

Mullin v Waste Mgt. of N.Y., LLC

2012 NY Slip Op 30101(U)

January 17, 2012

Supreme Court, Wayne County

Docket Number: 62571/2009

Judge: Dennis M. Kehoe

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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

CARL D. MULLIN,

Plaintiff,

-vs-

WASTE MANAGEMENT OF NEW YORK, LLC.

Defendant.

DECISION

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WAYNE COUNTY
SUPREME AND COUNTY COURT

WASTE MANAGEMENT OF NEW YORK, LLC.

Third-Party Plaintiff,

-vs-

RICCELLI ENTERPRISES, INC.

Third-Party Defendant

Index No. 62571

2009

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This action arises from a claim for personal injuries allegedly sustained by the Plaintiff Carl Mullin on December 20, 2005 at a transfer facility owned by the Defendant - Third-Party Plaintiff Waste Management in Kingston, New York. At the time of the incident, the Plaintiff was employed as a truck driver by Third-Party Defendant Riccelli Enterprises, Inc. Pursuant to a contractual agreement between Waste Management and Riccelli, Mr. Mullin had arrived at the facility to drop off an empty truck and pick up a loaded truck used to transport waste materials to a disposal site. Allegedly, Mr. Mullin noticed that the bungee straps used to secure the tarp over the load were not correctly fastened. After a telephone conversation with a Riccelli employee, Mr. Mullin attempted to climb the snow covered ladder on the truck to adjust the straps. During the attempt, he slipped and fell, which allegedly resulted in numerous injuries. However, Mr. Mullin proceeded to drive his truck to the disposal site in Phelps, New York.

The respective parties have made numerous motions in connection with this action. Waste Management has moved for an Order granting summary judgment on the claims set forth in its Third-Party Complaint against Riccelli as to issues based on breach of contract and contractual indemnity. Third-Party Defendant Riccelli has opposed Waste Management's motion in part and filed a Cross-Motion for an Order dismissing the Plaintiff's Second Amended

Complaint. This motion has been opposed by the Plaintiff. Riccelli, which had tacitly conceded in its original papers the validity of Waste Management's claim for breach of contract, based on Riccelli's failure to add Waste Management as an additional insured on its liability policies pursuant to their written agreement, subsequently filed a new motion for an order permitting renewal/reargument of Waste Management's summary judgment motion, maintaining that Riccelli had discovered new evidence which raised factual issues regarding the alleged breach of contract. Waste Management has opposed Riccelli's motion as untimely and unsubstantiated by any additional documentation. Before those motions could be decided by the Court, a motion was made by Riccelli's insurance carrier S.A.F.E., LLC, for an order authorizing it to be added as an intervenor in the Third-Party Action as of right, or in the alternative, that it be granted permissive intervention. If granted Intervenor status, S.A.F.E. then seeks an order dismissing Waste Management's claims for common law indemnification and contribution, based on allegations that the Plaintiff did not suffer a "grave injury", which is required to trigger coverage. The motion by S.A.F.E. to intervene has been opposed by all other parties.

Turning first to Waste Management's motion for summary judgment on its breach of contract cause of action against Riccelli, this claim arises from the

Transportation Services Agreement entered into by Waste Management and Riccelli, which provides that Riccelli was required to add Waste Management as an additional insured on its liability insurance policies. In order to prevail, under *Dimuro v Town of Babylon*, 210 AD2d 373 (2nd Dept, 1994), together with subsequent decisions, Waste Management must demonstrate that there exists a contractual provision which requires that it be named as an additional insured, and that the other party failed to comply with that provision. The Court finds that the contractual language relied on by Waste Management is clear and express, and indeed, in its responding affidavit, Riccelli does not dispute its inability to produce any evidence of its compliance. Based on the original motion papers, Waste Management is entitled to summary judgment as a result of Riccelli's breach. (See, e.g. *Moll v Wegman's Food Markets, Inc.*, 306 AD2d 1041 (4th Dept, 2002)).

However, taking the motions out of order for the sake of clarity, Riccelli filed a subsequent motion pursuant to CPLR §2221 to renew/reargue the breach of contract issue. Procedurally, the Court agrees with Waste Management that the motion to reargue is technically premature, as no decision or order has previously been rendered on the original motions. However, even if the motion were timely, Riccelli has failed to set forth any "matters of fact or law allegedly overlooked or misapprehended by the Court."

Therefore, that part of Riccelli's motion is summarily denied.

The Court therefore turns to consider Riccelli's remaining argument, which is based on its claim that it has obtained "newly discovered evidence," which now enables it to oppose Waste Management's motion for summary judgment on its breach of contract claim. The Court acknowledges that the motion contains certain procedural deficiencies under CPLR §2221; however, for the sake of judicial economy, and in the interests of determining these motions on a complete record, the court will consider Riccelli's motion on its merits.

First, it has been held that a court has the discretion to grant renewal in the interest of justice, upon facts that were known to the movant at the time the original motion was made. However, the appellate courts have also held that a trial court cannot exercise such discretion unless the movant establishes "reasonable justification for the failure to present such facts on the prior motion." (*Gauland v RLI Insurance Company*, 79 AD3d 1576 (4th Dept, 2010)). Here, it is evident that Riccelli had the knowledge and means to find and produce the documents in question at least two (2) years before the motion was made; however, for whatever reason, they were never submitted in response to Waste Management's various discovery demands, or in opposition to the summary judgment motion. Moreover, even if it found that such

reasonable justification exists, the Court agrees with Waste Management that the documents do not constitute sufficient evidence in admissible form to create a triable issue of fact. While some of the papers indicate that a different Waste Management entity may have been named somewhere in a policy issued by Essex Insurance Company, that document, even when considered with copies of various e-mails and letters, does not constitute the basis of a cognizable argument that Riccelli actually complied with the TSA prior to the Plaintiff's accident.

