

Scottsdale Ins. Co. v Sagona Landscaping Ltd.

2009 NY Slip Op 32867(U)

December 7, 2009

Supreme Court, Richmond County

Docket Number: 101026/09

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index. 101026/09
Motion No.:003**

SCOTTSDALE INSURANCE COMPANY,

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**SAGONA LANDSCAPING LTD.,
TRADES CONSTRUCTION SERVICES CORP.,
RAYMOND HOMES INC., and
PC GROUP, LLC,**

Defendants

The following items were considered in the review of the following motion to reargue.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant, Sagona Landscaping, Ltd., (“Sagona”) moves pursuant to CPLR § 2221 to reargue the decision and order of this court dated September 10, 2009 and upon reargument denying the plaintiff’s motion for summary judgment. After reconsideration of the decision and order of this court the defendant’s motion is denied.

Facts

Scottsdale Insurance Company, (“Scottsdale”) commenced this action seeking a declaratory judgment that it was not required to defend or provide insurance coverage in a suit captioned *Raymond Homes Inc. and PC Group, LLC v. Trades Construction Services Corp and Sagona Landscaping, LTD*, Index Number 100574/07. Raymond Homes, Inc. and PC Group

LLC commenced the underlying action by filing a summons and complaint on or about February 9, 2007 alleging breach of contract, negligent construction of a retaining wall, and reckless construction of a retaining wall. It is uncontested that Sagona completed construction of the retaining wall in September 2005; and that the retaining wall collapsed on or about November 6, 2006.

On or about March 1, 2007 Sagona notified Scottsdale of the incident. Upon notification Scottsdale disclaimed coverage stating that Sagona's Commercial General Liability policy bearing No. CLS 1313929 excluded coverage for property damage to Sagona's "work product" as that term is defined in the policy. However, Scottsdale defended Sagona in the underlying action until the eve trial.

By decision and order dated September 10, 2009 this court granted the plaintiff's motion for summary judgment finding that it was not required to defend or indemnify Sagona in the action *Raymond Homes Inc. and PC Group, LLC v. Trades Construction Services Corp and Sagona Landscaping, LTD*, Index Number 100574/07. Sagona moves to reargue that decision and upon reargument have the prior decision and order of this court reversed. Specifically, Sagona argues that this court's prior decision and order overlooked an ambiguity contained in the insurance contract with Scottsdale Insurance Company, ("Scottsdale").

The defendant asserts that the following two provisions are contradictory, section I(2)(j)(6) and section I(2)(l).

Section I(2)(j)(6) states:

This insurance does not apply to:

"Property damage" to: . . . that particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it . . . Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-

completed operations hazard”

Section I(2)(1) states:

This insurance does not apply to:

“Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard”. This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a sub-contractor.

In addition the contract defines the terms “property damage”, “your work” and “products-completed operations hazard”.

“Property damage” is defined at section V (17) which states:

“Property Damage” means: a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

“Your work” is defined at section V(22) which states:

“Your work”: a. Means: (1) Work or operations performed by you or on your behalf; and (2) Materials, parts or equipment furnished in connection with such work or operations. b. Includes (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work”, and (2) The providing of or failure to provide warnings or instructions.

“Products-completed operations hazard” is defined at section V(16) which states in pertinent part:

a. Includes all “bodily injury” and “property damage” occurring away from premises you own or rent and arising out of “your

product” or “your work” *except*: (emphasis added)

- (1) Products that are still in your physical possession; or
- (2) Work that has not yet been completed or abandoned. However, “your work” will be deemed completed at the earliest of the following times:
 - (a) When all of the work called for in your contract has been completed.
 - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
 - (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

Contrary to the contentions of the movant this court did not misapprehend the language contained in the insurance policy when rendering its decision and order dated September 10, 2009. The aforementioned language is unambiguous in its denial of coverage to property damage to property worked on by the insured and to property damage to the work performed by the insured subsequent to the completion of the project.

However, the previous decision and order this court failed to comment on the plaintiff’s failure to commence this declaratory judgment action until the eve of trial over two years after having first disclaimed coverage. This court finds this practice troubling to say the least. Despite this court’s misgivings about relieving Scottsdale from defending Sagona this court is without any authority to compel an insurer to defend an action that clearly falls outside the scope of coverage. It is the same absence of authority that prevents this court from issuing an order penalizing the insurer for acting in what can only be politely characterized as a tardy commencement of a declaratory judgment action based on the allegations contained in the

complaint.

Conclusion

After reconsideration this court it is the determination of this court that it did not overlook or misapprehend the facts or law in rendering its decision and order dated September 10, 2009. Therefore, this court affirms the legal reasoning set forth in its prior decision and order.

Accordingly after allowing the reargument of the petitioner and having reconsidered this court's decision and order of September 10, 2009, it is hereby:

ORDERED, that Sagona Landscaping Ltd.'s motion to reargue is denied to the extent it sought the reversal of this court's decision and order dated September 10, 2009, and it is further

ORDERED, that the counsel for the parties shall arrange for a conference call with each other and this court to schedule the bench trial of this matter.

ENTER,

DATED: December 7, 2009

Joseph J. Maltese
Justice of the Supreme Court