Amedore Land Devs., LLC v National Grange Mut. Ins. Co.
2012 NY Slip Op 30359(U)
February 16, 2012
Supreme Court, Albany County
Docket Number: 1494-10
Judge: Joseph C. Teresi

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

AMEDORE LAND DEVELOPERS, LLC,
and/or AMEDORE HOMES, INC.,

Plaintiffs,

-against-

NATIONAL GRANGE MUTUAL INSURANCE COMPANY and KEVIN CONWAY d/b/a CONWAY CONTRACTING & CONSTRUCTION,

Defendants.

DECISION and ORDER
INDEX NO. 1494-10
RJI NO. 01-11-105020

Supreme Court Albany County All Purpose Term, January 30, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Plaintiffs[1] commenced this action seeking, in part, a declaration that National Grange Mutual Insurance Company (hereinafter "NGMIC") is required to defend and indemnify them in

[1] Amedore Land Developers, LLC and Amedore Homes, Inc. will be collectively referred to as Plaintiffs or Amedore.

a personal injury action[2] pursuant to an insurance Policy[3] it issued to Conway. Issue was joined by Defendants[4] and discovery is ongoing.

Plaintiffs now move for summary judgment granting their declaratory judgment cause of action. Defendants oppose the motion, and cross-move for summary judgment declaring that NGMIC is not required to defend or indemnify Plaintiffs in Haskell v. Amedore. Because neither party established their entitlement to summary judgment, both motions are denied.

A "movant for summary judgment... [has] the initial burden of making a prima facie showing of entitlement to judgment as a matter of law." (Augur v Augur, 90 AD3d 1111 [3d Dept 2011]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). The movant is obligated to "proffer[] evidentiary proof in admissible form" (Lockwood v Layton, 79 AD3d 1342, 1342 [3d Dept 2010]) and its "burden may not be met by pointing to gaps in... proof." (DiBartolomeo v St. Peter's Hosp. of City of Albany, 73 AD3d 1326 [3d Dept 2010]; Antonucci v Emeco Industries, Inc., 223 AD2d 913 [3d Dept1996]).

If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Considering Plaintiffs' motion first, "it is well established that the party claiming

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[2] The action, which includes a third party action, is entitled Haskell, Et. Al. v. Amedore Land Developers, LLC, Et. Al., Sup Ct, Albany County, Teresi, J. - IAS, Index No. 7352-08. This action will hereinafter be referred to as "Haskell v. Amedore."

[3] This commercial general liability Policy insured Kevin Conway (hereinafter "Conway") as primary insured, for the period between May 22, 2007 and May 22, 2008 (hereinafter "the Policy").

[4] As Defendants are represented by the same counsel, taking identical positions throughout these motions, they are referred to collectively as Defendants where applicable.

insurance coverage bears the burden of proving entitlement, and... a party that is not named an insured or an additional insured on the face of the Policy is not entitled to coverage.... Nor does the certificate of insurance... confer coverage. 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." (Tribeca Broadway Assoc., LLC v Mount Vernon Fire Ins. Co., 5 AD3d 198, 200 [1st Dept 2004]; Consolidated Edison Co. of N.Y. v Allstate Ins. Co., 98 NY2d 208 [2002]; Stillwater Cent. School Dist. v Great Am. E & S Ins. Co., 66 AD3d 1260 [3d Dept 2009]; Natl. Abatement Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, PA, 33 AD3d 570 [1st Dept 2006]; Sevenson Envtl. Services, Inc. v Sirius Am. Ins. Co., 74 AD3d 1751 [4th Dept 2010]).

However, "an insurance company that issues a certificate of insurance naming a particular party as an additional insured may be estopped from denying coverage to that party where the party reasonably relies on the certificate of insurance to its detriment." (Sevenson Envtl. Services, Inc. v Sirius Am. Ins. Co., 74 AD3d 1751, 1753 [4th Dept 2010], citing Lenox Realty v Excelsior Ins. Co., 255 AD2d 644 [3d Dept 1998], lv denied 93 NY2d 807 [1999]; Bucon, Inc. v Pennsylvania Mfg. Assn. Ins. Co., 151 AD2d 207 [3d Dept 1989]). The party claiming estoppel must establish that they lacked "knowledge and ... the means of knowledge of the truth as to the facts in question" (Bartholomew v Sterling Ins. Co., 34 AD3d 1157, 1159 [3d Dept 2006], quoting Brelsford v. USAA, 289 AD2d 847 [3d Dept 2001]) and their "reliance must be justified." (Tosapratt, LLC v Sunset Properties, Inc., 86 AD3d 768, 769-70 [3d Dept 2011]).

Here, Plaintiffs failed to establish their entitlement to insurance coverage or that NGMIC

is estopped from denying coverage. Plaintiffs support their motion with the affidavit of Amedore, Inc.'s business manager (hereinafter "Mr. Amedore"), who is in charge of their business records, along with certain business records. He did not allege, or submit any documentation showing, that Plaintiffs were "named an insured or an additional insured on the face of the Policy" on which they rely. (Tribeca Broadway Assoc., LLC v Mount Vernon Fire Ins. Co., supra at 200). Rather, to support his contention of coverage, he relies solely on a certificate of liability insurance which listed Plaintiffs as "certificate holder [and]... as additional insured" with NGMIC as insurer. Importantly, the certificate of liability included two clear disclaimers, which read:

> 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.
>
> and
>
> If the certificate holder is an ADDITIONAL INSURED, the Policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

While Mr. Amedore claims that he relied on the certificate as evidence of insurance, reliance alone is not enough. He neither explained nor addressed the above unambiguous disclaimers, and set forth no factual basis for his "reasonable reliance" in light of them. Nor did he establish that he lacked the "means of knowledge of the truth" that Plaintiffs were not covered. As such, Plaintiffs wholly failed to demonstrate, as a matter of law, that they are insured by NGMIC for Haskell v. Amedore or that NGMIC is equitably estopped from denying coverage.

Plaintiffs also incorrectly rely, in their reply papers[5], on this Court's Haskell v. Amedore Decision and Order, dated November 2, 2011 (hereinafter "Decision and Order"). While Plaintiffs are correct that the Decision and Order found that Amedore could offer "secondary evidence"[6] of their "lost" indemnification contract with Conway, such finding resulted in no judgment being granted. Rather, Amedore's summary judgment motion in Haskell v. Amedore was denied and therefore has no preclusive effect herein. (Schriptek Mktg. Inc. v Columbus McKinnon Corp., 187 AD2d 800, 801 [3d Dept 1992][stating that "denial of a motion for summary judgment has little preclusive effect."]; Carroll v LeBoeuf, Lamb, Greene & MacRae, LLP, 623 F Supp 2d 504, 509 [SDNY 2009]).

Plaintiffs' also failed to demonstrate their entitlement to judgment as a matter of law with the secondary evidence admitted in Haskell v. Amedore. Under the title "Who Is An Insured," the Policy adds in pertinent part the following:

> "Any... owner for whom [Conway is] required to add as an additional insured on this Policy under a written construction contract or agreement where a certificate of insurance showing that... organization as an additional insured has been issued and received by [NGMIC] prior to the time of loss. The written contract and agreement must be: (1) in effect or become effective during the term of this Policy; and (2) executed prior to the "occurrence" resulting in "bodily injury"... [or] "personal injury"

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[5] Although Plaintiffs impermissibly introduce an entirely new legal theory upon which they seek relief (Crawmer v. Mills, 239 AD2d 844, 844-45 [3d Dept.1997]; Albany County Dept. of Social Services v. Rossi, 62 AD3d 1049 [3d Dept. 2009]; E.W. Tompkins Co., Inc. v. State University of New York, 61 AD3d 1248 [3d Dept. 2009]), because it is closely related to Defendants' summary judgment motion and both parties have fully addressed the issue, its merits are being considered.

[6] In Haskell v. Amedore this Court found that Mr. Amedore established Plaintiffs' unintentional loss of an alleged written indemnification contract between Conway and Amedore, and thus the foundation to submit secondary evidence of such contract's content. Even considering the secondary evidence, however, Amedore still failed to demonstrate its entitlement to summary judgment.

On this record, however, Plaintiffs failed to offer sufficient foundational proof to submit "secondary evidence" of the existence of their alleged written contract with Conway. Mr. Amedore's affidavit does not "sufficiently explain[] the unavailability of the primary evidence... [because he does not allege] a diligent search in the location where the document was last known to have been kept... [or the identity of] the person who last had custody of the original." (Schozer v William Penn Life Ins. Co. of New York, 84 NY2d 639, 644 [1994]). Without such proof the requisite foundation is not laid for the admission of Plaintiffs' secondary evidence. Thus, Plaintiffs failed to show that they are an insured under the Policy's above provision because of a written contract's existence. Moreover, Plaintiffs failed to proffer sufficient proof that the certificate of insurance issued herein was "received by [NGMIC] prior to the time of loss." In support of such contention, Plaintiffs offer the unsigned deposition of the insurance agency's president (hereinafter "Stemp") that obtained Conway's insurance Policy. Such unsigned deposition is neither admissible (Marks v Robb, 90 AD3d 863 [2d Dept. 2011]; Martinez v. 123-16 Liberty Ave. Realty Corp., 47 AD3d 901 [2 Dept. 2008]; In re Delgatto, 82 AD3d 1230 [2d Dept. 2011]), nor alleges that the certificate of insurance issued herein was "received by [NGMIC] prior to the time of loss." While Stemp alleged that he sent the certificate of insurance to NGMIC, no admissible proof of NGMIC's receipt was offered. As such, Plaintiffs failed to demonstrate that they fall within the definition of "Who Is An Insured."

