Illinois Natl. Ins. Co. v General Star Indem. Co.
2010 NY Slip Op 30055(U)
January 12, 2010
Supreme Court, New York County
Docket Number: 604466/2005
Judge: Jane S. Solomon
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SCANNED ON 1/13/2010

[* 1]

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

PRESENT: JANE S. SOLOMON PART 55

Index Number : 604466/2005

ILLINOIS NATIONAL INSURANCE

vs

GENERAL STAR INDEMNITY

Sequence Number : 004

RENEW

INDEX NO. ____

MOTION DATE 9/2/09

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 ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6-7

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed decision and order.

FILED
JAN 13 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1-12-10.

JANE S. SOLOMON J.S.C.

Check one: X 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 55

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ILLINOIS NATIONAL INSURANCE COMPANY, THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, THE CITY OF NEW YORK and J.A. JONES CONSTRUCTION GROUP, LLC.,

Plaintiffs,

-against-

GENERAL STAR INDEMNITY COMPANY,

Defendant.

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FILED
JAN 13 2010
NEW YORK
COUNTY CLERK'S OFFICE

Index No.: 604466/2005

DECISION and ORDER

JANE S. SOLOMON, J.:

Defendant, General Star Indemnity Company (General Star), moves to renew its prior Cross-Motion for summary judgment on the ground that new evidence exists which materially impacts the prior Decision, Order, Declaration and Partial Judgment (Prior Order), Index No. 604466/2005 (Motion, Ex. A). Alternately, General Star moves to modify or vacate the Prior Order. The motion is denied for the following reasons.

BACKGROUND

General Star issued a general liability insurance policy to Core Tech Associates. Core Tech was in the construction business, and it was awarded a sub-contract to perform work on a project at a New York City public school, owned by plaintiff City of New York (City). The general contractor, plaintiff J.A. Jones Construction Group, LLC (J.A. Jones) hired Core Tech. J.A. Jones was hired by plaintiff New York City

School Construction Authority (NYCSCA). On March 12, 2002, a Core Tech employee named Marcos Rivera (Rivera) allegedly slipped and fell from a ladder on the roof of the school. Rivera commenced a lawsuit against J.A. Jones, NYCSCA and the City, entitled *Rivera v. New York City School Construction Authority, et al.*, Index No. 26246/2002 (Sup Ct, Queens County) (the Rivera Action).

THIS LAWSUIT

In the instant lawsuit, plaintiffs sued for a declaratory judgment that the insurance policy issued by General Star covers the Rivera Action against them. The Prior Order granted plaintiffs summary judgment, and determined that NYCSCA, City and J.A. Jones are "additional insureds" to the General Star policy, and that General Star had the "primary obligation to defend and indemnify, up to its policy limits, plaintiffs City of New York, NYSCA and J.A. Jones Construction Group . . . [and] must reimburse Illinois National for defense costs, including reasonable attorneys fees, incurred on behalf of plaintiffs City of New York, NYSCSA and J.A. Jones" (Motion, Ex. A).

Though not discussed in the prior motion, the General Star insurance policy contains an additional insured endorsement, which states in part: "Such person or organization is an additional insured only with respect to liability arising out of [Core Tech's] ongoing operations and not for liability arising

out of any negligent acts committed by such additional insured" (Motion, Ex. C).

On January 12, 2009, the jury in the Rivera Action returned a verdict in favor of Rivera, which found the City, NYSCSA and J.A. Jones 60% at fault for Rivera's injuries, and Core Tech 40% at fault (Motion, Ex. B). After the verdict, General Star settled the lawsuit. By this motion, General Star wants to recover all but 40% of the settlement and litigation expenses.

DISCUSSION

"A motion for leave to renew . . . (2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221(e).

General Star argues that the jury verdict in the Rivera Action is a new fact. It further contends that the verdict is at odds with the findings of the prior motion, as General Star cannot be required to defend and indemnify up to its policy limit because it has no obligation to the additional insureds for liability arising out of their own negligent acts.

Illinois National counters that General Star's motion is merely an attempt to make a new legal argument that it failed to make in its original cross-motion. Essentially, Illinois

National argues that the key fact in issue is not the jury verdict, but the existence of the limiting language found in the additional insured endorsement, which General Star did not proceed upon in the original motion.

A motion to renew should not be granted "where a party has proceeded on one legal theory on the assumption that what has been submitted is sufficient, and thereafter sought to move again on a different legal argument merely because he was unsuccessful upon the original application" (*Matter of Beiny*, 132 AD2d 190, 210, [1st Dept, 1987], citing *Foley v. Roche*, 68 AD2d 558, 568 [1st Dept, 1979]). However, renewal may also be granted "in the interest of justice, upon facts which were known to the movant at the time the original motion was made . . . [and] relief may be properly granted so as not to defeat substantive fairness" (*Tishman Const. Corp. of New York v. City of New York*, 280 AD2d 374, 376-77 [1st Dept, 2001]). *Tishman* involved bribery and fraud upon the taxpayers of New York City, and renewal was proper because of "public policy designed to protect taxpayers from contracts tainted by fraud" (Id., 378).

Illinois National is correct that General Star should have argued for a limitation to its liability in the original motion. The new fact does not involve issues of substantive fairness or the interests of justice. Rather, General Star did not seek relief in the prior motion under a provision of their

standard insurance contract. The existence of the jury verdict, which was anticipated by all parties, is insufficient to warrant renewal.

Accordingly, it hereby is

ORDERED that the motion to renew is denied.

Dated: January 12, 2010

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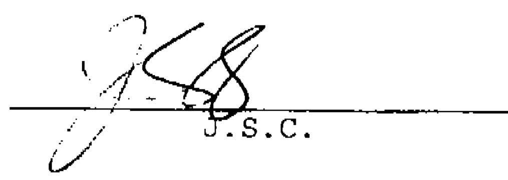

J.S.C.

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