

Tishman Constr. Corp. of N.Y. v Great Am. Ins. Co.

2010 NY Slip Op 32868(U)

October 13, 2010

Supreme Court, New York County

Docket Number: 112959/05

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 112959/2005
TISHMAN CONSTRUCTION
VS.
GREAT AMERICAN INSURANCE
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 3/22/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3
4-8
9-19

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided together with motion 007 in accordance with the annexed memorandum decision and order.

N.B. -- Compliance conf. is scheduled for Nov. 15, 2010 at 11 AM.

FILED

OCT. 15 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/13/10

JANE S. SOLOMON

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
TISHMAN CONSTRUCTION CORP. OF
NEW YORK, CARNEGIE HALL CORPORATION
and NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA,

Index No. 112959/05

Plaintiffs,

DECISION AND ORDER

-against-

GREAT AMERICAN INSURANCE COMPANY and
SCHIAVONE CONSTRUCTION COMPANY,

Defendants.

FILED
OCT 15 2010
NEW YORK
COUNTY CLERKS OFFICE

-----X

SOLOMON, J.:

This is an action for breach of contract, subrogation and declaratory judgment arising from a construction accident in the renovation below Carnegie Hall to create the Judy and Arthur Zankel Hall performance space. In these motions, plaintiffs Tishman Construction Corp. Of New York (Tishman) and Carnegie Hall Corporation (CHC) move for partial summary judgment against defendant Schiavone Construction Company (Schiavone) on their claim for declaratory judgment that they are entitled to contractual indemnification, and plaintiff National Union Fire Insurance Company of Pittsburgh, PA (National Union) moves for summary judgment on its subrogation claim.¹ Schiavone cross-moves for partial summary judgment dismissing plaintiffs' breach of contract claim, and for indemnification on its cross-claim

¹ The notice of motion also states that plaintiffs seek summary judgment for subrogation on behalf of Travelers Indemnity Company; however, Travelers is not a party to this action.

against defendant Great American Insurance Company (GAIC). By a separate motion, Schiavone seeks summary judgment dismissing Tishman's and CHC's claim for contractual indemnification. The motions are decided as follows.

FACTS:

THE UNDERLYING LAWSUITS

CHC owns Carnegie Hall. It hired Tishman to be the construction manager for the Zankel Hall project. Schiavone was the general contractor. The project required excavation of dirt and rock from under Carnegie Hall to make room for the new concert hall. Schiavone hired a design firm to design a hoist (known as a "muck hoist") that would lift a forklift loaded with a bucket of excavation debris from below grade up to the surface, where the debris would be dumped and removed from the premises. The empty forklift would return to the hoist and be lowered again and reloaded, and so on. The hoist was designed and constructed by Stokes Industries, Inc. (Stokes), and installed by Schiavone. A critical component in the hoist was a hydraulic piston that raised and lowered the hoist. The hydraulic piston was sold to Stokes by Ready Machine, Inc. (Ready).

On August 22, 2000, Schiavone employees Richard Maikowski and Robert Massie were injured when the hydraulic piston failed, causing the hoist to collapse and bring them and the forklift crashing down. The workers commenced lawsuits

against CHC and Tishman, which commenced third-party actions against Stokes and Ready. One of the workers, Maikowski, settled his lawsuit before trial for \$785,000. Massie pursued his claim to trial.

Stokes defended against the third-party action in part by arguing at trial that its design included safety latches which Schiavone had failed to install. William Van Kweren Stokes, the engineer who designed the hoist, testified that, in his opinion, the collapse was caused by "shock loads", that is, the extraordinary stress on the hydraulic piston caused by the movement of the forklift off and on the hoist platform, and that the safety latches were intended to relieve that stress (Stokes Trial Transcript, Aff. Of Scott E. Miller, Esq., Ex. E, 507, 799-803). Stokes testified that he discussed the safety latches with a Schiavone employee when the hoist was installed, and he was told that Schiavone had decided not to install the latches because Schiavone was anxious to put the hoist into service immediately (*id.*, 810).

The jury found that Stokes was not negligent in its design and manufacture of the hoist, and the third-party action against it was dismissed. Massie won a verdict in the amount of \$500,000 for past pain and suffering, \$1.5 million for future pain and suffering, and \$500,000 for future medical expenses. The parties stipulated to past lost earnings and medical expenses

totaling \$61,146. On a post-verdict motion, the trial court reduced the future medical expense award by \$237,000, but otherwise left the verdict intact (Decision and Order, annexed to Miller Aff., Ex. K, dated May 2, 2005). That decision was affirmed by the Appellate Division, First Department (35 AD3d 282 [2006]).² A judgment was entered against CHC and Tishman in the amount of \$2,324,146.

THIS LAWSUIT

Tishman, CHC and plaintiff National Union commenced this action in September 2005. National Union insured Tishman, and by a separate policy, it also insured Schiavone. CHC was insured by non-party Travelers Indemnity Company (Travelers). The National Union policies and the Travelers policy provide primary coverage in the amount of \$1 million. Schiavone also procured \$25 million in excess coverage from its co-defendant, GAIC. National Union paid the Maikowski settlement from the policy it issued to Schiavone, and paid the \$215,000 balance of that policy's \$1 million limit to Massie in partial satisfaction of his judgment. Each of the Tishman National Union policy and

² The submitted papers do not explain how the *Massie* litigation ended as against Ready, but the May 25, 2005 decision of Justice Alice Schlessinger denying the motion to set aside the verdict makes no mention of Ready as a party, and although Ready re-appears in the caption of the Appellate Division decision, no mention is made of how or if the claim against it was disposed.

the CHC Travelers policy contributed approximately \$1 million more toward satisfying the *Massie* judgment.³

The claims against Schiavone are that it is liable to Tishman and CHC for breach of its contractual duty to procure the correct insurance; declaratory judgment that Schiavone must indemnify Tishman and CHC in the underlying litigation; and declaratory judgment that GAIC must provide excess coverage for the unpaid portion of the judgment in the *Massie* action (Complaint, Notice of Motion, Ex. P). In this motion, plaintiffs seek partial summary judgment against Schiavone on their demand for a declaration that Tishman and CHC are entitled to contractual indemnification from Schiavone, and that National Union and non-party the Travelers Indemnity Company, as subrogees, are entitled to a money judgment in the amount paid from their policies to satisfy the *Massie* judgment.

The Schiavone contract provides that Schiavone shall indemnify Tishman and CHC against all claims which arise or are claimed to arise out of any accident or occurrence which happens in or about the place where Schiavone's work was being performed,

³ Plaintiffs allege payments made by the different insurers, both in the papers and at oral argument, that do not match the amounts plaintiffs alleged were paid in their submission to the Special Referee the court appointed pursuant to an earlier motion (see, Affirmation of Richard Imbrogio, Esq., Notice of Motion, Ex. N). It appears from Ex. N that the *Massie* judgment is nearly, if not completely, paid in full from the three primary policies, leaving little or nothing potentially to be paid by GAIC.

"as long as the indemnitor or its subcontractor or its materialman or its vendor was negligent in whole or in part" (Schiavone Contract, Aff. Of Scott E. Miller, Esq., Ex. B, § 7[c]). The Schiavone Contract also requires Schiavone to procure insurance covering CHC and Tishman as additional insureds, with primary commercial general liability coverage of at least \$10 million (Schiavone Contract, Insurance Rider, paragraph B).

The construction management contract between CHC and Tishman (CHC/Tishman Contract, Greenblatt Aff., Ex. C) sets forth in Article VI a detailed description of insurance requirements, not only for CHC and Tishman, but also for other contractors involved in the project. The contract contains the following waiver of subrogation provision:

- H. Waiver of Subrogation. All parties, including Trade Contractors and Owner shall obtain from its insurers a waiver of subrogation against Owner, Construction Manager, and Trade Contractors and their respective agents and employees for all insurance coverages.

