

385 Third Ave. Assoc., L.P. v Metropolitan Metals Corp.

2009 NY Slip Op 31619(U)

July 17, 2009

Supreme Court, New York County

Docket Number: 105708/08

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
J.S.C.
Justice

PART 2

385 Third Ave.

INDEX NO. 105708/8

MOTION DATE _____

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

- v -
Metropolitan Metals

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED ~~BY~~ JUDGMENT
WITH ACCOMPANYING MEMORANDUM DECISION**

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).

Dated: 7/17/09

Luy

LOUIS B. YORK *J.S.C.*
~~NON-FINAL DISPOSITION~~

Check one: FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 2

-----X
385 THIRD AVENUE ASSOCIATES, L.P. and KNK
CONSTRUCTION, LLC,

Plaintiffs,

Index No.: 105708/08

-against-

METROPOLITAN METALS CORP. and THE
BURLINGTON INSURANCE COMPANY,

Defendants.
-----X

UNFILED FOR ENTRY
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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
1412).

LOUIS B. YORK, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

In sequence 002, 385 Third Avenue Associates (385 Third Avenue), and KNK Construction, LLC (KNK), move, pursuant to 3212, for an order granting summary judgment and declaring and adjudging that defendant, The Burlington Insurance Company (Burlington), is bound to indemnify both plaintiffs as well as defendant Metropolitan Metals Corp. (Metropolitan), for claims in an underlying personal injury lawsuit (*Telford v 385 Third Avenue Associates*, Index No. 118105/06). Plaintiffs maintain that summary judgment should also be granted against Metropolitan for contractual indemnification and for failure to procure insurance coverage.

In sequence 003, Metropolitan, moves, pursuant to CPLR 3212, for an order granting summary judgment, declaring and adjudging, that Burlington is bound to indemnify Metropolitan, as well as plaintiffs, for the claims arising out of the underlying action.

Burlington cross-moves for summary judgment against plaintiffs as well as Metropolitan, and contends that it is not obligated to defend or indemnify any of the parties because of the cross

liability exclusion within the Burlington insurance policy.

FACTUAL ALLEGATIONS

On May 5, 2006, KNK subcontracted with Metropolitan to perform structural steel work at the premises of 385 Third Avenue, Manhattan, New York. 385 Third Avenue was the owner of the premises. The subcontract includes language which requires Metropolitan to indemnify, hold harmless, and defend KNK as well as other parties, including 385 Third Avenue.

On December 6, 2006, Dennis Telford (Telford), an employee of Metropolitan, and his wife commenced the underlying action against 385 Third Avenue and KNK, alleging that on November 20, 2006, Telford sustained serious injuries after he fell from a steel column while working at the premises. Telford's complaint sets forth causes of action for common-law negligence as well as violations of Labor Law §§ 200, 240 (1) and 241 (6).

Metropolitan had a commercial general liability policy with Burlington in effect from March of 2006 through March of 2007. Burlington received notice of the Telford accident on December 6, 2006. By letter dated December 28, 2006, Mutual Marine, the authorized representative of NY Marine and General Insurance Company, the commercial general liability insurance carrier for 385 Third Avenue and KNK, placed Metropolitan on notice of the Telford incident.

By letter dated January 22, 2007, Burlington disclaimed coverage as to Metropolitan, 385 Third Avenue, and KNK. Burlington maintained that 385 Third Avenue and KNK were not additional insureds under the policy, and that, even if they were, coverage was excluded because the bodily injury in question was suffered by an employee of an insured, thus the cross liability exclusion within the policy limits any claims for insurance coverage.

On June 8, 2007, 385 Third Avenue and KNK commenced a third-party action seeking a declaration that Burlington must defend themselves as well as Metropolitan for claims brought in the underlying action. Burlington answered the third-party complaint as well as a subsequent amended third-party complaint and denied liability pursuant to the cross liability exclusion in the policy. On November 30, 2007, this court severed the entire third-party action from the underlying action, and the claims and defenses pled in the supplemental third-party complaint are now being litigated in this action.

