, 2006 NY Slip Op 52376U, 14 Misc3d 1201A; 831 NYS2d 363 [Supreme Court of the State of New York, New York County 2006]).

In **Handelsman et al v Sea Insurance Company, Ltd.**, 85 NY2d 96; 623 NYS2d 750 [1994], the Court held that when a liability insurer is notified of a claim, it must timely disclaim coverage in order to avoid its duty to defend and indemnify Insurance Law §3420(d). A timely disclaimer is not required, however, when the policy on which the claim rests does not, by its terms, cover the incident giving rise to liability. In the instant action, Blue Ridge notified Empire that it was disclaiming coverage in the underlying claim.

In **Republic Franklin Insurance Company v Pistilli et al**, 16 AD3d 477; 791 NYS2d 639 [2nd Dept 2005], the Court stated the obligation to provide prompt notice under Insurance Law §3420(d) (for a disclaimer of insurance) is triggered when the insurer has a reasonable basis upon which to disclaim coverage, and this obligation cannot be delayed indefinitely until all issues of fact regarding the insurer’s coverage obligations are resolved. The Court further stated that “If in doubt, the insurer should have promptly issued a prompt disclaimer and then seek a declaratory judgment concerning its duty to defendant or indemnify, rather than seeking a judgment in lieu of issuing a disclaimer. Further, the insurer had a reasonable basis upon which to disclaim coverage when it was first informed by the alleged indemnitor of the underlying action.”

In the instant action the Court finds that Blue Ridge was first informed of Juneau’s intention to seek common-law indemnification from the co-defendant Empire via the cross-claim served with Juneau’s answer. Although some years have passed since that cross-claim was served, Blue Ridge has still not issued a letter or otherwise given notice to Juneau disclaiming coverage on Juneau’s cross-claim premised upon common-law indemnification. Instead, Blue Ridge has commenced the instant action for declaratory judgment. Based upon

the foregoing, Blue Ridge has not timely disclaimed coverage to Juneau on the issue of common-law indemnification.

Accordingly, the Court finds that Blue Ridge's policy is in effect as to Juneau's cross-claim against the co-defendant Empire for common-law indemnification in the underlying personal injury action, ***Patenaude v Empire Contracting and Sales Co., Inc. et al***, pending in Clinton County, subject to the determination of apportionment of fault, if any.

Empire commenced an action in the United States Bankruptcy Court of the Northern District of New York (Albany), Bankruptcy Petition #02-11498-1-rel. By order, dated May 22, 2003 (Littlefield, J.), in the matter entitled ***In re: Empire Contracting and Sales Company, Inc.***, the automatic stay imposed by 11USC §362(d)(1) was terminated as to Patenaude pursuant to 11USC §362(d)(1), and leave was granted for Patenaude to continue his Labor Law action in the Supreme Court of the State of New York, Clinton County and to participate in the action in the Supreme Court of the State of New York, Suffolk County and recovery, if any, in the Labor Law action in Clinton County, shall be limited to the amount of coverage provided by the Debtor's insurance policy or policies and Patenaude shall have no other claim in the bankruptcy estate. The Bankruptcy Case was closed September 25, 2003 (Thibault, J.) and entered September 25, 2003.

Dated: May 21, 2009



J.S.C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION