

Andron Constr. Corp. v Old Republic Ins. Co.

2010 NY Slip Op 30599(U)

March 11, 2010

Supreme Court, New York County

Docket Number: 602975/06

Judge: Emily Jane Goodman

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3.22.10

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

EMILY JANE GOODMAN

PRESENT: _____

PART 17

Index Number : 602975/2006
ANDRON CONSTRUCTION
 vs.
OLD REPUBLIC INSURANCE
 SEQUENCE NUMBER : 003
 SUMMARY JUDGMENT

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided for*
attached

WARNING
 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 1418).

Dated: 3/11/10

[Signature]
 J.S.C.
 EMILY JANE GOODMAN

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

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

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X

ANDRON CONSTRUCTION CORPORATION and
THE RYE CITY SCHOOL DISTRICT,

Plaintiffs,

Index No.: 602975/06

-against-

DECISION

OLD REPUBLIC INSURANCE COMPANY,
AMERICAN INTERNATIONAL SPECIALTY LINES
INSURANCE COMPANY, STS STEEL, INC.,
SCOTTSDALE INSURANCE COMPANY and
CONCEPTION BAY, INC.,

Defendants

EMILY JANE GOODMAN, J.S.C.:

BACKGROUND

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

Plaintiffs Andron Construction Corp. (Andron) and The Rye
City School District (Rye) move, pursuant to CPLR 3212, for
summary judgment as against defendant Scottsdale Insurance
Company (Scottsdale), whose insured is Conception Bay, Inc.
(Conception) declaring that the Scottsdale policy provides
additional insurance coverage to plaintiffs for the claims
asserted against them in the underlying personal injury action,
and, therefore, that Scottsdale is obligated to defend and
indemnify plaintiffs in the underlying personal injury action,
including reimbursing plaintiffs for all defense and/or indemnity
payments already incurred by them in the underlying personal
injury action.

In January 2004, Rye, as project owner, contracted with

Andron to act as Rye's construction manager for a construction project at the Milton Elementary School in Rye, New York.

Defendant STS Steel, Inc. (STS) was also contracted by Rye to act as Rye's general contractor for the project.

On June 13, 2005, STS hired defendant Conception Bay to perform structural steel work at the project. The Conception Bay subcontract provided that Conception Bay was to obtain general commercial liability insurance with a \$1 million per occurrence limit. That insurance contract was also to name the general contractor, the owner, and all other parties required of the general contractor to be named as additional insureds, providing equivalent coverage to the additional insureds as was provided to the named insured. Ex. C.

On January 19, 2006, Jose Pollock (Pollock), an employee of Conception Bay, allegedly slipped and fell from a wet deck on the second floor of the project to the first floor, sustaining serious injuries. On March 17, 2006, Zurich American Insurance Company (Zurich), as tendering agent for plaintiffs, tendered their defense and indemnification claim to Conception Bay for the Pollock occurrence, based on the additional insurance coverage pursuant to the Conception Bay subcontract requirements. Ex. H. On April 18, 2006, Zurich tendered its defense and indemnification claim to Scottsdale, based on the additional insurance coverage that it had under Conception Bay's general

commercial liability policy with Scottsdale. Ex. I.

On May 26, 2006, Pollock commenced a personal injury action (the underlying personal injury action) in Supreme Court, Westchester County, under Index No.: 9988/06. The complaint alleges common-law negligence and Labor Law violations, and seeks damages from plaintiffs for injuries allegedly sustained at the job site. Ex. J.

On June 1, 2006, Scottsdale, in a letter to Conception Bay, denied coverage on the ground that there was no coverage for bodily injury to an employee of the insured arising out of the employee's employment with the insured absent the existence of an "insured contract." Ex. K. Scottsdale maintained that "[t]here is no contractual liability coverage under your policy unless certain terms are met as specified," i.e., evidence that an "insured contract" existed between Conception Bay and another party that obligated Conception Bay to defend, indemnify, or hold that other party harmless. *Id.* The letter goes on to state that additional insurance coverage, under the Blanket Additional Insured Endorsement GLS-150s, only applies when there is a written contract that adheres to the written provisions in the endorsement, and, at that time, there was no evidence that such a contract existed between Conception Bay and plaintiffs. *Id.*

The Blanket Additional Insured Endorsement GLS-150s states, in pertinent part:

"Section II--Who is an Insured is amended to include as an additional insured any person or organization whom you are required to add as an additional insured on this policy under a written contract, agreement or permit which must be:

- a. Currently in effect or becoming effective during the term of the policy; and
- b. Executed prior to the 'bodily injury,' 'property damage,' or 'personal and advertising injury.'

