

Exeter Bldg. Corp. v Scottsdale Ins. Co.

2010 NY Slip Op 33019(U)

October 12, 2010

Sup Ct, Nassau County

Docket Number: 19254/08

Judge: Thomas Feinman

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

EXETER BUILDING CORP. and ROSENBERG
FORTUNA & LAITMAN, LLP,

Plaintiff,

- against -

SCOTTSDALE INSURANCE COMPANY,

Defendant.

TRIAL/IAS, PART 15
NASSAU COUNTY

INDEX NO. 19254/08

MOTION SUBMISSION
DATE: 10/8/10

MOTION SEQUENCE
NOS. 4, 5

The following papers read on this motion:

Notice of Motion and Affidavits.....	<u>X</u>
Memorandum of Law in Support of Motion...	<u>X</u>
Notice of Cross-Motion and Affidavits.....	<u>X</u>
Affirmations in Opposition.....	<u>X</u>
Reply Affirmations.....	<u>X</u>

The defendant, Scottsdale Insurance Company, (hereinafter referred to as "Scottsdale"), moves for an order (a) pursuant to CPLR §3001 declaring that Scottsdale Insurance Company does not owe coverage, defense or indemnity to any of the defendants in the underlying New York County action of *Board of Directors of the Maidstone Landing Home Owners Association, Inc. v. Maidstone Landing, LLC, Wilbur Fried, David Fried, Judith Fried, Exeter Building Corp., et al.*, Index No. 600438-2007, (b) an order pursuant to CPLR §2221 granting renewal of a prior motion seeking summary judgment pursuant to CPLR §3212(b) and granting said motion to dismiss plaintiff's Amended Complaint, and (c) an order pursuant to CPLR §3212(b) dismissing claims for attorneys' fees for defending Exeter Building Corp. in the underlying New York County action of *Board of Directors of the Maidstone Landing Home Owners Association, Inc. v. Maidstone Landing, LLC, Wilbur Fried, David Fried, Judith Fried, Exeter Building Corp., et al.*, Index No. 600438-2007. The defendant submits a Memorandum of Law in support of its motion.

The plaintiff, Exeter Building Corp., (hereinafter referred to as "Exeter"), and plaintiff, *pro se*, Rosenberg Fortuna & Laitman, LLP, (hereinafter referred to as the plaintiff "firm"), cross-move for an order (i) granting plaintiff's summary judgment pursuant to CPLR §3212 for the relief demanded in the amended complaint; (ii) striking the defendant's verified answer pursuant to CPLR §3126; (iii) compelling disclosure pursuant to CPLR §3124; and (iv) requiring an *in-camera* inspection of the documents listed in the defendant's privileged logs dated January 28, 2010 and February 5, 2010, and oppose defendant's motion. The defendant submits opposition to the plaintiffs' cross-motion, and a Memorandum of Law in opposition to the plaintiffs' cross-motion. The defendant submits a reply to plaintiffs' opposition, and a Memorandum of Law in reply. The plaintiff submits a reply to the defendant's opposition.

The defendant, pursuant to CPLR §3001, moves for a declaration that the plaintiff, Exeter, is not owed a defense or indemnity in the underlying action of the Supreme Court, County of New York, entitled *Board of Directors of the Maidstone Landing Home Owners Association, Inc. v. Maidstone Landing LLC, Wilbur Fried, David Fried, Judith Fried, Exeter Building Corp., Douglas R. Sharp and Bloodgood, Sharp, Buster Architects and Planners, Inc.*, bearing Index No. 600438/2007, (hereinafter referred to as the 'Maidstone action'), and that the defendant's conduct did not constitute bad faith. The plaintiffs cross-move for summary judgment pursuant to CPLR §3212 for the relief demanded in plaintiffs' amended complaint. The plaintiff, Exeter, seeks a declaratory judgment declaring that the defendant, Scottsdale, is obligated to defend and indemnify Exeter in the Maidstone action. The plaintiff firm seeks attorneys' fees for defending Exeter in the Maidstone action.

The defendant submits that the claims in the Maidstone action arose prior to inception of coverage of the pertinent policy from Scottsdale to Exeter, and therefore there is no coverage. The defendant also claims that assuming *arguendo* that there was coverage to Exeter under the Scottsdale policy, the claims against Exeter in the Maidstone action sound in construction defects which are expressly excluded under the subject policy. Additionally, the defendant argues that Exeter failed to timely notify the defendant of any claims in violation of the policy terms vitiating any potential coverage.

Plaintiffs in the Maidstone action essentially argue that they sustained property damage resulting from the defendants' failure to construct condominium units in a workmanlike manner, and assert that because of the "shoddy" construction, the units suffered severe leaks and water damage. Exeter was the general contractor for the work performed at Maidstone Landing.

The defendant maintains that the subject policy under which Exeter was a named insured expressly excluded coverage for "property damage" to "your work" arising out of it or any part of it, arising out of a "defect, deficiency, inadequacy" in "your work". The defendant further provides that "your work" means, under the policy, "work or operations performed by you or on your behalf". Therefore, upon review of the Maidstone action, the defendant issued a reservation of rights letter dated December 27, 2007 to Exeter citing the conditions of coverage and exclusions under the pertinent policies issued to Exeter reserving its right to disclaim coverage. The defendant expressly reserved its right to disclaim coverage for property damage arising out of a defect in Exeter's work, or work performed by Exeter or any contractor or subcontractor performing operations on Exeter's behalf.

Thereafter, the defendant issued a disclaimer letter to Exeter dated February 25, 2009 denying coverage to Exeter citing the conditions of coverage and exclusions. More particularly, defendant asserts that as allegations of construction defects are not covered at all, and there is no coverage for faulty workmanship. Therefore, the defendant denied coverage to Exeter for the Maidstone action as and against Exeter and advised it would neither defend nor indemnify Exeter with respect to the Maidstone action. The defendant annexes various correspondences indicating that the plaintiffs in the Maidstone action required the repair of reported defects, which plaintiffs maintained was a result of "poor, shoddy and unworkmanlike manner", seeking resolution of construction defects, asserting the quality of workmanship was below minimal standards.

The plaintiffs argue that the Maidstone complaint, as and against Exeter, asserts facts regarding property damage which come within the coverage afforded under the policies and therefore, the defendant is obligated to defend Exeter. However, the plaintiffs have not demonstrated such facts, or raised an issue as to any claim against Exeter not involving construction defects. In plaintiff's attempt to look beyond the complaint to demonstrate that the defendant has a duty to defend in the Maidstone action, the plaintiffs have not referred to any claim as against Exeter that does not involve water damage or water-flow, or other types of property damage based on alleged "improper grading ... construction" or other types of "construction defects".

It is well established that the undertaking of the defense of an action will not operate as a waiver or estoppel of the defense of non-coverage so long as the insurer assumed the defense under a reservation of its right. (*Smith Jean, Inc. v. Royal Globe Ins. Co.*, 139 AD2d 503). An insurer who wishes to exclude coverage from its policy obligations must do so in clean and unmistakable language. (*Seaboard Surety Co. v. Gillette Co.*, 64 NY2d 304). An insurer of a commercial general liability insurance policy is not a surety for a construction contractor's defective work product. (*Pavarini Construction Co. v. Continental Insurance Company*, 304 AD2d 501). It has also been held that a commercial general liability insurance policy does not afford coverage for breach of contract, but rather for bodily injury and for property damage, whereby, to hold otherwise would render an insurer a surety for the performance of its insured's work. (*Mid-Hudson Castle, Ltd. v. P.J. Exteriors, Inc.*, 292 AD2d 355). Where causes of action relate to defects in construction, under applicable policies, they fall within exclusions for construction defects and are properly exempted from coverage. (*Hartford Accident & Indemnity Company v. A.P. Reale & Sons, Inc.*, 228 AD2d 935).

The defendant, upon the record here, has demonstrated that the claims asserted, as and against Exeter in the Maidstone action, constitute construction defects, and faulty workmanship and fall within the policy exclusion. Here, the defendant is not obligated to provide Exeter with a defense in the Maidstone action. (*J. Lucarelli & Sons, Inc. v. Mountain Val. Indem. Co.*, 64 AD3d 856).

The plaintiffs assert that the defendant improperly moves for summary judgment in the instant application as the defendant's motion is a "successive" motion for summary judgment, in light of this court's prior order dated November 18, 2009, entered November 19, 2009. This Court, by way of its prior order entered November 19, 2009 denied defendant's prior motion for summary judgment pursuant to CPLR §3212 as "premature as the defendant's motion for summary judgment is made prior to discovery having been completed" As this action has been certified and is on the trial calendar, the defendant now timely moves for summary judgment. Plaintiff argues that the instant motion by defendant for summary judgment is "successive". However, this Court disagrees as this Court did not deny the defendant leave to renew upon the completion of discovery. Here, the defendant moves after certification of the action, and therefore, defendant's application for summary judgment is proper. Accordingly, the defendant is granted leave to move for summary judgment.

Upon the record herein, the defendant has demonstrated that the claims in the Maidstone action as and against Exeter fall within the exclusion under the policy. In light of the foregoing determination, this court need not address the defendant's remaining contentions with respect to defendant's other grounds upon which defendant disclaims coverage to Exeter in the Maidstone action. This Court has considered the plaintiffs' remaining contentions concerning coverage and has found them to be unavailing.

However, several issues of fact exist with respect to the fee dispute between the plaintiff firm and the defendant for profession fees rendered on behalf of Exeter in the Maidstone action.

The plaintiffs' request to strike the defendant's answer for failure to serve "properly responsive answers" to plaintiff's prior discovery demands and or compel the requested discovery is not warranted.

In light of the foregoing, it is hereby

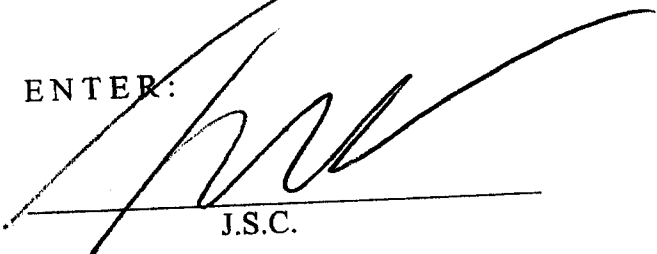
ORDERED that the defendant's motion is granted to the extent that the defendant is not obligated to defend or indemnify Exeter in the Maidstone action, and it is hereby

ORDERED that the plaintiff firm is entitled to reimbursement of the plaintiff firm's fees, to be determined at the time of trial, and it is hereby further

ORDERED that branch of defendant's motion seeking to dismiss the plaintiff firm's claims for attorney fees for defending Exeter in the Maidstone action is denied, and it is hereby further

ORDERED that that branch of plaintiffs cross-motion seeking summary judgment, the striking of defendant's answer, an order compelling disclosure, and/or an *in camera* inspection is denied.

ENTER:



J.S.C.

Dated: October 12, 2010

cc: Rosenberg Fortuna & Laitman, LLP
Faust Goetz Schenker & Blee, LLP

ENTERED
OCT 19 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE