

Carlson v Rockefeller Ctr. N., Inc.

2009 NY Slip Op 32940(U)

December 14, 2009

Supreme Court, New York County

Docket Number: 110191/07

Judge: Michael D. Stallman

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

PRESENT:
Index Number : 110191/2007
CARLSEN, MICHAEL

PART 7

vs
ROCKEFELLER CENTER NORTH
Sequence Number : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 9/14/09
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-M
Answering Affidavits — Exhibits A-F
Replying Affidavits _____

PAPERS NUMBERED

1-3
4-7
8-9

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross-motion are determined as per the annexed memorandum Decision Order and Judgment filed herewith.*

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).

MICHAEL D. STALLMAN
J.S.C.

Dated: 12/14/09

[Signature]
J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

-----X
MICHAEL CARLSEN and SUSAN CARLSEN,

Plaintiffs,

Index No.:
110191/07

- against -

**DECISION, ORDER AND
JUDGMENT**

ROCKEFELLER CENTER NORTH, INC., and
TISHMAN SPEYER PROPERTIES, L.P.,

Defendants.

-----X
ROCKEFELLER CENTER NORTH, INC.,

Third-Party Plaintiff,

Index No.:
591069/07

- against -

DAVID SHULDINER, INC.,

UNFILED
This judgment has not been filed in the County Clerk's Office and notice of entry cannot be given until it is so filed. To obtain entry, counsel or self must appear at the Judgment Book Office (Room 141B).

Third-Party Defendant.

-----X
Hon. Michael D. Stallman, J.:

In this personal injury action, defendant/third-party plaintiff, Rockefeller Center North, Inc. (RCN), moves, pursuant to CPLR 3212, for summary judgment against third-party defendant David Shuldiner, Inc. (Shuldiner), for an order declaring that Shuldiner breached its contract with RCN by failing to procure the necessary insurance coverage naming RCN as an additional insured on a primary basis.

Third-party defendant Shuldiner cross-moves, pursuant to CPLR 3212, for an order dismissing the third-party complaint in its

entirety.

Background

Primary Action

On June 1, 2007, plaintiff Michael Carlsen fell off a scaffold at the premises located at 1271 Avenue of the Americas, New York, New York (the Premises), owned by defendant/third-party plaintiff RCN, during the course of his employment with third-party defendant Shuldiner. Carlsen claims he suffered a number of personal injuries as a result of the fall.

Plaintiff seeks damages against defendant/third-party plaintiff RCN as a result.¹ Plaintiff's wife, Susan Carlsen, asserts a loss of consortium claim.

Third-Party Action

Third-party defendant Shuldiner worked with RCN at the Premises for a number of years. As testified to by Shuldiner's vice president, Richard Land (Land), at the end of each year, Shuldiner was to provide RCN with a certificate of insurance to demonstrate that it had procured insurance as per RCN's demands (Land dep., 34-36, Notice of Motion, Ex. I). Land acknowledged that RCN spoke to him about its insurance requirements, and further testified that RCN would not allow Shuldiner to perform work at the Premises unless RCN was provided with an insurance certificate

¹ The action has since been discontinued as against defendant Tishman Speyer Properties, L.P.

(*id.*). Although the contract was oral, it was memorialized by an unexecuted template that RCN supplied (see *id.*; see also "insurance coverage requirements for general contractors and vendors - 1271 Avenue of the Americas" [insurance requirements] Notice of Motion, annexed to Aff. of Brian Sullivan, Ex. J). Specifically, Shuldiner was required to procure comprehensive general liability coverage in the amount of \$3,000,000.00 per occurrence, and include broad form contractual liability and completed operations coverage, as well as name RCN as an additional insured on a primary basis (see insurance requirements, Notice of Motion, annexed to Aff. of Brian Sullivan, Ex. J).

At the commencement of 2007, Shuldiner provided RCN with a blanket certificate of insurance, naming RCN as an additional insured as required under RCN's insurance requirements (see Land dep., 34-36, Notice of Motion, Ex. I; see also certificate of insurance dated 12/19/06, Notice of Motion, Ex. K). The certificate of insurance provides that RCN was an additional insured on a primary basis for all work performed at "111 West 50th Street" from December 31, 2006 through to December 31, 2007 (*id.*). 111 West 50th Street is an alternate address for the Premises. The policy was purportedly issued by Nova Casualty Co. (Nova) (*id.*).

By letter dated November 6, 2007, Nancy Johansson, an employee at Chubb Services Corp., insurance administrator for RCN, upon receipt of the summons and complaint in the underlying action,

forwarded the matter to Island Risk Management Associates, "[f]or contractual defense and indemnification [as] additional insured status" for RCN, pursuant to the certificate of insurance (see Notice of Motion, Ex. L). Chubb requested that they refer the notice of tender to Shuldiner's general liability insurance carrier, i.e., Nova, for review and response (*id.*).

By letter dated December 4, 2007, the claims administrator for Nova advised that the

"blanket additional insured endorsement on David Shuldiner's policy specifically states that in order to be entitled to additional insured coverage, it must be agreed in writing in a contract or agreement that such person or organization be added as an additional insured on the policy. There is no such contract or agreement that was entered into between David Shuldiner and ... Rockefeller Center North"

(Notice of Motion, Ex. M).

As such, the request for additional insurance coverage was denied (*id.*).

RCN claims that Shuldiner is in breach of its oral agreement to procure insurance naming RCN as an additional insured, which would have afforded RCN insurance coverage in the underlying action, and further, that it is entitled to contractual indemnification from Shuldiner.

Discussion

In order to grant summary judgment, the movant must proffer admissible evidence to make a prima facie showing of entitlement to

[*6]

judgment as a matter of law by producing sufficient evidence to show the absence of any material issue of fact (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Once the moving party has made this showing, the burden is on the opposing party to demonstrate "evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman*, 49 NY2d at 560). "If there is any doubt as to the existence of a triable issue, the motion should be denied" (*Grossman v Amalgamated Hous. Corp., Inc.*, 298 AD2d 224, 226 [1st Dept 2002]).

"To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Matter of Express Indus. & Terminal Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]; *Riom Corp. v McLean*, 23 AD3d 298 [1st Dept 2005]).

Here, defendant/third-party plaintiff RCN asserts that third-party defendant Shuldiner breached their oral agreement by failing to procure insurance coverage with RCN as an additional insured under Shuldiner's policy for a one-year period. Notably, an oral agreement to procure insurance for up to one year, as at issue in the case at bar, is not precluded by the statute of frauds (see

[* 7]

Travelers Indem. Co. of Am. v Royal Ins. Co. of Am., 22 AD3d 252 [1st Dept 2005]).

There is no question that there was an agreement between the parties to obtain insurance coverage for RCN (*cf. A & E Stores, Inc. v U.S. Team, Inc.*, 63 AD3d 486 [1st Dept 2009]). Shuldiner's vice-president, Land, testified that it was required to provide RCN with a certificate of insurance naming RCN as an additional insured in order to perform any work at the Premises (Land dep., 34-36, Notice of Motion, Ex. I). Shuldiner, indeed, took steps to do so, in that it provided RCN with a certificate of insurance naming RCN as an additional insured. Shuldiner, however, failed to procure the insurance, as RCN claims, in that it did not meet the requirements as set forth by its owner insurer, Nova, who required that a written agreement be submitted to Nova, confirming the agreement to add RCN or any other person or organization it wished to list as an additional insured on the policy in order to insure coverage (*see Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 40 n 2 [1st Dept 2006]). Again, Shuldiner does not dispute this.

The court, therefore, finds that third-party defendant Shuldiner breached its oral agreement with defendant/third-party plaintiff RCN to procure insurance naming RCN as an additional insured. Accordingly, the motion by defendant/third-party plaintiff RCN must be granted.

The court next turns to the cross motion by third-party defendant Shuldiner to dismiss the third-party action in its entirety.

In light of the court's decision above, the motion to dismiss the breach of contract claim for failure to procure insurance is denied. However, because RCN does not oppose Shuldiner's cross motion with respect to the contractual indemnification claim, that portion of the cross motion is granted. Accordingly, the third-party claim for contractual indemnification must be dismissed.

Conclusion

Accordingly, it is

ADJUDGED and DECLARED that third-party defendant David Shuldiner, Inc. breached its contract with defendant/third-party plaintiff Rockefeller Center North, Inc. by failing to procure the necessary insurance coverage naming Rockefeller Center North, Inc. as an additional insured; and it is further

ORDERED that third-party defendant David Shuldiner, Inc.'s cross motion for summary judgment is denied in part and granted in part, and the third-party claim for contractual indemnification is dismissed; and it is further

ORDERED that the remainder of the action shall continue.

Dated: December 14, 2009
New York, NY

ENTER: 

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).
J.S.C.
D. STALLMAN