

Indemnity Ins. Corp. RRG v Scottsdale Ins. Co.

2012 NY Slip Op 30151(U)

January 11, 2012

Supreme Court, Nassau County

Docket Number: 005009/11

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 14

_____ X

INDEMNITY INSURANCE CORPORATION
RRG and MGM PRODUCTIONS, INC.,

Plaintiffs,

Index No. 005009/11
Motion Sequence...01, 02
Motion Date...10/21/11
XXX

-against-

SCOTTSDALE INSURANCE COMPANY,

Defendant.

_____ X

Papers Submitted:

- Notice of Motion (Mot. Seq. 01).....X
- Memorandum of Law.....X
- Notice of Cross-Motion (Mot. Seq. 02).....X
- Memorandum of Law.....X
- Reply Affirmation.....X
- Affirmation in Reply.....X
- Reply Memorandum of Law.....X

Upon the foregoing papers, the Motion (Mot. Seq. 01) brought pursuant to CPLR § 3212 by the Plaintiffs seeking summary judgment declaring that the Defendant, Scottsdale Insurance Company (Scottsdale), is obligated to defend and indemnify the Plaintiff, MGM Productions, Inc. (MGM) in an action in Supreme Court, Queens County, entitled *Adli Collako v. MGM Productions, Inc. d/b/a GLO Nightclub and Alpha 1 Security*, under Index No. 9843/10 (the underlying action) and the Cross-motion by the Defendant,

Scottsdale, brought pursuant to CPLR § 3212 seeking summary judgment dismissing the complaint are determined as provided herein.

In this declaratory judgment action, the Plaintiff, MGM, and its insurer, the Plaintiff, Indemnity Insurance Corporation RRG (IIC), seek a declaration that the Defendant, Scottsdale, is required to defend and indemnify the Plaintiff, MGM, in connection with the claims of Aldi Collako in the underlying action based on the Plaintiff, MGM's status as an additional insured under a policy of insurance issued to the Defendant, Scottsdale, in accordance with an alleged insurance procurement provision in the contract for security services between the Plaintiff, MGM and Alpha 1 Security Inc. (Alpha 1). At the time of the incident, Alpha 1 was insured under a commercial general liability policy issued by the Defendant, Scottsdale (Policy #: BCS0018223) in effect for the policy period October 8, 2008 to October 8, 2009.

The underlying personal injury action arises out of an incident at the GLO Nightclub located at 737 Merrick Avenue, Westbury, New York, on February 27, 2009. The plaintiff in that action alleges he sustained personal injuries in a brawl at the nightclub as a result of the failure of Alpha 1, the company hired by MGM to provide security services at the premises, to protect patrons from being harmed. At the time of the alleged incident, Alpha 1's security services were provided pursuant to a purported contract¹ for security

¹The copy of the undated contract for security services included in the Plaintiffs' moving papers is executed by Alpha 1. The name of the client company and witness is undecipherable. There is no discernible indication that the contract was signed by the Plaintiff, MGM.

services.

By letters dated June 8, 2009 and February 16, 2011, the Plaintiff, IIC informed the Defendant, Scottsdale and its insured, Alpha 1 of the underlying claim and requested that said insurer defend and indemnify MGM as an additional insured in the underlying action. The Defendant, Scottsdale, rejected the tender on January 20, 2010 and informed the Plaintiff, IIC, that its contract with Alpha 1 actually required MGM to provide Alpha 1 with additional coverage under a professional liability policy. As a result of the Defendant, Scottsdale's refusal of tender, the Plaintiff, IIC, was required to defend the Plaintiff, MGM, in the underlying action and to indemnify it in the event damages were awarded.

In support of their motion for summary judgment, the Plaintiffs contend that under the sections "J" and "K"² of the security contract between Alpha 1 and the Plaintiff, MGM, Alpha 1 was required to maintain applicable insurance and include the Plaintiff, MGM, as an additional insured under the Scottsdale policy. Based on the certificate³ of

²The relevant provisions provide as follows:

"J." Insurance. ALPHA 1 warrants and represents that it has in full force and effect and will continue to maintain a full force and effect applicable insurance. Certificate of Insurance is available upon request.

"K." Losses incurred by Client. In the event that Client does suffer loss due to negligence, carelessness or affirmative acts ALPHA 1 employees, then in such event, Client shall be first required to process a claim with the applicable insurance carrier on the certificate referred to in paragraph "J" above. . .

³The certificate of insurance lists the Plaintiff, MGM, as an additional insured.

liability insurance dated December 18, 2008, the Plaintiffs contend that the Defendant, Scottsdale, has a duty to both defend the Plaintiff, MGM, and to indemnify it to the extent that it is found liable in the underlying action for the alleged assault.

The Plaintiffs further maintain that the Defendant, Scottsdale, is estopped from denying the existence of the parties' security contract based on Scottsdale's reliance on such contract in a separate coverage action wherein the insurer claimed that Alpha 1 was entitled to insurance coverage from the Plaintiff, IIC, in connection with a separate incident that occurred at the Glo Nightclub on September 4, 2009.

The Defendant, Scottsdale, counters that there is nothing on the face of the contract on which the Plaintiffs rely to support the assertion that Alpha 1 was, in fact, providing security services to the Plaintiff, MGM, pursuant to such contract at the time of Collako's alleged injury. Even assuming a security contract was in effect, the Defendant, Scottsdale, maintains that the contract does not require Alpha 1 to procure insurance for the Plaintiff, MGM, as an additional insured. In this regard, the Defendant, Scottsdale, notes that a contract cannot be interpreted to require procurement of additional insured coverage unless such requirement is expressly and specifically stated. Moreover, contract language that merely requires the purchase of insurance will not be read as also requiring the contracting party to be named as an additional insured. *Trapani v. 10 Ariel Way Assoc.*, 301 A.D.2d 644, 647 (2d Dept. 2003).

The principle is well settled that a party claiming insurance coverage bears the burden of proving entitlement to coverage. *Moleon v. Kreisler Borg Florman Gen. Constr.*

Co., 304 A.D.2d 337, 339 (1st Dept. 2003). A party not named as an insured or an additional insured on the face of the policy is not entitled to coverage. *Tribeca Broadway Associates, LLC v. Mount Vernon Fire Ins. Co.*, 5 A.D.3d 198, 200 (1st Dept 2004). An additional insured endorsement is an addition to, rather than a limitation on, coverage. *National Abatement Corp. v. National Fire Ins. Co. of Pittsburgh, PA.*, 33 A.D.3d 570, 571 (1st Dept. 2006).

A certificate of insurance, by itself, does not confer insurance coverage, particularly where the certificate itself provides that it is “issued as a matter of information only and confers no rights upon the certificate holder [and] does not amend, extend or alter the coverage afforded by the [general liability] policies listed below.” *Home Depot U.S.A., Inc. v. National Fire & Marine Ins. Co.*, 55 A.D.3d 671, 673 (2d Dept. 2008); *ALIB, Inc. v. Atlantic Cas. Ins. Co.*, 52 A.D.3d 419 (1st Dept. 2008). A certificate of insurance is evidence only of a carrier’s intent to provide coverage. It is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists. *Metropolitan Heat & Power Co., Inc. v. AIG Claims Services, Inc.*, 47 A.D.3d 621, 623 (2d Dept. 2008); *Empire Ins. Co. v. Insurance Corp. of New York*, 40 A.D.3d 686, 688 (2d Dept. 2007). In addition, a certificate of insurance is not binding on an insurer when the certificate of insurance is issued by an insurance broker inasmuch as the broker is an agent of the insured and not the insurer. *James M. Inman Constr. Corp. v. Cathedral Marble & Granite Co.*, 307 A.D.2d 955, 956 (2d Dept. 2003).

The additional insured endorsement of the Scottsdale policy at issue herein

provides that “an insured” includes:

“any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for ‘bodily injury’, ‘property damage’, or ‘personal and advertising injury’ caused, in whole or in part by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured.”

A person’s or organization’s status as an additional insured under the endorsement ends when your operations for that additional insured are completed.”

Notwithstanding the Plaintiffs’ assertions to the contrary, the record is devoid of “undisputed evidence” demonstrating the Plaintiff, MGM’s status as an additional insured under the Scottsdale policy. The Plaintiffs have failed to proffer a written agreement between the Plaintiff, MGM, and Alpha 1 requiring Alpha 1 to name the Plaintiff, MGM, as an additional insured on its general liability coverage as required by the Scottsdale policy.

The Defendant, Scottsdale, is, in the Court’s view, not estopped from arguing the lack of a binding security contract obligating Alpha 1 to name the Plaintiff, MGM, as an additional insured. Generally, judicial estoppel, or the doctrine of inconsistent positions, precludes a party who assumed a certain position in a prior legal proceeding from, and who secured a judgment in its favor from assuming a contrary position in another action simply because its interests have changed. *Wenger v. DMR realty Management, Inc.*, __ AD3d __

(2d Dept. 2011) 934 N.Y.S. 221, 2011 Slip. Op. 8932 (citations and quotation marks omitted). To the extent that judicial estoppel has been applied to court or other rulings that are not denominated judgments, it still must be shown that the party espousing the inconsistent position benefitted from or obtained decisive relief based on that position. *Marcial v. Central Park North Parking Systems, Inc.*, 30 Misc. 3d 1233 (N.Y.Sup. 2011). No such showing has been made here.

In any event, even if a binding security contract exists between the Plaintiff, MGM, and Alpha 1, the language of the contract does not require Alpha 1 to procure additional insurance coverage for the Plaintiff, MGM.

It is axiomatic that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law tendering sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Here, the Plaintiffs have failed to sustain this burden. Under the circumstances extant, the Plaintiffs have failed to establish, as a matter of law, that the Plaintiff, MGM, qualifies for additional insured status under the policy issued by Scottsdale to Alpha 1. Although Section “J” of the unsigned, undated contract, on which the Plaintiffs rely, states that:

“Alpha 1 warrants and represents that it has in full force and effect applicable insurance” [and that a] Certificate of Insurance is available upon request,”

the provision does not specifically state that Alpha 1 is required to name the Plaintiff, MGM, as an additional insured on a general liability policy. Consequently, the plain language of this

provision cannot be read to require the Defendant, Scottsdale, to defend and indemnify the Plaintiff, MGM, as an additional insured.

Accordingly, it is hereby


ORDERED, that the Plaintiffs' motion (Mot. Seq. 01) seeking summary judgment is **DENIED**; and it is further

ORDERED, that the Defendant, SCOTTSDALE INSURANCE COMPANY's Cross-motion (Mot. Seq. 02) seeking summary judgment is **GRANTED** and it is declared that the Defendant, SCOTTSDALE INSURANCE COMPANY is not obligated to defend and indemnify the Plaintiff, MGM, in the underlying action pursuant to the subject insurance policy. *Hargob Realty Assoc., Inc. v. Fireman's Fund Ins. Co.*, 73 A.D.3d 856, 857-858 (2d Dept. 2010); *School Constr. Consultants, Inc. v. ARA Plumbing & Heating Corp.*, 63 A.D.3d 1029 (2d Dept. 2009).

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are **DENIED**.

DATED: Mineola, New York
January 11, 2012



Hon. Randy Sue Marber, J.S.C.
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ENTERED
JAN 12 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE