

Stack McWilliams, LLC v Greater N.Y. Mut. Ins. Co.

2009 NY Slip Op 31634(U)

July 8, 2009

Supreme Court, Nassau County

Docket Number: 918221/06

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

STACK MCWILLIAMS, LLC and STAMACK
CONSTRUCTION, LLC,

Plaintiff,

-against-

GREATER NEW YORK MUTUAL INSURANCE
COMPANY,

Defendant.

Motion Sequence #01
Submitted March 16, 2009
XXX

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The following papers were read on this motion:

GNY Notice of Motion.....	1
STACK/STAMACK Affirmation in Opposition.....	2
Reply Affirmation.....	3

In the above declaratory judgment action that has been severed from an underlying personal injury action entitled ANTHONY DICICCO and KAREN DICICCO v. STACK MCWILLIAMS, LLC, STAMACK CONSTRUCTION, LLC and 55th CLINTON ASSOCIATES, LLC, CURTIS PARTITION CORP., THE RELATED COMPANIES, INC. and THE RELATED COMPANIES LP., defendant, GREATER NEW YORK MUTUAL INSURANCE COMPANY (hereinafter referred to as "GNY"), moves, pursuant to CPLR §2221, to renew and reargue that portion of the Court's Short Form Order, dated December 16, 2008, that denied its motion to dismiss the action against GNY, pursuant to CPLR §3211(a)(1)(3) and

(7). Plaintiff, STACK McWILLIAMS, LLC (hereinafter referred to as "STACK") and STAMACK CONSTRUCTION LLC (hereinafter referred to as "STAMACK") oppose the motion, which is determined as follows:

The underlying personal injury litigation arises from an accident that occurred on August 6, 2004, at a construction project located at John Jay College in Manhattan, when Mr. DICICCO, a foreman for the company performing the electrical work at the project, slipped on some construction debris in the main stairwell and sustained injury. The instant declaratory judgment action concerns the duty of GNY to defend and indemnify STACK and STAMACK (hereinafter collectively referred to as "STACK/STAMACK"), the owners of the project, as additional insureds under a policy of insurance issued to CURTIS PARTITION CORP. (hereinafter referred to as "CURTIS"), a sub-contractor of STACK, who was obligated pursuant to a "Master Subcontractor Agreement", dated July 18, 2003, to, *inter alia*, keep the work area and premises free from debris and unsafe conditions resulting from the work, and to indemnify the contractor and owner of the project and hold them harmless from any claims for personal injury resulting from the performance of the work, except as to claims for their own negligence.

The prior order of the Court found that CURTIS had a commercial general liability policy issued by GNY, which covered the period from December 31, 2003 to December 31, 2004, which contained an "additional insured endorsement" that referred to a schedule "on file with the company." Because GNY had not submitted the schedule of additional insureds on the motion to dismiss, the Court gave STAMACK the benefit of the favorable inference that it was an additional insured on the GNY policy and denied the motion to dismiss. Additionally, the Court gave STAMACK the favorable inference that STAMACK

and CURTIS were “united in interest” so that notice of the claim by CURTIS was deemed notice by STAMACK, and denied the motion to dismiss on the ground that STAMACK’s notice to GNY of the claim was untimely.

In support of the instant motion, counsel for GNY asserts that the Court misapprehended the facts and the law in its prior order because, *inter alia*, neither STACK nor STAMACK filed a Certificate of Insurance with GNY prior to the date of DICICCO’s accident triggering their inclusion in the GNY policy. Indeed, GNY denies knowledge of STAMACK, which it claims never contracted with CURTIS, and points out that the policy contains no blanket - additional insured endorsement but, rather, required GNY to add certificate -submitting entities as additional insureds on its policy if their names were not “on file with the company” already. It appears that STACK, through CURTIS’ broker, forwarded a Certificate of Insurance to GNY, on August 12, 2004, six (6) days after the accident, and that STAMACK never forwarded a Certificate of Insurance. It is GNY’s position that, whether it has a duty to defend STACK/STAMACK on its contractual indemnification claim against CURTIS, will be determined in the underlying DiCICCO action, which is separate and apart from whether STACK/STAMACK are the insureds of GNY in the instant declaratory judgment action. Counsel for GNY asserts that, upon reargument, the motion for dismissal should be granted.

Moreover, counsel for GNY argues that GNY disclaimed coverage to STACK/STAMACK for late notice and that the “surrogate notice” argument was not made on the prior motion and, upon renewal, should be rejected by the Court. Counsel points out that STACK/STAMACK are adversaries of CURTIS and cannot be “united in interest” with the notifying party, citing *1700 Broadway Co. v Greater NY Mut Ins. Co.*, 54 AD3d 593,

863 NYS2d 434 (1st Dept. 2008). GNY argues that there is no proof that STAMACK and STACK are affiliated, and even if they are, there is no documentary evidence that they filed Certificates of Insurance to trigger their inclusion on the policy. GNY urges that upon renewal, the motion for dismissal be granted.

