

**Garcia v 225 E. 57th St. Owners, Inc.**

2009 NY Slip Op 32767(U)

November 20, 2009

Supreme Court, New York County

Docket Number: 105831/07

Judge: Marilyn Shafer

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

PRESENT: MARILYN SHAFER

PART 8

Index Number : 105831/2007

GARCIA, CARLOS

vs

225 EAST 57TH STREET

Sequence Number : 008

SUMMARY JUDGMENT

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 *decided*  
*present to attached item*

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

**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: 11/20/09

MARILYN SHAFER  
J.S.C.

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 8

-----x

CARLOS GARCIA,  
Plaintiff,

Index No. 105831/07

-against-

225 EAST 57<sup>th</sup> STREET OWNERS, INC.,  
Defendant.

-----x

225 EAST 57<sup>th</sup> STREET OWNERS, INC.,  
Plaintiff,

Index No. 591065/07

BROMAR ENTERPRISES CORP. d/b/a JMPB  
ENTERPRISES, U.S. UNDERWRITERS INSURANCE  
COMPANY, and DAVIS AGENCY, INC.  
Defendant

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appear in person at the Judgment Clerk's Desk (Room  
141B).

MARILYN SHAFER, J.:

Third-party defendant U.S. Underwriters Insurance Company (U.S. Underwriters) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the third-party action against it. It further seeks a declaration that U.S. Underwriters is not obligated to defend and indemnify Bromar Enterprises Corp. d/b/a JMPB Enterprises Corp., JMPB Enterprises, Bromar Enterprises Corp. (collectively referred to as Bromar/JMPB), 225 East 57<sup>th</sup> Street Owners, Inc. (225 East), or any other party, under Policy number CL 3075227B, with respect to the underlying personal injury action entitled *Carlos Garcia v 225 East 57<sup>th</sup> Street Owners, Inc.*, Index Number 105831/07, in New York State Supreme Court, New York

County (the Underlying Action), and the claims asserted in the instant action.

#### THE UNDERLYING ACTION

On or about April 23, 2007, plaintiff Carlos Garcia (Garcia) commenced the Underlying Action against defendant 225 East asserting claims for negligence, violation of Labor Law §§ 200, 240 and 241, and violation of Part 23 of the Industrial Code. Garcia alleged in the complaint that he sustained serious personal injuries on January 16, 2007 while performing construction work at premises located at 225 East 57<sup>th</sup> Street, New York, New York (the Premises). The Premises was owned by 225 East.

Prior to the incident, 225 East and JMPB Enterprises had entered into a contract, pursuant to which JMPB was to perform construction work at the Premises (the Contract). In his deposition testimony, dated September 18, 2008, Garcia testified that, at the time of the incident, he was employed by Bromar/JMPB.

#### THE THIRD-PARTY ACTION

U.S Underwriters issued a Commercial Liability policy to Bromar Enterprises Corp., policy number CL 3075227B, for the policy period April 2, 2006 to April 2, 2007, with policy limits of \$1 million per occurrence and \$2 million in the aggregate (the Policy). On or about June 1, 2007, 225 East advised U.S. Underwriters of the Underlying Action, and demanded that U.S. Underwriters provide 225 East with defense and indemnity in the

Underlying Action on the bases of a certificate of insurance, and the Contract between 225 East and JMPB Enterprises.

On or about June 5, 2007, U.S. Underwriters disclaimed any obligation to defend and indemnify 225 East in connection with the Underlying Action on the bases that 225 East was not an insured or additional insured under the Policy, and that the claims asserted by Garcia in the Underlying Action were excluded from coverage under the terms of the Policy. U.S. Underwriters also disclaimed any obligations to defend and indemnify its insured, Bromar Enterprises Corp., in connection with the Underlying Action and the third-party action, based upon various provisions in the Policy.

On or about November 2007, 225 East commenced the instant third-party action against Bromar/JMPB, the insurance broker, Davis Agency, and insurance company, U.S. Underwriters, asserting claims based upon the parties' alleged failure in their respective obligations to provide 225 East with insurance coverage. By order dated September 5, 2008, this court granted the motions by Davis Agency and U.S. Underwriters to sever the third-party action from the personal injury action.

In its answer to the third-party complaint, U.S. Underwriters generally denied the allegations, and asserted five affirmative defenses, and various cross claims and counterclaims. Third-party defendants Davis Agency and Bromar/JMPB also generally denied the

allegations of the third-party complaint, and asserted affirmative defenses and cross claims.

