

**Eliou & Scopelitis Steel Fabrication, Inc. v
Scottsdale Ins. Co.**

2011 NY Slip Op 31372(U)

April 11, 2011

Sup Ct, NY County

Docket Number: 103456/10

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ELIOU & SCOPELITIS STEEL FABRICATION, INC.,

INDEX NO. 103456/10

Plaintiff,

MOTION DATE _____

- against -

MOTION SEQ. NO. 001

SCOTTSDALE INSURANCE COMPANY,

MOTION CAL. NO. _____

Defendant.

The following papers, numbered 1 to 4 were read on this motion by defendant to dismiss pursuant to Section 3211 of the Civil Practice Law and Rules.

FILED

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits (Memo)	<u>3</u>
Replying Affidavits (Reply Memo)	<u>4</u>

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NEW YORK
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Cross-Motion: Yes No

This is an action by plaintiff Eliou & Scopelitis Steel Fabrication, Inc. ("Eliou") against Scottsdale Insurance Company ("Scottsdale") for declaratory judgment, *inter alia*, requiring Scottsdale to indemnify and defend Eliou as an additional insured under a liability insurance policy issued to Ebenezer Construction Inc. ("Ebenezer"), in connection with an underlying personal injury action. Before this Court is a pre-answer motion by Scottsdale to dismiss the complaint against it pursuant to CPLR § 3211(a)(1) and (a)(7).

Background

Ebenezer entered into a contract dated April 22, 2005, with Alisa Construction, LLC ("Alisa"), the general contractor, as a subcontractor to furnish materials and perform structural steel erection and pre-cast plank installation work on a building project located at 353 4th Avenue in Brooklyn, New York ("construction site"). Ebenezer entered into purchase orders with

Eliou to furnish steel to be used by Ebenezer at the construction site on September 16, 2005 and September 20, 2005.

On September 29, 2005, Wilfredo Lorenzo, an employee of Ebenezer, was injured at the construction site. Wilfredo Lorenzo ("the underlying plaintiff") commenced an action against Alisa and Eliou, entitled *Wilfredo Lorenzo v 343 LLC, Alisa Construction Co. Inc., and Eliou Steel Fabrication, Inc.*,¹ Index No. 24436/05 pending in the Supreme Court, Bronx County.

Prior to the underlying plaintiff's injuries, Scottsdale issued a commercial general liability policy to Ebenezer, policy number CLS1063812, in effect for the policy period October 8, 2004 to October 8, 2005.

On October 27, 2005, after receiving notice of the underlying plaintiff's accident at the construction site, Illinois Union Insurance Co., Eliou's general liability insurer, demanded that Scottsdale assume the defense and indemnification of Eliou and accept tender regarding these claims pursuant to an agreement between Ebenezer and Eliou. The agreement between Ebenezer and Eliou was entered into on December 16, 2004, and it allegedly required Ebenezer to indemnify and hold harmless Eliou as well as to name Eliou as an additional insured under its liability insurance policy. Attached to this correspondence was a certificate of insurance, naming Eliou as the certificate holder and an additional insured under the Scottsdale policy, as well as the agreement between Eliou and Ebenezer.

In June 2006, Eliou commenced a third-party action against Ebenezer, among others, entitled *Eliou Steel Fabrication, Inc. v Ebenezer Construction, Inc., Siegel Bros. Supply Co., Inc. and Shaw Belting Co., Inc.*, Index No. 85331/06 in the Supreme Court, Bronx County. In its complaint Eliou asserts causes of action against Ebenezer for, *inter alia*, breach of contract, negligence in failing to properly train its employees, and indemnification and contribution.

¹ Eliou alleges in its complaint that Eliou & Scopelliti Steel Fabrication, Inc. is an a/k/a of Eliou Steel Fabrication, Inc. Eliou & Scopelliti Steel Fabrication, Inc. commenced the herein action.

On March 16, 2010, Eliou commenced the herein action against Scottsdale seeking declaratory judgment, *inter alia*, that Eliou is an additional insured on the insurance policy issued by Scottsdale to Ebenezer, the policy was in effect on the date of the underlying incident, and that under said policy Scottsdale is obligated to indemnify and defend Eliou for damages and loss sustained by the underlying plaintiff, including legal fees, expenses and costs incurred in the defense of the underlying litigation.

Scottsdale now moves to dismiss the complaint against it, pursuant to CPLR § 3211 (a)(1) and (a)(7), based on documentary evidence and Eliou's failure to state a cause of action.

In support of the motion Scottsdale submits, *inter alia*, a copy of the pleadings, an affirmation of counsel, two purchase orders between Eliou and Ebenezer, the indemnification agreement between Eliou and Ebenezer dated December 16, 2004, and the commercial general liability policy issued to Ebenezer, including the Blanket Additional Insured Endorsement provision. In opposition, Eliou submits, *inter alia*, an affirmation of counsel, the indemnification agreement between Eliou and Ebenezer and the Blanket Additional Insured Endorsement provision of the insurance policy.

In support of its motion, Scottsdale relies upon the Blanket Additional Insured Endorsement provision in the policy, which provides as follows:

"who is an insured (section II) is amended to include as an insured any person or organization (called additional insured) whom you are required to add as an additional insured on this policy under a written contract, agreement or permit which must be: a. currently in effect or becoming effective during the term of the policy; b. executed prior to the "bodily injury," "property damage," "personal injury," or "advertising injury." The insurance provided to this additional insured is limited as follows: 1. That person or organization is an additional insured only with respect to liability arising out of: a. premises you own, rent, lease or occupy; or b. your ongoing operations performed for that additional insured as specified in the written contract, agreement or permit . . . 3. Coverage is not provided for "bodily injury," "property damage," "personal injury" or "advertising injury" arising out of the sole negligence of the additional insured" (motion to dismiss exhibit H).

