

Scottsdale Ins. Co. v Plumb Level & Sq. Constr. Inc.
2010 NY Slip Op 30753(U)
April 2, 2010
Supreme Court, New York County
Docket Number: 102577/08
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA R. KAPNICK

PRESENT: _____ **J.S.C.** _____

PART 29

Index Number : 102577/2008

SCOTTSDALE INSURANCE

VS.

PLUMB LEVEL & SQUARE

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

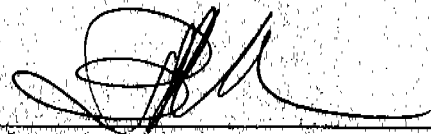
FILED

APR 07 2010

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/2/10



BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 39

-----X
SCOTTSDALE INSURANCE COMPANY,

Plaintiff,

-against-

PLUMB LEVEL & SQUARE CONSTRUCTION INC.,
RICHARD DONATO, RICHARD TOELK, TERRAPIN
INDUSTRIES, LLC, CERTIFIED TESTING
LABORATORIES, INC., RICHARD J. ZALOUM,

Defendants.
-----X

BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 102577/08
Motion Seq. No. 002

FILED
APR 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

In this action, plaintiff Scottsdale Insurance Company ("Scottsdale") seeks a declaratory judgment concerning its rights and obligations regarding liability insurance coverage for certain defendants in the lawsuit entitled *Terrapin Industries, LLC v. Plumb Level & Square Construction, Inc. et al.*, Index no. 600083/2007 (the "underlying action"), currently pending before this Court, and Richard Toelk ("Toelk"), allegedly the President and sole shareholder of Plumb, as well as claims asserted and claims that may be asserted against Scottsdale by Terrapin Industries, LLC ("Terrapin"), Certified Testing Laboratories, Inc. ("CTL"), and Richard J. Zaloum ("Zaloum"), who is the Executive Vice President and Chief Engineer of CTL, to the extent that they seek coverage as additional insureds or indemnitees under a Commercial General Liability Policy (the "Policy") issued by

Scottsdale to Plumb Level & Square Construction Inc. ("Plumb").¹

In the underlying action, which was commenced in or about January 2007, Terrapin, which is the owner of the premises located at 121 and 123 West 15th Street, New York, New York 10011 (the "Premises"), alleges that on January 13, 2006 it entered into an agreement (the "Agreement") with Plumb, pursuant to which Plumb was to serve as the excavation and foundation contractor in connection with construction and renovations at the Premises (the "Project"). Terrapin claims that it sustained damages as a result of the collapse of an original foundation wall on November 8, 2006, caused by faulty design, engineering and inadequate shoring performed by Plumb in connection with the Project.

Specifically, the Complaint in the underlying action sets forth causes of action for breach of contract against Plumb for: (1) failing to build supporting piers of the foundation to "bear on NYC Class 3-65 rock or better at a minimum bearing capacity of 20

¹ The defendants named in the underlying action include: Plumb, Richard Donato, CTL, Zaloum, The Hartford Financial Services Group, Inc., and Hartford Fire Insurance Company ("Hartford Insurance").

The Policy, with effective dates of coverage from February 28, 2006 to February 28, 2007, provides coverage with limits of \$1,000,000 under Coverage A for any one occurrence for bodily injury and property damage liability and \$2,000,000 in the aggregate subject to a \$1,000 deductible per occurrence for bodily injury or property damage.

tons per square foot" (first cause of action); (2) failing to follow the plans and specifications of CTL and Zaloum in the Shop Drawings for shoring, sheeting and bracing to protect workers and adjacent properties (second cause of action); (3) disregarding laws, building codes, safety rules and regulations applicable to the Project (third cause of action); (4) refusing and/or failing to maintain the construction schedules, failing to supply enough properly skilled workers, and failing to provide proper materials (fourth cause of action); (5) and abandoning the Project and failing to complete the work after the Department of Buildings issued a stop work order on November 8, 2006 (fifth cause of action).

Terrapin also asserts claims for liquidated damages under the Agreement against Plumb (sixth cause of action); fraud against Richard Donato, who was allegedly employed by, or affiliated with, Plumb (seventh cause of action); negligence against CTL and Zaloum (eight and ninth causes of action); breach of contract against Hartford Insurance (tenth cause of action); and seeks a declaratory judgment against Hartford Insurance, which is Terrapin's insurance carrier (eleventh cause of action).

On July 27, 2007, the Hon. Helen E. Freedman granted Terrapin's motion in the underlying action for a default judgment

against Plumb on the first through sixth causes of action, and against Donato on the seventh cause of action. Plumb and Donato were also found liable to defendants CTL and Zaloum on their cross-claims.

