Hermitage Ins. Co. v Skyview & Son Constr. Corp.

2013 NY Slip Op 30229(U)

January 22, 2013

Sup Ct, New York County

Docket Number: 107777/11

Judge: Paul Wooten

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SCANNED ON 2/4/2013

[* 1]

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

HERMITAGE INSURANCE COMPANY,
Plaintiff,

INDEX NO. 107777/11

-against-

MOTION SEQ. NO. 001

SKYVIEW & SON CONSTRUCTION CORP., MUHAMET MIRZO, SUZANA MIRZO, 786 IRON WORKS CORP., STALIN IVAN DIAZ, and ASPEN INSURANCE UK LIMITED,

Defendants.

FILED
FEB 04 2013
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 5 were read on this motion dismiss by defendant Stalin Diaz

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2, 3, 4
Replying Affidavits (Reply Memo)	5

Cross-Motion: ☐ Yes ■ No

This is an action brought by plaintiff Hermitage Insurance Company (Hermitage) seeking: (1) a judicial declaration that it is not obligated to defend or indemnify defendants Muhamet Mirzo and Skyview & Son Construction Corporation (Skyview) in an underlying tort action, brought by Stalin Ivan Diaz (Diaz), against Skyview, Muhamet Mirzo and Suzana Mirzo in the Supreme Court of Queens County Index No.: 29058-10 (the underlying tort action); (2) a declaration that defendant Aspen Insurance UK Limited (Aspen) is obligated to defend and indemnify Muhamet Mirzo and Skyview against claims made in the underlying tort action; (3) recovery from Aspen of defense costs incurred by Hermitage in the course of its defense of the underlying tort action and (4) granting Hermitage its costs and attorney's fees. Hermitage has named Diaz, the injured plaintiff in the underlying tort action, as a defendant in this declaratory

judgment action on the ground that he will be directly affected if the Court grants Hermitage the relief sought. Diaz now moves to dismiss the complaint as asserted against him, pursuant to CPLR 3211(a)(7).

The underlying tort action arises out of personal injuries allegedly sustained by Diaz on June 4, 2009, when he was injured while removing a metal roll-up gate at a property owned by defendant Mirzo. The underlying tort action asserts claims for negligence and violations of the Labor Law. After instituting the underlying tort action in Queens County, Diaz, though his attorneys, received a summons and complaint, naming him as a defendant in this declaratory judgment action brought by Hermitage.

Diaz argues that since he is not a party to any insurance contract issued by Hermitage, does not stand in privity with Hermitage, and is not a third-party beneficiary of the policy, he is not a proper defendant in this action and declaratory relief is not available against him. Both Hermitage and Aspen oppose the motion to dismiss. They argue that despite the lack of privity with an insurer, injured claimants such as Diaz are proper party defendants in a declaratory judgment action because their rights and interests will be directly affected by a determination of coverage. They assert that naming Diaz as a defendant guarantees and provides him with the opportunity to participate in the coverage litigation and allows him to be bound by its result.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord the plaintiff the benefit of every possible favorable inference and determine whether the facts as alleged fit within any cognizable theory (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]; *see also Leon v Martinez*, 84 NY2d 83, 87 [1994]).

Diaz correctly asserts that he is not a party to any of the subject insurance policies, is not an insured, does not stand in privity with either Hermitage or Aspen, and is not a third-party

beneficiary of the policies, even though he would clearly benefit if Skyview and Mirzo obtained coverage for the occurrence. Pursuant to Insurance Law § 3420(a)(2), an injured party can only maintain a direct action against an insurer where a judgment has been obtained and has gone unsatisfied for more than 30 days. Relying on this statute, the Court of Appeals has held that an injured party may not bring a declaratory judgment action against an insurer before securing a judgment against the tortfeasor (*Lang v. Hanover Insurance Company*, 3 NY3d 350, 355 [2004]). The First Department had taken this logic a step further and concluded that an injured party, in addition to being unable to commence his own declaratory judgment action pre judgment, also could not be named as a defendant or subject to permissive joinder (*Mount Vernon Fire Ins. Co. v NIBA Construction , Inc.*, 195 AD2d 425, 426 [1st Dept 1993]; *Clarendon Place Corp Landmark Ins. Co.*, 182 AD2d 6, 9-10 [1st Dept 1992]). Diaz relies on these cases in urging dismissal of the complaint against him.

However, more recently, it has been held that an insurer may name an injured party as a defendant in a declaratory judgment action, in order to permit that party to contest the issue of coverage (*see Cataract Sports & Entertainment Group, LLC.*, 59 AD3d 1083, 1084 [4th Dept 2009]; *3405 Putnam Realty Corp. of New York*, 36 AD3d 565 [1st Dept 2007]). This reasoning is both logical and actually beneficial to the injured plaintiff. In the case where an injured party was not named as a defendant in a declaratory judgment action, he or she would still be bound by the court's determinations as to coverage, irrespective of their absence from the case. Section 3420 of the Insurance Law merely states the proposition that injured parties are not usually signatories to the contract between the insurer and the insured, and thus cannot assert rights under that policy until a judgment puts the injured party into the insured's shoes, creating a statutory entitlement. (*See Lang* at 354-55). Insurance Law § 3420(a)(2) is inapplicable here, where it is the insurer who is pursuing a declaration of non-coverage against its insured, as well as the injured tort claimants (*see U.S. Underwriters Ins. Co. v Landau*, 679 FSupp2d 330, 338

[EDNY 2010]). Even if Hermitage only names its insureds and Aspen as defendants, the result of a declaratory judgment denying coverage under one or both of the subject policies, "would practically affect the injured parties in exactly the same way as if they had been named defendants" (*id.*). Thus, if Hermitage is successful, Diaz will be precluded from bringing a direct action against Hermitage pursuant to Insurance Law § 3420(a)(2), when and if he obtains a judgment against Mirzo or Skyview (*id.*). Hermitage appropriately named Diaz as a defendant because Diaz's rights and interests would be affected if the relief sought by Hermitage is granted.

Diaz does not offer any evidence to suggest that he will be prejudiced by his inclusion as a defendant in this action. As stated above, he will greatly benefit from being able to contest the issue of coverage. Diaz does not suggest that his participation in the litigation would be burdensome and the court can alleviate any such concerns during the discovery process. It is worth noting that this appears to be a case involving a dispute between two insurance companies and it seems likely if not certain that insurance coverage for the defense of the underlying tort action will ultimately be provided by one, if not both, of the insurance companies that are parties to this action. Judicial economy and expedience would seem to dictate that the issues of coverage be litigated quickly and in one forum so that the injured party can ensure his recovery of any judgment that he may be awarded in the underlying tort action. Since the naming of Diaz as a defendant was proper and Diaz has not demonstrated any prejudice, the motion to dismiss is denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion by defendant Diaz to dismiss the complaint as asserted against him, pursuant to CPLR 3211(a)(7), is denied; and it is further,

ORDERED that the parties are directed to appear for a Preliminary Conference on

February 27, 2013 at 11:00 a.m., at 60 Centre Street, Room 341, Part 7; and it is further,

ORDERED that counsel for plaintiff Hermitage Insurance Company is directed to serve a copy of this Order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 1/22/13

Paul Wooten J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

FILED

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