(CHC/Tishman Contract, Article VI, Bates stamp number 3176). The initial capitals in "Trade Contractors" implies that the term is defined elsewhere in the contract, although said definition is not in the submitted papers.

The contract also provides:

- I. Other Provisions

* * *

10. Any policies effected by the Trade Contractors on their owned and/or rented equipment and materials shall contain a provision requiring the insurance carriers to waive their rights of subrogation against [CHC and Tishman] and all other indemnities named in the contract.

* * *

J. Certificates of Insurance. Before commencing performance of the Work, the Construction Manager and Trade Contractors must furnish a certificate of insurance evidencing:

1. Insurance coverage acceptable to Owner.

* * *

4. A waiver of subrogation endorsement has been attached to all policies.

* * *

(CHC/Tishman Contract, Article VI, bates stamp number 3177).

Schiavone did not obtain a waiver of subrogation endorsement with respect to any coverage in its insurance contract, and there is no evidence that it submitted a certificate of insurance evidencing such waiver before its work on the project began. There is no indication as to whether any other contractor obtained a waiver of subrogation endorsement from its insurer, or if said waiver was made a part of any trade contract.

In 2007, GAIC moved to amend its answer, and plaintiffs cross-moved for summary judgment declaring, *inter alia*, that GAIC is obligated to indemnify Tishman and CHC in the *Massie* action. This court denied GAIC's motion and granted the cross-motion.

That decision was reversed by the Appellate Division, which held that the GAIC policy is excess to Tishman's National Union policy (53 AD3d 416 [1st Dept. 2008]). The Appellate Division declined to consider whether National Union violated the anti-subrogation rule in commencing this action (*id.*, at 421).

DISCUSSION

A. Contractual Indemnification

Plaintiffs contend that Schiavone is liable for contractual indemnification as a matter of law because the Maikowski and Massie accident arose from Schiavone's work, and because it was established at the *Massie* trial that the accident was the result of Schiavone's negligence in failing to install the safety latches. To prove Schiavone's negligence, plaintiffs rely solely upon the evidence presented in the *Massie* trial.

While it is clear that the accident arose from Schiavone's work, Schiavone's negligence is contested. Schiavone maintains that the opinion expressed by the Stokes engineer at the *Massie* trial, *i.e.*, that the hydraulic piston failed because Schiavone did not install safety latches, is incorrect. Schiavone was not a party in the *Massie* action, and did not have an opportunity to cross-examine Stokes or offer its own evidence and explanation of what occurred (*see, D'Arata v New York Central Mutual Fire Ins. Co.*, 76 NY2d 659, 664 [1990] [a requirement of

collateral estoppel is that the party to be precluded from relitigating an issue had a full and fair opportunity to contest the prior determination). There was evidence to suggest that the cause of the accident was a failure of the hydraulic piston, which would be attributable to the manufacturer, Ready, rather than to Schiavone's negligence. Indeed, Schiavone's negligence was not an issue put to the jury. Also, plaintiffs rely on testimony given in the *Massie* trial without showing that it is admissible under any part of CPLR 4517. Accordingly, CHC and Tishman have not made a prima facie showing of entitlement to summary judgment on their contractual indemnification claim, and there is no basis for granting summary judgment to National Union on its subrogation claim.

Schiavone alternatively contends (and GAIC joins in the argument) that National Union should be denied summary judgment because its claim is barred under the anti-subrogation rule.⁴ Since National Union's motion is denied on other grounds, it is not necessary to determine this issue.

⁴ The Court of Appeals held in *North Star Reins. v Continental Ins. Co.* that an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered (82 NY2d 281, 294 [1993]).

B. Schiavone's Cross-Motions

Schiavone claims that by procuring a \$1 million primary policy and a \$25 million excess policy, with CHC and Tishman as additional insureds on the policies, it satisfied its obligation to procure insurance under the Schiavone Contract. It further argues that CHC and Tishman have not alleged any damages, which is a necessary element of a breach of contract claim. Schiavone makes out a prima facie case for summary judgment on this issue, and CHC and Tishman offer no opposition to this branch of the cross-motion. Accordingly, summary judgment dismissing plaintiffs' second cause of action is granted.

