

American Bldg. Supply Corp. v Petrocelli Group, Inc.
2010 NY Slip Op 30611(U)
March 19, 2010
Supreme Court, New York County
Docket Number: 601562/08
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____

PART 15

Justice

American Building Supply Corp.

INDEX NO. 601562/08

- v -

Petrocelli Group, Inc. and
Pollak Assocs. ~~Pollak~~

MOTION DATE _____

MOTION SEQ. NO. 2

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-5

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

MAR 24 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/19/10


HON. EILEEN A. RAKOWER

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 STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

AMERICAN BUILDING SUPPLY CORP.,

Plaintiff,

- against -

PETROCELLI GROUP, INC. and POLLAK
ASSOCIATES,

FILED
MAR 24 2010
NEW YORK
COUNTY CLERK'S OFFICE

Index No.
601562/08

**DECISION
and ORDER**

Mot. Seq.
002

-----X

HON. EILEEN A. RAKOWER

Plaintiff American Building Supply Corp. ("ABS") commenced this action against Defendants Petrocelli Group, Inc. ("Petrocelli") and Pollak Associates ("Pollak") for negligence and breach of contract in connection with their procuring of general liability insurance which ABS claims provided insufficient coverage. Presently before the Court is Petrocelli's motion for summary judgment.

ABS is a business which supplies building materials to contractors. During the time period relevant to the case at bar, ABS was located at 150 Bruckner Boulevard in the Bronx. ABS was the sole tenant of the building, which it sub-leased from DRK, LLC ("DRK")¹. ABS and DRK are both owned by Howard Kahn. In October 2004, Petrocelli became ABS' insurance broker. From 2002 until it was replaced by Petrocelli, Pollak was ABS' insurance broker. Prior to Petrocelli becoming broker, Pollak had procured a general liability policy with Burlington Insurance Company ("Burlington") for the period of June 14, 2004 through June 14, 2005. At the time Petrocelli took over as broker, the Burlington policy had been cancelled for nonpayment of premium. Petrocelli arranged to have the policy reinstated.

¹DRK purchased the premises on or around April 1, 2002. As a condition to financing the purchase through the New York City Industrial Development Agency ("NYCIDA"), DRK executed a deed in favor of NYCIDA. The deed, according to ABS, was essentially used for collateral, and allowed DRK to lease the premises from NYCIDA.

In or around May and June of 2005, Petrocelli submitted applications to several insurance providers. According to Petrocelli, Burlington was the only carrier willing to insure ABS. Petrocelli Vice President Richard Longueira testified that carriers were unwilling to write coverage for ABS because of its adverse claim history, payment problems, and the percentage of lumber in their overall sales. Petrocelli renewed the Burlington policy for the period from June 14, 2005 through June 14, 2006. The 2005-06 Burlington policy contained the same terms and conditions as the 2004-05 Burlington Policy obtained by Pollak.

ABS General Manager Peter Lech was the individual responsible for procuring insurance on ABS' behalf. Lech testified at his deposition that he reached out to Petrocelli on behalf of ABS because ABS was dissatisfied with Pollak's inability to procure "sufficient" insurance coverage. Lech testified that, after retaining Petrocelli as its insurance broker, Lech "told [Petrocelli] what type of operations were at [ABS' Manhattan and Bronx] locations." Lech testified that he specifically advised Petrocelli that ABS' Bronx location "had basically only workers" in the premises; and that customers did not enter the building, but rather would load purchased materials onto their trucks at a loading zone outside. Lech also testified that he advised Petrocelli that ABS needed "[c]ertain limits of liability," including "general liability for the employees and for the... customers in Manhattan if anybody was to trip and fall and get injured in any way." Lech testified that he did not recall discussing any other specific requirements for a general liability policy with Petrocelli, or requesting that the terms of the policy procured by Pollak be changed or modified in any way.

When the Burlington policy obtained by Pollak was set to expire, Lech "had discussions to see if [Longueira] could market around to see if [ABS] could save money on ... premiums or get direct billing for the policy" (rather than through a finance company). Lech did not recall asking Petrocelli to change any of the terms or conditions of the Burlington policy set to expire. Lech testified that he was not aware of the terms and conditions of the policy because he "rel[ies] on the broker to... issue... a policy that is appropriate for [ABS'] operations." After Petrocelli procured the June 14, 2005 through June 14, 2006 policy from Burlington, Lech never contacted Petrocelli to request any changes in the terms and conditions of the policy. Lech testified that he "wouldn't have read the policy because... [he] trusted an insurance broker to give [him] the coverages that were applicable to [his] businesses."

ABS President Kahn testified at his deposition that, although Lech was primarily in charge of securing insurance coverage for ABS, he did meet with

Longueira on one or two occasions to discuss insurance coverage. Kahn did not specify the coverage sought by ABS other than to say, in words or in substance, that ABS needed liability and umbrella insurance coverage, and that he wanted Petrocelli to "make sure everybody's covered."

Longueira also testified that when he initially spoke with Lech over the telephone in 2004, Lech expressed his general dissatisfaction with Pollak's services, but was not specific as to what exactly his issues with Pollak were. He further testified that ABS never specifically requested any particular terms or conditions, and that ABS "asked for a general liability policy covering the location and operations of a building materials dealer."

On or around October 18, 2005 an ABS employee by the name of Gregorio Lucero was injured at ABS' Bronx facility while in the course of performing his duties as an ABS employee. Lucero subsequently commenced an action against, *inter alia*, ABS in Supreme Court, Bronx County ("the Lucero action"). Burlington disclaimed insurance coverage as to ABS based upon the cross-liability exclusion contained in the policy, which reads, in pertinent part,

This insurance does not apply to any actual or alleged "bodily injury", "property damage", "personal injury" or "advertising injury" to:

- 3. A present, former, future or prospective partner, officer, director, stockholder or employee of any insured;

ABS subsequently commenced this action.

