

Mentor Dev. Corp. v Mt. Hawley Ins. Co.

2011 NY Slip Op 33809(U)

August 3, 2011

Sup Ct, Richmond County

Docket Number: 102111/10

Judge: John A. Fusco

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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**MENTOR DEVELOPMENT CORP. and
PRESIDO CONSTRUCTION CORP.,**

DCM Part 4

Plaintiffs,

Present:

-against-

HON. JOHN A. FUSCO

DECISION AND ORDER

**MT. HAWLEY INSURANCE COMPANY,
ATLANTIC CASUALTY INSURANCE COMPANY
and ANTHONY VISCUSO and LANCE VISCUSO
BROKERAGE, INC.**

Index No. 102111/10

Motion No. 128-10

Defendants.

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The following papers numbered 1 to 3 were marked fully submitted on the 13th day of May, 2011.

	Papers Numbered
Notice of Motion of Defendant Atlantic Casualty Insurance Company (Affirmation, Affidavit, Memorandum of Law in Support).....	1
Affirmation, Affidavit in Opposition.....	2
Affirmation of Robert W. Lewis in Further Support of Atlantic Casualty's Motion to Dismiss (Affidavit of R. Scott Bricker, Memorandum of Law in Further Support of Defendant Atlantic Casualty's Motion to Dismiss and in Reply to Plaintiffs' Opposition).....	3

Upon the foregoing papers, the motion of defendant Atlantic Casualty Insurance Company (hereinafter "Atlantic") for an order dismissing the complaint and all cross claims asserted against it is granted.

This matter originates from a construction site accident which occurred on June 12, 2007 on premises known as 2955 Veterans Road, Staten Island, New York. At that time, an iron worker by the name of Safdar Ally claims to have sustained extensive personal injuries after falling backwards from a height of ten to twelve feet while bolting up a steel beam for his employer, Quality Fab, **Inc.**

(hereinafter “Quality Fab”; emphasis added), a fencing subcontractor (*see* Atlantic’s Exhibit B, para 21). It is undisputed that Atlantic issued a Commercial General Liability Policy to “Quality Fab Corp.” (Policy No. L044000674-2; emphasis added) which covered the time period during which the accident occurred (*see* Atlantic’s Exhibit A[2]).

By summons and complaint dated March 10, 2010, Mr. Ally instituted a personal injury action in the Supreme Court, Queens County, under Index No. 597/10(*see* Atlantic’s Exhibit B) naming as defendants the plaintiffs herein, Mentor Development Corp. (hereinafter “Mentor”) and Presidio Construction Corp. (hereinafter “Presidio”) in their capacity as the owners, operators, and/or managers of the construction site where Ally was injured. Thereafter, defendant Mt. Hawley Insurance Company (hereinafter “Hawley”), the liability insurer for Mentor and Presidio, disclaimed coverage due, *inter alia*, to a late notice of claim. As a result, plaintiffs Mentor and Presidio commenced this action on or about September 27, 2010, for a judgment declaring “that [they] are additional insured[s] under the policy issued by Atlantic Casualty [which imposed upon it]...an obligation to pay [for Ally’s] injuries” as alleged in the Queens County action (*see* Complaint for Declaratory Judgment, Atlantic’s Exhibit A, p 7). Plaintiffs maintain that if they are found to be additional insureds under the policy issued to Quality Fab, then Atlantic would be obligated to defend and indemnify each in the personal injury cause of action pending against them in Queens County.

In moving to dismiss in lieu of answering pursuant to CPLR 3211(e)(*see* Atlantic’s Affirmation in Support, para 6), Atlantic claims that neither plaintiff was an “insured” or “additional insured” on the subject policy and, even assuming that they *were*, Ally’s claim is excluded from coverage inasmuch as he was an employee of Quality Fab at the time of the injury. As a result, Atlantic claims that coverage is barred by the policy clause which excludes from coverage damages arising out of “[i]njury to [e]mployees...[c]ontractors and...[s]ubcontractors (*see* Atlantic’s Exhibit

D, p ACIC 038; *see also* Plaintiffs' Exhibit D, "Declination of Coverage" letters from Atlantic to Quality Fab Corp.).

In an effort to raise an issue of fact as to coverage under the Atlantic policy, plaintiffs attach, *inter alia*, a March 12, 2007 "Certificate of Liability Insurance" issued to Quality Fab Corp. which lists Presidio as "Certificate Holder" on the Atlantic policy. They also submit an undated "Standard Form of Agreement Between Contractor [Presidio] and Subcontractor [Quality Steel Fab]" which addresses their respective rights to indemnification and insurance coverage. It is therein provided that Quality **Steel** Fab (emphasis added) is contractually obligated to name Presidio "as an additional insured on a primary basis to [its] comprehensive general liability policy..." (*see* Atlantic's Affirmation in Further Support, Exhibit C)¹.

As there is no evidence that Mentor was an additional insured under the Quality Fab policy, Atlantic's motion to dismiss so much of the complaint as requests any relief on behalf of this plaintiff is granted. As for Presidio, the law is clear that "[a] certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists" (*see* Sevenson Envt. Servs. Inc. v. Sirius Am Ins Co., 74 AD3d 1751, 1753, citations and internal quotation marks omitted]). Thus, the documentation offered by Presidio fails to raise a triable issue sufficient to defeat Atlantic's motion for summary judgment against it. In addition, any cross claims asserted against this defendant must be dismissed.²

"The four corners of an insurance agreement govern who is covered and the extent of

¹To the extent relevant, it appears that "Quality **Steel** Fab Inc." (emphasis added) is separate and distinct from "Quality Fab Inc." (*see* NYS Department of State Division of Corporations printouts, attached to Atlantic's Affirmation in Further Support of Motion, Exhibits A and B). The named insured under the Atlantic policy is "Quality Fab **Corp.**" which is named as "Quality Fab **Corp.** d/b/a Quality Fab **Inc.**" in the third-party summons and complaint in the Queens County action as Ally's employer.

²In this regard, the Court would note that Atlantic's motion to dismiss the cross claims of defendants Anthony Viscuso Brokerage, Inc., s/h/a Anthony Viscuso and Lance Viscuso Brokerage, Inc., is unopposed.

coverage...[W]here a third party seeks the benefit of coverage, the terms of the contract must clearly evince such intent” (Sixty Sutton Corp. v. Illinois Union Ins. Co., 34 AD3d 386,388 [citations omitted]). Here, the unambiguous language of the Atlantic policy comports with its position that plaintiffs are not covered, either as named or additional insureds under the policy (*see* Binasco v. Break-Away Demolition Corp., 256 AD2d 291; I.S.A. In NJ v. Effective Sec. Sys., 138 AD2d 681, 682).

Whether or not Quality Fab may have been contractually obligated to name either plaintiff as an “additional insured” under its General Commercial Liability Policy is not an issue before the Court (*cf.* Galvan v. 9519 Third Ave. Res. Corp., 74 AD3d 743).

Accordingly, it is

ORDERED, that the motion for summary judgment of defendant Atlantic Casualty Insurance Company is granted, and it is further

ORDERED, that the complaint and any cross claims against this defendant are severed and dismissed; and it is further

ORDERED, that the balance of the action shall continue, and it is further

ORDERED, that the Clerk enter judgment accordingly.

E N T E R,

Dated: August 3, 2011

Hon. John A. Fusco, J.S.C.