

Lannon v Bay Creek Bldrs. LLC
2012 NY Slip Op 31722(U)
June 14, 2012
Supreme Court, Suffolk County
Docket Number: 11-4230
Judge: Peter Fox Cohalan
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SHORT FORM ORDER

INDEX No. 11-4230

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 4-26-11 (#001)
MOTION DATE 5-27-11 (#002 & #003)
ADJ. DATE 10-12-11
Mot. Seq. # 001 - MG
 # 002 - MG
 # 003 - MG

-----X
STEVEN LANNON,

Plaintiff,

- against -

BAY CREEK BUILDERS LLC, MARY IRENE
MARRON, McM HOMES INC., THE TINGO
INSURANCE AGENCY, INC., EVEREST
NATIONAL INSURANCE COMPANY, FIRST
REHAB LIFE INSURANCE, and ZURICH IN
NORTH AMERICA,

Defendants.
-----X

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Upon the following papers numbered 1 to 40 read on this motion ____; Notice of Motion/ Order to Show Cause and supporting papers 1 - 5; 6 - 22; 29 - 40 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 23 - 26 ; Replying Affidavits and supporting papers 27 - 28 ; Other ____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motions (#001 and #003) by the defendant The Tingo Insurance Agency, Inc. and the motion (#002) by the defendant Everest National Insurance Company are consolidated for purposes of this determination; and it is

ORDERED that the unopposed motions by the defendant The Tingo Insurance Agency, Inc. for orders dismissing the complaint and the cross claims against it are granted; and it is further

ORDERED that the motion by the defendant Everest National Insurance Company for an order dismissing the complaint and all cross claims against it is granted.

On August 19, 2009, the plaintiff Steven Lannon allegedly was injured while performing construction work at a residence located in the Town of Southold, Suffolk County on Long Island, New York. The premises under construction was owned by the defendant Mary Irene Marron (hereinafter Marron), and the general contractor for the project was the defendant Bay Creek Builders, Inc (hereinafter Bay Creek). At the time of his accident, the plaintiff was employed by the defendant MCM Homes, Inc. (hereinafter MCM), a subcontractor which allegedly had been hired to perform carpentry work at the residence.

In March 2010, the plaintiff commenced an action in Supreme Court (Index #11145-10) against Bay Creek and Marron to recover damages for injuries he allegedly sustained when a second-story beam on which he was working broke, causing him to fall to the ground. The complaint in that action alleged that Bay Creek and Marron were liable to the plaintiff for violations of Labor Law § 200 and § 240 and common law negligence. In May 2011, Bay Creek commenced a third-party action against MCM for indemnification, contribution, and breach of contract.

Meanwhile, in February 2011, the plaintiff commenced the instant action for declaratory relief. In addition to Bay Creek, MCM, and Marron, the complaint names as defendants The Tingo Insurance Agency, Inc. (hereinafter Tingo), an insurance brokerage firm which allegedly procured an insurance policy for MCM, and Everest National Insurance Company (hereinafter Everest National), which allegedly issued a comprehensive general liability policy to MCM. After stating the alleged facts regarding the plaintiff's accident and the parties' relationships, the complaint alleges, in relevant part, that MCM "was to add defendant Bay Creek as an additional insured on their insurance policy"; that Tingo, as the insurance broker for MCM, "was to add defendant Bay Creek as an additional insured on MCM Homes Inc.'s policy"; that MCM had a general liability policy with Everest National, as well as insurance policies with First Rehab Life Insurance and Zurich in North America; and that Tingo failed to add Bay Creek as an additional insured on MCM policies. The "wherefore" clause of the complaint seeks a judgment "declaring the rights and other legal relations of the parties in respect to the

matters stated in the complaint.” The Court notes that a notice discontinuing the claim against the defendant Zurich in North America was filed by the plaintiff in March 2011, and that a stipulation discontinuing the claim against the defendant First Rehab Life Insurance Company was filed with the Suffolk County Clerk in June 2011. Subsequently, Bay Creek asserted cross claims against the other co-defendants, except Marron, alleging each had a duty to defend and a duty to indemnify it in the underlying personal injury action. Marron also interposed cross claims against all her co-defendants for indemnification.

