

Handras v American Grill Diner

2010 NY Slip Op 32975(U)

September 29, 2010

Supreme Court, Queens County

Docket Number: 5192/2007

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

<p style="text-align: right; margin: 0;">x</p> <p>JOHN HANDRAS and MARIANTHI HANDRAS,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">- against -</p> <p>AMERICAN GRILL DINER and 117 2nd AVENUE CORPORATION,</p> <p style="text-align: center;">Defendants.</p> <hr style="border: 0.5px solid black; margin-top: 5px;"/> <p style="text-align: right; margin: 0;">x</p>	<p>Index Number <u>5192</u> 2007</p> <p>Motion Date <u>June 2,</u> 2010</p> <p>Motion Cal. Number <u>26</u></p> <p>Motion Seq. No. <u>4</u></p>
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The following papers numbered 1 to 10 read on this motion by third-party defendant Masters Coverage Corporation (Masters) for summary judgment dismissing the third-party complaint or, in the alternative, for severance of the third-party action from the first-party action; and on this cross motion by defendant/third-party plaintiff American Grill Diner (American Grill) for leave to amend the caption to reflect its proper corporate name pursuant to CPLR 3025(b), to sever the third-party action from the primary action, and to consolidate the third-party action for a joint trial with a companion action in another county entitled *117 2nd Avenue Corp. v Underwriters of Lloyd's, London* (index No. 101681/2010).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1 - 4
Notice of Cross Motion - Affidavits - Exhibits.....	5 - 8
Reply Affidavits.....	9 - 10

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

On October 2, 2006, plaintiff John Handras was allegedly injured while performing construction work during the renovation of American Grill. On February 28, 2007, plaintiff John Handras, and his wife suing derivatively, subsequently commenced an action against defendants American Grill and 117 2nd Avenue Corporation under Labor Law § 240 and common-law negligence. Gerakas Enterprises, LLC (Gerakas), doing business as American Grill, leased the premises from 117 2nd Avenue Corporation, the owner of the property. Underwriters of Lloyd's, London (Lloyd's of London) issued a commercial general liability insurance policy to Gerakas, which was in effect on the date of plaintiff John Handras' accident, and 117 2nd Avenue Corporation was named as an additional insured under the policy. On June 28, 2007, Lloyds of London disclaimed coverage on the grounds that there was an exclusion in the policy for personal injuries arising out of construction work and that it received late notice of the accident. Thereafter, on November 28, 2007, American Grill instituted a third-party action against Masters, its insurance broker, for negligently failing to procure proper and adequate insurance coverage for the subject property. On February 5, 2010, 117 2nd Avenue Corporation commenced an action against Gerakas and Lloyd's of London in Supreme Court, New York County under index No. 101681/2010 seeking, inter alia, a declaratory judgment that Lloyd's of London defend and indemnify it in the underlying personal injury action.

The court will first address the branch of Masters' motion for summary judgment dismissing the third-party complaint asserted against it. In that action, American Grill claims that Masters, as its insurance broker, was negligent by failing to construction coverage for the subject property. Insurance agents and brokers have a common-law duty to obtain requested coverage for their clients within a reasonable time, or to inform the client of their inability to do so (*see Trizzano v Allstate Ins. Co.*, 7 AD3d 783 [2004]; *Utica First Ins. Co. v Floyd Holding, Inc.*, 5 AD3d 762 [2004]). An agent or broker may be held liable under theories of breach of contract or negligence for failing to procure insurance (*see Structural Bldg. Prods. Corp. v Business Ins. Agency, Inc.*, 281 AD2d 617 [2001]; *American Ref-Fuel Co. of Hempstead v Resource Recycling*, 281 AD2d 574 [2001]). In order for an agent or broker to be held so liable, a plaintiff must demonstrate that the agent or broker failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that it breached the agreement or because it failed to exercise due care in the transaction (*see Mickey's Rides-N-More, Inc. v Anthony Viscuso Brokerage, Inc.*, 17 AD3d 328 [2005]). A broker who negligently fails to procure a policy stands in the shoes of the insurer, and is liable to indemnify the plaintiff for any judgment which would have been covered by the policy (*see Andriaccio v Borg & Borg*, 198 AD2d 253 [1993]).

Masters failed to establish its entitlement to judgment as a matter of law that it was not negligent in failing to procure proper and adequate insurance coverage for the subject premises. In light of the evidence in the record, there are triable issues of fact as to whether

American Grill specifically requested construction coverage. In his affidavit, Richard Orlando, a broker employed by Masters, stated that Gus Malonoukos, the president of Gerakas, never requested insurance coverage for construction work. Meanwhile, Mr. Malonoukos' deposition testimony and affidavit indicated that, in April or May 2006, he informed Mr. Orlando that construction work was scheduled to begin within a couple of weeks and, at that time, Mr. Orlando visited the work site to evaluate the work being done in order to obtain the required construction coverage for the property.

