

Inner City Redevelopment Corp. v Thyssenkrupp El. Corp.
2009 NY Slip Op 31988(U)
August 31, 2009
Supreme Court, New York County
Docket Number: 103830/07
Judge: Milton A. Tingling
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SCANNED ON 9/2/2009
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. MILTON A. TINGLING**
J.S.C.

PART 44

Justice

Index Number : 103830/2007
INNER CITY REDEVELOPMENT
vs
THYSSENKRUPP ELEVATOR
Sequence Number : 004
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE 4/8/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in*
accordance with annexed decision.

FILED
SEP - 2 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/31/09 _____ *met* _____
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

HON. MILTON A. TINGLING

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 44

-----X
INNER CITY REDEVELOPMENT CORP.,

Plaintiff,

-against-

Index No.

THYSSENKRUPP ELEVATOR CORPORATION and
LEXINGTON INSURANCE COMPANY,

103830/07

Defendants.

-----X
MILTON TINGLING, J. :

Mot. Seq. Nos. 004 and 005 shall be consolidated for disposition.

In Mot. Seq. No. 004, defendant Lexington Insurance Company (Lexington) seeks leave to reargue the order dismissing its summary judgment motions, and to renew said motions. In Mot. Seq. No. 005, defendant Thyssenkrupp Elevator Corporation (Thyssenkrupp) seeks leave to reargue the order dismissing its summary judgment motion and to reargue its motion and plaintiff's motion for summary judgment.

This case arises out of a personal injury action, *Kenneth A. Smith v Inner City Redevelopment Corp.*, Index No. 101574/05, in Supreme Court, New York County. The *Smith* action names plaintiff as a defendant and seeks a recovery for injuries suffered by an employee of Thyssankrupp in the course of his employment. Plaintiff and Thyssankrupp were contractors in a project in which Thyssankrupp was to install an elevator at Upper East Side High School located in New York, New York.

In the *Smith* case, plaintiff instituted a third-party action against Thyssankrupp, Lexington's insured. Plaintiff is seeking coverage under the Lexington policy, claiming to be an additional insured under the policy. Subsequently, plaintiff commenced this declaratory

judgment action against defendants. Then, plaintiff made a summary judgment motion to declare that defendants were obligated to defend and indemnify plaintiff in the *Smith* action. Lexington brought two summary judgment motions, one that sought dismissal of the action on the ground that late notice from plaintiff allegedly absolved it of the duty to defend and indemnify plaintiff, and one that sought dismissal on the ground that the employee exclusion clause in the policy applied to the underlying claim. Thyssenkrupp brought a summary judgment motion claiming that in the absence of a finding of negligence against plaintiff in the *Smith* action, this action must be dismissed as premature.

This court's order denied Thyssenkrupp's motion, finding the present action timely; denied Lexington's first motion, based on late notice, due to an ambiguity in its policy provisions; denied Lexington's second motion, based on the employee exclusion clause, as untimely filed; and granted plaintiff's motion against Thyssenkrupp based on contractual duties to defend and indemnify plaintiff. Now, defendants seek reargument and/or renewal of their past motions.

Lexington argues that there is no ambiguity between the Policy and Endorsement 20, which involves Self-Insured Retention, and that they must be read conjunctively. Lexington states that plaintiff is bound by the Policy terms, which provides that an insured shall immediately forward to Lexington every demand, notice, summons or other process received by an insured's representative. The Endorsement provides that the insured must notify Lexington in writing of any claim to which the policy applies if one of three conditions are met. The conditions concern claims involving serious bodily injury or fatality, claims in which the insured has received notice of a suit in which the damage exceeds the Self-Insured Retention, and claims

that may exceed 25 % of the Self-Insured Retention. Lexington asserts that the Endorsement applies to the main insured, Thyssenkrupp, and does not apply to plaintiff. Plaintiff is allegedly bound to the terms of the Policy and did not notify Lexington immediately, therefore forfeiting Lexington's policy obligations.

In addition to reargument, Lexington moves for renewal by submitting a copy of a decision entitled *Vertex Engineering Services, Inc. v New York City Transit Authority*, Supreme Court, New York County, Index No. 108236/06. Lexington claims that this case speaks to the exact issues pending before this court. In *Vertex*, a late notice argument was raised by the insurer, and the plaintiff in that action argued that late notice was excused based on Endorsement 13 in the policy. This Endorsement provided that the insurer would not deny coverage as a result of an unintentional failure by the insured to give proper notice. The court held that the Endorsement did not avail plaintiff of an excuse for late notice. The court apparently concluded that there was no inconsistency between the Endorsement and the rest of the policy.

