

Everest Reinsurance Co. v THI Props., Ltd.
2011 NY Slip Op 31082(U)
April 27, 2011
Sup Ct, NY County
Docket Number: 112373/09
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

PART 55

Index Number : 112373/2009

EVEREST REINSURANCE

vs

THI PROPERTIES

Sequence Number : 007

OTHER RELIEFS

INDEX NO. _____

MOTION DATE 4/18/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-8

9

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the a nered memorandum decision, order, declaration and judgment.

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).

Dated: 4/27/11

[Signature]
JANE S. SOLOMON 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 55

-----x
EVEREST REINSURANCE COMPANY a/s/o
MASCHA SEIDEN,

Plaintiff,

Index No. 112373/09

-against-

DECISION, ORDER,
DECLARATION and
JUDGMENT

THI PROPERTIES, LTD, KESLER MANAGEMENT,
INC., K.T. SEUNG, P.E., KINGDOM
ASSOCIATES, INC., and KHC EQUIPMENT, INC.,

Defendants.

-----x
THI PROPERTIES, LTD,

Index No. 590432/10

Third Party Plaintiff,

-against-

UNFILED JUDGMENT

HARLEYSVILLE WORCESTER INSURANCE COMPANY

Third Party Defendant

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
141B).

-----x
SOLOMON, J.:

This action involves an insurance coverage dispute arising in connection with a property damage claim. Defendant and third-party plaintiff THI Properties, LTD (THI) owned real property on West 74th Street in Manhattan. Defendant Kingdom Associates, Inc. was hired in December 2008 to perform excavation on the property. The adjoining property, owned by Mascha Seiden, allegedly was damaged by the excavation. Seiden's insurance company, plaintiff Everest Reinsurance Company (Everest Re), paid money to repair and stabilize Seiden's property, and sues here to recover that money.

THI commenced a third party action against movant Harleysville Worcester Insurance Company (Harleysville), which insured Kingdom Associates. THI seeks a declaration that it is entitled to coverage from Harleysville as an additional insured on the Kingdom Associates policy.

In this motion, Harleysville asks for summary judgment in its favor declaring that THI is not an additional insured on the policy it issued to Kingdom Associates, or, in the alternative, that the third party action be severed from the main action. THI cross-moves for summary judgment and a declaration that it is an additional insured on the Kingdom Associates policy. For the reasons below, Harleysville's is granted, and the cross-motion is denied.

Harleysville issued to Kingdom Associates a commercial general liability policy (Primary Policy, Notice of Motion, Ex. B) and excess policy (Excess Policy, Notice of Motion, Ex. C) (together referred to as the Policies). The Excess Policy follows form to the Primary Policy, which means that it provides coverage where the claim is covered by the Primary Policy (Affidavit of Lee Costelloe, Notice of Motion, Ex. A, ¶ 3). The Primary Policy has the following endorsement with respect to who is an additional insured:

[*4]

COMMERCIAL GENERAL LIABILITY COVERAGE

Section II - Who Is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy ...
(Policy, CG 20 33 07 04)

Harleysville maintains that there is no written contract or agreement between THI and its insured providing that Kingdom Associates will add THI as an insured on its policy.

In its cross-motion, THI contends that it had a verbal understanding with Kingdom Associates that THI would be an additional insured on its policy. THI submits a copy of a certificate of insurance provided by Kingdom Associates' insurance broker, dated December 18, 2008 (Certificate, Aff. Of Spencer Ting, Ex. 2). The Certificate identifies Harleysville as the insurer for Kingdom Associates, and THI as the certificate holder. It further states that "the Certificate Holder is an additional insured when required under written contract or agreement".

Spencer Ting, THI's vice president, alleges that he demanded that Kingdom Associates name THI as an additional insured on its insurance policy before he would accept Kingdom Associates' proposal to do the work (Ting Aff., ¶ 5). He signed the proposal on December 17, 2008, a day before the Certificate

issued (*id.*, Ex. 1). Six days later, on December 23, 2008, Kingdom Associates sent Ting an email that reads "Hi Spencer, attached please find requested insurance certificates" (Ting Aff., Ex. 3).

Everest Re sued THI and the other defendants in August 2009. By a letter dated October 7, 2009, THI's attorney demanded coverage as an additional insured under the Policies; Harleysville sent a letter declining coverage on January 29, 2010, stating, *inter alia*, that THI was not its insured. THI's third party complaint seeks a declaration that it is entitled to a defense and indemnification under the Policies, and it demands reimbursement of defense expenses (Third Party Complaint, Notice of Motion, Ex D).

THI argues that the Certificate and the December 23, 2008 email from Kingdom Associates are writings memorializing an agreement to name THI as an additional insured on the Primary Policy. This argument fails because these documents contain no language obligating Kingdom Associates to name THI as an additional insured on its policy. Indeed, the Certificate provides a warning that an unwritten understanding or verbal agreement will not suffice. The Certificate also includes a specific disclaimer that it was issued as a matter of information only, and does not amend, extend or alter coverage in the referenced policy; therefore, the Certificate does not create

[* 6]

coverage where the unambiguous language of the policy provides none (see, *American Motorist Ins. Co. v Superior Acoustics, Inc.*, 277 AD2d 97 [1st Dept 2000]). Contrary to THI's argument, Section II of the Primary Policy unambiguously provides that the agreement or contract requiring Kingdom Associates to add a person as an additional insured must be in writing (*Erin Constr. & Dev. Co. v Gulf Ins. Co.*, 2008 NY Slip Op 32046U [Sup. Ct. NY County 2008]). Since THI was not an additional insured on the Primary Policy, there is no merit to its argument that coverage was created by Harleystown's alleged failure to issue a speedy disclaimer after THI tendered its defense. Accordingly, it hereby is

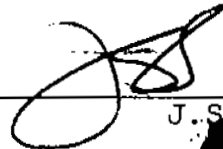
ORDERED that Harleystown's motion for summary judgment is granted, and THI's cross-motion is denied; and it further is

DECLARED and ADJUDGED that Harleystown is not obligated to defend or indemnify THI under the Policy with respect to the claims by plaintiff or co-defendants in the main action herein (New York County Index Number 112373/2009); and it further is

ORDERED that the third party complaint is severed and dismissed, with costs and disbursements to Harleysville as taxed by the Clerk of the Court, who shall enter judgment accordingly.

Dated: April 27, 2011

ENTER:



J. S. C.
JANE S. SOLOMON

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