On November 6, 2007, Terrapin's counsel forwarded a copy of Judge Freedman's Order with Notice of Entry along with a copy of the Amended Complaint to Scottsdale, who contends that this was its first notice of the existence of that lawsuit.

After the commencement of this declaratory judgment action, Scottsdale moved for an order granting it a default judgment against defendants Plumb, Donato and Richard Toelk for their failure to appear. By Decision dated February 4, 2009, this Court granted said motion without opposition and directed the parties to "Settle Order." A judgment was, in fact, signed by this Court on May 5, 2009, declaring that Scottsdale owes no duty to indemnify or defend Plumb, Donato and Toelk in the underlying action.

Plaintiff now moves for an order, pursuant to CPLR §§ 3212 and 3001, declaring that Scottsdale does not owe coverage, defense or indemnity to any of the defendants in the underlying action on the grounds, *inter alia*, that none of the defendants provided timely notice to Scottsdale of the underlying action and that the Policy

procured by Plumb covers only property damage to third parties for which Plumb would be liable in tort, and does not cover claims for breach of contract and fraud.

"SECTION IV-COMMERCIAL GENERAL LIABILITY CONDITIONS," of the Policy expressly requires at paragraph 2, "Duties In The Event Of Occurrence, Offense, Claim or Suit," that the insured provide notice of the commencement of a lawsuit "as soon as practicable." Plaintiff contends that coverage under the Policy should be barred because Scottsdale was not notified of the underlying action until after Terrapin had secured a default judgment against Plumb.

In opposition, Terrapin contends that its insurance agent contacted Plumb's insurance agent regarding the wall collapse within days of the incident; that within two weeks Scottsdale had already retained an adjuster who inspected the Premises; and that there is evidence that Scottsdale initiated an investigation which shows that it received timely notice of the incident.

However, Scottsdale argues that the Policy expressly requires notice at two separate junctures, (1) the time of the occurrence, and (2) the commencement of a suit. Here, it is uncontested that Terrapin did not provide notice of the underlying action to Scottsdale until close to ten months after that action was filed

and a default judgment had been granted. See *American Transit Ins. Co. v. Rechev of Brooklyn, Inc.*, 57 AD3d 257 (1st Dep't 2008), in which the Court held that:

[a]lthough appellant had provided plaintiff with information about the accident shortly after it occurred, in compliance with the policy, she failed to give plaintiff **notice** of her **suit** against its insureds until 14 months after the **suit** was commenced and she had obtained an order for a default judgment. Plaintiff having thus lost its right to appear and interpose an answer, its disclaimer of coverage was proper (citations omitted)."

Accordingly, Scottsdale has an adequate basis to disclaim coverage under the express terms of the Policy.

Moreover, it appears that the claims asserted in the underlying action are barred by the language of section I, Paragraph 2 of the Policy, which identifies the exclusions to coverage and provides, in relevant part:

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

... "property damage" expected or intended from the standpoint of the insured...

b. Contractual Liability

... "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement...

j. Damage To Property

"Property Damage" to:

- (5) That particular part of real property on which you or any contractors or subcontractors working directly

or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

k. Damage To Your Product

"Property Damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property Damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."² ...

See George A. Fuller Co. v. United States Fid. & Guar. Co., 200 AD2d 255, 259 (1st Dep't 1994), a declaratory action involving similar provisions in a commercial general liability insurance policy, in which the Court held that:


[the] policy ... does not insure against faulty workmanship in the product itself but rather faulty workmanship in the work product which creates a legal liability by causing bodily injury or property damage to something other than the work product. The policy was never intended to provide contractual indemnification for economic loss to a contracting party because the work product contracted for is defectively produced (citations omitted) (emphasis supplied).

² In opposition, Terrapin relies on the endorsement to the Policy entitled "EXCLUSION-CONTRACTORS-PROFESSIONAL LIABILITY" and contends that summary judgment should be denied because Plumb performed contracting services which fall within the realm of covered construction techniques under the Policy. However, neither the "exception" invoked by Terrapin for construction services that are incidental to professional services, nor the alleged "exclusion" to that exception, are relevant in this case.

Accordingly, plaintiff's motion for summary judgment is granted and it is hereby Ordered and Declared that Scottsdale does not owe coverage, defense or indemnity to any of the defendants in the underlying action of *Terrapin Industries, LLC v. Plumb Level & Square Construction, Inc. et al.*, Index no. 600083/2007.

This constitutes the decision and order of this Court.

Dated: April 2, 2010



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

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