

Quality Bldg. Constr., Inc. v Delos Ins. Co.

2011 NY Slip Op 30888(U)

April 5, 2011

Supreme Court, New York County

Docket Number: 116551/07

Judge: Joan A. Madden

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

HON. JOAN A. MADDEN

PRESENT: _____ J.S.C.

PART 11

Index Number : 116551/2007
~~QUALITY BUILDING CONSTRUCTION,~~
~~DESIGNER TOWERS CONDOMINIUM INC.~~
 vs.
 DELOS INSURANCE
 SEQUENCE NUMBER : 004
 SUMMARY JUDGMENT

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 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

Upon the foregoing papers, It is ordered that this motion

And cross-motion are determined in accordance with the annexed decision and order.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1418).

Dated: April 5, 2011

[Signature]
HON. JOAN A. MADDEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 11

-----X
QUALITY BUILDING CONSTRUCTION, INC.,

INDEX NO. 116551/07

Plaintiff,

-against-

DELOS INSURANCE COMPANY f/k/a SIRIUS
AMERICAN INSURANCE COMPANY,

Defendant.
-----X

JOAN A. MADDEN, J.:

In this declaratory judgment action, plaintiff Quality Building Construction, Inc. (QBC) moves, pursuant to CPLR 3212, for summary judgment on its claims declaring that defendant Delos Insurance Company f/k/a Sirius American Insurance Company (Delos) was obligated to defend and indemnify QBC for all claims asserted in the underlying lawsuit, titled *Miguel Angel Diaz Galindo v. Dorchester Tower Condominium*, Index No. 20556/05 (Bronx County) (the underlying action) and awarding QBC its attorneys fees in this declaratory judgment action and in a prior declaratory judgment action (the first declaratory judgment action or the Nassau County action) instituted by Delos against QBC.¹ Defendant Delos opposes the motion and cross moves, pursuant to CPLR 3212, for summary judgment dismissing QBC's claims against it.

¹On February 25, 2011, this court issued an order directing amendment of the caption to reflect that QBC is a plaintiff against Delos as the only remaining defendant. The caption as it appears above is the amended and current caption of the action. The court's order also granted the motion by the original plaintiff, Board of Managers of the Dorchester Towers Condominium, for permission to discontinue the main action against defendants, to dismiss the complaint, and to sever QBC's cross claims against Delos and permit QBC to proceed as a plaintiff against Delos as defendant. As a result, the original claims asserted by Dorchester have been dismissed, and only QBC's claims against Delos remain.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

BACKGROUND

A. The Underlying Action

Miguel Angel Diaz Galindo (Galindo), an employee of the original third-party defendant Vanlo, Inc. (Vanlo), alleged that on July 5, 2005, he was injured while working on an exterior construction project at the Dorchester Towers Condominium (the Dorchester or the premises). According to Galindo, Ogden Cap Properties LLC (Ogden), contracted with QBC to perform certain exterior work at the premises and QBC, as general contractor, entered into a subcontract with Vanlo to perform the exterior work (Eisenstein Aff., Ex. A). Galindo commenced a personal injury action naming the Dorchester, QBC and others as defendants.

It is undisputed that Delos issued a commercial general liability policy to QBC for the period June 1, 2005 through June 1, 2006. The policy included an exclusion of coverage for injuries resulting from, or caused by, the work of a subcontractor, including injuries to employees of the subcontractor (SAIC 022 [12/03] endorsement). On July 26, 2005, QBC provided Delos with timely notice of Galindo's accident. Delos, through its claims administrator, submitted the Galindo claim to Utica First Insurance Co. (Utica), the company that insured Vanlo, because, pursuant to the contract between QBC and Vanlo, Vanlo was required to indemnify QBC for any losses arising out of the work at the premises. Utica disclaimed coverage based on an exclusion in its policy and, on October 3, 2005, Delos's claims administrator disclaimed coverage to QBC. However, pursuant to the terms of the policy, Delos appointed counsel to represent QBC in the underlying action.