Scottsdale maintains that Eliou cannot meet the requirements to be an additional insured under the policy because 1) a contract was not in effect at the time of the underlying plaintiff's accident that required Ebenezer to name Eliou as an additional insured on its policy; and 2) Ebenezer was not performing work for Eliou at the time of the underlying action. Moreover, Scottsdale argues that the underlying incident arose solely out of Eliou's negligence. Accordingly, Scottsdale argues that Eliou is not an additional insured under the policy requiring Scottsdale to defend or indemnify Eliou in the underlying litigation.

Eliou, in opposition, maintains that it is an additional insured under Scottsdale's insurance policy because an indemnification agreement exists, executed on December 16, 2004, prior to the date of the underlying incident, requiring Ebenezer to name Eliou as an additional insured. Eliou contends that Eliou's work in delivering steel to the project site arose solely out of an obligation between Eliou and Ebenezer, thus it arises out of ongoing operations between the parties. Lastly, Eliou maintains that at this stage in the litigation it remains unclear whether the underlying injury occurred as a result of Eliou's sole negligence, as discovery has not been completed in the underlying litigation.

CPLR § 3211 Motion to Dismiss Standards

CPLR 3211 [a], provides that:

"a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

- [1] A defense is founded on documentary evidence; . . .
- [7] The pleading fails to state a cause of action; . . ."

When determining a CPLR § 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]; see *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). "We also accord plaintiffs the benefit of every

possible favorable inference" (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff*, 96 NY2d at 414).

"In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995]; see *Juliano v McEntee*, 150 AD2d 524 [2d Dept 1989]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1987]). A CPLR § 3211(a)(1) motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Ladenburg Thalmann & Co. v Tim's Amusements*, 275 AD2d 243, 246 [1st Dept 2000]).

Upon a CPLR § 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). In order to defeat a pre-answer motion to dismiss pursuant to CPLR § 3211, the opposing party need only assert facts which fit within any cognizable legal theory (see *Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]).

Discussion

As this is a pre-answer motion to dismiss, it must be taken as true that Scottsdale issued a commercial general liability insurance policy to Ebenezer, which was in effect for the period of October 8, 2004 to October 8, 2005, which contained a blanket additional insured endorsement provision. It must also be taken as true that at the time the underlying plaintiff was injured he was employed by Ebenezer, and that prior to the incident, Ebenezer entered into a contract with Eliou on December 16, 2004, which required Ebenezer to indemnify and name

Eliou as an additional insured on its insurance policy.

Scottsdale has refused to defend, indemnify, and insure Eliou with regards to the underlying plaintiff's claims because it maintains that Eliou is not an additional insured under the policy. However, Eliou's claims survive a motion to dismiss for failure to state a cause of action under CPLR § 3211(a)(7), because the factual allegations in the complaint raise cognizable legal theories (*see Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]).

Additionally, Scottsdale's submissions do not establish a defense founded upon documentary evidence because they fail to resolve all factual issues and dispose of Eliou's claims (*see Barghout v Dweck*, 244 AD2d 190 [1st Dept 1997]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1987]). Scottsdale failed to conclusively show that Eliou does not qualify as an additional insured under the policy. Scottsdale failed to show that the indemnification agreement between Eliou and Ebenezer, signed prior to the underlying plaintiff's injuries, does not meet the criteria as set forth in the additional insured provision. Scottsdale also failed to show the accident occurred solely as a result of Eliou's negligence. Questions of fact remain as to the applicability of the indemnification agreement between Eliou and Ebenezer, as well as the respective parties' negligence regarding the underlying plaintiff's injuries. Accordingly, "at this pre-discovery stage of the present litigation, these submissions do not meet the CPLR 3211(a)(1) requirement of conclusively establishing [a] defense as a matter of law" (*IMO Indus v Anderson Kill & Olick*, 267 AD2d 10, 11 [1st Dept 1999]).

The Court has considered Scottsdale's remaining arguments and finds them to be without merit.

Conclusion

For these reasons and upon the foregoing papers, it is,

ORDERED that Scottsdale's motion to dismiss the plaintiff's complaint pursuant to CPLR § 3211(a)(1) and (7) is denied; and it is further,

ORDERED that the parties are to appear for a preliminary conference in Part 7, 60 Centre Street, Room 341 on June 8, 2011 at 11:00 a.m.; and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all parties.

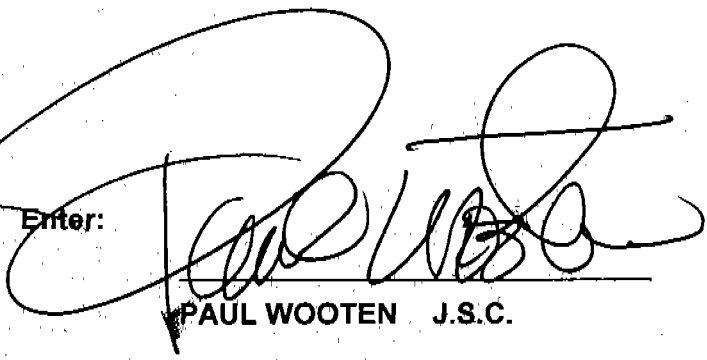
This constitutes the Decision and Order of the Court.

Dated: April 11, 2011

FILED

Enter:

MAY 25 2011



PAUL WOOTEN J.S.C.

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