Liberty Surplus Ins. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.
2009 NY Slip Op 32581(U)
October 30, 2009
Supreme Court, New York County
Docket Number: 113296/07
Judge: Judith J. Gische
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SCANNED ON 11/5/2009

[* 1]

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

PRESENT: JUDITH J. GISCHE, J.S.C. **PART** 10

Index Number : 113296/2007

LIBERTY SURPLUS INS. CORP.

VS

NATIONAL UNION FIRE INS. CO.

Sequence Number : 005

DISMISS

INDEX NO. ________

MOTION DATE ________

MOTION SEQ. NO. ________

MOTION CAL. NO. ________

The following papers, numbered 1 to ______ were read on this 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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

FOR THE FOLLOWING REASON(S):

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
NOV 05 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/30/09

JUDITH J. GISCHE, J.S.C.

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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LIBERTY SURPLUS INSURANCE CORPORATION, HOME PROPERTIES APPLE HILL, LLC, and HOME PROPERTIES INC.,

Plaintiffs,

-against-

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., and MITSUI SUMITOMO INSURANCE COMPANY OF AMERICA,

Defendants.

---x

DECISION/ORDER
Index No.: 113296/07
Seq. No. : 004/005

Present:
Hon. Judith J. Gische
J.S.C.

FILED
NOV 05 2009
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Motion Sequence No. 004 - Papers	**Numbered**
Def Mitsui n/m [CPLR § 3212]	1
TDK affirm w/ exhs	2
AC affid w/ exhs	3
9/17/09 Transcript	4

Motion Sequence No. 005 - Papers	**Numbered**
Def National Union n/m [CPLR § 3212]	1
JPG affirm, exhs	2
JAM affirm, exhs	3
AC affid w/ exhs	4

Upon the foregoing papers the court's decision is as follows:

This action arises from a dispute involving insurance coverage. The defendants have brought motions for summary judgment pursuant to CPLR § 3212 dismissing this action. Plaintiffs oppose the motion.

Plaintiff Liberty Surplus Insurance Company ("Liberty") brings this action both on

its behalf and also as subrogee of plaintiffs Home Properties Apple Hill LLC ("Apple Hill") and Home Properties, Inc. ("Home Properties"). The defendants are Mitsui Sumitomo Insurance Company of America ("Mitsui") and National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union").

Summary judgment relief may be considered by the court since issue has been joined, and the note of issue has not yet been filed. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004).

Since the arguments made in each motion overlap one another, these motions are hereby consolidated for consideration by the court in this single decision.

On or about December 9, 2002, Hontz submitted to Apple Hill a proposal for elevator maintenance (the "12/9/02 Proposal"), which provided in relevant part:

> Dear Margo:
>
> Thank you for asking Hontz Elevator to submit our proposal for elevator maintenance.
>
> Along with the proposal, I'm including some additional information about our company, a list of customers and references, a labor rate schedule and a list of some newly awarded contracts that we're very proud of. Following are some things that we think will be of interest to you as a purchaser of elevator services:
>
> ...
>
> **Insurance**
>
> Hontz Elevator will name you additionally insured under our insurance contract to provide you with additional protection and peace of mind. Will the other service companies give you this coverage?

According to Ann Carlisle, a former employee of Home Properties, in or about April 2003, Hontz submitted a second proposed agreement dated April 23, 2003 to her

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(the "Agreement"). Ms. Carlisle states:

> The Agreement had three sections. The three sections were presented as a single contract and provided in one package, all of which together constituted the binding agreement between Home Properties/Apple Hill and Hontz. The three sections consisted of a signature page, which was the cover sheet, the "FM5Y" form, which consists of five pages with nine paragraphs, and the December 9, 2002 Proposal. I understood that these documents all together constituted the contract. They were presented to me as a single package.

The first page of the Agreement (herein referred to as the "Cover Sheet"), which contains the lines for signatures of the parties to the Agreement, states, in relevant part:

> This Agreement, including the provisions contained on the following pages, when accepted by the Purchaser and approved by an authorized representative of the Hontz Elevator Company shall constitute, exclusively and entirely, the Agreement between the parties for the service to be provided hereunder, and all prior representations or agreements not incorporated herein are superseded.

The Agreement is not otherwise signed at its conclusion, and there does not appear to be any other language otherwise indicating the conclusion of same.

Ms. Carlisle signed the agreement on behalf of Home Properties/Apple Hill. She claims that she would never have signed the Agreement or retained Hontz if the Agreement did not contain a provision requiring Hontz to include Home Properties and Apple Hill as additional insureds on its liability policies.

A personal injury lawsuit entitled Rose Gordon, *et al.* v. Home Properties Apple Hill LLC, *et al.*, Docket No. NNH-CV06-5002335, was commenced in February 2006 in Connecticut Superior Court, Judicial District of New Haven (the "personal injury action"). The plaintiffs in the personal injury action alleged that Rose Gordon ("Gordon"), a Connecticut resident, sustained serious bodily injuries in an accident which led to her

death on April 2, 2004, when she exited from an elevator in a building located in Hamden Connecticut (the "building"). The building was owned by Apple Hill on the date of Gordon's accident and Home Properties is a member of Apple Hill. Hontz Elevator Company, Inc. ("Hontz") was responsible for maintaining the elevators. The defendants in the personal injury action were Apple Hill, Home Properties, and Hontz.

Meanwhile, Hontz obtained a commercial general liability insurance policy providing Commercial Liability Coverage from Mitsui, policy No. PKG312101701, effective on the date of Gordon's accident (the "Mitsui policy"). The Mitsui policy provided Hontz with, *inter alia*, Commercial General Liability ("CGL") coverage, containing "bodily injury" limits of $1 million per occurrence with a $3 million general aggregate. The Mitsui policy also contains a "Blanket Additional Insured Endorsement" which provided, in relevant part:

> SECTION II - WHO IS AN INSURED is amended to include as an Insured any person or organization (called Additional Insured) whom you are required to add as an Additional Insured on this policy under:
>
> 1. A written contract or agreement; or
>
> 2. An oral agreement or contract where a certificate of insurance showing that person or organization as an Additional Insured has been issued; and
>
> 3. The contract or agreement must be:
>
>   a. currently in effect or becoming effective during the term of this policy; and
>
>   b. executed prior to the "occurrence" of any "bodily injury," "property damage," "personal injury," or "advertising injury."

Hontz also obtained a commercial umbrella liability policy, No. BE 2349135, from

National Union, effective on the date of Gordon's accident (the "National Union policy").

Liberty issued a liability policy, No. EGL-NY-199504-023, effective on the date of the accident, to Home Properties as the first Named Insured (the "Liberty policy"). Pursuant to the Liberty policy, Liberty was required to provide liability coverage to Home Properties and Apple Hill in excess of a $250,000 self-insured retention for "each Occurrence".

The personal injury action was settled for a total sum of $2.5 million. The settlement in the personal injury action was paid as follows: [1] Liberty, on behalf of Home Properties and/or Apple Hill - $1,000,000; [2] Mitsui on behalf of Hontz - $1,000,000; and [3] National Union on behalf of Home Properties and/or Apple Hill - $500,000. Liberty then commenced this action on its own behalf and as subrogee of Apple Hill and/or Home Properties to the extent that it was required to fund the settlement in the personal injury action and to pay for Apple Hill's and/or Home Properties' defense in the personal injury action.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman

v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film , 3 N.Y.2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2nd dept. 2003).

The defendants each argue that Hontz did not name Home Properties/Apple Hill as additional insureds because the 12/9/02 Proposal was not incorporated into the Agreement. Therefore, Hontz was not contractually obligated to named Home Properties or Apple Hills as additional insureds. This argument is based upon the principal of Connecticut law that another document may only be incorporated into a contract by express reference.[1] New Moon Shipping Co., Ltd. v. Man B & W Diesel, AG, 121 F.3d 24, 30 (2d Cir 1997); Allstate Life Ins. Co. v. BFA Limited Partnership, *et al.*, 287 Conn 307, 315 (2008). However, this argument is unavailing because Ms.

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[1] In a prior motion to dismiss, the court held that Connecticut law was to be applied in this action (see decision/order of the Court dated August 4, 2008).

Carlisle steadfastly maintains that the 12/9/02 Proposal was a part of the contract, not a separate document which would otherwise need to be incorporated by clear reference.

"The rules governing contract formation are well settled. To form a valid and binding contract in Connecticut, there must be a mutual understanding of the terms that are definite and certain between the parties ... To constitute an offer and acceptance sufficient to create an enforceable contract, each must be found to have been based on an identical understanding by the parties ... If the minds of the parties have not truly met, no enforceable contract exists ..." (Internal citations omitted.) Duplissie v. Devino, 96 Conn.App. 673, 688, 902 A.2d 30 (2006).

Ms. Carlisle states in her affidavit that the 12/9/02 Proposal was part of a number of pages which followed the cover sheet of the Agreement which provided "the provisions contained on the following pages." Ms. Carlisle, a signatory to the Agreement, maintains she signed the same with the understanding that the 12/9/02 Proposal was part of the Agreement.

The defendants have, however, submitted a copy of the deposition transcript of Margo Esparo in the underlying action, dated March 15, 2007. Ms. Esparo was the Property Manager during the period in which Hontz submitted the 12/9/02 Proposal, was the person to whom the 12/9/02 Proposal was addressed, and had personal knowledge of the negotiations between Home Properties/Apple Hill and Hontz in connection with the Agreement. Ms. Esparo identified the contract between Home Properties/Apple Hill and Hontz during this deposition as being the cover sheet with the FM57 Form, only, and not including the 12/9/02 Proposal. Ms. Esparo was not,

however, directly questioned on whether the 12/9/02 Proposal was in fact part of the contract or not.

Noticeably absent on this record is any testimony by someone from Hontz with personal knowledge of the Agreement, for example, Christopher Costanza, who signed the Agreement on behalf of Hontz. It is, therefore, unclear whether there was a mutual understanding about the terms of the Agreement at the time of its making.

The defendants have not met their burden of establishing entitlement to judgment as a matter of law. Even if this burden was met though, plaintiff has demonstrated a triable issue of fact, to wit, the ambiguity resulting from the Cover Sheet of the Agreement and whether the 12/9/02 Proposal containing Hontz' obligation (or mere unenforceable offer) to name Home Properties and Apple Hills as additional insureds followed the cover sheet and was part of the contract signed executed by Home Properties/Apple Hills and Hontz.

The court recognizes, however, that the factual dispute of whether Hontz was contractually obligated to name Home Properties and Apple Hills as additional insureds is a threshold issue which may be outcome determinative of this entire case. The court, therefore, orders an expedited hearing of this framed issue be held in the interests of justice. CPLR § 3212 (c). Limited discovery related to this issue may be had within sixty days from the date of this decision. The court will, at a status conference herein scheduled for December 17, 2009, schedule a date for this hearing. The remainder of the defendants' arguments on this motion are held in abeyance pending the determination of the threshold issue outlined herein.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the consolidated motions are held in abeyance pending a determination of the threshold issue of whether Hontz was contractually obligated to name Home Properties and Apple Hills as additional insureds; and it is further

ORDERED that limited discovery related to the issue outlined herein may be had; and it is further

ORDERED that a status conference in this matter is hereby scheduled for November 19, 2009 in Part 10 at 60 Centre Street, Room 232.

Any relief requested but not expressly addressed is hereby denied and this shall constitute the decision and order of the court.

Dated: New York, New York
October 30, 2009

So Ordered:

Hon. Judith J. Gische, JSC

FILED
NOV 05 2009
NEW YORK
COUNTY CLERK'S OFFICE