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B. The First Declaratory Judgment Action

On January 6, 2006, Delos instituted a declaratory judgment action against QBC in Supreme Court, Nassau County, seeking a judgment that it was not required to defend and indemnify QBC in the underlying action. On September 6, 2006, QBC filed a third-party complaint against Utica seeking adjudication of QBC's rights to coverage under the Utica policy. Utica filed a motion for summary judgment to dismiss the third-party complaint which was granted on March 8, 2007. The Dorchester then successfully sought to intervene in the Nassau County action to assert its own claim for coverage under the Delos policy. However, on November 19, 2007, the Nassau County Court discontinued the first declaratory judgment action subject to Delos right to commence a new action (Staley Aff., Ex. A).

C. The Instant Declaratory Judgment Action

Thereafter, on December 13, 2007, the Dorchester commenced this declaratory judgment action against Delos and QBC to adjudicate its rights to coverage under the Delos policy. QBC appeared and asserted cross claims against its co-defendant Delos, claiming that it was entitled to a defense and indemnification in the underlying action. Delos did not seek affirmative relief against QBC in the instant declaratory judgment action.

D. Settlement in the Underlying Action

The underlying action was settled on June 3, 2010, for \$12 million with Delos agreeing to contribute \$500,000 on behalf of QBC and the Dorchester.

CONTENTIONS

In support of the motion for summary judgment, QBC argues that Delos is liable for payment of QBC's legal fees in the instant action and the first declaratory judgment action, because Delos put QBC in a defensive posture by instituting the initial declaratory judgment action, and because it has admitted its coverage obligations to QBC (*see Mighty Midgets v Centennial Insurance Co.*, 47 NY2d 12, 21 [1979]). QBC claims that the instant action is a mere continuation of the first declaratory judgment action and that Delos is liable for QBC's fees in the instant action, because Delos put the question of its obligations in issue on in the first declaratory judgment action, thereby "setting the boulder in motion" (Eisenstein Aff., p. 4, n. 3).

Alternatively, QBC argues that it is entitled to reimbursement for its attorneys' fees because Delos's disclaimer of coverage to QBC was untimely; Delos failed to timely reserve its rights under the policy when it assumed QBC's defense in the underlying action; and the SAIC 022 (12/03) endorsement is ineffective, because Delos did not advise QBC that the endorsement was a material change to the policy. QBC also claims that the endorsement is ineffective because the coverage it provides is illusory.

In opposition to QBC's motion for summary judgment and in support of Delos's cross motion for summary judgment dismissing QBC's cross-claims, Delos contends that the only remaining issue is whether QBC is entitled to attorneys' fees it incurred after November 19, 2007, the date that the first declaratory judgment action was discontinued. In addition, Delos states that all claims for indemnification have been rendered moot

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because Delos, in part, indemnified QBC by payment of \$500,000 on QBC's behalf, in the underlying action.²

As to the claim for attorneys' fees in the instant declaratory judgment action, Delos argues that, pursuant to *Mighty Midgets v Centennial Ins. Co.* (47 NY2d at 21), an insured cannot recover legal fees incurred in bringing an affirmative action against an insurer to settle its rights under the policy.

DISCUSSION

Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d at 562).

² The parties agree (Staley Aff., p. 3; Eisenstein Reply aff., para 12) that the issues related to Delos's obligation to indemnify QBC have been rendered moot by Delos's payment of \$500,000 on QBC's behalf in the underlying law suit. Accordingly, the court will not address the indemnification issues that the parties advanced "out of an abundance of caution" (Eisenstein Aff, para. 12).

In this case, QBC has made a prima facie showing that it is entitled to judgment as a matter of law on the portion of its claim for attorneys' fees that relates to the first declaratory judgment action.

“It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 [2004][citations omitted]). However, an insured who is placed in a defensive posture by a declaratory judgment action that the insurer institutes in an effort to free itself from policy obligations, and who prevails on the merits, may recover the attorneys' fees it incurred in defending against the insurer's action (*Mighty Midgets, Inc. v Centennial Ins. Co.*, 47 NY2d at 21). The reasoning underlying *Mighty Midgets* is that the “insurer's duty to defend an insured extends to any action arising out of the occurrence, including a defense against the insurer's declaratory judgment action (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d at 597-598).

