

Five Star Elec. Corp. v Zurich American Ins. Co.

2010 NY Slip Op 33002(U)

October 14, 2010

Sup Ct, Queens County

Docket Number: 34378/2009

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

FIVE STAR ELECTRIC CORPORATION, X

Plaintiff,

- against -

ZURICH AMERICAN INSURANCE COMPANY,
TRAVELERS EXCESS AND SURPLUS LINES
COMPANY, ILLINOIS UNION INSURANCE
COMPANY, AXIS SURPLUS INSURANCE
COMPANY, and ARCH SPECIALTY
INSURANCE COMPANY,

Defendants.

Index
Number 34378 2009

Motion
Date July 7, 2010

Motion
Cal. Number 24

Motion Seq. No. 1

_____ X

The following papers numbered 1 to 5 read on this motion by the defendants for an order dismissing the complaint against them pursuant to CPLR 3211(a)(3) and (7) or CPLR 3211(c).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-2
Memoranda of Law	3-5

Upon the foregoing papers it is ordered that the motion is denied. (See the accompanying memorandum.)

Dated: October 14, 2010

J.S.C.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

FIVE STAR ELECTRIC CORPORATION,

Plaintiff,

- against -

ZURICH AMERICAN INSURANCE COMPANY,
TRAVELERS EXCESS AND SURPLUS LINES
COMPANY, ILLINOIS UNION INSURANCE
COMPANY, AXIS SURPLUS INSURANCE
COMPANY, and ARCH SPECIALTY
INSURANCE COMPANY,

Defendants.

X INDEX NO. 34378/09

MOTION SEQ. NO. 1

BY: KITZES, J.

DATED: October 14, 2010

X

The defendants have moved for an order dismissing the complaint against them pursuant to CPLR 3211(a)(3) and (7) or CPLR 3211(c).

Plaintiff Five Star Electric, Inc. has brought this action for breach of an insurance policy against several insurance companies that issued a builders risk policy covering property damage incurred during the construction of the new Mets stadium known as Citifield. Plaintiff Five Star alleges that from April, 2007 to April, 2009 other contractors on the project damaged its work by, inter alia, cutting through, drilling through, and/or breaking electrical cable and other electrical materials. The dispute between the plaintiff and the defendant insurers centers around the issue of whether the builders risk policy was part of an Owner Controlled Insurance Program (OCIP) sponsored by the owner of the project.

In February, 2007, Hunt/Bovis Lend Lease Alliance II, a joint venture serving as the general contractor for the construction of Citifield, entered into a subcontract with plaintiff Five Star whereby the latter obligated itself to do electrical work on the project. The subcontract's insurance clauses made reference to Exhibit C which the parties attached to the main document. Exhibit C had three parts: (1) a 23 page document entitled "the New York Mets Stadium – Owner Controlled Insurance Program – Field Procedures Manual," (2) an 11 page document package of "Required OCIP forms," and (3) an 11 page document entitled "Exhibit C-1 OCIP which provided a summary of the insurance coverage provided by the OCIP.

Section 3 of the OCIP manual provided in relevant part: "Excluded Contracts [:] Participation in the OCIP is required for all subcontractors and subordinate contractors of any tier with the following exceptions: *** Electrical Contractors." Plaintiff Five Star admittedly chose not to participate in the OCIP. The subcontract had an insurance clause which read as follows: "Article 11. Insurance[:] Before commencing the work and until completion and final acceptance thereof by Owner, Subcontractor shall obtain and maintain, at its expense, at least the insurance coverage specified in Exhibit C attached hereto, all from companies and in form and substance acceptable to Contractor." One part of Exhibit C provided in relevant part: "Owner Provided Insurance (OCIP Coverage)[:]. The following descriptions are summaries only. *** A. Coverage Provided [:] *** 4. Builders Risk Insurance." Paragraph 66 of Exhibit B to the subcontract provided: " Subcontract Price includes on-site insurance. This Subcontractor is aware that an Owner Controlled Insurance Program (OCIP) will not be implemented ***. Note that Subcontractor shall always be responsible to provide insurance coverage."

Prior to the commencement of construction, in 2006, Queens Ballpark Company LLC, the owner, retained Willis of New York, Inc., an insurance brokerage, to procure builders risk insurance to cover physical losses on the project. Willis procured builders risk policy No. IM 532162200 effective from August 22, 2006 until April 1, 2009 from defendant Zurich American Insurance Company and the other defendant insurers (the scale of the

project necessitated multiple carriers). The builders risk policy contains a provision which reads in relevant part: “ADDITIONAL NAMED INSURED(S): To the extent required by any contract or subcontract for an Insured Project, and then only as their respective interests may appear, all owners, all contractors and subcontractors of every tier *** are recognized as Additional Named Insureds hereunder.”