The insurance provided to this additional insured is limited as follows:

1. That person or organization is an additional insured only with respect to liability for "bodily injury," "property damage," or "personal and advertising injury" caused in whole or in part, by:
 - a. Your acts or omissions; or
 - b. The acts or omissions of those acting on your behalf.

3. Coverage is not provided for 'bodily injury,' 'property damage,' or 'personal and advertising injury' arising out of the sole negligence of the additional insured."

The STS subcontract with Conception Bay states:

"3. Conception Bay shall assume toward STS Steel, Inc. all obligations and responsibilities which STS Steel, Inc., under such documents, assumes toward Rye City School District as the Owner, Fletcher Thompson as the Architect and Andron Construction as the Construction Manager. Conception Bay is mutually bound to the extent of the work to be performed, assuming toward each other all obligations and responsibilities which the Contractor and Subcontractor assume toward each other and having the benefit of all rights, remedies and redress each against the other which the Contractor and Subcontractor have by virtue of the provisions of this Agreement.

4. HOLD HARMLESS AGREEMENT

To the fullest extent permitted by law, Conception Bay shall defend, indemnify and hold harmless STS Steel, Inc., Owner, Construction Mgr., Architect, the Architect's consultants and agents and employees or any one of them (individually or collectively, "Indemnatee") from and against all claims, damages, liabilities, losses and expenses, including but not limited to attorney's fees, arising out of or in any way connected with the performance or lack of performance of the Work under the

agreement, provided that any such claim, damage, liability, loss or expense is attributable to bodily injury, sickness, disease or death or physical injury to or destruction of tangible property (other than the Work itself), including the loss of use of tangible property that is not physically injured and caused in whole or in part by any actual or alleged:

* Act or omission of the Subcontractor or anyone directly or indirectly retained or engaged by it or anyone for whose acts it may be liable ...

The Subcontractor's obligations under this Article shall apply regardless of whether or not any such claim, damage, liability, loss or expense is or may be attributable to the fault or negligence of the Subcontractor.

However, this promise by the Subcontractor to defend, indemnify and hold harmless the indemnitee shall not extend to claims, damages, liabilities, losses or expenses which are the result of the indemnitee's own negligence."

Ex. C.

On or about June 12, 2007, plaintiffs commenced a third-party action against Conception Bay, seeking contractual and common-law indemnification and contribution, alleging that Pollock's injuries, if any, were caused by Conception Bay's negligence.

On July 10, 2008, Pollock was deposed in the underlying personal injury action. Pollock testified that he was working at a height, laying out a sheet of aluminum with a rookie partner from Conception Bay, when his partner froze. When Pollock went over to assist his partner, Pollock allegedly slipped, causing him to fall. Ex. N, at 30, 34. Pollock further stated that Conception Bay did not provide him with any safety equipment, including a harness. *Id.* at 19-20.

Plaintiffs assert that the language of the policy means that Scottsdale is required to defend and/or indemnify them, even if they are negligent, as long as Conception Bay's acts or omissions also caused the injury. Therefore, unless plaintiffs are solely negligent (which means that the insured could not be even partially negligent) coverage attaches. Accordingly, plaintiffs argue that the un-controverted evidence from the underlying action establishes that plaintiffs are not solely negligent (and are not negligent at all) and that Conception Bay is at least partly (if not solely responsible) for the accident. Scottsdale maintains that under the language of the policy, no coverage would attach unless the additional insured is only vicariously liable-meaning that any fault of the additional insured will not be covered. The basis for this argument is the policy language providing that coverage is afforded for liability for bodily injury "caused in whole or in part, by" the insureds "acts or omissions." Scottsdale maintains that this language essentially means that coverage is afforded only to the extent that liability is caused by the insured's acts or omissions.

In addition, plaintiffs contend that they are entitled to coverage because Scottsdale failed to timely disclaim coverage, thereby waving its defenses under the policy. According to plaintiffs, plaintiffs tendered the Pollock claim to Scottsdale on April 18, 2006. Ex. I. On June 1, 2006, Scottsdale denied

coverage based on the assumption that Conception Bay did not have a contract with STS. Ex. K. On September 25, 2006, in its answer to the present action, Scottsdale, allegedly for the first time, asserted a late notice defense and the applicability of unspecified exclusions.

In its opposition, Scottsdale states that it has agreed to provide a defense to plaintiffs, but, because there are other policies involved, they are entitled to a right of co-insurance. Further, Scottsdale avers that since liability has yet to be determined in the underlying personal injury action, a determination that Scottsdale must indemnify plaintiff in the underlying action is premature because there has been no finding of liability in the underlying action.

The court notes that STS has filed a partial opposition to the instant motion, not objecting to the relief sought by plaintiffs, but objecting to its characterization in the papers as the project's "general contractor."

DISCUSSION

"The proponent of a summary judgment motion [pursuant to CPLR 3212] must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the

motion's opponent to "present 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); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

That portion of plaintiffs' motion seeking a declaration that Scottsdale is required to defend plaintiffs in the underlying personal injury lawsuit is granted, since Scottsdale, in its opposition, agrees that it is required to do so. Further, the issue of the disclaimer of coverage (and the timeliness thereof) is no longer an issue as Scottsdale has abandoned the issue in its opposition papers, and, as the basis for the disclaimer (the lack of contract) is not applicable.

That portion of plaintiffs' motion seeking a declaration that Scottsdale is required to indemnify them in the underlying personal injury action is denied as premature. "In the absence of a jury finding in the underlying action, any claim of an entitlement to indemnification would be premature." *Bovis Lend Lease LMB Inc. v Garito Contracting, Inc.*, 65 AD3d 872, 875 (1st Dept 2009); *Crespo v City of New York*, 303 AD2d 166 (1st Dept 2003).

However, the court agrees with plaintiffs' interpretation of

the language of the policy. As plaintiffs note, the plain meaning of the endorsement provides that Scottsdale is required to defend and/or indemnify them, even if they are negligent, as long as Conception Bay's acts or omissions also caused the injury. This must be the case because otherwise, the reference to the exclusion of coverage for the additional insured's sole negligence is rendered superfluous and therefore, meaningless. Scottsdale's argument that no coverage would attach unless the additional insured is only vicariously liable is not supported by the language of the endorsement. Further, Scottsdale's reference to *Crespo v City of New York*, 303 AD3d 166, *supra*, is inapposite as it involves interpretation of different policy language providing coverage only where the party is "held liable for [the insured's] acts or omissions."

Scottsdale's request, made in its opposition, that the court determine the percentage of plaintiffs' defense expenses for which it is responsible is denied.

"In order to determine the priority of coverage among different policies, a court must review and consider all of the relevant policies at issue. Here, [the court concludes] that because none of the other insurance carriers are parties to this declaratory judgment action and no other relevant policies have been submitted, the priority of coverage cannot be determined [internal citation omitted]."

BP Air Conditioning Corp. v One Beacon Insurance Group, 8 NY3d 708, 716 (2007).

CONCLUSION

Based on the foregoing, it is hereby

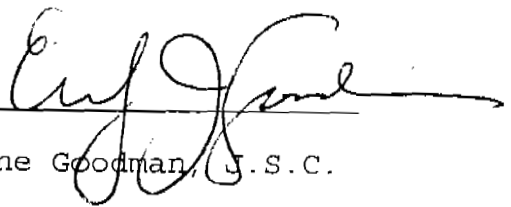
ORDERED that plaintiffs' motion is denied as premature as to the issue of indemnification, but is granted to the extent that the Scottsdale has conceded that its policy affords additional insured coverage to plaintiffs for the claims asserted against them in the underlying action and that Scottsdale is required to defend plaintiffs; and it is further

DECLARED that the Scottsdale policy provides plaintiffs with additional insured coverage for the claims asserted against them in the underlying action and Scottsdale is therefore required to defend plaintiffs in that action.

This Constitutes the Decision and Order of the Court.

Dated: March 11, 2009

ENTER:


Emily Jane Goodman, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, original or authorized representative must appear in person at the Judgment Clerk's Desk (Room 147B).