Returning to Waste Management's original motion against Riccelli, the Third-Party Plaintiff maintains that it is also entitled to summary judgment on its cause of action for indemnification. Without reaching the issue of the availability of contract indemnification to Waste Management in these circumstances under the provisions of the Transportation Services Agreement, the Court agrees with Riccelli that there are factual issues as to whether there was any negligence on the part of Waste Management, which contributed to Mr. Mullin's alleged injuries. If Waste Management is not found to be "free from active negligence" as a matter of law, then an award of conditional indemnification at this time is not appropriate. Mr. Mullin's affidavit, as well as his deposition testimony, submitted by his attorney in response to Riccelli's motion to dismiss the Plaintiff's Complaint, underscores the issues of fact

regarding negligence and causation in the underlying action.

Therefore, the Court has determined, as part of the reason for the denial of Waste Management's motion for summary judgment regarding indemnification, that there are issues of fact as to possible comparative negligence on the part of both Waste Management and Riccelli. Riccelli's Cross-Motion to dismiss the Plaintiff's Second Amended Complaint is dependent upon the Court's granting of Waste Management's motion for contractual indemnification, which would necessarily require a finding that Waste Management was free from negligence; such a finding would negate the Plaintiff's claims of negligence against Waste Management in the underlying action. Since the Court did not grant Waste Management summary judgment on the issue of indemnification, based on that same reasoning, it hereby denies that portion of Riccelli's Cross-Motion which seeks the dismissal of the Plaintiff's Second Amended Complaint.

Finally, the Court must consider the motion by S.A.F.E., LLC for an order permitting it to intervene as of right, or in the alternative, to be granted permissive intervention. S.A.F.E. is acting as the Third-Party administrator on behalf of the Transportation Trust & Worker's Compensation Board, which insures its members through a Trust providing Worker's Compensation and Employer's liability coverage. Riccelli was listed as a "participating member" of

the Trust. As such, on September 26, 2008, Riccelli was assigned the Costello, Cooney law office to assume its defense in this action. On December 15, 2010, more than two (2) years later, S.A.F.E. issued a denial of coverage to Riccelli for the first time, maintaining that Waste Management's contractual claims were excluded from coverage, and further, that S.A.F.E. had recently determined that Mr. Mullin had not suffered a "grave injury", and therefore employees' liability coverage under the policy was not triggered. S.A.F.E. maintains that it is a real party in interest to this litigation, due to the alleged unwarranted failure of the Costello firm to raise the "grave injury" issue as a defense on Riccelli's behalf, in spite of S.A.F.E.'s requests that the firm take such action. If S.A.F.E. is not permitted to intervene in the action, in order to bring the motion to dismiss on its own behalf, it maintains that its rights will be prejudiced by the failure to raise this meritorious defense.

All of the parties have opposed the motion to intervene by S.A.F.E. Their arguments are substantially the same: 1) S.A.F.E.'s motion is untimely and inappropriate, in that its insured (Riccelli) was served on July 28, 2008, and therefore S.A.F.E. had early access to the Plaintiff's medical records; 2) public policy interests dictate against the creation of an adversarial position between carriers and their insureds; 3) under case law, denial of intervenor status will not cause S.A.F.E. to be bound by any judgment as a result of

collateral estoppel regarding the issue of “grave injury” in the instant action; 4) S.A.F.E.’s proper remedy is the commencement of a separate declaratory action which will adequately protect its interests; 5) S.A.F.E.’s argument regarding the resulting prejudice which may be caused by the alleged failure by Riccelli’s counsel to move to dismiss the Plaintiff’s claim is speculative; 6) S.A.F.E. has no legitimate interest in the present litigation.

The Court has examined the arguments presented by the parties and finds that the motion to intervene should be denied. In Severino v Brookset Housing Development Fund Corp., et al, 71 AD3d 607 (1st Dept, 2010), the appellate court upheld the trial court’s denial of an insurer’s motion to intervene, based upon its finding that mere speculation regarding counsel’s prospective actions is not enough to show that insurer’s rights are not being adequately represented. Further, S.A.F.E. has not set forth sufficient factual allegations to support its position that the Plaintiff did not suffer a “grave injury”.

Moreover, S.A.F.E. will not be bound by a verdict in the instant action, and therefore its rights will not be prejudiced. (See, e.g. Kaczmarek v Shoffstall, 119 AD2d 1001 (4th Dept, 1986)). S.A.F.E. may institute a declaratory judgment addressing its concerns, if it so chooses.


CONCLUSION

In summary, the Court grants the motion made by Waste Management for summary judgment against Riccelli on its cause of action for breach of contract and finds that Riccelli is therefore liable for any "out-of-pocket" expenses incurred by Waste Management as a result of the breach, up to the level of its deductible. (see, Antinello v YMCA and Bast Hertfield, Inc., 42 AD3d 351 (3rd Dept, 2007)). Riccelli's motion to renew/reargue is denied. The remaining portion of Waste Management's motion for summary judgment against Riccelli as to contract indemnification is denied without prejudice; all issues regarding indemnification, as well as attorney's fees, must await settlement or trial of the underlying action. Riccelli's Cross-Motion seeking dismissal of the Plaintiff's Second Amended Complaint is denied.

Finally, the motion to intervene made by S.A.F.E. LLC is hereby denied.

Counsel for the Third-Party Plaintiff is hereby directed to submit a proposed Order in accordance with this Decision.

Dated: January 17, 2012
Lyons, New York



Honorable Dennis M. Kehoe
Acting Supreme Court Justice