

W&W Glass Sys., Inc. v Admiral Ins. Co.

2010 NY Slip Op 32120(U)

July 29, 2010

Sup Ct, NY County

Docket Number: 111707/09

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C.

PART 1

Index Number : 111707/2009
W&W GLASS SYSTEMS, INC.
vs.
ADMIRIAL INS. COMPANY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 111707/09
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

in this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-I
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
1
2

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision, order and judgment.

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 141B).

Dated: July 29, 2010



J.S.C.

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):

8/10

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
W&W GLASS SYSTEMS, INC.,

Index No.: 111707/09

Plaintiff,

Decision, Order and Judgment

-against-

ADMIRAL INSURANCE COMPANY and
METAL SALES COMPANY, INC.,

Defendants.

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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
141B).

SHULMAN, J.:

Plaintiff W&W Glass Systems, Inc. ("W&W"), seeks summary judgment pursuant to CPLR 3212, declaring that defendant Admiral Insurance Company ("Admiral") has a duty to defend and indemnify W&W in the personal injury action captioned *Naughton v. City of New York and Petrocelli Construction, Inc.*, New York County Index No. 104026/05 (the "underlying action"). Upon the court determining that Admiral is obligated to defend W&W, the motion further requests a hearing to determine the amount of attorney's fees W&W has incurred to date and for which Admiral is responsible. Admiral and its insured, co-defendant Metal Sales Company, Inc. ("Metal Sales"), oppose the motion.

In the underlying action, plaintiff Naughton, a Metal Sales employee, sued the City of New York and Petrocelli Construction, Inc. ("Petrocelli") for injuries he sustained in 2004 while working on the construction of the Manhattan Family Court building. Petrocelli, the general contractor for the project, subsequently commenced a third-party action against subcontractors Metal Sales and W&W. At the time of his injury,

Naughton was installing a curtain wall and it is undisputed that W&W had subcontracted this work to Metal Sales. See purchase order at Exh. E to motion.

DISCUSSION

"The proponent of a summary judgment motion 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 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, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

The purchase order between W&W and Metal Sales provides that Metal Sales must procure additional insured coverage on W&W's behalf. Admiral's policy with Metal Sales includes an additional insured endorsement providing coverage to persons and organizations as required by written contract "with respect to liability **caused** by your [Metal Sales'] ongoing operations performed for that insured [W&W]." See Exhs. F and F1 to motion (emphasis and bracketed material added). W&W claims to be insured under Admiral's policy with Metal Sales because Naughton's deposition testimony in the underlying action demonstrates his accident occurred "during and as a result of" Metal Sales' operations. W&W further claims that at the time of Naughton's

accident, it had its own commercial general liability policy with Travelers Insurance which provides that it is excess to additional insured coverage provided by another insurer. See Exhs. G and I to motion. As such, W&W claims entitlement to coverage and a defense from Admiral on a primary basis.

In opposition to this motion, Admiral argues that summary judgment is premature because discovery is outstanding in this action and in the underlying action. Metal Sales maintains that further discovery is needed to ascertain whether liability herein was caused by Metal Sales' ongoing operations performed for W&W.

Duty to Defend

W&W cites *BP Air Conditioning Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 (2007), which rejected the notion that liability must be determined in an underlying personal injury action before an additional insured is entitled to a defense:

[I]t is well settled that an insurer's duty to defend [the insured] is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest ... a reasonable possibility of coverage. The duty to defend [an insured] ... is derived from the allegations of the complaint and the terms of the policy. If [a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend. . . .

An insurer's duty to defend its insured is broader than its duty to indemnify (see *Fitzpatrick v American Honda Motor Co., Inc.*, 78 NY2d 61 [1991]). Thus, "an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course" (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]).

There is no dispute that W&W was named as an additional insured on the schedule of Admiral's policy on the date of the loss. Admiral attempts to distinguish *BP Air Conditioning* from the instant case by noting that: 1) the policy therein involved different contractual language;¹ and 2) W&W is not named as a direct defendant in the underlying action. These purported distinctions are unavailing.

First, the rationale of *BP Air Conditioning* applies in this action notwithstanding the more restrictive language in Admiral's additional insured endorsement. Nor is W&W's status as a third-party defendant rather than as a direct defendant in the underlying action relevant. Here, the third-party complaint in the underlying action alleges that, in the event Petrocelli is held liable for Naughton's injury, such liability will have been caused due to the negligence of W&W and/or Metal Sales, rendering these third-party defendants liable to Petrocelli. As the allegations of potential liability against W&W "form a 'factual [and] legal basis on which [the insurer] might eventually be held to be obligated to indemnify'" its additional insured (*BP Air Conditioning* at 715, quoting *Servidone Const. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424 [1985]), they are sufficient to have triggered Admiral's duty to defend. *See also*, *373 Wythe Realty, Inc. v. Indian Harbor Ins. Co.*, 2010 WL 1930256 (E.D.N.Y. 2010) (rejecting the argument that a finding of liability is required before a duty to defend an additional insured arises where the policy provides coverage for injuries caused by the insured's acts or omissions).

¹ The additional insured endorsement in *BP Air Conditioning* applied to "liability **arising out of** [the insured's] ongoing operations performed for [the additional insured]." *Id.* at 712 (bracketed matter and emphasis added).

Additionally, having been provided with copies of the relevant policies, including W&W's Travelers policy which provides that its coverage is excess to additional insured coverage provided by another insurer such as Admiral, the court must conclude that the coverage Admiral owes to W&W is primary. *See, e.g., BP Air Conditioning*, at 716.

Accordingly, W&W's motion for summary judgment is granted to the extent that Admiral must provide a defense to W&W on a primary basis in the underlying action and reimburse W&W for its legal fees incurred to date in the defense of the underlying action. The amount owed to W&W shall be determined by a special referee as provided below.

Duty to Indemnify

With respect to indemnification, W&W's motion must be denied. Unlike the duty to defend, Admiral's obligation, if any, to indemnify W&W must await the determination of ultimate liability in the underlying action. For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted only to the following extent, so that it is

ORDERED and ADJUDGED that Admiral Insurance Company is obligated to defend plaintiff W&W Glass Systems, Inc. on a primary basis in connection with the Supreme Court, New York County action entitled *Naughton v. City of New York, et al.*, Index No.: 104026/05; and it is further

ORDERED that the issue of the amount of attorney's fees incurred by plaintiff W&W Glass Systems, Inc. to date and for which defendant Admiral Insurance Co. is responsible is referred to a Special Referee to hear and report with recommendations,

except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR §4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

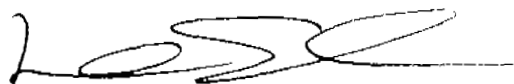
ORDERED that final determination of this matter is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Special Referee Clerk (Room 119) to arrange a date for the reference to a Special Referee.

Counsel for the parties are directed to appear for a preliminary conference on September 14, 2010 at 9:30 a.m. at I.A.S. Part 1, 60 Centre Street, Room 325, New York, New York.

The foregoing constitutes this court's Decision and Order. A copy of this Decision and Order has been sent to counsel for the parties.

Dated: July 29, 2010



Martin Shulman, J.S.C.

UNFILED JUDGMENT

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