

Global Coverage, Inc. v Charter Oak Fire Ins. Co.

2010 NY Slip Op 33842(U)

May 7, 2010

Sup Ct, New York County

Docket Number: 110180/07

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Ling-Cohan
Justice

PART 36

Index Number : 110180/2007

GLOBAL COVERAGE

vs.

CHARTER OAK FIRE

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAGES NUMBERED

12

5, 6

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

3, 4

Upon the foregoing papers, it is ordered that this motion a *cross-motion* for *summary judgment* be decided in accordance with the attached memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASONS:

FILED
MAY 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/7/10

JUSTICE DORIS LING-COHAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
GLOBAL COVERAGE, INC.,

Plaintiff.

-against-

THE CHARTER OAK FIRE INSURANCE COMPANY
and TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA,

Defendants.

-----X
HON. DORIS LING-COHAN, J.S.C.:

Index No.: 110180/07
DECISION/ORDER

Motion Seq. No.: 002

FILED
MAY 14 2010
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In this contractual indemnification action, defendants move for summary judgment to dismiss the complaint, and plaintiff cross-moves for summary judgment on the complaint (motion sequence number 002). For the following reasons, the motion is granted, and the cross motion is denied.

BACKGROUND

Plaintiff Global Coverage, Inc. (Global) is a New York State licensed corporation which operates an insurance brokerage and agency. See Notice of Motion, Exhibit A (complaint), ¶ 1. For the purposes of this motion, it is also relevant to note that Global was an employer of 30-35 employees during the operative period of late 2006. *Id.*; Binsky Affirmation, ¶ 8.

In 1997, Global contracted with non-party Quality Payroll Systems, Inc. (Quality) to administer its payroll system and to pay its employees and payroll taxes. See Notice of Cross Motion, Lerner Affirmation, ¶ 5. Pursuant to that contract, Global permitted Quality to make weekly withdrawals from the general operating account that Global maintained at HSBC Bank

(the Global account) into an escrow account that Quality maintained at KeyBank (the Quality account). *Id.*, ¶ 6. Quality would thereafter make payments from the Quality account to cover Global's employees' salaries, as well as Global's federal and state payroll tax payments. *Id.*

In September of 2005, defendant Charter Oak Fire Insurance Company (Charter), an insurance company duly licensed by the state of Connecticut, issued a commercial general liability/business owners property insurance policy (the Charter policy) to Global with effective dates of September 23, 2005 through September 23, 2006. *Id.*, ¶ 8; Notice of Motion, Exhibits A, ¶ 2; F. The relevant portion of the Charter policy is found in the section entitled "Businessowners Property Coverage Special Form MP T1 02," and provides as follows:

B. Exclusions ...

2. We will not pay for loss or damage caused by or resulting from any of the following: ...

1. Voluntary parting with any property by you or anyone else to whom you have entrusted the property.

Id.: Exhibit F.

In August of 2006, defendant Travelers Property Casualty Company of America (Travelers), an insurance company also duly licensed by the state of Connecticut, issued a commercial general liability/business owners property insurance policy (the Travelers policy) to Global with effective dates of September 23, 2006 through September 23, 2007. *See* Notice of Cross Motion, Lerner Affirmation, ¶ 17; Notice of Motion, Exhibits A ¶ 3; G. The relevant portion of the Travelers policy is also found in the section entitled "Businessowners Property Coverage Special Form MP T1 02," and uses the exact same language as the provision set forth in the Charter policy. *Id.*: Exhibit G.