In light of the foregoing, that branch of Schiavone's motion seeking indemnification from GAIC is denied. Not only is there no finding of liability as against Schiavone, there also is no determination that all primary policies have been exhausted so GAIC's excess coverage is implicated (see *Tishman Constr. Co. v GAIC*, 53 AD3d 416). In this context, it is notable that plaintiffs submitted an unauthorized sur-reply on February 12, 2010, which for the first time reveals to the other parties the content of CHC's Travelers policy. The other parties properly objected to this submission. A determination of GAIC's obligation to pay from its excess coverage requires consideration of all policies that may provide primary coverage, and the priority of coverages found from those policies (see, *Bovis Lend*

Lease LMB, Inc. v GAIC, 53 AD3d 140 [2008] and *Tishman Constr. Co. v GAIC*, 53 AD3d 416). Plaintiffs failed to produce the Travelers policy until after these motions were made and responded to. Moreover, in light of the Appellate Division's decision in this matter, it may be that the three policies providing \$1 million in primary coverage each will not be exhausted before the *Massie* judgment is satisfied. Accordingly, Schiavone's cross motion against GAIC is denied.

B. Schiavone's Summary Judgment Motion Under the Alleged Waiver of Subrogation

Schiavone contends that it is a "Trade Contractor" enjoying the benefit of the waiver of subrogation contained in the Paragraph H of the CHC/Tishman Contract (Greenblatt Aff., paragraph 12). CHC and Tishman argue that the narrow subrogation provision contained in Paragraph I (10) of the CHC/Tishman Contract implies that no broad waiver of subrogation was intended in Paragraph H of that contract, because a broad waiver would make Paragraph I (10) superfluous.

The Court of Appeals discussed contractual waiver of subrogation in the case *Kaf-Kaf, Inc. v Rodless Decorations, Inc.*:

Subrogation, an equitable doctrine, allows an insurer to stand in the shoes of its insured and seek subrogation from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse (see, *Pennsylvania Gen. Ins. Co. v Austin*

Powders Co., 68 NY2d 465). While parties to an agreement may waive their insured's right of subrogation, a waiver clause cannot be enforced beyond the scope of the specific context in which it appears (see, *S.S.D.W. Co. v Brisk Waterproofing Co.*, 76 NY2d 228).

(90 NY2d 654, 659 [1997]).

Here, Paragraph H provides for a broad waiver of subrogation with respect to all insurance coverages. However, it also states that all parties shall obtain waivers in favor of the Owner and Construction Manager (i.e., CHC and Tishman) from their respective insurers. The Schiavone Contract has no waiver of subrogation provision, and Schiavone did not obtain a waiver of subrogation from its insurers. Accordingly, Schiavone would not be able to show that it performed its obligations such that it could enforce Paragraph H. Accordingly, Schiavone is not entitled to summary judgment dismissing the first cause of action on this basis.

Accordingly, it hereby is

ORDERED that plaintiffs' motion for summary judgment is denied; and it further is

ORDERED that defendant Schiavone's cross-motion for summary judgment is granted to the extent that plaintiffs' second cause of action for breach of contract is dismissed, and otherwise is denied; and it further is

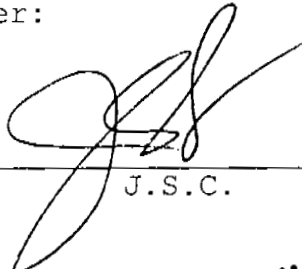
ORDERED that defendant Schiavone's motion for summary judgment dismissing plaintiffs CHC's and Tishman's claim for

declaratory judgment that they are entitled to contractual indemnity is denied; and it further is

ORDERED that counsel shall appear for a compliance conference in Part 55, 60 Centre Street, Room 432, New York, NY on November 15, 2010 at 11 AM.

Dated: October 13, 2010

Enter:



J.S.C.
JANE S. SOLOMON

FILED
OCT. 15. 2010
NEW YORK
COUNTY CLERKS OFFICE