

<b>Central Parking Sys. of N.Y. v CP Assoc., LLC</b>
2011 NY Slip Op 33867(U)
July 21, 2011
Sup Ct, Bronx County
Docket Number: 310659-10
Judge: Kibbie F. Payne
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AUG 25 2011

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

-----X  
CENTRAL PARKING SYSTEM OF NEW YORK,

Plaintiff,

-against-

Index No.: 310659-10

CP ASSOCIATES, LLC, FEDERAL INSURANCE  
COMPANY AND BERNICE BENNETT,

Defendants.

-----X  
KIBBIE F. PAYNE, J.:

Defendant CP Associates, LLC moves to dismiss this complaint pursuant to CPLR 3211 (a) (4), arguing that there is another action pending between the parties seeking the same relief. Additionally, defendant moves for dismissal pursuant to CPLR 3211 (a) (1), alleging that documentary evidence flatly contradicts the plaintiff's cause of action. Finally, defendant argues that this controversy is not ripe for judicial determination and is, therefore, premature because liability has not been established in the underlying action. This last ground for dismissal is not included in the plaintiff's notice of motion, and consideration would normally run afoul of CPLR 2214 (a)'s requirement that the notice state "the relief demanded and the grounds therefor" (cf McGuire v McGuire, 29 AD3d 963; NYCTL 1998-1 Trust v Prol Properties Corp, 18 AD3d 525, 527). However, since defendant has addressed this branch in its opposing affirmation, no prejudice results from court entertaining this final prong of the

application.

Plaintiff commenced this declaratory judgment action seeking a ruling that the defendants are obligated to defend and indemnify plaintiff in the underlying personal injury action. It is undisputed that, in the underlying action, Central Parking asserted a cross-claim against the defendant alleging that it breached the aforesaid provisions of the Management Agreement by failing to defend and indemnify. This claim is based upon the same facts and transactions and seeks the same relief as the first cause of action interposed by the plaintiff here. Since the monetary claim for indemnification is derivative of the original, underlying personal injury cause of action, and since that action was commenced first, plaintiff's first claim is dismissed pursuant to CPLR 3211 (a) (4). With respect to plaintiff's second cause of action, the relief sought, declaratory judgment, differs substantially from that sought in the underlying action. Moreover, plaintiff's claim that granting declaratory judgment would be premature prior to a finding of liability in the underlying action is contrary to the case law. "A declaratory judgment action against insurers...is permitted prior to judgment where the judgment likely to be recovered in the underlying action would amount to more than the excess floor

or the potential liability might well reach into the excess coverage" (Costa v Colonial Penn Insurance Company, 204 AD2d 591).

The court turns finally to the branch of the application pursuant to CPLR 3211 (a) (1), arguing the claim is contracted by documentary evidence. Paragraph 3 (o) of the parties' agreement places a duty upon the garage owner to maintain and make repairs to the garage structure. Defendant dismisses this language, arguing that there has been no proof of any defect that caused the underlying accident. Additionally, paragraph 4 (g) of the agreement places a duty upon the defendant, to procure insurance for the plaintiff if it obtains insurance for itself. On a motion addressed to the sufficiency of a complaint pursuant to CPLR 3211, the standard is whether there is any legal or factual basis for the assertion of the cause of action (Matter of Ideal Mut Ins Co, 140 AD2d 62). The facts pleaded are presumed true and are accorded the benefit of every favorable inference (Leon v Martinez, 84 NY2d 83, 87-88; Monroe v Monroe, 50 NY2d 481, 481). Under a liberal view of the pleadings, a defense or claim is stated, the motion must be denied. Extrinsic evidence will warrant dismissal only where the record before the court "establish[es] conclusively that

plaintiff has no cause of action" (Rovello v Orofino Realty Co, Inc, 40 NY2d 633). At this juncture, the evidence does not conclusively establish that the plaintiff lacks a claim for defense or indemnification based upon plaintiff's failure to procure insurance or maintain the premises. Hence, this portion of the motion to dismiss is, in all respects, denied.

Accordingly, it is


ORDERED the defendant's motion is granted only to the extent of dismissing plaintiff's first cause of action without prejudice to pursuing that claim in the underlying action.

Since it is undisputed that the relief sought in the instant matter is derivative of claims asserted in the underlying matter, principles of equity and judicial economy favor coordinated disposition.

Accordingly, it is also

ORDERED the clerk is directed to reassign this matter to the Honorable Alison Tuitt, who has another action pending between the parties concerning the same set of facts.

Date: July 21, 2011

  
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KIBBIE F. PAYNE  
J.S.C.