

**Liberty Architectural Prods., Inc. v A-Tech
Restoration, Inc.**

2009 NY Slip Op 32654(U)

November 11, 2009

Supreme Court, New York County

Docket Number: 111731-2008

Judge: Carol R. Edmead

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Liberty Architectural Products

INDEX NO. 111731/08
MOTION DATE 11/10/09
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

- v -

A-TECH RESTORATION

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 _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

PAPERS NUMBERED

FILED

NOV 13 2009

NEW YORK COUNTY CLERK'S OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant/third-party plaintiff A-Tech Restoration,

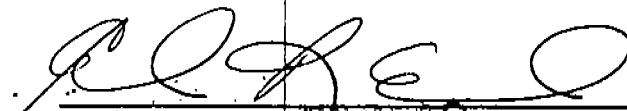
Inc. pursuant to CPLR 1003 to amend its third-party complaint to add American Safety

Insurance Services, Inc. as a third-party defendant is denied; and it is further

ORDERED that A-Tech Restoration, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 11/10/09


HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

THIS MOTION/CASE IS REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----x
LIBERTY ARCHITECTURAL PRODUCTS, INC.
and ASPEN SPECIALTY INSURANCE,

Plaintiffs,

Index No. 111731-2008

-against-

DECISION/ORDER

A-TECH RESTORATION, INC. and
AMERICAN SAFETY CASUALTY INSURANCE CO.,

Defendants.

-----x
A-TECH RESTORATION, INC.,

Third-Party Plaintiff

-against-

Third-Party Index No.:
591059-2008

HANSON & RYAN, INC. and FAIRMONT INSURANCE
BROKERS, LTD.,

Third-Party Defendants.

FILED
NOV 13 2009
NEW YORK
COUNTY CLERK'S OFFICE

-----x
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this insurance declaratory judgment action, defendant/third-party plaintiff A-Tech Restoration, Inc. ("A-Tech") moves pursuant to CPLR 1003 to amend its third-party complaint to add American Safety Insurance Services, Inc. ("ASIS"), the program manager for defendant American Safety Casualty Insurance Co. ("ASCIC"), as a third-party defendant.

Factual Background

A scaffold accident occurred on a commercial jobsite in which one of A-Tech's employees was injured and another employee died. Actions were commenced by and on behalf of these employees against various contractors. And, one of the contractors, plaintiff Liberty

Architectural Products, Inc. herein (“Liberty”), commenced an action against A-Tech for defense and indemnification. As a result of the denial of coverage by American Safety Casualty Insurance Co. (“ASCIC”) to A-Tech under a commercial general liability policy (the “Policy”) it issued to A-Tech, A-Tech filed a cross-claim for contribution and indemnification against ASCIC.

Motion

In support of its motion, A-Tech contends that ASIS is a proper party to this matter. A-Tech’s proposed Amended Complaint alleges that ASIS breached its contract with A-Tech by denying coverage to A-Tech, denied coverage to Liberty and violated the New Jersey Administrative Code 11-1-20.2(c), and that ASIS is required to continue a prior policy pursuant to the New Jersey Administrative Code 11:1-202(j) (Eighth Cause of Action). A-Tech’s proposed Amended Complaint also alleges that ASIS was negligent in failing to properly advise A-Tech that an Endorsement would void coverage for claims made by an employee of A-Tech against any third party even though ASIS knew that A-Tech reasonably relied on the existence of coverage excluded by the Endorsement (Ninth Cause of Action). A-Tech asserts that ASCIC’s Amended Answer was certified by ASIS’s Claims Counsel. ASIS’s corporate structure chart identifies ASIS as ASCIC’s “program administrator.” ASCIC’s discovery also includes an insurance proposal from ASIS to A-Tech, stating that ASIS is the program manager of the “American Safety Insurance program” and that ASIS’s responsibilities include “marketing, underwriting, loss control, claims handling, accounting, and other financial and administrative function.” Therefore, ASIS was the servicing agent for ASCIC and the entity which disclaimed A-Tech’s claim, and was responsible for notifying A-Tech of the above changes in coverage.

Opposition

ASCIC opposes the motion, arguing that the defense and indemnity A-Tech seeks will come, if at all, from ASCIC, the party that issued the ASCIC Policy, not from ASIS, the program manager. The proposed Third-Party Complaint is duplicative of claims already asserted by A-Tech in its cross-claim against ASCIC, making joinder of ASIS wholly unnecessary.

Additionally, the breach of contract claim in the proposed Third-Party Complaint simply restates the declaratory judgment claim, making dismissal of same for failure to state a cause of action under CPLR 3211(a)(7), appropriate.

Also, as there is no contractual relationship between A-Tech and ASIS, no breach of contract claim exists, warranting dismissal pursuant to CPLR 3211(a)(7).

Finally, argues ASCIC, ASIS did not issue the ASCIC Policy.

As to the claim of negligence, if ASIS was negligent, which it was not, the remedy will be a declaration that ASCIC is obligated to defend and indemnify A-Tech. As A-Tech has already asserted a claim of negligence against ASCIC, a similar claim against ASIS is redundant.

Third-party defendant Hanson & Ryan, Inc. has no opposition to the motion.

Reply

A-Tech adds that in its cross-claim against ASCIC, A-Tech asserts that ASCIC's renewal of the Policy violated the New Jersey's Administrative Code in that ASCIC failed to give at least 30 days written notice of changes to existing policy language and coverage, such that the prior policy issued to A-Tech remained in effect providing coverage otherwise negated by endorsement in the renewal policy. To the extent that this renewal or underwriting function was performed in error and/or violated New Jersey's Administrative Code, such would constitute a

negligent act on behalf of the underwriter. ASCIC does not perform underwriting functions for policies it issues; rather, this function is performed by ASIS as program manager. Thus, ASIS should be held responsible.

A-Tech also alleged in its cross-claim against ASCIC that ASCIC provided a late disclaimer of coverage to A-Tech under New York Insurance Law 3420(d) and New Jersey Insurance Law. Disclaimer of a claim is a claims function, and to the extent ASIS, as ASCIC's claims administrator, negligently disclaimed coverage in an untimely fashion, such would be a negligent act causing damage to A-Tech.

A-Tech argues that it not only seeks declaratory relief in its cross-claim and proposed Amended Complaint, but also seeks damages from ASCIC and ASIS, respectively. ASCIC was essentially a shell company, while ASIS performed all the business functions and made all decisions with respect to ASCIC. ASIS is therefore the proper party, with respect to A-Tech's negligence claims. If A-Tech prevails and ASCIC becomes bankrupt or defunct, then A-Tech could seek monetary damages against ASIS independent of any enforcement action against ASCIC.

Discussion

Leave to amend a pleading, pursuant to CPLR §3025(b), should be freely granted provided there is no prejudice or surprise to the nonmoving party (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]; *Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]; *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Lambert v Williams*, 218 AD2d 618 [1st Dept 1995]). Although leave to amend should be freely granted, the movant must make some evidentiary

showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.* at 405; *Hynes v Start Elevator, Inc.*, 2 AD3d 178 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1st Dept 2001]).

The party “opposing a motion to amend a pleading must overcome a presumption of validity in the moving party’s favor, and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment” (*Peach Parking Corp. v 346 West 40th Street, LLC*, 42 AD3d 82, 86 [1st Dept 2007], citing *Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]).

It is noted that CPLR 1003 provides that “[p]arties may be added at any stage of the action by leave of court”

The “Wherefore” clauses in the proposed Amended Complaint seeks, in most part, a declaration that A-Tech is entitled to indemnification and/or contribution, as a result of ASIS’s negligence and breach of contract, and generally seeks damages incurred by A-Tech. A plain reading of the proposed Amended Complaint clearly indicates that A-Tech is seeking defense and indemnification from ASIS for any and all costs that A-Tech incurs related to and arising from the underlying action. Yet, none of the submissions indicate that ASIS owed any duty to A-Tech so as to give rise to a negligence claim, or a duty to defend or indemnify A-Tech, as it is undisputed that ASIS is not the insurer of the subject Policy for purposes of the coverage sought herein. ASIS, as the “program administrator” for ASCIC, owes a duty to ASCIC, not to A-Tech. And, in the absence of privity of contract, the breach of contract claim by A-Tech against ASIS lacks merit as well. Nor does A-Tech cite any caselaw to support the amendment sought against

ASIS, the underwriter. Further, A-Tech's arguments relating to its claims that ASCIC is a mere shell of ASIS, and A-Tech may need to recover any judgment from ASIS in the event ASCIC become bankrupt or defunct, does not warrant the amendment sought. These claims appear to fall under the theory of piercing the corporate veil or alter ego, which has not been plead in any degree. Therefore, A-Tech's motion to add ASIS as a party defendant is denied.

Conclusion

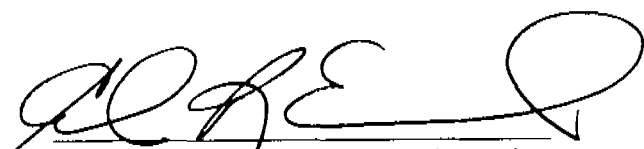
Based on the foregoing, it is hereby

ORDERED that the motion by defendant/third-party plaintiff A-Tech Restoration, Inc. pursuant to CPLR 1003 to amend its third-party complaint to add American Safety Insurance Services, Inc. as a third-party defendant is denied; and it is further

ORDERED that A-Tech Restoration, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: November 11, 2009


Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
NOV 13 2009
NEW YORK
COUNTY CLERK'S OFFICE