On August 25, 2006, after being informed by several of its employees that their salaries had not been paid, Global contacted KeyBank and learned that the bank had attached the funds in the Quality escrow account. *See* Notice of Cross Motion, Lerner Affirmation, ¶ 7. At her deposition on March 26, 2009, Global employee Andrea Pushkin (Pushkin) stated that she had been able to halt the transfer of approximately \$40,000.00 from the Global account into the Quality account on August 25, 2006. *Id.*; Notice of Motion, Exhibit C, at 70-71. This amount had been earmarked for Global's employees' weekly salaries. *Id.* Pushkin also stated that she had not been able to halt the transfer of \$14,740.61 into the Quality account, which amount had been earmarked to pay Global's federal and state payroll taxes that week. *Id.*; Notice of Motion, Exhibit C, at 70-71. Global states that it paid this amount to the federal and state taxing authorities instead, and presents copies of the cancelled checks reflecting these payments. *Id.*, ¶ 9; Exhibit A. Global also states that it submitted a notice of claim for these payments to Charter (the Charter claim), but that Charter denied liability therefor. *Id.*, ¶¶ 9-12. In its denial letter, dated September 28, 2006, Charter referenced the policy language quoted earlier, and stated that:

One or more [Quality] employees were granted access to specific [Global] accounts. [Quality] was functioning in the capacity of fiduciary agents of [Global]. [These Quality] employees were [not] employees of [Global]. An agency relationship existed and Covered Property was entrusted to those [Quality] employees. Based upon the available information, this loss is considered to be the result of fraudulent, dishonest, or criminal acts committed by [Quality] employees, who were acting as agents of [Global] and were also persons to whom covered property had been entrusted. The business relationship and actions on the part of those [Quality employees] fall within the exclusionary language cited above.

Id.; Exhibit C. However, on July 24, 2009, Global deposed a Charter employee - investigator David Semelmaker (Semelmaker) - who had concluded that the loss of Global's funds had *not*

been caused by fraudulent acts committed by Quality, but were instead the result of KeyBank attaching those funds after it had placed a lien on the Quality account. *Id.*; Exhibit B, at 30-34.

On October 30, 2006, Global learned that Quality had once again failed to pay Global's weekly federal and state payroll taxes to the respective taxing authorities. *Id.*; Lerner Affirmation, ¶ 17. On this occasion, Global states that it paid a total of \$33,351.17 to those taxing authorities, and has annexed copies of the cancelled checks as proof. *Id.*, ¶ 19; Exhibit E. Global also states that it submitted a notice of claim for these payments to Travelers (the Travelers claim), but that Travelers denied coverage therefor. *Id.*, ¶¶ 18, 20. Traveler's denial letter, dated November 14, 2006, refers to the exclusion provisions of the Travelers policy and states as follows:

Based on the available information, this loss is considered to be the result of fraudulent, dishonest, or criminal acts committed by [Quality] employees, who were acting as agents of [Global] and were also persons to whom covered property had been entrusted. The business relationship and actions on the part of those at [Quality] fall within the exclusionary language cited above.

Id.; Exhibit F. Global notes that the claim representative, Susan Scott (Scott), did not assign an investigator to the Travelers claim, as she had previously done to the Charter claim.¹ *Id.*; Lerner Affirmation, ¶ 20.

Global commenced this action on November 26, 2007, by filing a complaint that sets forth causes of action for: 1) breach of the Charter policy; and 2) breach of the Travelers policy. *See* Notice of Motion, Exhibit A. Defendants filed a joint answer on December 3, 2007. *Id.*, Exhibit B. Defendants now move for summary judgment to dismiss the complaint, and Global

¹ Scott is employed by Travelers, but also oversees claims made on Charter policies because Charter is evidently a Travelers member company. *See* Notice of Cross Motion, Exhibit D.

cross-moves for summary judgment on the complaint (motion sequence number 002).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Further, it is well settled that ““on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself.”” *Maysek & Moran v Warburg & Co.*, 284 AD2d 203, 204 (1st Dept 2001), quoting *Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514, 515 (1st Dept 1995).

The issue before the court is whether or not Global’s two claims for reimbursement of federal and state payroll tax payments that it had deposited in the Quality account must fail because they fall within the “voluntary parting” exclusionary language of the Charter and Travelers policies. For the following reasons, the court finds that they do fail.

