

County of Orange v Reclamation Inc. of Kingston

2010 NY Slip Op 30463(U)

March 5, 2010

Supreme Court, Orange County

Docket Number: 1382/2008

Judge: Lewis Jay Lubell

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Disp

To commence the 30 day statutory
time period for appeals as of right
(CPLR 5513[a]), you are advised to
serve a copy of this order, with
notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF ORANGE**

-----X
COUNTY OF ORANGE,

DECISION/ORDER

Plaintiff(s),

Index No. 1382-2008

-against -

RECLAMATION INC. OF KINGSTON, and
CONTINENTAL CASUALTY COMPANY,

Motion Date: 1/15/10

Defendant(s).

-----X
LUBELL, J.

The following papers were considered in connection with this motion by defendant Reclamation Inc. of Kingston for an Order pursuant to CPLR §2221 granting leave to reargue its motion for an Order granting summary judgment in its favor declaring that neither a defense nor indemnification are owed by Reclamation, Inc. of Kingston to the County of Orange in connection with a certain personal injury action and, thereupon, modifying the Court's September 29, 2009 Decision and Order by granting Reclamation's motion for summary judgment and dismissing this action against it, and for such other and further relief as to the Court may seem just and proper:

PAPERS	NUMBERED
Notice of Motion	1
Affirmations/Exhibits A-D	2
Memorandum of Law	3
Affirmation in Opposition	4
Memorandum of Law of Plaintiff	5
Reply Affirmation/Exhibits A-E	6
Reply Memorandum of Law	7

At the outset, the Court hereby grants the application of Reclamation Inc. of Kingston ("Reclamation") for an Order granting leave to reargue and acknowledges but rejects any procedural

objection to the Court's consideration of the application. Among other things, the Court finds no prejudice to the County of Orange due to movant's failure to have attached to its moving papers all of the underlying papers upon which reargument is sought. All such papers are possessed by the County of Orange and now, by way of reply papers, are possessed by the Court.

Now, upon reargument, the Court grants Reclamation's motion for summary judgment in its favor for the reasons herein stated.

This is a declaratory judgment action in which plaintiff, County of Orange (the "County"), seeks defense and indemnification from the defendants with respect to a personal injury action entitled Shandi Weed v. County of Orange, Reclamation Inc. of Kingston et al. (Orange County Index No. 10124-2006 [Lubell, J.]["the personal injury action"]). Therein, plaintiff Shandi Weed was involved in a one vehicle accident in the Town of Wawayanda when the vehicle that she was driving left County Route 12, allegedly due to the accumulation of ice on the road caused by improper drainage. Plaintiff in that action sued the County of Orange, among others including Reclamation Inc. of Kingston ("Reclamation") which had performed work on the highway pursuant to a July 1997 contract with the County (the "Contract").

Pursuant to the terms of the Contract, Reclamation was required to name the County as an additional insured on required liability insurance. Reclamation procured such insurance from co-defendant Continental Casualty Company (hereinafter "Continental").

By Decision & Order of September 29, 2009, the Court ruled on the various motions then before the Court by: granting the motion by defendant Continental Casualty Company for summary judgment in its favor declaring that neither defense nor indemnification are owed by it to plaintiff County of Orange in connection with the personal injury action; denying the cross-motion of defendant Reclamation, Inc. of Kingston for summary judgment seeking that neither a defense nor indemnification are owed by Reclamation, Inc. of Kingston to the County of Orange in connection with said personal injury action; granting the cross-motion of the County of Orange for summary judgment in its favor and against defendant Reclamation, Inc. of Kingston with respect to defense and indemnification regarding the personal injury action to the extent therein noted; and, denying as moot the County of Orange's application for an Order staying this action pending an appeal of this Court's March 31, 2009 Order in the personal injury action.

Upon deciding Reclamation's cross-motion for summary judgment against said defendants, the Court noted that the Contract between

the County and Reclamation contains the following indemnification clause:

[Reclamation] [shall defend, indemnify and save harmless the County from suits, actions, damages, and costs of every name and description resulting from the work under his [sic] contract. ... [Reclamation's] obligations under this paragraph shall not be deemed waived by the failure of the County to retain the whole or any part of such monies due to the [Reclamation], nor shall such obligation be deemed limited or discharged by the enumeration or procurement of any insurance for liability for damages impose by law upon [Reclamation], subcontractor or the County.

(Contract dated July 15, 1997, p. C4 [emphasis added]).

Upon noting that the Court had already determined in its March 31, 2009 Decision & Order in the personal injury action that neither Reclamation nor the County were liable to plaintiff in the personal injury action, the Court nevertheless ruled against Reclamation on its cross-motion to dismiss this action upon citation to Town of Oyster Bay v Employers Ins. of Wausau (269 AD2d 387 [2d Dept., 2000]) wherein the Court reiterated the well-established rule that the duty to defend is broader than the duty to indemnify and arises when the allegations of the complaint fall within the scope of the risks undertaken by the indemnitor.

Now, upon reargument, the Court grants Reclamation's motion to dismiss. Where, as here, the Court has already ruled that a party is not liable for the underlying injuries or damages, there can be no duty to defend (see, B&T Masonry Construction Co. v. Public Service Mutual Ins. Co., 382 F3d 36, 39 [1st Cir., 2004]). Reclamation, a contractor and not an insurance company, has been found to have no liability in the underlying personal injury action. As such, it cannot be called upon to indemnify or defend the County in the Personal Injury action (see, Worth Construction Co., Inc. v. Admiral Ins. Co., 10 NY3d 411 [2008]). A contractor's duty to defend is no broader than its duty to indemnify (Byrde v. CVS Pharmacy, 61 AD3d 907, 909 [2d Dept., 2009]; George v. Marshalls of MA, Inc., 61 AD3d 925, 931 [2d Dept., 2009] citing Brasch v Yonkers Constr. Co., 306 AD2d 508, 511 [2d Dept., 2003]; Bermudez v New York City Hous. Auth., 199 AD2d 356, 358 [2d Dept., 1993]).

In any event, having ruled that the County had failed to give Continental notice of the claim "as soon as practicable" and, therefore, that Continental's disclaimer was proper (see Essex Ins. Co. v Oakwood Construction Corp., 59 AD3d 591 [2009]; American Transit Ins. Co. v Rechev of Brooklyn, Inc., 57 AD3d 257 [2008] [14 month delay in giving notice was untimely]; 639 Bushwick, LLC v American Western Home Ins. Co., 57 AD3d 648 [2008] [5 month delay in giving notice was untimely]), the County cannot properly seek to hold Reclamation responsible for any lack of insurance coverage.

There being no merit to any other arguments advanced in opposition to Reclamation's motion, it is hereby

ORDERED, that, upon reargument, the motion of Reclamation Inc. of Kingston for summary judgment in its favor be and is hereby granted; and, it is further

ORDERED, that, in light of the earlier dismissal of the action as against Continental Casualty Company (see, Decision & Order of September 29, 2009), this entire action is hereby deemed resolved in favor of defendants and against plaintiff.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: Goshen, New York
March 5, 2010

s/_____
HON. LEWIS J. LUBELL, J.S.C.

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