In opposition to the motion, counsel for STACK/STAMACK states that no new evidence supporting a modification or reversal has been provided and that no affidavit from an adjuster or underwriter or anyone from GNY with knowledge of the facts is contained in the record. Counsel for plaintiffs points out that the list of those entities "on file" with the company has still not been provided and, therefore, GNY cannot prove, as a matter of law, that STACK and STAMACK were not already on file with GNY prior to the subject accident and that the Certificate of Insurance, dated August 12, 2004, was the first such Certificate offered to GNY referencing the STACK entity. Counsel for plaintiffs contends that CURTIS had a contractual obligation to add STACK and STAMACK to the GNY policy, under the "Master Subcontractor Agreement", dated July 18, 2003, and there is no evidence that GNY was not put on notice of STACK/STAMACK or that it did not put STACK/STAMACK "on file" prior to the date of loss. Additionally, counsel for plaintiffs claims that, contrary to its contention, GNY never responded to the tender for defense and indemnification at any time and therefore it has waived the defense of untimely notice.

In reply, GNY states that if STACK and STAMACK previously filed anything with GNY, they would know what and when it was filed and attach a copy to support their position. GNY asserts that these arguments rest on unfounded assertions and cannot defeat the motion to dismiss. It is GNY's position that STAMACK never filed anything and that STACK filed a certificate of insurance six (6) days after the accident for which

coverage is sought and, therefore no coverage exists. Counsel for GNY states that because STACK and STAMACK are not insureds under the GNY policy, GNY did not have to respond to their tender letter, allegedly forwarded on April 10, 2008. Furthermore, counsel for GNY states that, as Assistant General Counsel of GNY, he does have knowledge of the facts offered herein and based on the record before the Court, the motion for reargument and renewal should be granted.

A motion to reargue is addressed to the sound discretion of the Court and may be granted upon a showing that the court overlooked or misapprehended relevant law in arriving at its previous decision (*Hoey-Kennedy v Kennedy*, 294 AD2d 573, 742 NYS2d 573 [2nd Dept. 2002]; *Long v Long*, 251 AD2d 631, 676 NYS2d 208 [2nd Dept. 1998]). A motion to reargue is not a means for an unsuccessful party to obtain a second opportunity to relitigate issues that have been previously decided (*McGill v Goldman*, 261 AD2d 593, 691 NYS2d 75 [2nd Dept. 1999]; *Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 588 NYS2d 8 [1st Dept. 1992]).

After a careful reading of the submission herein, it appears to the Court that modification of the prior order is warranted. While Insurance Law §3420(d) provides that an insurance carrier may not disclaim liability if it fails to give the insured timely notice of the disclaimer, upon reargument, the Court credits the analysis of GNY, that it did not have to respond to the tender letter allegedly forwarded by plaintiffs because STACK and STAMACK were not additional insureds under the policy and there was no coverage for them. *Crespo v City of New York*, 303 AD2d 166, 756 NYS2d 183 (1st Dept. 2003) (a disclaimer under Insurance Law §3420(d) is unnecessary when a disclaimer is based on

additional- insured status and there is no coverage for the additional insured under the policy). The Court finds that notice from CURTIS cannot act as notice from STACK and STAMACK because they are not "united in interest", the only exception to the general rule that notice on behalf of one insured is not notice on behalf of other insureds, assuming STACK and STAMACK were GNY insureds. *Travelers Ins. Co. v Volmar Constr. Co., Inc.*, 300 AD2d 40, 752 NYS2d 256 (1st Dept. 2002). Upon review, it is the judgment of the Court that the speculative assertions that STACK and STAMACK may have been listed and certified as additional insureds prior to the subject accident are insufficient to establish a cause of action for contractual indemnification from GNY. While the issue of whether GNY must defend and indemnify plaintiffs under CURTIS' policy will be determined in the underlying DICICCO action, the Court finds that no reading of the complaint provides a basis for granting plaintiffs contractual indemnification in the instant declaratory judgment action. Accordingly, it is hereby

ORDERED, that GNY's motion to renew and reargue the order of the Court, dated December 16, 2008, is granted, and upon reargument and renewal, the motion to dismiss the instant declaratory judgment action is granted.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the court.

Dated: July 8, 2009



 WILLIAM R. LaMARGA, J.C.

ENTERED

JUL 16 2009

**NASSAU COUNTY
 COUNTY CLERK'S OFFICE**

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