Lexington also contends that the court should not have dismissed the second motion for summary judgment because there was no prejudice as a result of this motion being brought. Lexington asserts that in the interest of justice, the motion should be considered on its merits.

Thyssenkrupp contends that plaintiff's motion should have been denied because Thyssenkrupp's contractual obligation to defend and indemnify plaintiff was conditioned upon certain terms. According to Thyssenkrupp, a Rider in the policy conditions its obligation on the extent of its own negligence. Thus, Thyssenkrupp states that the motion granted was premature because the *Smith* court has not found Thyssenkrupp negligent. Thyssenkrupp concludes that its

motion to dismiss this action should be granted and plaintiff's motion denied.

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. *Foley v Roche*, 68 AD2d 558,567 (1st Dept 1979).

A motion for renewal must be specifically identified as such. CPLR 2221 (e) (1). It must be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination. An application for leave to renew must be predicated on new matters not available prior to the court's decision. *See Weintraub v Half Hollow Central School Dist.*, 82 AD2d 802 (2d Dept 1981).

Pursuant to Endorsement 20, certain situations must be reported to Lexington to determine whether the Self- Insured Retention amount will be satisfied. Lexington argues that the Endorsement was not intended to apply to an additional insured like plaintiff because it required an insured to maintain a company-approved claims handling service. The Endorsement was applicable to a policy holder like Thyssenkrupp that paid the premiums and negotiated retention of liability in exchange for a monetary benefit.

The court finds that it has misapprehended the facts of this case and the terms of the policy. There was no ambiguity in the policy whereas Endorsement 20 was an alternative notice provision that applied to conditions that had not been met by plaintiff. Therefore, plaintiff was bound by the notice provisions in the main policy. Because plaintiff did not provide immediate notice to Lexington, plaintiff is precluded from Lexington's duty to defend and indemnify it in the *Smith* action.

The court has considered the motion to reargue Lexington's second summary judgment.

The motion is hereby dismissed as moot.

As for Thyssenkrupp, the provision of the Rider that is relevant to this case provides as follows:

To the fullest extent permitted by New York State Law, the Subcontractor (Thyssenkrupp) and all subsubcontractors shall defend, indemnify, and hold harmless the Contractor (plaintiff) and Owner and their employees from all damages, losses, or expenses including, but not limited to, attorney's fees arising in whole or in part, out of or relating to the Subcontractor's work, including, without limitation, the failure of the Subcontractor to perform any obligation under this contract. The indemnification provision shall include, but not be limited to, claims, damages, losses, or expenses attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property, penalties imposed on account of the violation of any law, order, citation, rule, regulation, standard, ordinance, or statute, and claims and/or liens for labor, materials, or equipment used or furnished to be used on the project, but only to the extent caused in whole or in part by negligent acts or omission of the Subcontractor or anyone directly or indirectly employed by it or anyone for whose acts it may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

This provision limits Thyssenkrupp's duty to indemnify plaintiff as to whether Thyssenkrupp is negligent, in part or in whole, with respect to the accident affecting its employee. While the duty to defend is broader than the duty to indemnify, the duty to defend arises as a matter of the contractual obligation to insure, whereas the liability for indemnification rests on principles of basic negligence. *See New Hampshire Ins. Co. v. Jefferson Ins. Co. of New York*, 213 AD2d 325 (1st Dept 1995).

The court shall declare that Thyssenkrupp has an obligation to defend plaintiff in the *Smith* action, but its obligation to indemnify is conditioned upon a finding of negligence on its part in that action.

Accordingly, it is

ORDERED that Lexington' motion for reargument is granted; and it is further

ORDERED that, upon reargument, Lexington's motion for summary judgment based on late notice is granted and the complaint is dismissed with costs and disbursements to Lexington as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Thyssenkrupp's motion for reargument is granted; and it is further

ORDERED that, upon reargument, Thyssenkrupp's motion for summary judgment is granted to the extent that Thyssenkrupp does not have a duty to indemnify plaintiff at this phase of the *Smith* action.

DATED 8/31/09

ENTER

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HON. MILTON A. TINGLING
J.S.C. J.S.C.

FILED