In support of its motion, Masters additionally contends that, even assuming it was negligent in obtaining proper and adequate insurance coverage for American Grill, there is no coverage for the subject accident because, pursuant to the disclaimer dated June 28, 2007, American Grill did not provide timely notice of the incident to the insurer. Specifically, the commercial general liability policy obligated Gerakas to notify Lloyd's of London in writing of a claim or potential claim "as soon as practicable." The requirement that an insured notify its liability carrier of a potential claim "as soon as practicable" operates as a condition precedent to an insurer's obligation to defend or indemnify the insured (*see White v New York*, 81 NY2d 955, 957 [1993]; *Avery & Avery, P.C. v American Ins. Co.*, 51 AD3d 695, 697 [2008]). Notice of the occurrence must be given to the insurer within a reasonable time under all the circumstances, or promptly after the insured receives notice that a claim against him or her will be made (*see Donovan v Empire Ins. Group*, 49 AD3d 589, 590 [2008]). Failure to comply with the notice requirement vitiates coverage, absent a valid excuse (*see Rondale Bldg. Corp. v Nationwide Prop. & Cas. Ins. Co.*, 1 AD3d 584, 585 [2003]). The insured has the burden of showing the reasonableness of such excuse (*see Brennan Bros. Co., Inc. v Lumbermens Mut. Cas. Co.*, 14 AD3d 525, 526 [2005]). Here, Masters argues that American Grill first provided notice of the accident to Masters on May 30, 2007, more than seven months after the accident occurred and over 60 days after the underlying personal injury action was filed by plaintiffs in February 2007. Masters, in turn, promptly forwarded the notice to Lloyd's of London. However, Mr. Malonoukos testified at his deposition that he was informed of plaintiff John Handras' accident "a couple of weeks" after it occurred. In opposition, American Grill raised a triable issue of fact by submitting the affidavit of Mr. Malonoukos, in which he stated that he first learned of plaintiff John Handras' accident in late May 2007, when he received plaintiffs' complaint in the mail.

The court, in its discretion, hereby finds that the branch of American Grill's cross motion for leave to amend the third-party complaint pursuant to CPLR 3025(b) to reflect its proper corporate name of "Gerakas Enterprises, LLC d/b/a American Grill Diner" is granted. Leave to amend a pleading should be freely given, absent prejudice or surprise resulting directly from the delay (CPLR 3025[b]; *see Fahey v County of Ontario*, 44 NY2d 934 [1978]). In the case at bar, it is undisputed that "Gerakas Enterprises, LLC" was the name of the insured designated on the insurance policy at issue, and that "American Grill Diner"

was not its true corporate name. In addition, the third-party defendant does not oppose the proposed amendment.

The court will now address the branches of Masters' motion and American Grill's cross motion to sever the third-party action from the main action. Generally, it is recognized that, even where common facts exist, it is prejudicial to insurers to have the issue of insurance coverage tried before the same jury that considers the underlying liability claims (*see Kelly v Yannotti*, 4 NY2d 603 [1958]; *Christensen v Weeks*, 15 AD3d 330, 331 [2005]; *Rauch v Berlin*, 24 AD2d 976 [1965]). The severing of negligence actions from insurance coverage actions applies to brokers and agents as well as to insurance companies (*see Hoffman v Kew Gardens Hills Assoc.*, 187 AD2d 379 [1992]). Here, the third-party action against Masters involves the issue of whether an insurance broker negligently failed to procure proper and adequate insurance coverage for the underlying liability claim, which is at issue in the main action. Given that a trial of liability and insurance issues before the same jury would subject Masters to some prejudice, severance of the third-party action is appropriate under these circumstances (*see e.g. Griffin v DaVinci Dev., LLC*, 44 AD3d 1001, 1003 [2007]; *Golfo v Loevner*, 7 AD3d 568 [2004]).

Next, the court turns to the branch of American Grill's cross motion to consolidate the third-party action for purposes of a joint trial with the companion action in Supreme Court, New York County entitled *117 2nd Avenue Corp. v Underwriters of Lloyd's, London* (index No. 101681/2010). The court, in its discretion, may order a joint trial or consolidate actions involving a common question of law or fact (CPLR 602[a]). The burden of showing that joinder will prejudice a substantial right rests upon the party opposing the motion (*see Williams v Mascitti*, 71 AD2d 813 [1979]). Here, the third-party action is against Masters, alleging negligence in failing to obtain the required insurance coverage for construction work. The companion action, against the insurer, is for a declaratory judgment demanding, inter alia, that it defend and indemnify 117 2nd Avenue Corporation, which is named as an additional insured under the subject insurance policy, in the underlying personal injury action. The insurer disclaimed coverage, in part, because the policy contained an exclusion for injuries arising out of construction work. Since it appears that a common question of fact will arise in each action as to the conduct of Masters, the broker, in dealing with the insurance company, a joint trial is appropriate in the interest of judicial economy and to avoid the possibility of inconsistent findings of fact (*see e.g. Fashion Tanning Co. v D'Errico & Farhart Agency*, 105 AD2d 1034, 1035 [1984]; *L. G. J. K. Realty Corp. v Hartford Fire Ins. Co.*, 48 AD2d 670 [1975]). In opposition, Masters has failed to sustain its burden in establishing that a joint trial would significantly prejudice its interests.

Accordingly, the branch of Masters' motion for summary judgment dismissing the third-party complaint is denied. Those branches of Masters' motion and American Grill's

cross motion to sever the third-party action from the main action are granted. In addition, the branch of American Grill's cross motion for leave to amend the third-party complaint to reflect its proper corporate name pursuant to CPLR 3025(b) is granted. That branch of American Grill's cross motion to consolidate the third-party action for a joint trial with the companion action is also granted.

Dated: September 29, 2010

J.S.C.