In the underlying action, Telford filed a motion for partial summary judgment, which was granted on April 16, 2008, and which held 385 Third Avenue and KNK liable pursuant to Labor Law § 240 (1).

DISCUSSION

As an initial matter, Burlington argues that Metropolitan should not be permitted to file a motion for summary judgment, because Metropolitan does not have any cross-claims against Burlington. However, because plaintiffs seek a declaratory judgment, pursuant to CPLR 3001, regarding Burlington's obligations to provide insurance coverage to Metropolitan, and as such coverage and whether it should or should not be declared or rejected is the center of the dispute in this litigation, Metropolitan should be heard on this issue. CPLR 3212 (a) also states that any party may move for summary judgment after joinder of issue.

Burlington maintains that it is not obligated to defend or indemnify Metropolitan, KNK, or 385 Third Avenue, because the cross liability exclusion contained in the policy, unambiguously disclaims coverage. The cross liability exclusion states, in part, that the coverage "does not apply to any actual or alleged 'bodily injury' . . . to . . . [a] present, former, future or

prospective . . . employee of any insured.” (Foster Affirm., ex. K). Here, it is undisputed that the underlying action involves alleged bodily injury to Telford, an employee of Metropolitan, the named insured, who was working in the scope of his employment at the time of his injury.

Several recent Supreme Court cases have held Burlington’s cross liability exclusion clause, and similarly worded exclusions, are clear and unambiguous. *See Richner Dev., LLC v Burlington Ins. Co.* (Sup Ct, Nassau County, Nov. 19, 2008, Diamond, J., Index No. 33063/07) (holding that the cross liability exclusion is unambiguous, subject to only one interpretation, and that the policy at issue does not apply in matters involving bodily injury to an employee of a named insured or an additional insured); *Allen-Stevenson School v Burlington Ins. Co.* (Sup Ct, New York County, March 31, 2008, Edmead, J., Index No. 603036/06) (holding that the cross liability exclusion is unambiguous and applies to bar coverage to an additional insured); *Vislocky v City of N.Y.* (Sup Ct, Kings County, Jan. 30, 2008, Hinds-Radix, J., Index No. 75233/07) (holding that the cross liability exclusion applied and that the exclusion was unambiguous).

The Eastern District of New York has also recently held that Burlington’s cross liability exclusion is clear and unambiguous and acts to preclude coverage. *See Chimbay v Avalon Communities Inc. d/b/a Avalon Pines* (US. Dist. Ct., ED NY, O6 CV 1908, Seybert, J., Sept. 26, 2008) (holding that the cross liability exclusion is not ambiguous and states in plain language that the Burlington policy does not apply to injuries sustained by employees of any insured).

The Court of Appeals has held that when an insurance policy is “clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement.” *United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 231 (1986) (citations omitted). Furthermore, when an insurance policy is unambiguous, the court does not have to

consider extrinsic evidence concerning the intent behind the policy. *See Katz v American Mayflower Life Ins. Co. of New York*, 14 AD3d 195, 200 (1st Dept 2004), *affd sub nom Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561 (2005).

Therefore, because there is no question that Telford was an employee working for Metropolitan at the time of the injury, the language of the cross liability exclusion unambiguously precludes coverage for Metropolitan as the named insured and 385 Third Avenue and KNK as purported additional insureds. Also, because the policy was clear and unambiguous, any arguments that provisions were hidden within the exclusions, that the policy fails to meet reasonable expectations, or that it violates public policy, are without merit.

Although plaintiffs argue that Burlington placed the exclusion language where the reasonable insured would not read it, the third page of the policy contains a listing of forms and endorsements and indicates what form discusses the cross liability policy. The exclusion is on its own page with a heading in bold and capital letters which states **“THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY. EXCLUSION - CROSS LIABILITY.”** Therefore, any argument that this exclusion was deceptively hidden within the policy, is without merit.

