

Schneider v Liberty Mut. Ins. Co.

2011 NY Slip Op 30015(U)

January 5, 2011

Sup Ct, NY County

Docket Number: 117395

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
J.S.C. Justice

PART 10

Index Number : 117395/2009
SCHNEIDER, MORTON
vs.
LIBERTY MUTUAL INSURANCE CO
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

JAN 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

*motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.*

Dated: 1/05/11


HON. JUDITH J. GISCHE *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: Part 10

Morton Schneider, as Administrator for the
Estate of Gertrude Schneider,

Plaintiff,

Decision/Order

-against-

Index#117395
Mot. Seq. # 001

Liberty Mutual Insurance Company,

Defendant.

Liberty Mutual Insurance Company,

Third-Party Plaintiff,

Index# 590054/10

-against-

FILED

Morton Schneider,

Third party Defendant.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review
of this (these) motion(s):

PAPERS	NUMBERED
Notice of Motion, CJS affirm., exhibits.....	1
DP affd. in support of summary judgment, exhibits.....	2
MS affd.....	3
Reply affirm CJS.....	4

Hon. Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Defendant/third Party Plaintiff, Liberty Mutual Insurance Company ("LMIC")
moves for summary judgment dismissing the complaint and on its third party complaint
for specific performance (count 1) and damages (count 2). LMIC represents that its
demand to have Morton Schneider (sometimes "Schneider") deposit additional security
with it is alternative relief if this court should otherwise deny its motion for summary

judgment dismissing the complaint. Schneider, who is now self represented, has filed opposition to the motion¹. Issue has been joined on both the complaint in chief and the third party complaint. No Note of Issue has yet been filed. Summary judgment relief is, therefore, available; this motion will be decided on the merits (CPLR § 3212 [a]; Brill v. City of New York, 2 N.Y.3d 648 [2004]; Myung Chun v. North American Mortgage Co., 285 AD2d 42 [1st Dept 2001]).

Certain facts are undisputed. Schneider was appointed administrator of the estate of his mother, Gertrude Schneider, by order of the Hon. Renee Roth, Surrogate of New York County. In connection with such appointment, Schneider and LMIC entered into an indemnity agreement (indemnity agreement") by which Schneider obtained an administration bond from LMIC in the amount of \$825,000 ("bond"). Thereafter, Schneider made a claim against the bond as a result of learning that Marilyn Schneider, his sister, had looted the estate. LMIC denied the claim on the basis that the bond does not cover theft by a third party.

Schneider, in his capacity as estate administrator, subsequently brought this action claiming that LMIC has wrongfully refused to pay out on the bond.² The third-party action, commenced by LMIC, seeks specific performance of the indemnity agreement. It also seeks monetary damages, including LMIC's costs, expenses and legal fees incurred in connection with this action.

The bond is for \$825,000, names Morton Schneider as Principal, and is issued

¹By prior order Schneider's counsel was relieved.

²Although the complaint sets forth two causes of action, they both sound in breach of contract in denying "insurance" coverage.

for the security and benefit of persons now or hereafter interested in the estate of Gertrude Schneider. It also expressly provides:

“THE CONDITION OF THIS OBLIGATION IS SUCH, that if the above Principal shall faithfully discharge the trust reposed in him as Administrator of all and singular the goods, chattels and credits of Gertrude Schneider, deceased...and obey all lawful decrees and orders touching the administration of the assets committed to him, including but not limited to decrees or orders directing repayment of amounts allowed as advances on commissions and render a verified account of his administration whenever required to do so by the Court then this obligation shall be void; otherwise it shall remain in full force and effect. “

In connection with obtaining the bond, Schneider executed an indemnity agreement on March 7, 2005. Under the indemnity agreement Schneider agreed to:

“[3]To exonerate and indemnify [LMIC] from and against all claims, losses. Liability, damages of any type (including punitive), costs, fees, expenses, suits, orders, judgments or adjudications whatsoever, which [LMIC] may incur in connection with Bond...the defense or prosecution of any proceeding brought in connection with Bond...enforcement of the agreement contained herein...”

Schneider also agreed to:

“[5] to place [LMIC] in funds immediately upon demand the amount the [LMIC] deems necessary to protect itself from any liability, loss or expense, whether or not [LMIC] has made payment or posted a reserve..”