Based upon its failure to provide responses to U.S. Underwriters' discovery demands, this court issued an order, dated February 11, 2009, precluding Bromar/JMPB from: (1) offering evidence contesting Garcia's status as an employee of Bromar/JMPB at the time of his alleged accident; (2) contesting that Garcia's accident occurred in the course of his employment for Bromar/JMPB, and (3) offering any evidence sought by U.S. Underwriters in its January 9, 2008 Notice for Discovery and Inspection. Finally, all cross claims by Bromar/JMPB against U.S. Underwriters and Davis Agency were stricken.

#### THE INSTANT MOTION

U.S. Underwriters argues that it has no coverage obligation to 225 East under three separate Insurance Policy provisions. It contends that: (1) Garcia was an employee of Bromar/JMPB at the time of the incident, thus, the claims asserted in the Underlying Action are excluded from coverage by the "employee exclusion" provision in the Insurance Policy; (2) 225 East retained Bromar/JMPB to act as an independent contractor; thus, coverage is excluded under the Policy's "Independent Contractor Exclusion"; and (3) 225 East was not a named or an additional insured under the Insurance Policy.

In opposition to the motion, 225 East argues, inter alia, that: (1) the "employee exclusion" in the Policy does not apply since Garcia was an employee of JMPB Enterprises - not Bromar Enterprises Corp.; (2) issues of fact exist as to whether Garcia's employer was an independent contractor; and (4) 225 East was an additional insured, as reflected in the Certificate of Insurance.

The Policy contains an Endorsement, entitled "Bodily Injury Exclusion - All Employees, Volunteer Workers, Temporary Workers, Casual Laborers, Contractors, and Subcontractors." The "employee exclusion" excludes from coverage:

1. "Bodily injury" to any "employee", "volunteer worker", "temporary worker" or "casual laborer" arising out of or in the course of:
  - (a) Employment by any insured; or
  - (b) Performing duties related to the conduct of any insured's business.
2. "Bodily injury" to any contractor, subcontractor or any "employee" ... of any contractor or subcontractor arising out of or in the course of the rendering or performing services of any kind or nature whatsoever of such contractor, subcontractor, or "employee" ... of which any insured may become liable in any capacity; or
3. Any obligation of any insured to indemnify or contribute with another because of damages arising out of such "bodily injury" ... This exclusion applies to all claims and "suits" by any person ... for damages because of such "bodily injury" ... .

The Policy also includes an "Independent Contractors Exclusion" which states, in relevant part:

1. It is agreed that this policy shall not apply to "bodily injury" ... arising out of

operations performed for any insured by independent contractors or acts or omissions of any insured by independent contractors or acts or omissions of any insured in connection with their general supervision of such operations.

It is well settled that where a defendant is the proponent of a summary judgment motion, the defendant must establish that the "cause of action ... has no merit" (CPLR 3212 [b]), sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 939 [1993]; *Winegrad v New York University Medical Center.*, 64 NY2d 851, 853 [1985]). The moving party must tender sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230 [1<sup>st</sup> Dept 2003]).

Once the proponent of a summary judgment motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing summary judgment to demonstrate by admissible evidence the existence of a material factual issue requiring a trial of the action (*Vermette v Kenworth Truck Co., Div. of Paccar, Inc.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, 49 NY2d at 560; CPLR 3212).

The deposition testimony and the documentary evidence before this court establish that U.S. Underwriters is entitled to an order granting summary judgment and for a declaration that it is

not obligated to defend and indemnify Bromar Enterprises Corp., JMPB Enterprises, Bromar Enterprises Corp. d/b/a JMPB Enterprises, 225 East or any other party, under Policy number CL 3075227B with respect to the Underlying Action, and the claims asserted in the action at bar.

The burden of proving entitlement to coverage under a policy of insurance is on the party claiming coverage. A party that is not named an insured or an additional insured on the face of the policy is not entitled to coverage (*Moleon v Kreisler Borg Florman General Constr. Co., Inc.*, 304 AD2d 337 [1<sup>st</sup> Dept 2003]). The instant Policy's Declarations Page clearly states that the only named insured under the Policy is Bromar Enterprises Corp.

Nor does the certificate of insurance in this case confer coverage. 225 East attaches a copy of a certificate of insurance, dated May 7, 2007, which was provided to it by Bromar/JMPB, and names 225 East as an additional insured on the Policy. However, the certificate contains a disclaimer stating that it was issued for information only, that it did not confer any rights on the certificate holder, and that it did not extend or amend the policy's coverage. A second disclaimer on the certificate states that the insurance afforded by the policy listed on the certificate "is subject to all the terms, exclusions and conditions of such policies."

A certificate of insurance is merely evidence of an insurance carrier's intent to provide coverage, but "is not a contract to insure ... nor is it conclusive proof, standing alone, that such a contract exists" (*Buccini v 1568 Broadway Assocs.*, 250 AD2d 466, 469 [1<sup>st</sup> Dept 1998]). The Policy does not list 225 East as an insured or as an additional insured. Further, Bromar/JMPB's broker had no authority to bind U.S. Underwriters, for which it did not act as agent.<sup>1</sup>

In order to be enforced, an exclusion from coverage must be specific and unambiguous (see *Sanabria v American Home Assur. Co.*, 68 NY2d 866 [1986]; *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304 [1984]). New York courts have upheld insurance policy exclusions exactly as or similar to that contained in the instant Policy, finding them unambiguous and enforceable (*Commissioners of State Ins. Fund v Insurance Co. of N. Am.*, 80 NY2d 992, 994 [1992] [exclusion for "'claims that arise from bodily injury that'" (the employer's) employees suffer on the job"]; *Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, 387 [1<sup>st</sup> Dept 2006] [exclusion for "'bodily injury to any employee of any insured ... if such claim for bodily injury arises out of and in the course of his/her employment or retention of such contractor by or for any

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<sup>1</sup>The certificate of insurance was issued to 225 East by Bederick-Kaitz Agency, Inc., designated as the agent for Bromar/JMPB on the certificate.

insured' (emphasis omitted)"]; *Bassuk Bros. v Utica First Ins. Co.*, 1 AD3d 470, 471 [2<sup>nd</sup> Dept 2003] [exclusion for "'bodily injury to an employee of an insured if it occurs in the course of employment'"].

In this case, sufficient evidence has been provided in admissible form to establish that Bromar Enterprises Corp. and JMPB Enterprises were one and the same company, and that Garcia's accident occurred at the Premises during the course of his employment with Bromar/JMPB. In his deposition testimony, dated September 18, 2008, Garcia testified that, at the time of his accident, he worked for JMPB, which was the same company as Bromar Enterprises.<sup>2</sup>

Bromar/JMPB admitted in its answer to the third-party complaint that it is a domestic corporation and that it "did and does business as JMPB Enterprises" (§ 10). In that same answer, Bromar/JMPB denies that JMPB Enterprises was and is a domestic or foreign corporation, or a partnership, or a limited partnership (§§ 2, 3, and 4). Further, searches conducted by U.S. Underwriters evidence that Bromar Enterprises Corp. is a corporate entity, but that there is no evidence that JMPB Enterprises is a separate entity. It is also pointed out that the New York Department of State, Division of Corporations, lists John Marino

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<sup>2</sup>In his bill of particulars, Garcia also stated that he was employed by Bromar/JMPB.

as the Chirman/Chief Executive Officer of Bromar Enterprises, and that John Marino signed the Contract on behalf of and as the owner of JMPB Enterprises. Beyond mere conclusory allegations and speculation, 225 East proffers no evidence that Bromar Enterprises Corp. and JMPB Enterprises are two separate entities. 225 East's remaining contentions are without merit.

Based upon this court's finding that U.S. Underwriters properly denied coverage for the claims asserted in the Underlying Action and in the third-party action based upon the liability "employee exclusion" contained in the Policy, this court need not address the issue of whether the independent contractor exclusion also bars coverage.

Accordingly, it is

ORDERED that the motion for summary judgment is granted and the complaint is severed and dismissed as against U.S. Underwriters; and THE Clerk is directed to enter judgment in favor of thIS defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the motion for a declaratory judgment is granted; and it is further

ADJUDGED AND DECLARED that U.S. Underwriters is not obligated to defend and indemnify Bromar Enterprises Corp., JMPB Enterprises Corp. d/b/a JMPB Enterprises, 225 East 57<sup>th</sup> Street Owners Inc., or any other party, under Policy number CL 3075227B with respect to

the Underlying Action, and the claims asserted in the instant action; and it is further

ORDERED that the remainder of the action shall continue.

DATED:

11/20/09

WENDY SHAFER  
J.S.C.

ENTER:  
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).