Burlington also contends that plaintiffs should not be considered additional insureds under the policy, because the subcontract entered into between Metropolitan and KNK only requires Metropolitan to add them as additional insureds on a certificate of insurance and not the Burlington policy itself. The court rejects this strained reading of Article 11 of the subcontract and the insurance rider to which it refers. The clear import of the language of this provision is to require that Metropolitan procure and maintain commercial general liability insurance coverage.

and name 385 Third Avenue and KNK as additional insureds under that coverage. In addition, the insurance rider (exhibit C to the subcontract) clearly states that an additional insured endorsement naming 385 Third Avenue as an additional insured be procured.

Metropolitan and plaintiffs contend that Burlington fails to recognize the “insured contract” exception to the policy. An insured contract is defined as “[t]hat part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for ‘bodily injury’ or ‘property damage’ to a third person or organization.” (Foster Affirm., ex. K). The “insured contract” provision states that coverage should be provided for tort liability “[a]ssumed in a contract or agreement that is an ‘insured contract’, provided the ‘bodily injury’ or ‘property damage’ occurs subsequent to the execution of the contract or agreement.” *Id.*

Although Metropolitan and plaintiffs argue that the “insured contract” exception would apply, the First Department has held that “exclusions of policies of insurance must be read *seriatim*, not cumulatively, and if any one exclusion applies there can be no coverage since no one exclusion can be regarded as inconsistent with another.” *Monteleone v Crow Constr. Co.*, 242 AD2d 135, 140-141 (1st Dept 1998) (citations omitted). The Court of Appeals has also held that, in insurance policies, if any exclusion applies, then there can be no coverage. *See Maroney v New York Central Mutual Fire Ins. Co.*, 5 NY3d 467, 471 (2005).

Here, if Metropolitan wanted “insured contracts” to not be subject to the cross liability exclusion, it could have explicitly provided for this in the policy. Therefore, because the cross liability exclusion applies, the court refuses to hold that the “insured contract” exception would permit coverage.

Metropolitan as well as plaintiffs contend that the separation of insureds condition bars the application of the cross liability exclusion. The separation of insureds condition states that the policy applies “[a]s if each Named Insured were the only Named Insured; and . . . [s]eparately to each named insured against whom a claim is made or ‘suit’ is brought.” (Foster Affirm., ex. K). Metropolitan and plaintiffs contend that because Telford was an employee of Metropolitan, plaintiffs cannot be grouped together with the primary insured for the purpose of disclaiming coverage and that plaintiffs must be treated as separate entities.

However, the cross liability exclusion applies to preclude coverage where there is bodily injury to an “employee of any insured,” and is not limited to an “employee of the insured.” Therefore, coverage would be precluded to employees of the named insured as well as the additional insured. *See Tardy v Morgan Guar. Trust Co. of New York*, 213 AD2d 296 (1st Dept 1995) (holding that the policy in question which excludes coverage for bodily injuries to any employee of any named insured, unambiguously bars coverage to additional insureds); *see also Hayner Hoyt Corp. v. Utica First Ins. Co.*, 306 AD2d 806 (4th Dept 2003) (holding that the exclusion applies to plaintiff as an additional insured because the plaintiffs in the underlying actions were employees “of an insured”).

Because Telford was an employee of Metropolitan on the date of the accident, and Metropolitan was a named insured under the policy, coverage would be precluded regardless of whether or not the primary and additional insureds are treated as separate entities.

Plaintiffs also contend that the supplementary payments provision of the policy impacts the applicability of the cross liability exclusion, however, such argument is moot as this provision applies only if Burlington is required to defend an insured against a lawsuit.

Finally, while Burlington contends that the employer's liability exclusion also applies, this argument is moot as the court has found that coverage is already precluded by the cross liability exclusion.

