

**GPH Partners LLC v Westchester Fire Ins. Co.**

2010 NY Slip Op 30582(U)

March 18, 2010

Supreme Court, New York County

Docket Number: 114983/08

Judge: Jane S. Solomon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 55

-----X  
GPH PARTNERS LLC, THE LILLIAN GOLDMAN  
2002 LLC, JANE HARRIET GOLDMAN, ALLAN  
HOWARD GOLDMAN, and LOUIS LITTLE, JANE  
H. GOLDMAN, ALLAN H. GOLDMAN, AMY P.  
GOLDMAN, and DIANE GOLDMAN KEMPER,

Plaintiffs,

-against-

WESTCHESTER FIRE INSURANCE COMPANY and  
MANHATTAN DEMOLITION CO., INC.

Defendants.

Index No.: 114983/08  
DECISION, ORDER,  
DECLARATION AND  
PARTIAL JUDGMENT

-----X  
MANHATTAN DEMOLITION CO., INC.,

Third-Party Plaintiff,

-against-

TOTAL MANAGEMENT CORP.,

Third-Party Defendant.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served by a person. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
1412).

-----X  
**JANE S. SOLOMON, J.:**

Plaintiffs GPH Partners, The Lillian Goldman 2000 LLC,  
Jane Harriet Goldman, Allan Howard Goldman, and Louis Little  
[sic],<sup>1</sup> Jane H. Goldman, Allan H. Goldman, Amy P. Goldman and  
Diane Goldman Kemper (plaintiffs) seek declaratory relief against  
Defendant Westchester Fire Insurance Company (Westchester Fire)  
for coverage in an underlying lawsuit and against Defendant/Third  
Party Plaintiff Manhattan Demolition Co., Inc. (MDC) for breach

<sup>1</sup> So in complaint; in the policy at issue, she is properly named "Louisa."

[\* 2]

of contract to procure insurance for that underlying negligence action. MDC, in turn, filed a third party complaint against Third Party Defendant Total Management Corp. (Total Management), its insurance agent. Pursuant to CPLR 3211 (a)(1), Total Management moves, pre-answer, to dismiss the second cause of action against MDC on the ground that documentary evidence exists to refute plaintiffs' claim that MDC failed to procure insurance, and, pursuant to CPLR 3211 (a)(7), to dismiss the third party complaint because there is no remaining claim against MDC for MDC, in turn, to press against it.

#### BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs own the Grammercy Park Hotel, located at 2 Lexington Avenue in Manhattan. They hired non-party Bovis Lend Lease LMB, Inc. (Bovis) as general contractor for a construction project there. Bovis hired MDC as a sub-contractor. The subcontract required MDC to procure commercial general liability insurance, naming plaintiffs as additional insureds. On MDC's behalf Total Management procured such a policy from Westchester Fire.

On May 20, 2005, Manuel Balbuca-Morocho (Balbuca), an MDC employee, was injured while doing construction work at the hotel. On or about May 9, 2008, Balbuca sued the plaintiffs (the Balbuca Action), who in turn filed a third party complaint against MDC.

Believing themselves to be additional insureds, plaintiffs sought coverage from Westchester Fire. Westchester Fire disclaimed coverage by letter dated July 14, 2008, asserting late notice. This declaratory judgment action arises from the coverage dispute pertaining to the Balbuca Action.

#### DISCUSSION

##### **A. Plaintiffs' Cause of Action against MDC:**

Plaintiffs allege that MDC "had a duty to and failed to name the PLAINTIFFS as Additional Insureds on its general liability policy" (Complaint, Notice of Motion, Ex A, ¶32), and that MDC is liable to defend and indemnify Plaintiffs in the Balbuca Action "by virtue of the breach of the agreement to procure a comprehensive liability policy of insurance" (*Id.*, ¶34). Specifically, plaintiffs seek a declaration that MDC is obligated to defend and indemnify plaintiffs in the Balbuca Action, and to reimburse plaintiffs for attorneys fees, costs and expenses incurred defending that lawsuit (*Id.*, ¶¶ 35-37).

Notably, MDC's third party complaint does not allege that Total Management failed to obtain insurance, but rather, asserts that it failed to notify Westchester Fire of Balbuca's accident in a timely manner, and seeks to recover damages arising from a verdict or judgment, plus attorneys fees, costs and disbursements (Third Party Complaint, Notice of Motion, Ex. A).

Total Management argues here that MDC did not breach

[\* 4]

its agreement to procure liability insurance for plaintiffs (see CPLR 1008). In support, Total Management submits the Westchester Fire insurance policy bearing the number GLW-782731 (Motion, Ex. C), in effect for MDC at the time of Balbuca's injury. Total Management also submits an additional insured endorsement with the same policy number that names each of the plaintiffs as an additional insured (Motion, Ex. D). Plaintiffs do not challenge the validity of this evidence, and MDC does not address it.

A policy which contains a blanket endorsement for contractually designated additional insureds defeats the claim that the insured breached its obligation to procure that very insurance; an insurer's refusal to cover the claim does not change that conclusion (*Perez v. Morse Diesel Intl. Inc.*, 10 AD3d 497, 498 [1<sup>st</sup> Dept. 2004]). Based on the uncontroverted documentary evidence, MDC did not breach its agreement to procure insurance for plaintiffs.

Plaintiffs are correct that "dismissing" their claim is not the remedy where they seek a declaration (see, *200 Genesee St. Corp. v. City of Utica*, 6 NY3d 761 [2006]).

**B. The Third-Party Complaint:**

MDC's claim in the third party complaint is that Total Management negligently failed to give Westchester Fire timely notice of Balbuca's accident. The complaint, however, makes no claim against MDC for late notice, only that MDC failed to

procure insurance.

An impleader claim is tied to the liability that the plaintiff alleges against the defendant/third party plaintiff. "The test is simply whether what [the third party defendant] has done has exposed [the defendant] in any measure to the liability [the plaintiff] is asserting" [Siegel, New York Practice §157, at p.268 [4<sup>th</sup> ed.]]. As MDC did not breach its agreement to procure insurance, and that being the only basis for liability asserted against MDC by plaintiffs, the third party complaint must be dismissed.

Finally, MDC states, with no explanation, that if plaintiffs' claim against it is determined in this action, MDC may be exposed to liability in the Balbuca Action that are not raised here (Aff. Of Vito Giannola, Esq., ¶¶ 18-21). This argument does not defeat Total Management's motion. Accordingly, it hereby is

DECLARED and ADJUDGED that defendant Manhattan Demolition Co., Inc. did not breach its agreement to procure insurance naming plaintiffs as additional insureds, and Manhattan Demolition Co., Inc. owes no duty to defend and indemnify plaintiffs in the Balbuca action as a result of a failure to procure insurance; and it further is


ORDERED that the complaint is severed and dismissed as against MDC, and the Clerk shall enter judgment accordingly; and

it further is

ORDERED that the motion to dismiss the third party complaint is granted, and the third party complaint is severed and dismissed with costs and disbursements to Total Management as taxed by the Clerk of the Court, and the Clerk shall enter judgment accordingly.

Dated: March 18, 2010

ENTER:

  
\_\_\_\_\_

J.S.C.

JOSEPH SOLOMON

**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 1419).