

**Brother Jimmy's BBQ, Inc. v American Intl. Group,
Inc.**

2010 NY Slip Op 31229(U)

May 18, 2010

Supreme Court, New York County

Docket Number: 105077/09

Judge: Emily Jane Goodman

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5-26-2010

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
EMILY JANE GOODMAN

PART 17

Index Number : 105077/2009

BROTHER JIMMY'S BBQ INC.

VS.

AMERICAN INTERNATIONAL GROUP INC

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided per attached*

FILED

MAY 20 2010

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/18/10

EGJ

EMILY JANE GOODMAN ^{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: IAS PART 17

-----X
BROTHER JIMMY'S BBQ, INC., BROTHER
JIMMY'S NYC RESTAURANT HOLDINGS, LLC,
BROTHER JIMMY'S FRANCHISING, LLC, JOSH
LEIBOWITZ, MICHAEL DAQUINO and KEVIN
BULLA,

Plaintiffs,

-against-

Index No. 105077/09

AMERICAN INTERNATIONAL GROUP, INC.
ILLINOIS NATIONAL INSURANCE COMPANY,
AIG DOMESTIC CLAIMS, INC., LAUREN
SCLAFANI, BACARDI'S USA, INC., BACARDI
CORPORATION, BACARDI BOTTLING
CORPORATION and BACARDI IMPORTS, d/b/a
BACARDI,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

FILED
MAY 20 2010
NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence numbers 001 and 002 are consolidated for disposition.

This is a declaratory judgment action seeking defense and indemnification with respect to a negligence and strict products liability action captioned *Sclafani v Brother Jimmy's BBQ, Inc.*, Index No. 115551/08 (Sup Ct, NY County) (hereinafter, the underlying action).

In motion sequence number 001, defendants Bacardi U.S.A., Inc., Bacardi Corporation, Bacardi Bottling Corporation, and Bacardi Imports n/k/a Bacardi U.S.A., Inc. (collectively, Bacardi) move, pursuant to CPLR 3211 (a) (7), to dismiss the amended complaint for failure to state a cause of action as against them. In motion sequence number 002, defendants American International Group, Inc. (AIG), AIG Domestic Claims, Inc. (AIGDC), and Illinois National Insurance Company (Illinois National) move, pursuant to CPLR 3211 (a) (7), to dismiss the

amended complaint as against AIG and AIGDC.

BACKGROUND

In the underlying action, plaintiff Lauren Sclafani alleges that, on March 29, 2008, she was severely burned while at a bar-restaurant located at 428 Amsterdam Avenue, New York, New York. The bar-restaurant was owned, operated, and/or managed by plaintiffs Brother Jimmy's BBQ, Inc., Brother Jimmy's NYC Restaurant Holdings, LLC, and Brother Jimmy's Franchising, LLC, Inc. (collectively referred to as Brother Jimmy's or the Brother Jimmy's entities). She alleges that an employee of Brother Jimmy's, Kevin Bulla, intentionally poured Bacardi 151 rum onto the surface of the bar and lit it on fire, that the rum combusted and exploded, and that the flaming contents of the bottle engulfed her in flames. Sclafani sued both Brother Jimmy's and Bacardi under theories of strict products liability and negligence, alleging, inter alia, that Bacardi 151 was "defective, hazardous, unreasonably dangerous, and not [a] reasonably safe product."

In this action, Brother Jimmy's seeks defense and indemnification in the underlying action from AIG, Illinois National, and AIGDC. Brother Jimmy's alleges that AIG, Illinois National, and AIGDC issued a commercial umbrella policy (Policy No. EBU 8685976) naming the Brother Jimmy's entities as named insureds. According to Brother Jimmy's, the initial policy period was from March 7, 2007 through March 7, 2008. Brother Jimmy's alleges that, pursuant to Endorsement No. 17, coverage was extended through May 12, 2008 (and therefore was in effect on March 29, 2008, the date of the injury). Brother Jimmy's alleges that the policy affords excess coverage and a defense in connection with bodily injury liability. The complaint alleges that Brother Jimmy's requested defense and indemnification from AIG, Illinois National, and

AIGDC, but that they failed to defend or indemnify Brother Jimmy's in the underlying action.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference" (*M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 49 AD3d 258, 260 [1st Dept 2008], *affd as mod* 12 NY3d 798 [2009] [internal quotation marks and citation omitted]). Where extrinsic evidence is submitted in connection with the motion, the appropriate standard of review "is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 402 [1st Dept 2007] [internal quotation marks and citation omitted]).

A. Bacardi's Motion to Dismiss

In support of its motion, Bacardi contends that it is not a necessary party to this action. It argues that it is a complete stranger to the insurance contracts, and that it will not be inequitably affected by a judgment rendered in this action.

In opposition, Brother Jimmy's argues that Bacardi might be "inequitably affected" by a judgment in this action. Brother Jimmy's contends that Bacardi is a necessary party because "the aggregate total of collectible insurance policies may influence the trial strategy of plaintiff [in the underlying action]" and because there is the potential for "joint and several liability" in the

underlying action (Plaintiffs' Affirm. in Opposition, at 2).

Necessary parties are “[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action . . .” (CPLR 1001 [a]; *see generally* 1-7 Weinstein-Korn-Miller, CPLR Manual § 7.02). Here, Bacardi is not a necessary party to this action. Plaintiffs do not allege that Bacardi is an insured under the subject policy. Moreover, Bacardi’s potential liability in the underlying action has no bearing on Brother Jimmy’s coverage or the interpretation of the insurance policy. Accordingly, Bacardi’s motion to dismiss must be granted (*see Mayer’s Cider Mill, Inc. v Preferred Mut. Ins. Co.*, 63 AD3d 1522, 1523-1524 [4th Dept 2009] [manufacturer and distributor of machine were not necessary parties in insured’s declaratory judgment action against insurer for defense and indemnification in underlying personal injury action]; *Silverman v State Farm Fire & Cas. Co.*, 22 Misc 3d 591, 596 [Sup Ct, Nassau County 2008] [insurer’s motion to dismiss for failure to join former employee (the plaintiff in the underlying action) and her husband as necessary parties was denied; “(g)iven the essential nature of this case, these individuals, strangers to the insurance contracts at issue, are not necessary for any of the current parties to obtain complete relief’’]).

B. Motion by AIG, Illinois National, and AIGDC

AIG, Illinois National, and AIGDC argue that Illinois National, not AIG or AIGDC, issued Policy No. EBU 8685976, and that AIG and AIGDC were not parties to the insurance contract (Greensfelder Affirm., Exh. A). Thus, there is no privity of contract between Brother Jimmy’s and AIG or AIGDC. They further contend that AIG, as the parent corporation of

Illinois National (Mofsenson Aff., ¶ 3), may not be held liable for any breach of contract by its affiliates or subsidiaries. Finally, according to these defendants, AIGDC merely acted as a claims administrator for Illinois National.

In response, Brother Jimmy's argues that AIG, Illinois National, and AIGDC have made a procedurally improper summary judgment motion. Brother Jimmy's contends that only the AIG defendants are privy to the particulars of their corporate structure and the extent that they made determinations under the subject policy. Brother Jimmy's maintains that granting the motion would improperly resolve credibility issues in favor of AIG and AIGDC.

Brother Jimmy's further argues that, if the court elects to consider this motion as one for summary judgment, the motion should be denied pursuant to CPLR 3212 (f), since the particulars relating to the AIG defendants' involvement in this matter are within their exclusive knowledge. Brother Jimmy's asserts that there is an issue of fact as to whether the AIG defendants have held themselves out as having made the determinations under the subject policy. To support this contention, Brother Jimmy's submits the disclaimer letter dated January 9, 2009 to Brother Jimmy's NYC Restaurant Holdings, LLC, which bears the names "AIG Domestic Claims, Inc." and "American International Group, Inc." and states "Services Provided by Members of American International Group, Inc." (Cooper Affirm., Exh. 1).

Initially, the court rejects Brother Jimmy's contention that defendants have essentially made an improper summary judgment motion. A party may move to dismiss the complaint pursuant to CPLR 3211 (a) (7) "at any time even if such objection [was] not raised in the answer" (*State of New York v Hollander*, 245 AD2d 625, 626 [3d Dept 1997], *lv denied* 92 NY2d 801 [1998]; *see also* CPLR 3211 [e]). Further, the court may consider affidavits and

documentary evidence on such a motion (*see De Paulis Holding Corp. v Vitale*, 66 AD3d 816, 818 [2d Dept 2009]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000] [(i)n cases where the court has considered extrinsic evidence on a CPLR 3211 motion, ‘the allegations are not deemed true. . . . The motion should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted’’]).

Here, the subject policy states that Illinois National was the insurer that issued the policy (Greensfelder Affirm., Exh. A, Declarations Page). The court must, therefore, consider whether AIG may be held liable for a breach of contract by its affiliates or subsidiaries.