Plaintiffs also maintain that they are entitled to full indemnification from Metropolitan on the basis of Article 12 of the subcontract between KNK and Metropolitan.

The Court of Appeals has held that "[a] party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances." *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 (1987) (citations omitted).

Article 12 of the subcontract states that;

[the] [s]ubcontractor agrees to defend, indemnify and save harmless Contractor and Owner, as well as any other parties which Contractor is required under the Contract Documents to defend, indemnify and hold harmless, and their agents, servants and employees, from and against any claim, cost, expense, or liability . . . attributable to bodily injury, sickness, disease, or death . . . caused by, arising out of, resulting from, or occurring in connection with the performance of the Work by Subcontractor, its subcontractors and suppliers, or employees . . .

(Foster Affirm., ex. J).

To establish a claim for contractual indemnification, the one seeking indemnity must establish that it was not guilty of any negligence beyond the statutory liability. *See Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60 (1st Dept 1999) (summary judgment on contractual indemnification claims was premature because there was a factual issue as to whether the indemnitee was negligent, and if so, to what extent).

In this case, while Telford was granted partial summary judgment on his statutory Labor Law § 240 (1) claim, there has been no resolution of Telford's claims against 385 Third Avenue

and KNK for common law negligence or violations of Labor Law §§ 200 and 241 (6). Indeed, the November 30, 2007 order specifically notes that the court was not opining on these additional claims. Thus, it remains unclear whether or not plaintiffs were completely free from any negligence for the underlying Telford accident and whether they were solely liable by virtue of the statutory liability. Therefore, the branch of plaintiffs' motion for summary judgment for contractual indemnification is premature.

Plaintiffs contend that, in the event the court rules in favor of Burlington, summary judgment should be granted on plaintiffs' claim that Metropolitan breached the subcontract by failing to procure the required insurance. Metropolitan maintains that it procured such coverage and furnished certificates of insurance which list 385 Third Avenue and KNK as the certificate holders. Thus, while insurance coverage was obtained, Telford's accident is not covered. Thus, the issue is what insurance coverage was required by the terms of the subcontract and whether an accident to a Metropolitan employee intended to be covered.

Article 11 of the subcontract provides that Metropolitan is required to obtain and maintain, at its own expense, the insurance specified in Exhibit C. Exhibit C provides that the requirements for the insurance coverage include the issuance of a certificate of insurance providing commercial general liability issued in the name of the contractor reflecting a per occurrence limit of \$10,000,000, as well as "Employers' Liability coverage" with a minimum of \$1,000,000. Because the insurance was not procured as a result of the applicability of the cross-liability exclusion, the specifications of Article 11 have therefore not been met, and summary judgment on liability must be granted for breach of the subcontract.

CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED that plaintiffs' motion (seq. no. 002) for summary judgment is denied as against defendant The Burlington Insurance Company, and granted, in part, against defendant Metropolitan Metals Corp. only to the extent that plaintiffs KNK Construction, LLC and 385 Third Avenue Associates are granted summary judgment, on liability, on the second cause of action of the Amended Third-Party Complaint against defendant Metropolitan Metals Corp. for breach of the subcontract's insurance requirements; and it is further

ORDERED that the motion of defendant Metropolitan Metals Corp. (seq. no. 003) for summary judgment against defendant The Burlington Insurance Company is denied; and it is

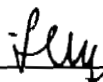
ORDERED that the cross motions of defendant The Burlington Insurance Company are granted; and it is further

ORDERED, ADJUDGED and DECLARED that The Burlington Insurance Company has no obligation to defend or indemnify KNK Construction, LLC, 385 Third Avenue Associates, L.P., or Metropolitan Metals Corp. against the plaintiffs' claims in *Telford v 385 Third Avenue Associates*, Supreme Court, New York County, Index No. 118105/06.

This is the Decision, Order, and Judgment of the Court.

Dated: July 17, 2009

ENTER:



J.S.C.
LOUIS B. YORK
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 141B).