Here, QBC has submitted invoices from its attorney which demonstrate that from March 8, 2006 through December 3, 2007, QBC incurred legal fees in its defense against Delos's attempt to free itself from its obligations under the subject policy (Pederson Aff., Ex. C). QBC has also submitted evidence to demonstrate that Delos voluntarily discontinued the first declaratory judgment action (Staley Aff., Ex. A) and that Delos contributed \$500,000 to the settlement of the underlying action on behalf of QBC without any reservation of rights with respect to its coverage position (Pederson Aff., Ex. B). Accordingly, pursuant to the *Mighty Midgets* rule, QBC is entitled to reimbursement for

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the legal fees it expended from March 8, 2006 through December 3, 2007 in defense of the declaratory judgment action instituted by Delos (*see also U.S. Underwriters Ins. Co. v Mesiftah Eitz Chaim of Bobov*, 210 AD2d 218 [2d Dept 1994]).

However, QBC has failed to establish a prima facie case regarding its right to recover legal fees in the instant action. In this declaratory judgment action, commenced by the Dorchester, QBC is seeking affirmative relief in the form of a declaration that Delos, it's co-defendant, is obligated to defend and indemnify it in the underlying lawsuit. In *New York Univ. v Continental Ins. Co.* (87 NY2d 308, 324 [1995]), the Court of Appeals reiterated the *Mighty Midgets* rule stating, "that an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy" (*see also Colon v Nationwide Mut. Fire Ins. Co.*, 211 AD2d 579 [1st Dept 1995]) In the instant case, Delos, not QBC, is in a defensive posture and, even though Delos could have, it did not file a cross claim against QBC in this action.

QBC's reliance on *U.S. Underwriters Ins. Co. v Mesiftah Eitz Chaim of Bobov* (210 A.D.2d 218, *supra*) for the proposition that it is entitled to an award of attorney's fees in the instant action is misplaced. In that case, plaintiff insurer sought a declaratory judgment in order to free itself from its policy obligations to the insured in an underlying personal injury action. The insurer then abandoned the prosecution of the declaratory judgment action, admitted coverage and settled the underlying action on behalf of the insured. There, the court found that the insured was entitled to an award of the costs and attorneys' fees it incurred in that declaratory judgment action because the insured was cast in a defensive posture as a result of the insurer's attempt to avoid its policy obligations.

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In the instant action, QBC was not cast in a defensive posture by legal steps that Delos took in order to free itself from its policy obligations. Rather, this is a case where QBC as an original defendant, and now as plaintiff, affirmatively cross-claimed against the insurer for a declaratory judgment to settle its rights. Therefore, QBC may not recover the legal fees it incurred in the instant declaratory judgment action.

Accordingly, it is

ORDERED that the motion by plaintiff Quality Building Construction, Inc. for summary judgment on its claims against defendant Delos Insurance Company f/k/a Sirius American Insurance Company is granted in part and denied in part; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff Quality Building Construction, Inc. shall recover from defendant Delos Insurance Company f/k/a Sirius American Insurance Company, the legal fees and costs incurred from March 8, 2006 through December 3, 2007 in its defense of the first declaratory judgment action; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff Quality Building Construction Inc. is not entitled to recover from defendant Delos Insurance Company f/k/a Sirius American Insurance Company, the legal fees and costs incurred in the instant declaratory judgment action; and it is further

ORDERED that the cross-motion by defendant Delos Insurance Company f/k/a Sirius American Insurance Company for summary judgment dismissing Quality Building Construction Inc.'s claims against it is granted only to the extent of dismissing the portion of the claims seeking reimbursement for legal fees and costs incurred in the

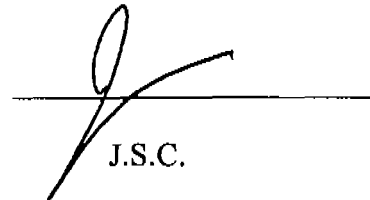
instant declaratory judgment action, and the cross-motion is otherwise denied; and it is further

ORDERED that the issue as to the amount of legal fees and costs to which Quality Building Construction, Inc. is entitled, shall be determined at trial; and it is further

ORDERED that plaintiff Quality Building Construction, Inc. and defendant Delos Insurance Company f/k/a Sirius American Insurance Company are directed to appear for a pre-trial conference on May 5, 2011 at 4:00 p.m., in Part 11, Room 351 60 Centre Street.

DATED: April 5, 2011

ENTER:


J.S.C.

UNFILED JUDGMENT

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