Generally, a party seeking to pierce the corporate veil must show: (1) complete domination and control of the subsidiary by the parent with respect to the transaction at issue; and (2) that such domination was used to commit a fraud or wrong against the plaintiff that resulted in the plaintiff’s injury (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; *Do Gooder Prods., Inc. v American Jewish Theatre, Inc.*, 66 AD3d 527, 528 [1st Dept 2009]; *Eastern States Elec. Contrs. v Crow Constr. Co.*, 153 AD2d 522, 523 [1st Dept 1989]). Notably, “[e]vidence of domination alone does not suffice without an additional showing that it led to inequity, fraud, or malfeasance” (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]).

In *Town of Smithtown v National Union Fire Ins. Co.* (191 AD2d 426 [2d Dept 1993]), the plaintiffs commenced a declaratory judgment action seeking a declaration that their insurers were obligated to defend them in four actions brought by various school districts. The subject policy was issued by National Union Fire Insurance Company, a subsidiary of AIG. The Court

held that “the plaintiffs have failed to allege or tender proof that the parent company, American International Group, Inc., exercised complete dominion and control over National Union Fire Insurance Company in this matter. Thus, liability of the parent company for the contractual obligations of its subsidiary may not be imposed” (*id.* at 428).

In the instant case, Brother Jimmy’s does not have a viable cause of action against AIG. Brother Jimmy’s fails to allege that AIG exercised complete dominion and control over Illinois National. Moreover, Brother Jimmy’s has failed to remedy this defect in opposition to the motion. AIG is a holding company for Illinois National, and had no involvement in the investigation or denial of plaintiffs’ claims under the policy (Mofsenon Aff., ¶¶ 3, 5).

Nor is there a basis for AIGDC’s liability in this declaratory judgment action. It is well established that “an agent for a disclosed principal ‘will not be personally bound unless there is clear and explicit evidence of the agent’s intention to substitute or superadd his personal liability for, or to, that of his principal’” (*Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 [1964], quoting *Mencher v Weiss*, 306 NY 1, 4 [1953]; see also *News Am. Mktg., Inc. v Lepage Bakeries, Inc.*, 16 AD3d 146, 147 [1st Dept 2005]; *Crimmins v Handler & Co.*, 249 AD2d 89, 91-92 [1st Dept 1998]). Here, as noted above, the policy states that Illinois National was the company issuing the policy. AIGDC was not a party to the insurance contract, and there is no evidence that AIGDC intended to substitute its own liability for that of Illinois National. In addition, the January 9, 2009 disclaimer letter from AIGDC to Brother Jimmy’s NYC Restaurant Holdings, LLC states that “[AIGDC] is the claims administrator *on behalf of Illinois National Insurance Company (‘Illinois National’)*” (Cooper Affirm., Exh. 1 [emphasis supplied]). Thus, AIGDC was acting as agent for Illinois National for purposes of claims administration.

Finally, although the court may deny a motion to dismiss where discovery is needed, plaintiffs have failed to establish that “facts essential to justify opposition may exist” (CPLR 3211 [d]; *see also Mandel v Busch Entertainment Corp.*, 215 AD2d 455 [2d Dept 1995] [a party’s mere invocation of CPLR 3211 (d) is not enough to defeat the motion; a party must come forward with some tangible evidence showing the validity of the cause of action]). Plaintiffs merely speculate that discovery will allow them to establish causes of action against AIG and AIGDC.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (sequence number 001) of defendants Bacardi U.S.A., Inc., Bacardi Corporation, Bacardi Bottling Corporation, and Bacardi Imports n/k/a Bacardi U.S.A., Inc. to dismiss the amended complaint as against them is granted and the amended complaint is hereby severed and dismissed as against said defendants, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

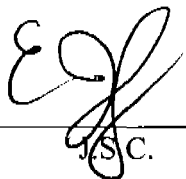
ORDERED that the motion (sequence number 002) of defendants American International Group, Inc., AIG Domestic Claims, Inc., and Illinois National Insurance Company to dismiss the amended complaint as against American International Group, Inc. and AIG Domestic Claims, Inc. is granted and the amended complaint is hereby severed and dismissed as against American International Group, Inc. and AIG Domestic Claims, Inc., and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue.

This Constitutes the Decision and Order of the Court.

Dated: May 18, 2010

ENTER:



J.S.C.

EMILY JANE GOODMAN

FILED
MAY 20 2010
NEW YORK
COUNTY CLERK'S OFFICE