CNY Builders, LLC v Fireman's Fund Ins. Co.
2012 NY Slip Op 32835(U)
November 26, 2012
Sup Ct, New York County
Docket Number: 105751/2011
Judge: Louis B. York
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[* 1]
SCANNED ON 12/3/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C.
Justice

PART 2

Index Number : 105751/2011
CNY BUILDERS, LLC
vs.
FIREMANS'S FUND INSURANCE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______

Answering Affidavits — Exhibits ______ | No(s). ______

Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 11/26/12

______, J.S.C.
LOUIS B. YORK J.S.C.

1. CHECK ONE: .... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---x

CNY BUILDERS, LLC and AL-STORE, LLC,

Plaintiffs,

Index No. 105751/2011

-against-

FIREMAN'S FUND INSURANCE COMPANY and CHICAGO INSURANCE COMPANY,

Defendants.

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YORK, J.:

Before the court are plaintiffs' motion for summary judgment declaring that they are entitled to be covered as additional insureds pursuant to a commercial general liability policy issued by defendant Chicago Insurance Company ("Chicago Insurance") to Regal USA Construction Inc. ("Regal") and defendants Fireman's Fund Insurance Company's ("Fireman's Fund") and Chicago Insurance Company's ("Chicago Insurance) cross-motion for summary judgment declaring that defendants are not obligated to defend or indemnify plaintiffs as additional insureds.

BACKGROUND

Michael Aspesi, employed by Regal, was injured on September 21, 2009 while working at 8 Stone Street, New York, New York ("Premises") In an action entitled Michael Aspesi v CNY Builders, Inc. et al. pending in Supreme Court, New York County, under index number 114984/2010, he sued CNY Builders, LLC ("CNY") and Al-Stone, LLC ("Al-Stone"). CNY is the construction manager on the project and Al-Stone the owner of the premises.

On February 28, 2008 CNY, acting as an agent of Tritel, the general contractor, entered into a contract with Broadway Concrete Corp. for the concrete superstructure work at the premises. The trade contract was assigned to Regal on November 4, 2008. The contract obligated the subcontractor to procure insurance to protect the trade contractor, owner and construction manager from claims for damages due to bodily injury and/or property damage which may arise out of the performance of the contract at a limit of $1,000,000.00 each occurrence/$2,000,000.00 aggregate. Regal obtained commercial general liability insurance from Chicago Insurance with effective date of July 14, 2009 through July 14, 2010. The policy contains an additional insured endorsement which defines an additional insured as:

> Any person or organization for whom you are performing operations when you and such person or such organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy.

The coverage of additional insured is limited to "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by acts or omissions of the primary insured or person working on its behalf in the performance of ongoing operations for the additional insured at the designated locations (Pl. Aff. Exh. I). The certificate of liability insurance lists CNY and Al-Stone as additional insureds on the policy issued by Chicago Insurance to Regal (Pl. Aff. Exh. E).

On October 30, 2009 ACE North American Claims, on behalf of CNY and Al-Stone, tendered its defense and indemnification in the underlying action to Chicago Insurance, and on December 8, 2010 sent a similar letter to Fireman's Fund. Neither company responded. Plaintiffs started this declaratory judgment action.

DISCUSSION

As a preliminary matter, Fireman's Fund is not a party to the Chicago Insurance policy. Its motion for summary judgment to dismiss all claims against it was not opposed, and is granted.

At issue in this declaratory action and in the two opposing motions for summary judgment is whether Chicago Insurance provided coverage as additional insureds to CNY as construction manager and Al-Stone as owner of the premises on which the construction project was conducted. By the terms of the additional insureds endorsement, a primary insured must agree in writing in a contract or agreement to add a person or organization as an additional insured on its insurance policy. The First Department has interpreted this standard industry language as requiring a direct written contract between the co-insureds. It is not sufficient if the purported additional insured is named as a third-party beneficiary in a contract. Linarello v City Univ. of New York, 6 AD3d 192, 195; 774 N.Y.S.2d 517 [1st Dept 2004]. There is no dispute that Regal and Al-Stone are not in privity of contract, and thus Al-Stone is not entitled to coverage by the Chicago Insurance policy.

Plaintiffs argue that CNY signed the contract with Broadway Concrete Corporation, Regal's predecessor. Since Regal took over Broadway Concrete Corporation's obligations by assignment, Regal has a written contract with CNY. These claims are contested by Chicago Insurance. It points to the language in the trade contract establishing an agency relationship between CNY and Tritel as general contractor: "[T]rade Contractor [Broadway Concrete/Regal] acknowledges that the Construction Manager [CNY] is acting solely as agent for General Contractor [Tritel]… there is no privity of contract between the Construction Manager [CNY] and the Trade Contractor [Broadway Concrete/Regal];… the relationship created by this Trade

Contract is solely between General Contractor [Tritel] and Trade Contractor [Broadway Concrete/Regal]. To the extent this provision conflicts with any provision in this Trade Contract, this provision shall govern." (Pl. Aff. Exh. F at ¶2.01).