According to plaintiff Five Star Electric Corporation, the builders risk policy was obtained separately from the casualty insurance covering the project (the commercial general liability, excess liability, and worker’s compensation coverage). The plaintiff alleges that the owner provided casualty insurance for itself and participating contractors through an OCIP policy (also known as a wrap-up policy) and that National Insurance Company (not one of the defendants herein) issued the wrap up policy. One expert explained the nature of a wrap-up policy as follows: “In short, a wrap-up does exactly what it says. It wraps up all the worker compensation and general liability insurance for all onsite contractors (including the general contractor or construction manager) and owners of the project site. The premium for this insurance is paid for by the owner and in return all participating contractors reduce their bid prices by the cost of their own insurance.” ([http: www.irmi.com /expert/ articles /2006 /resnick.](http://www.irmi.com/expert/articles/2006/resnick)). According to some sources, an OCIP can include builders risk coverage (*see*, [www.construction weblinks. com](http://www.constructionweblinks.com); [www. alliantinsurance.com](http://www.alliantinsurance.com).), although Jonathan Oppenheim of Willis alleges “Builders risk is not part of a wrap-up ***.”

Plaintiff Five Star elected not to participate in the OCIP. However, according to the plaintiff, the subcontract incorporated a document which defined the coverages provided by the OCIP in such a manner as not to include builders risk coverage: “3.0 Description of Insurance Coverages [:] The following coverages are provided by the OCIP: ●Workers’ Compensation and Employer’s Liability ●Commercial General Liability ● Excess Liability.” On the other hand, according to the defendant insurers, the subcontract defined the coverages provided by the OCIP in such a manner as to include builders risk coverage: “3.0 Description of OCIP Coverage [:] 3.1 Workers’ Compensation and Employer’s Liability Insurance [.] 3.2 Commercial General Liability Insurance and Excess Liability Insurance [.]

3.3 Builders Risk Insurance.” Plaintiff Five Star also relies on section 3.3 of the OCIP manual which provided in relevant part: “The Builders Risk policy will be endorsed to add all contractors and subordinate subcontractors as additional named insureds ***.”

After severe damage allegedly occurred to Five Star’s work during construction, both Hunt/Bovis and Five Star submitted claims for coverage under the builders risk policy. The defendant insurers denied coverage on the ground that Five Star is not an insured under the builder’s risk policy. The defendant insurers assert that the owner procured builders risk insurance under the OCIP program from which Five Star admittedly excluded itself. On the other hand, plaintiff Five Star insists that builders risk insurance is not one of the OCIP coverages.

Instead of following the usual route in cases of this type of moving for pre-answer dismissal pursuant to CPLR 3211(a)(1) (defense founded on documentary evidence) or for post-answer summary judgment pursuant to CPLR 3212, the defendants have elected to move pursuant to CPLR 3211(a)(3) and (7), asserting that the plaintiff lacks the legal capacity and standing to sue. It is true that a cause of action asserted by a party without the legal capacity to do so or without the standing to do so is subject to dismissal pursuant to CPLR 3211(a)(3) (*see, Security Pacific Nat. Bank v Evans*, 31 AD3d 278) or 3211(a)(7) (*see, Parker & Waichman v Napoli*, 29 AD3d 396; *Truty v Federal Bakers Supply Corp.*, 217 AD2d 951) respectively. However, in the case at bar, the attempt by the defendant insurers to obtain a dismissal of the complaint on the grounds of lack of capacity and lack of standing is misguided. As for the plaintiff’s capacity to maintain this action, capacity “is a threshold question involving the authority of a litigant to present a grievance for judicial review.” (*Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs.*, 5 NY3d 36, 41.) In the case at bar, the plaintiff clearly has the authority to present its own claim for breach of contract whatever its merits. As for standing, “[s]tanding to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request ...” (*Caprer v Nussbaum*, 36 AD3d 176, 182.) “The most critical requirement of standing *** is the presence of ‘injury in fact-an actual

legal stake in the matter being adjudicated.’ ” (*Security Pacific Nat. Bank v Evans* , *supra*, 279, quoting *Society of the Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 772.) In the case at bar, the plaintiff contractor has adequately alleged an “actual injury” to its own financial interests. (*See, Hunts Point Terminal Produce Co-op. Ass’n, Inc. v New York City Economic Development Corp*, 36 AD3d 234, 247; *New York State Ass’n of Nurse Anesthetists v Novello*, 2 NY3d 207.) On a CPLR 3211(a)(7) motion, the plaintiff’s claim that it is an insured under the policy issued by the defendants is a sufficient predicate for standing. The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion. (*See, Stukuls v State of New York*, 42 NY2d 272; *Jacobs v Macy’s East Inc.*, 262 AD2d 607.)

Finally, the court is mindful of the defendants’ request that this motion be treated as one for summary judgment pursuant to CPLR 3211(c), but, anticipating further submissions, the court finds that a properly noticed motion for summary judgment pursuant to CPLR 3212 is a preferable procedure.

Accordingly, the motion is denied.

Short form order signed herewith.

J.S.C.