Tingo moves pursuant to CPLR §3211 for an order dismissing the complaint against it because the plaintiff lacks standing to bring a claim against it for declaratory relief. It also moves for an order dismissing cross claims interposed against it by Bay Creek and Marron, arguing that it owed no duty of care to these co-defendants. No papers were submitted in opposition to Tingo’s motions.

In addition, Everest National moves pursuant to CPLR §3211 for an order dismissing the complaint against it, arguing that the plaintiff has no right to bring an action for a declaration that a third party, i.e. Bay Creek, is entitled to coverage as an additional insured on the insurance policy it issued to MCM. As to the cross claims, Everest National argues that it has no obligation to defend or indemnify Bay Creek in the plaintiff’s Labor Law action, because Bay Creek is not an insured under the policy issued to MCM. Everest National also argues that the notice of claim submitted by Bay Creek was untimely and was properly denied because Bay Creek is not an insured. In addition, it alleges that Marron has never filed a notice of claim with it in connection with the plaintiff’s accident. Bay Creek opposes Everest National’s motion because a determination as to Everest National’s obligations under its insurance contract with MCM is premature.

When a party moves under CPLR §3211 for dismissal based on the failure to state a cause of action, the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (**Sokol v Leader**, 74 AD3d 1180, 1180-1181, 904 NYS2d 153 [2d Dept 2010]). A court must determine whether, accepting the facts as alleged in the pleading as true and according the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory (**Leon v Martinez**, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). Affidavits may be used to remedy pleading defects, thereby preserving “inartfully pleaded, but potentially meritorious, claims” (**Rovello v Orofino Realty Co.**, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss” (**EBC I, Inc. v Goldman, Sachs & Co.**, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). However, “factual allegations which are flatly contradicted by the record are not presumed to be true, and ‘[i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211 (a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action’” (**Deutsche Bank Natl. Trust Co. v Sinclair**, 68 AD3d 914, 915, 891 NYS2d 445 [2d Dept 2009], quoting **Peter F. Gaito Architecture, LLC v Simone Dev. Corp.**, 46 AD3d 530, 530, 846 NYS2d 368 [2d Dept 2007]).

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Further, declaratory judgment actions are a means for establishing the respective legal rights of the parties to a justiciable controversy (see CPLR §3001; **Rockland Power & Light Co. v City of New York**, 289 NY 45, 43 NE2d 803 [1942]; **Chanos v MADAC, LLC**, 74 AD3d 1007, 903 NYS2d 506 [2d Dept 2010]; **Thome v Alexander & Louisa Calder Found.**, 70 AD3d 88, 890 NYS2d 16 [1st Dept 2009], *lv denied* 15 NY3d 703, 906 NYS2d 817 [2010]). “The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or future obligations” (**James v Alderton Dock Yards**, 256 NY 298, 305, 176 NE 401 [1931]; see **Palm v Tuckahoe Union Free School Dist.**, __ AD3d __, 944 NYS2d 291 [2d Dept 2012]; **Chanos v MADAC, LLC**, 74 AD3d 1007, 903 NYS2d 506).

