

City of New York v Zurich Am. Ins. Co.

2011 NY Slip Op 31670(U)

June 17, 2011

Supreme Court, New York County

Docket Number: 401165/2010

Judge: Barbara Jaffe

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: JAFFE BARBARA JAFFE J.S.C.

PART 5

Index Number : 401165/2010

CITY OF NEW YORK

vs
ZURICH AMERICAN INS.,

Sequence Number : 003

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

CAL #17

_____ were read on this motion to/for dismiss

PAPERS NUMBERED

1
2
3

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

JUN 22 2011

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 6/17/11
JUN 17 2011

BJ
BARBARA JAFFE 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 5

-----X
THE CITY OF NEW YORK,

Plaintiff,

-against-

ZURICH AMERICAN INSURANCE CO. and BOVIS LEND
LEASE LMB, INC.,

Defendants.
-----X

BARBARA JAFFE, J.:

For City:
Sabita Krishnan, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St., Rm. 20-83
New York, NY 10007
212-442-0588

Index No. 401165/10

Mot. Arg.: 4/12/11
Mot. Seq. No.: 003
Cal. No.: 17

DECISION AND ORDER

FILED

JUN 22 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

For Bovis:
Stephen M. Bigham, Esq.
Newman Myers et al.
14 Wall St., 22nd Fl.
New York, NY 10005
212-619-4350

By notice of motion dated January 11, 2011, defendant Bovis Lend Lease LMB, Inc. (Bovis) moves pursuant to CPLR 3211(a)(4) for an order dismissing plaintiff's complaint against it on the ground that there is another action pending between the parties for the same relief as sought here. Plaintiff opposes the motion.

I. BACKGROUND

On September 20, 2007, Roxanne Bailey commenced an action in this court against City and Bovis, along with other defendants, for injuries she sustained after she tripped and fell on Lexington Avenue near 85th Street in Manhattan (Bailey action). (Affirmation of Stephen M. Bigham, Esq., dated Jan. 11, 2011 [Bigham Aff.], Exh. C). City and Bovis served answers in that action in which they asserted claims for contribution and indemnity against each other. (*Id.*,

Exhs. D, E).

On or about May 4, 2010, City filed the instant action against defendant Zurich American Insurance Co. (Zurich), Bovis' insurer, seeking a judgment declaring that Zurich had a duty to defend City in the Bailey action. (*Id.*).

On or about December 13, 2010, City served a supplemental summons and complaint adding Bovis as defendant in this action, in which it asserts a claim against Bovis for breach of its obligations as follows: "in the event that this Court issues a determination that Zurich has no duty to defend the City in the Bailey action, then Bovis will have breached its obligations under the Highway Rules to procure proper insurance coverage for the City from liability arising out of Bovis's work pursuant to the Permit," and seeks damages in an amount "no less than the cost to the City of defending itself in the Bailey Action and/or the cost to the City of paying any judgment rendered against it in the Bailey Action." (*Id.*, Exh. A).

By decision and order dated February 15, 2011, I granted Zurich's motion for summary judgment and declared that it had no duty to defend City in the Bailey action, finding that the insurance policy issued by Zurich to Bovis did not name City as an additional insured and that City did not qualify as an additional insured under it.

II. CONTENTIONS

Bovis argues that City's claims in this action are the same claims raised in the Bailey action and that the claims here are merely a particularization of City's cross claims for defense and indemnity in the Bailey action, that City is seeking the same relief from Bovis in both actions, and that dismissal of this action would avoid the risk of inconsistent results. (Bigham Aff.).

City argues that its claim against Bovis here, based on Bovis's breach of its obligations differs from the claims for indemnity and contribution it asserted in the Bailey action in which it seeks to have liability apportioned among all of the defendants for any negligence leading to Bailey's injuries, and observes that a cause of action based on a failure to procure insurance is separate and distinct from a claim based on an obligation to indemnify another. It also contends that extensive discovery is required in the Bailey action, while its claim here may be resolved quickly. (Affirmation of Sabita Krishnan, ACC, dated Feb. 22, 2010).

In reply, Bovis maintains that both claims arise from its alleged breach of its obligations to procure insurance, even if the theories of liability differ. (Reply Affirmation, dated Feb. 25, 2011).

III. ANALYSIS

Pursuant to CPLR 3211(a)(4), an action may be dismissed on the ground that there is another action pending between the same parties for the same cause of action. In seeking a dismissal pursuant to CPLR 3211(a)(4), the movant must show that there is a sufficient identity between both the parties and the claims or that "both suits arise out of the same subject matter or series of alleged wrongs." (*White Light Prods., Inc. v On the Scene Prods., Inc.*, 231 AD2d 90 [1st Dept 1997]). The relief sought must also be the same or substantially the same in both actions. (*Id.*). If the claims arise from the same wrongs and seek the same relief, it is irrelevant if different legal theories are pleaded. (*Cherico, Cherico & Assocs. v Midollo*, 67 AD3d 622 [2d Dept 2009]; *Matter of Schaller v Vacco*, 241 AD2d 663 [3d Dept 1997]).

Here, Bovis and City are parties to both actions and the claims in both arise from Bailey's accident and the alleged negligence of the defendants named in the Bailey action. The gravamen

of City's cross claim in the Bailey action is that Bovis had a contractual duty to indemnify it while here it alleges that Bovis breached its contractual obligation to obtain insurance which would require the insurer to indemnify and defend City. As both claims arise from Bovis's contractual obligation to City, they arise from the same actionable wrong. (*See Matter of Schaller*, 241 AD2d at 663 [dismissing action as, although legal theories in two actions differed, pleadings were based on same actionable wrong and sought same relief]).

Moreover, City does not seek any damages here that are independent from those sought in the Bailey action as its alleged damages are the costs of defending itself in the Bailey action or of any judgment rendered in the Bailey action. (*See eg Alpert v Alpert*, 303 AD2d 433 [2d Dept 2005] [dismissing action seeking declaration that defendant was obligated to indemnify plaintiff in another action as relief sought was substantially same as that sought in cross claim in other action]).

As Bovis has thus established that there is sufficient identity between both the parties and claims in the two actions, dismissal of the instant action is warranted.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Bovis Lend Lease LMB, Inc.'s motion to dismiss is granted and the complaint is hereby dismissed.

ENTER:


Barbara Jaffe, JSC

FILED
BARBARA JAFFE
J.S.C.

JUN 22 2011

DATED: June 17, 2011
New York, New York

JUN 17 2011

4

NEW YORK
COUNTY CLERK'S OFFICE