In their moving papers, defendants assert that the plain language of the identical exclusionary provisions set forth in sections B (2) (1) of the Charter and Travelers policies shows that Global’s two claims are not covered. *See* Notice of Motion, Binsky Affirmation, ¶¶ 15-17.

Global responds that that language is clearly inapplicable to the subject claims, because it requires a “voluntary parting with property,” whereas Global did not part with the funds in the Quality escrow account “voluntarily,” but only because KeyBank had attached them to satisfy a judgment. *See* Notice of Cross Motion, Lerner Affirmation, ¶¶ 28-30. Defendants’ reply papers restate their original argument. *See* Defendants’ Reply Memorandum of Law, at 9-10. Based upon the submissions, the court is constrained to grant defendants’ motion for summary judgment.

Global correctly notes that “[g]enerally, the court will ‘construe the limitations of an insurance contract in the light of the speech of common [people].’” *Throgs Neck Bagels v GA Ins. Co. of N.Y.*, 241 AD2d 66, 69 (1st Dept 1998), quoting *Gittelsohn v Mutual Life Ins. Co. of N.Y.*, 266 App Div 141, 145 (1st Dept 1943), citing *Lewis v Ocean Acc. & Guar. Corp., Ltd. Of London, England*, 224 NY 18 (1918). As previously mentioned, Global argues that it did not voluntarily part with its property because KeyBank took that property (i.e., the funds in the Quality escrow account) without Global’s knowledge via attachment to satisfy a judgment against Quality. *See* Notice of Cross Motion, Lerner Affirmation, ¶¶ 28-30. Global’s president, Philip Rosenthal (Rosenthal), further argues that, because the Quality account was an escrow account, Global was the actual owner of the Quality account, *not* Quality itself. *See* Notice of Cross Motion, Rosenthal Affidavit, ¶ 12. Thus, Global concludes that, given the common usage of the term, it would be unreasonable to find that it had “voluntarily parted with its property.” This argument, however, does not account for all of the operative facts of this case.

Global does not deny that it deposited its funds into an escrow account. *Id.* However, the very term “escrow” refers to a purely legal construction. In *National Union Fire Ins. Co.*

Pittsburgh, Pa. v Proskauer Rose Goetz & Mendelsohn (165 Misc 2d 539, 544-545 [Sup Ct, NY County 1994], *aff'd* 227 AD2d 106 [1st Dept 1996]), this court (Schackman, J.) observed that:

For an instrument to operate as an escrow there must be: a) an agreement as to the subject matter and delivery of the same; b) a third-party depository; c) delivery of the subject matter to a third party conditioned upon the performance of some act or the happening of the event; and d) relinquishment by the promisor.

Delivery of the instrument or property is necessary in order to have an escrow. Moreover, the delivery must be made with the intent that the condition required to release the same take effect in the future. The delivery must be made to a third person, i.e., the escrow agent (discussed *supra*), and the delivery must be intended by the promisor as relinquishment of any right of possession and control of the property [internal citations omitted].

Global's admitted use of an "escrow" account presumes that it relinquished "possession and control" over the funds that KeyBank later appropriated. Indeed, under the foregoing definition, it would be anomalous to find that Global's weekly deposits of its federal and state payroll tax payments into the Quality escrow account were not "voluntary." Therefore, the court rejects Global's argument. On the submissions, defendants have demonstrated that the exclusions set forth in sections B (2) (i) of the Charter and Travelers policies clearly apply to Global's claims. Thus, defendants' motion for summary judgment of dismissal is granted. Global's cross motion is denied.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendants the Charter Oak Fire Insurance Company and Travelers Property Casualty Company of America is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the


Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of plaintiff Global Coverage, Inc. is denied; and it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy upon plaintiffs, with notice of entry.

Dated: New York, New York
May 7, 2010



Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\globalvcharterandtravelers

FILED
MAY 14 2010
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