This language acts as an effective disclaimer of any contractual relationship between CNY and the trade contractor. Thus there is no agreement in writing between CNY and Regal in which Regal agrees to provide CNY with coverage as an additional insured. CNY tries to find an alternative binding contract with Regal in the assignment documents. It argues that CNY signed its consent to the assignment in its individual capacity, not as an agent for Tritel. The assignment contains the following language: "Subject to the above provisions, CNY executes this Assignment pursuant to Article 6.03 of the Trade Contract" (Pl. Aff. Exh. G, P.4). Article 6.03 of the trade contract addresses a construction manager's authority to direct the trade contractor to perform work overtime, at its own expense, in order to comply with the applicable schedule or project requirements. Nothing in this article makes the construction manager a party to the trade contract.

CNY refers to the certificate of insurance naming CNY Builders LLC as an additional insured under Regal's policy and states that "[t]his is clear evidence that Regal USA Construction, Inc. acknowledged their obligations under the contract assignment and complied. This establishes proof of a written contract between parties." (Pl. Aff. In Opp., at ¶7). However, the case law refutes this evidentiary claim. ALIB, Inc. v Atl. Cas. Ins. Co., 52 AD3d 419; 861 N.Y.S.2d 28 [1st Dept 2008] (the certificate of insurance, which contained the disclaimer that it was "issued as a matter of information only and confers no rights upon the certificate holder" and that it did not "amend, extend or alter the coverage afforded" by the subject policy, nor did it confer additional insured status). The presentation of the certificate was not sufficient to raise a

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factual issue in opposition to the motion for summary judgment. W. 64th St., LLC v Axis U.S. Ins., 63 AD3d 471; 882 N.Y.S.2d 22 [1st Dept 2009].

Defendant Chicago Insurance raises another ground to show why it is not obligated to provide defense or indemnification to CNY and Al-Stone in the underlying action. The expression "caused, in whole or in part, by acts or omissions" of the primary insured in the limiting clause of the additional insured endorsement refers to negligence. The courts have used these terms interchangeably. *See,* Am. Guar. and Liab. Ins. Co. v CNA Reins. Co., 16 AD3d 154, 155-56; 791 N.Y.S.2d 525 [1st Dept 2005]; Crespo v City of New York, 303 AD2d 166, 167; 756 N.Y.S.2d 183 [1st Dept 2003]. In its cross-motion Chicago Insurance remarks that in the underlying action Aspesi never asserted that his alleged bodily injury was caused, in whole or in part, by Regal's negligence. The underlying action is against CNY, Al-Stone and B&R Rebar Consultants. In its opposition to the cross-motion CNY provides a lengthy argument with reference to Aspesi's deposition and other documents purporting to prove that in fact Aspesi's injury was caused by Regal's negligence. The court refuses to consider these materials. This evidence may be relevant for the underlying action, and should be presented in that matter.

A large part of plaintiffs' argument is devoted to the analysis of cases interpreting the term "arising out of the ongoing operations." The additional insured endorsement contains the phrase "in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above." Courts found this term to mean "originating from, incident to, or having connection with." Regal Const. Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, PA, 15 NY3d 34, 38; 904 N.Y.S.2d 338 [2010]; Worth Const. Co., Inc. v Admiral Ins. Co., 10 NY3d 411,415; 859 N.Y.S.2d 101 [2008]. Plaintiffs claim that the incident in the underlying action is covered, since it is connected with Regal's operations. These cases do not support their position

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in Regal that the coverage was "only with respect to liability arising out of [Regal's] ongoing operations". In the present case the limiting clause refers to negligence by the primary insured, and is much broader. Proof of Regal's negligence would be necessary even if CNY and Al-Stone were additional insureds.

Contrary to plaintiffs' assertions, by not providing a prompt written disclaimer of coverage pursuant to New York Insurance Law §3420(d), Chicago Insurance did not waive its right to disclaim such coverage,. Plaintiffs failed to prove that they were additional insureds on Regal's policy. Insofar as an insurance company's denial of coverage is based upon lack of coverage as an additional insured pursuant to the additional insured endorsement, a timely disclaimer is unnecessary . Matter of Worcester Ins. Co. v. Bettenhauser, 95 N.Y.2d 185, 188, 712 N.Y.S.2d 433 [2000]; Hunter Roberts Const. Group, LLC v Arch Ins. Co., 75 AD3d 404, 407; 904 N.Y.S.2d 52 [1st Dept 2010]; Crespo, 303 AD2d 166 at 167.

CONCLUSION

For the foregoing reasons, it is

ADJUDGED and DECLARED that defendants Fireman's Fund Insurance Company and Chicago Insurance Company are not obligated to defend and indemnify plaintiffs CNY Builders, LLC and Al-Stone, LLC in the action entitled Michael Aspesi v CNY Builders, Inc, et al. (New York County, index number 114984/2010).

Dated: 11/26/12

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ENTER:

J.S.C.

LOUIS B. YORK J.S.C.