Petrocelli now moves for summary judgment. Petrocelli submits an affirmation and a memorandum of law in support of it motion. Annexed to the affirmation as exhibits are copies of the pleadings; Pollack's demand for a bill of particulars; a 12/12/08 preliminary conference order; ABS' bill of particulars; the deposition transcript of Peter Lech; the deposition transcript of Brett Pollak, Owner of Pollak; the stipulation of discontinuance as against Pollak; the deposition transcript of Howard Kahn; the deposition transcript of Richard Longueira, Vice President of Petrocelli; ABS' note of issue; the 8/7/09 Order of the Hon. Ira Gammerman and the transcript of proceedings held on July 30, 2009 in the matter of *DRK, LLC., et al v. The Burlington Insurance Company*, Index No. 114856/06; Burlington Policy #HGL0010089 (the 2005-06 policy); 7/7/05, 3/6/06, and 8/8/06 letters from

Burlington disclaiming coverage; a letter dated 8/30/05 from Petrocelli delivering the 2005-06 Burlington policy; and the declaration pages of Burlington Policy #HGL0006450 (the 2004-05 policy).

ABS submits an affidavit from Howard Kahn and a memorandum of law in opposition to Petrocelli's motion. Annexed to the Kahn affidavit as exhibits are copies of the lease agreement between NYCIDA and DRK; the sublease agreement between DRK and ABS; the incident report pertaining to the underlying accident; ABS' Employer's Report of Work-Related Accident/Occupational Disease Form, which was sent to Petrocelli after the accident; the 12/7/05 letter from Burlington to ABS disclaiming coverage; the complaint in the Lucero action against ABS, DRK, and Kahn; a 2/16/06 letter from CRC Services, Petrocelli's wholesaler; the 3/6/06 letter from Burlington disclaiming coverage; a 7/26/06 letter from Petrocelli to Burlington; the 8/8/06 letter from Burlington disclaiming coverage; an Order from the Hon. Betty Owen Stinson granting Lucero's application to serve and file a late notice of claim against NYCIDA in the Lucero action; copies of the pleadings in the *DRK v. Burlington* action; a 12/2/04 letter from Petrocelli to NYCIDA wherein Longueira advises that he will commit to replace the primary and excess liability policies in a licensed admitted New York insurer; Burlington's declaration for the 2005-06 policy; a letter dated 11/10/05 from Petrocelli to CRC, wherein Longueira asserts that Burlington should cover DRK pursuant to the policy; a letter dated 3/10/06 from Petrocelli to ABS, wherein Longueira states that Burlington should cover DRK and Kahn in the Lucero action; a letter dated 3/10/06 from Petrocelli to CRC requesting that the latter, as agent for Burlington, refute Burlington's letters disclaiming coverage of DRK and Kahn in the Lucero action; and a letter dated 5/2/06 from Petrocelli to Burlington stating Petrocelli's position that Burlington's disclaimer of coverage was inappropriate.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249,

* 6
251-252 [1st Dept. 1989]).

A party that has engaged an insurance broker to procure adequate insurance may recover for breach of contract “if the policy obtained does not cover a loss for which the broker contracted to provide insurance, and the insurance company refuses to cover the loss” (*Bruckmann, Rosser, Sherrill & Co. v. Marsh USA, Inc.*, 2009 NY Slip Op 6366, *1 [1st Dept. 2009]). An insurance broker can also be held liable in negligence if the broker fails to exercise due care in an insurance brokerage transaction (*id.*).

It is well settled that an insurance broker is under a duty to either obtain the coverage that a customer specifically requests, or to inform the customer of its inability to do so (*see Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*, 7 N.Y.3d 152, 157 [2006]) (*citing Murphy v. Kuhn*, 90 N.Y.2d 266 [1997]). “A general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage” (*Hoffend & Sons* at 158). Absent a special relationship between the broker and the customer, a broker is under no obligation to advise the customer as to the amount of coverage it would be prudent to obtain, or to otherwise function in a risk management capacity on behalf of the customer (*see Garnerville Holding Co. v. Kaye Ins. Assocs.*, 309 A.D.2d 541 [1st Dept. 2003]).

Here, the Court finds that an issue of fact exists which precludes summary judgment. As noted above, ABS General Manager Lech testified that he specifically informed Petrocelli that ABS needed, among other things, “general liability for the employees... if anybody was to trip and fall and get injured in any way.” Given Lech’s testimony, a jury could rationally conclude that ABS made a specific request for coverage in the event of bodily injury to ABS employees in the course of their employment; and accordingly, that it was incumbent upon Petrocelli to either procure insurance which provided such coverage, or notify ABS of its inability to do so. ABS’ failure to review the policy procured by Petrocelli does not alter the Court’s conclusion (*see Baseball Office of the Comm’r v. Marsh & McLennan*, 295 A.D.2d 73, 82 [1st Dept. 2002]) (although a plaintiff’s failure to read the procured policy may give rise to a defense of comparative negligence, it does not bar such an action).

Wherefore it is hereby

ORDERED that Petrocelli’s motion for summary judgment is denied.

This constitutes the decision and order of the Court. All other relief requested is denied.

DATED: March 19, 2010



EILEEN A. RAKOWER, J.S.C.

FILED
MAR 24 2010
NEW YORK
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