LMIC claims that the bond it provided was based upon the performance of Morton Schneider as administrator of the Estate, and not an insurance policy against the wrongful actions of any third party, even if those actions were deleterious to the estate of Gertrude Stein. LMIC also claims that after Schneider refused to withdraw his meritless action, it demanded that he post \$825,000 with LMIC the protect it from liability against Schneider’s own action. If the court does not otherwise grant LMIC summary judgment dismissing the complaint, LMIC seeks to have Schneider post

collateral in accordance with the terms of the indemnity agreement. LMIC also claims that under the indemnity agreement it is entitled to the legal fees and expenses that it incurred in connection with having to defend this action.

In opposition to the motion Schneider asserts that at all times he acted according to the advice of his attorneys. After he learned that his sister, Marilyn Schneider, had looted the estate, he was advised by his attorneys that the bond provided protection to the estate against the loss. Among other things, Schneider states that he was never advised by his attorneys that LMIC had a valid defense to his claim against the bond and/or that LMIC had filed a third party action against him personally. He further asserts that had his attorneys advised him correctly, he would have discontinued the action in chief.

Discussion

A movant seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case " (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing (See: Hindes v. Weisz, 303 A.D.2d

* 6]
459 [2nd Dept 2003]).

The underlying issues raised on this motion concern the provisions of the bond and the indemnity agreement. These documents are unambiguous contracts, and are to be interpreted in accordance with their plain meaning (WWW Assoc. v. Giancontieri, 77 NY2d 157 [1990]; Riverside south Planning Corp. v. CRP/Extell Riverside, LP, 60 AD3d 61 [1st dept. 2008]).

The bond by its terms is limited to the faithful performance of Morton Schneider in his capacity as Administrator of the Estate of Gertrude Stein. Thus, regardless of whether Marilyn Stein looted the estate or not, there is no right of recovery on the bond for her actions. Schneider's reliance on his attorneys, who he claims gave him advice to the contrary, is not a valid defense to this motion. The motion for summary judgment dismissing the complaint is, therefore, granted.

As a consequence of dismissing the complaint in chief, LMIC will not be seeking to enforce its alternative request for specific performance that Schneider post additional security. The first count in the third party complaint, is, therefore, dismissed.

Under the terms of the indemnity agreement, Schneider is obligated to pay LMIC reasonable attorneys fees in connection with this action. LMIC has provided sworn statements that through May 10, 2010 the amount of \$8,938.19 was expended as and for legal fees in connection with this matter. LMIC's attorney bills them at a discounted rate of \$190 per hour. LMIC seeks the amount already billed and an additional amounts as were necessary thereafter. Since May 10, 2010, LMIC has had to make the instant motion, which included several court appearances. Schneider has not objected to the reasonableness of the fees charged. His only argument is that these

7] .
fees would never have been incurred if his own attorneys had given him better advice. This argument, even if true, is not a defense as against LMIC's claim for fees..

The court finds that the amount of \$8,938.19 reflects reasonable compensation for legal fees incurred prior to May 10, 2010 and that an additional \$2,000 reflects reasonable compensation for the work that came thereafter. The court, therefore, grants LMIC summary judgment on its second count asserted in the third party complaint in the amount of \$10,938.19, plus statutory costs and disbursements.

Conclusion

In accordance herewith it is hereby:

ORDERED that Liberty Mutual Insurance Company's motion for summary judgment dismissing the complaint filed under index # 117395/09 is granted and the complaint is hereby dismissed, and it is further

ORDERED that the clerk is directed to enter a judgment in favor of defendant, Liberty Mutual Insurance Company, and against plaintiff, Morton Schneider, as Administrator for the Estate of Gertrude Stein, dismissing the complaint with prejudice and it is further

ORDERED that Liberty Mutual Insurance Company's motion for summary judgment on the third party complaint filed under index #590054/10 is granted on its second count, and it is further

ORDERED that the clerk is directed to enter a money judgment in favor of third-party plaintiff, Liberty Mutual Insurance Company, and against third-party defendant, Morton Schneider, on the second count of the third-party complaint in the amount of \$10,938.19 plus statutory costs and disbursements and it is further

ORDERED that the first count of the third party complaint filed under index #590054/10 is hereby dismissed, and it is further

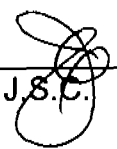
ORDERED that the clerk is directed to enter a judgment in favor of third-party defendant, Morton Schneider and against third-party plaintiff, Liberty Mutual Insurance Company, dismissing the first count of the third-party complaint, and it is further

ORDERED that any requested relief not expressly granted herein is denied, and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, NY
January 5, 2011

So Ordered:



J.G. J.S.C.

FILED
JAN 06 2011
NEW YORK
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