An insurance agent or broker has a common law duty to obtain requested coverage for a client within a reasonable amount of time or to inform the client of the inability to do so (see **Murphy v Kuhn**, 90 NY2d 266, 660 NYS2d 371 [1997]; **Core-Mark Intl. v Swett & Crawford, Inc.**, 71 AD3d 1072, 898 NYS2d 206 [2d Dept 2010]; **Verbert v Garcia**, 63 AD3d 1149, 882 NYS2d 259 [2d Dept 2009]). Absent a specific request for coverage not already in a client’s policy, or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide or direct a client to obtain additional coverage (see **Murphy v Kuhn**, *supra*; **Verbert v Garcia**, 63 AD3d 1149, 882 NYS2d 259; **Loevner v Sullivan & Strauss Agency, Inc.**, 35 AD3d 392, 825 NYS2d 145 [2d Dept 2006], *lv denied* 8 NY3d 808, 834 NYS2d 88 [2007]). The complaint fails to allege that the plaintiff had a relationship with Tingo or that the broker breached an obligation it owed to the plaintiff (see **Superior Ice Rink, Inc. v Nescon Contr. Corp.**, 40 AD3d 963, 838 NYS2d 93 [2d Dept 2007]). Similarly, Bay Creeks’ and Marron’s cross claims against Tingo are dismissed absent allegations or evidence showing that the insurance broker owed them a duty of care (see **American Ref-Fuel Co. of Hempstead v Resource Recycling**, 248 AD2d 420, 671 NYS2d 93 [2d Dept 1998]). Tingo’s motions for an order pursuant to CPLR §3211 dismissing the complaint and the cross claims against it, therefore, are granted.

As to Everest National’s motion for an order dismissing the complaint against it, Insurance Law § 3420 states that an injured party may directly sue a tortfeasor’s insurer for an amount not exceeding the amount of coverage under a policy provided the injured party already obtained a judgment against the tortfeasor, served the tortfeasor’s insurer with a copy of the judgment, and waited at least thirty (30) days for payment from the insurer (see **Lang v Hanover Ins. Co.**, 3 NY3d 350, 787 NYS2d 211 [2004]; **Smith v Allstate Ins. Co.**, 38 AD3d 522, 832 NYS2d 587 [2d Dept 2007]). “Once the statutory prerequisites are met, the injured party steps into the shoes of the tortfeasor and can assert any right of the tortfeasor-insured against the insurance company” (**Lang v Hanover Ins. Co.**, *supra*; see **Hernandez v American Tr. Ins. Co.**, 60 AD3d 634, 875 NYS2d 125 [2d Dept 2009]; **Creinis v Hanover Ins. Co.**, 59 AD3d 371, 872 NYS2d 544 [2d Dept], *lv denied* 12 NY3d 710, 881 NYS2d 660 [2009]). As the complaint does not allege that the plaintiff has satisfied the prerequisites for a direct action against the tortfeasor’s insurer, dismissal of the complaint against Everest National because the plaintiff lacks standing is granted (see **Lang v Hanover Ins. Co.**, *supra*; **Azad v Capprelli**, 51 AD3d 956, 858 NYS2d 393 [2d Dept 2008]; **Geissler v Liberty Mut. Ins. Co.**, 23 AD3d 432, 808 NYS2d 118 [2d Dept 2005]). Everest National’s motion to dismiss the cross claims against it also is granted, as Bay Creek and Marron failed to present evidence

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rebutting the insurer's showing that neither party is named as an insured or an additional insured under the terms of the general liability policy it issued to MCM (see ***Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.***, 5 AD3d 198, 774 NYS2d 11 [1st Dept 2004]; ***Moleon v Kreisler Borg Florman Gen. Constr. Co.***, 304 AD2d 337, 758 NYS2d 621 [1st Dept 2003]; see also ***Sirius Am. Ins. Co. v Burlington Ins. Co.***, 81 AD3d 562, 917 NYS2d 192 [1st Dept 2011]; ***Essex Ins. Co. v Michael Cunningham Carpentry***, 74 AD3d 733, 904 NYS2d 78 [2d Dept 2010]; ***Majawalla v Utica First Ins. Co.***, 71 AD3d 958, 897 NYS2d 217 [2d Dept 2010], *lv dismissed* 16 NY3d 871, 923 NYS2d 407 [2011]). Accordingly, Everest National's motion for an order dismissing the complaint and the cross claims against it is granted.

Dated: 6/14/12

Peter J. Cohalan
 HON. PETER J. COHALAN
 U.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION