

Glenman Constr. Corp. v First Mercury Ins. Co.

2011 NY Slip Op 34257(U)

January 26, 2011

Supreme Court, New York County

Docket Number: 111214/10

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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GLENMAN CONSTRUCTION CORPORATION and
GLENMAN INDUSTRIAL & COMMERCIAL
CONTRACTOR, CORP.,

Plaintiffs,

- against -

FIRST MERCURY INSURANCE COMPANY and
DAMAP CONSTRUCTION INC.,

Defendants.

-----X

KENNEY, JOAN M., J.

DECISION AND ORDER

Index: 111214/10

Cal.:10/26/10

Mot. Seq. No.: 001

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss:

Papers

Notice of Motion, Affirmation, Affidavit & Exhibits
Attorney's Affidavit in Opposition & Exhibits
Reply Memorandum of Law

Numbered

1-11
12-22
23

Appearances

Tressler LLP
Attorneys for Defendants Glenman Construction
Corporation and Glenman Industrial & Commercial
Contractor, Corp.
One Penn Plaza, Suite 4701
New York, New York 10119

Cornell Grace, P.C.
Attorneys for First Mercury
Insurance Company and Damap
Construction Inc.
225 Broadway, Suite 1400
New York, New York 10007

In this declaratory judgment action, defendant First Mercury Insurance Company (First Mercury) seeks an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the complaint.

FACTUAL AND PROCEDURAL BACKGROUND

On September 13, 2008 defendant Damap Construction, Inc. (Damap)'s former employee, Doroteo Martinez, commenced a personal injury suit entitled *Doroteo Martinez and Maria Arigueta v Glenman Construction Corporation, Esther Gitlow Towers II Housing Development Fund Corp., and Rockland Home for the Aged Housing Development Fund Company Inc.*, Index No. 002024/09, Supt Ct, Rockland County (underlying suit) for injuries he allegedly suffered while performing labor at a construction project located at 200 Lafayette Avenue, Suffern, New York (the Project). Mr. Martinez commenced the underlying suit against, *inter alia*, plaintiffs Glenman Construction Corporation and Glenman Industrial & Commercial Contractor, Corp. (Glenman) as the general contractor of the Project. DaMap was the subcontractor of the Project.

001

Glenman brings the instant action against Damap and Damap's insurance carrier, First Mercury, for an order declaring that Damap and First Mercury must defend, indemnify, and provide coverage for Glenman as an "additional insured."

On August 27, 2008, Glenman and Damap executed an agreement regarding the Project (the subcontract). Plaintiff alleges that, pursuant to Exhibit "B" of the rider attached to the subcontract, Damap was required to list Glenman "as certificate holder additionally insured on a primary basis" (*see* Ex "A" attached to opposition to notice of motion, "Exhibit B: Scope of Work" attached to the subcontract, ¶ 11). Damap produced a certificate of insurance dated August 22, 2008 and issued by a "B Insured Agency, Inc." The certificate of insurance lists Damap as "insured" (*see* Ex. "B" in opp to notice of motion).

The certificate of insurance provides, in pertinent part:

"THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW . . .

DISCLAIMER

The Certificate of Insurance on the reverse side of this form does not constitute a contract between the issuing Insure(s), authorized representative or producer, and the certificate holder, nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon." (*See* Ex. "B" attached to opp to notice of motion).

Damap also procured general liability insurance from First Mercury, policy number FMMA002254, for the policy period August 25, 2008 to August 25, 2009 (the policy). Glenman does not dispute that it is unnamed in the "Declarations" section to the policy, nor is it named as an additional insured in any other section of the policy (*see* Affidavit of Janet O' Connor Cornell in opp to notice of motion, ¶ 21).

The policy also includes a Commercial General Liability Coverage Form (CG Form). The CG Form outlines First Mercury's coverage for bodily injury and property damage to an "insured" (*see* Ex. "A" attached to notice of motion). The "Exclusions" section of the CG Form provides, in pertinent part:

"This insurance does not apply to:

- b. Contractual Liability
"Bodily injury" or "property damage for which the insured is obligated to pay

damages by reason of the assumption of liability on a contract. This exclusion does not apply to liability for damages: . . .

(2) Assumed in a contract or agreement that is an “insured contract”, provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement . . .” (See Commercial General Liability Form CG 01 3 09 99 attached to the policy, Ex. “A” attached to motion papers).

An “insured contract” is defined under the policy’s Amendment of Insured Contract

Definition Endorsement:

“That part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization, provided the “bodily injury” or “property damage” is caused, in whole or in part, by you or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.” (See Section “F” of Endorsement CG 24 26 07 04 attached to policy, Ex. “A” attached to notice of motion).

After the underlying action had commenced, Glenman’s insurance administrator Gallagher Bassett Services (Gallagher), by letter dated October 13, 2008, demanded that First Mercury defend, indemnify, and grant additional insured status to plaintiffs “for claims arising from Damap’s work, on a primary, non-contributory basis” (see Ex. “C” attached to opp to notice of motion). By letter dated October 12, 2009, First Mercury denied coverage to Glenman, stating that “Glenman is not an insured under the terms of the policy” (the disclaimer letter) (Ex. “F” attached to opp to notice of motion).

ARGUMENTS

Defendant First Mercury argues that the motion to dismiss should be granted because: 1) Glenman is not named as an insured or additional insured in the policy; 2) the unambiguous language in “Section II - Who is Insured” of the policy precludes by its terms Glenman as an “insured” or “additional insured”; and 3) the certificate of insurance naming Glenman as an “insured” and the subcontract’s language purportedly requiring Damap to procure coverage for Glenman as an “additional insured” are insufficient and/or irrelevant to the policy issued between First Mercury and Damap.

Glenman contends that the instant motion to dismiss should be denied on three grounds: 1) the policy’s Commercial General Liability Coverage Form, which governs the terms of Damap’s coverage, implicitly provides coverage for Glenman; 2) the disclaimer letter was untimely pursuant

to New York Insurance Law (NYIL) § 3240; and 3) further discovery is necessary as Damap has not yet appeared in the instant action.

DISCUSSION

Under CPLR 3211 (a) (1), dismissal is warranted when the documentary evidence conclusively establishes a defense to the claims asserted in the complaint, as a matter of law (*see Sixty Sutton Corp. v Ill. Union Ins. Co.*, 34 AD3d 386, 388 [1st Dept 2006]). When deciding whether or not a complaint should be dismissed pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true, limiting the inquiry to whether or not the complaint states, in some recognizable form, any cause of action known to our law (*see World Wide Adjustment Bureau et al., v Edward S. Gordon Comp., Inc., et al.*, 111 AD2d 98 [1st Dept 1985]). In assessing the sufficiency of the complaint, this court must also consider the allegations made in both the complaint and the accompanying affidavit, submitted in opposition to the motion, as true and resolve all inferences which reasonably flow therefrom, in favor of the plaintiff (*Joel v Weber*, 166 AD2d 130 [1st Dept 1991]).

The four corners of an insurance agreement govern who is covered and the extent of coverage (*see Sixty Sutton*, 34 AD3d at 388). The party claiming insurance coverage has the burden of proving entitlement (*Moleon v Kreisler Borg Florman Gen. Constr. Comp. Co., Inc.*, 304 AD2d 337, 340 [1st Dept 2003]). Where a third party seeks the benefit of coverage, the terms of the contract must clearly evince such an intent (*id.*). Thus, a party that is not named an insured or additional insured on the face of the policy is not entitled to coverage (*id.*).

Here, the policy between First Mercury and Damap does not name Glenman as either a named or additional insured. Rather, the policy's declarations page names only one entity as a named insured: Damap. On its face, the policy conclusively supports First Mercury's grounds for denying Glenman's claim of entitlement to coverage, *to wit*, Glenman is not an insured under the relevant policy. Accordingly, dismissal is warranted under CPLR 3211 (a) (1) based on the documentary evidence and Glenman has failed to state a cause of action for entitlement of coverage because it was not an insured under the policy in question.

Glenman contends that the "Exclusion" section to the policy's GC Form, coupled with the

policy's definition of an "Insured Contract", supports the position that Glenman "should" be covered. However, this argument fails for two reasons. First, the section upon which Glenman relies applies to Damap's coverage, not an alleged unnamed insured. Second, Glenman fails to show that it has met the definition of an "Insured Contract" because Glenman has not demonstrated that Damap "assume[d] the tort liability" of Glenman. Therefore, Glenman fails to meet its burden of alleging a fact supporting its entitlement to coverage.

The production of the subcontract purportedly requiring Damap to procure insurance for Glenman is insufficient to confer actual coverage as an "additional insured" to Glenman since the terms of the subcontract between Glenman and Damap are irrelevant to an insurance policy issued by First Mercury to Damap (*see e.g. Molean*, 304 AD2d at 337). Moreover, it is also well-established that a certificate of insurance is not a contract to insure the designated party, nor is it conclusive proof, standing alone, that such a contract exists (*Tribeca Broadway Assoc., LLC v Mount Vernon Fire Ins. Comp.*, 5 AD3d 198, 200 [1st Dept 2004]). Indeed, the certificate produced by Glenman, admittedly issued by a third-party, explicitly confers no rights or privity of contract between First Mercury and Glenman (*see* Ex. "B" attached to opp to notice of motion). Thus, both the subcontract and certificate of insurance are insufficient to establish that Glenman is an "insured" or "additional insured" under the policy (*see Molean*, 304 AD2d at 339).

This Court is not persuaded by Glenman's argument that the instant motion is premature because Damap has not yet appeared in this action and "vital" discovery remains outstanding. Damap may never appear in this action and holding this matter in abeyance until Damap does appear is speculation and unwarranted at this juncture (*see also Sixty Sutton*, 34 AD3d at 387-388).


Finally, Glenman claims First Mercury's disclaimer dated October 12, 2009 was untimely. This argument is unavailing. Pursuant to NYIL § 3240 (d), an insurer is required to provide written notice of a disclaimer of coverage "as soon as is reasonably possible." However, this section is inapplicable where, as in this case, the denial of coverage is based upon lack of coverage (*Hunter Roberts Contr. v Arch Ins. Co.*, 75 AD3d 404, 407 [1st Dept 2010]).

Accordingly, it is

ORDERED that defendant First Mercury Insurance Company's motion to dismiss the complaint is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant First Mercury Insurance Company and against plaintiffs Glenman Construction Corporation and Glenman Industrial & Commercial Contractor, Corp., dismissing the complaint.

Dated: January 26, 2011 .

ENTER


Hon. Joan M. Kenney
J.S.C.

FILED
MAR 22 2011
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NEW YORK