Relatedly, because Plaintiffs did not demonstrate their coverage under the Policy, their late disclaimer argument is irrelevant. "A disclaimer pursuant to Insurance Law §3420(d) is unnecessary when a claim does not fall within the coverage terms of an insurance Policy... when a claim is denied because the claimant is not an insured under the Policy, there is no statutory

obligation to provide prompt notice of the disclaimer." (York Restoration Corp. v Solty's Const., Inc., 79 AD3d 861, 863 [2d Dept 2010]). As such, a "timely disclaimer was unnecessary" and Plaintiffs are not entitled to summary judgment upon such basis. (Hargob Realty Assoc., Inc. v Fireman's Fund Ins. Co., 73 AD3d 856, 858 [2d Dept 2010]; Markevics v Liberty Mut. Ins. Co., 97 NY2d 646 [2001]; Matter of Worcester Ins. Co. v Bettenhauser, 95 NY2d 185 [2000]; J. Lucarelli & Sons, Inc. v Mtn. Val. Indem. Co., 64 AD3d 856 [3d Dept 2009]).

Accordingly, Plaintiffs' motion is denied in its entirety.

Turning to Defendants' motion for summary judgment, they too failed to demonstrate their entitlement to judgment as a matter of law.

Defendants offer the affidavit of the NGMIC employee who handled Plaintiffs' claim (hereinafter "Fassler"), the affidavits of Stemp and Conway, along with a copy of the Policy. The affidavits establish, as is essentially conceded, that Plaintiffs were not named an insured or an additional insured on the face of the Policy. Defendants, however, failed to disprove a Policy exclusion's exception.

Relied upon by Defendants, one of the Policy's "Exclusions - Applicable to Business Liability Coverage" states, in pertinent part, that:

> This insurance does not apply to:... "Bodily injury"... for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:... Assumed on a contract or agreement that is an "insured contract," provided the "bodily injury"... occurs subsequent to the execution of the contract or agreement."

For this exclusion to apply in the first instance, the Defendants necessarily assume that the "insured [Conway] is obligated to pay [Amedore's] damages by reason of the assumption of liability in a contract or agreement" between Conway and Amedore. Defendants offer neither

admissible proof supporting their assumption, nor do they directly address or concede it. Instead, Defendants claim that Plaintiffs cannot establish the exclusions' exception because they cannot produce or tender an "executed" contract or agreement. Not only does Defendants' argument necessarily assume the existence of a contract, Defendants did not proffer sufficient proof to establish, as a matter of law, that no contract or agreement was "executed." Conway's affidavit concedes that "in the distant past, year unknown, but long before 2007, he signed a contract with one of the Amedore entities to act as a subcontractor... and cannot attest to the terms, conditions or language regarding indemnification." Such admission fails to demonstrate that no executed contract was "executed" to disprove, as a matter of law, the exclusions' exception. Nor did Defendants demonstrate, as a matter of law, that the Policy required the executed agreement to be produced or tendered to it. The Policy contains no such language. As the proof Defendants rely on merely "point[s] to gaps in [Plaintiffs']... proof" they failed to meet their prima facie summary judgment burden. (DiBartolomeo v St. Peter's Hosp. of City of Albany, supra at 1326).

Accordingly, Defendants motion is denied.

This Decision and Order is being returned to the attorneys for Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: February 16, 2012
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated October 3, 2011; Affirmation of Carrie Appler, dated October 3, 2011, with attached Exhibits A-K; Affidavit of Paul Amedore, dated September 30, 2011, with attached Exhibits A-D.
2. Notice of Cross Motion, dated December 23, 2011; Affirmation of Robert Stockton, dated December 22, 2011, with attached Exhibit A; Affidavit of Kevin Conway, dated August 26, 2011; Affidavit of Frederick Stemp, dated December 13, 2011, with attached Exhibits A-D; Affidavit of F. Joseph Fassler, dated December 12, 2011, with attached Exhibits A-C.
3. Affirmation of Carrie Appler, dated January 23, 2012, with attached Exhibits A-E.
4. Affirmation of Robert Stockton, dated January 26, 2012.