

**Founders Ins. Co. v Da Shark, Inc.**

2013 NY Slip Op 30383(U)

February 19, 2013

Supreme Court, New York County

Docket Number: 112112/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

FOUNDERS INSURANCE COMPANY,

Plaintiff,

-against-

DA SHARK, INC., et al.,

**FILED**  
FEB 22 2013  
NEW YORK COUNTY CLERK'S OFFICE

INDEX NO. 112112/11

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001,002,003

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1-3

Answering Affidavits- Exhibits 4,5

Replying Affidavits 6,7

CROSS-MOTION: \_\_\_\_\_ YES  NO

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 2/19/13

Donna M. Mills  
J.S.C.

DONNA M. MILLS, J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 58

----- X  
FOUNDERS INSURANCE COMPANY,

Plaintiff,

Index No.: 112112/11

-against-

DECISION AND ORDER

DA SHARK, INC. d/b/a JADE LOUNGE,  
JOSH INGBER, MATTHEW WALDMAN,  
and JIMMY ESCOBAR,

**FILED**

Defendants.

FEB 22 2013

----- X  
MILLS, J.

NEW YORK  
COUNTY CLERK'S OFFICE

Motion sequence numbers 001, 002 and 003 are consolidated for disposition.

This declaratory judgment action arises from an insurance coverage dispute involving an underlying lawsuit commenced by defendants and counter-plaintiffs Josh Ingber ("Ingber"), Matthew Waldman ("Waldman"), and Jimmy Escobar ("Escobar"), (Ingber, Waldman and Escobar sometimes collectively "Counter-Plaintiffs") for injuries they sustained on or about December 13, 2008 wherein each of the Counter-Plaintiffs were stabbed and caused to suffer physical injuries at the premises of plaintiff, Founders Insurance Company's ("Founders") insured, defendant DA Shark, Inc. ("DA Shark").

In sequence number 001, Founders seeks an Order pursuant to CPLR 3215 (b), for a default judgment against defendant, DA Shark, on the grounds that it has failed to answer, plead, or move for any damages apportioned in the underlying action.

Defendant Da Shark has not appeared or otherwise responded to the Complaint in the instant action.

In sequence number 002, Counter-Plaintiffs seek leave to amend the Answer and Counterclaim and granting summary judgment in regard to all relief sought by them in the proposed Amended Answer and Counterclaim pursuant to CPLR 3212 and 3025(b).

In sequence number 003, Founders seeks an Order pursuant to CPLR 3212, granting it summary judgment and dismissing the Counter-Plaintiffs' counterclaims.

### **FACTUAL BACKGROUND**

Founders commenced the instant action for declaratory judgment seeking to disclaim and limit its insured DA Sharks' insurance coverage for Counter-Plaintiffs' injuries to \$300,000 under various exclusions in the insurance policy. Counter-Plaintiffs contend that Founders' position is in direct opposition to the insurance coverage disclosures produced in the underlying action commenced more than two years ago which set forth that Founders' insurance coverage in regard to Counter-Plaintiffs' injuries were: "General aggregate limit: \$2 million; each occurrence limit: \$1 million." Thus, Counter-Plaintiffs contend that Founders is now estopped from now attempting to disclaim and limit insurance coverage for Counter-Plaintiffs' injuries on the eve of trial of the underlying action.

In the alternative, Counter-Plaintiffs argue that the subject insurance policy affords coverage in the amount of \$600,000 based upon the combined coverage of two separate sublimit and/or "buy-back" coverage forms contained in the Commercial General Liability and Liquor Liability coverage forms, in the amount of \$300,000 for each form for which separate premiums were assessed for each coverage form.

In the underlying action, Counter-Plaintiffs claim that on or about the late evening

of December 12, 2008 and early morning of December 13, 2008, they were seriously injured as a result of multiple stabbings that occurred at the premises of DA Shark, which occurred approximately one hour after Counter-Plaintiffs arrived at DA Shark after leaving Vino Bar. Counter-Plaintiffs' injuries occurred when various individual perpetrators, including Leston Simpson, who were allegedly intoxicated patrons of both Vino Bar and DA Shark, and who had been served by and consumed alcohol sold from both establishments on that day, stabbed each of the Counter-Plaintiffs.

As a result of the injuries sustained by each of the Counter-Plaintiffs, the underlying action was commenced which asserted claims inter alia against DA Shark for negligence, negligent security and violation of the applicable Dram Shop Act.

The subject of the instant action involves Insurance Policy Number CPNY00012 (the "Insurance Policy") which was issued by Founders and which named DA Shark and Sat Prakash as the named insureds.

The Insurance Policy, which was in effect provided Commercial General Liability ("CGL") coverage for bodily injury caused by an "occurrence" in the amount of \$1 million per occurrence and \$2 Million in the aggregate, as disclosed and relied upon by the Counter-Plaintiffs in the underlying action, and also includes a separate declaration and coverage part titled New York Liquor Liability Coverage Part which provided coverage for a "Combined Single Limit" of \$1 Million.

On March 31, 2010, the attorneys for DA Shark in the underlying action served on behalf of DA Shark and its insurer Founders the Insurance disclosure, which stated in relevant portion that it was insured by Founder Insurance Company, with a general aggregate limit of \$2 million, each occurrence limit: \$1 million, medical expense limit;

\$5,000. On March 21, 2011, the attorneys for DA Shark in the underlying action served on behalf of DA Shark and its insurer Founders the Supplemental Insurance disclosure, which merely added the fact that the insurance policy also had an assault battery buy-back in the amount of \$300,000.

Founders now seeks in its motion a declaration that the coverage limit amount of the Insurance Policy to satisfy all bodily injury claims in the underlying action is \$300,000 under an assault and battery buy-back form to the Liquor Liability Coverage part, that the general liability portion of the policy contains an exclusion for liquor liability, that the liquor liability portion of the policy contains an assault and battery exclusion, and that it is not obligated and, DA Shark is not entitled to indemnification of and above the limit of \$300,000 for the occurrence as alleged in the underlying complaint.

Founders is undisputably denying insurance coverage under the CGL coverage part of the Insurance Policy in its entirety by claiming the applicability of a liquor liability exclusion. Counter-Plaintiffs not only argue that Founders waived their right to exclude coverage, but also a failure to timely disclaim coverage. Founders contends that it is not required to disclaim coverage because it claims it is affording coverage to its insured pursuant to the insuring agreement, which contains a \$300,000 sublimit.

## **DISCUSSION**

"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 [internal quotation marks and citation omitted]." Santiago v Filstein, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then

shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 (1st Dept 2006); see Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978).

Insurance Law § 3420 (d) (2) requires that an insurer intending to disclaim liability under a liability policy "shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." "The purpose of Insurance Law § 3420 (d) is to protect the insured, the injured party 'and any other interested party who has a real stake in the outcome' from prejudice resulting from a belated denial of coverage" (Tops Mkts. v Maryland Cas., 267 AD2d 999, 1000 [1999], quoting Excelsior Ins. Co. v Antretter Contr. Corp., 262 AD2d 124, 127 [1999]).

While Counter-Plaintiffs argue that Founders has violated Insurance Law § 3420(d)(2), this section of the Insurance Law is inapplicable because Founders is not disclaiming liability or denying that insurance coverage is available for the underlying action. Indeed, Founders has offered the full measure of available insurance for the incident—\$300,000. Therefore, notice of disclaimer is unnecessary ( see Santa v Capitol Specialty Insurance, Ltd., 33 Misc3d 1218 [NY Cty. 2011]) aff'd 96 AD3d 638 [1<sup>st</sup> Dept 2012]) (notice requirement does not apply to insurance endorsement limiting, but not denying, coverage).

Based upon Santa, which is controlling, the argument advanced by Counter-Plaintiffs that there was an untimely disclaimer does not apply here - this is not a

situation where Founders is disclaiming coverage. It is defending its insured in the underlying case and is affording coverage to its insured pursuant to the insuring agreement, which contains a \$300,000 sublimit.

In the instant action, there is no question that the policy sublimit applies and Founders coverage obligation with regard to all claims made by Counter-Plaintiffs is limited to \$300,000.

As to that branch of the Counter-Plaintiffs' motion to amend their Answer and Counterclaim, this Court is mindful that "in the absence of significant prejudice or surprise to the opposing party, leave to amend a pleading should be freely given (see CPLR 3025 [b]), unless the proposed amendment is palpably insufficient or patently devoid of merit (see Bernardi v Spyratos, 79 AD3d 684, 688 [2010]). In the instant action the proposed Amended Answer and Counterclaim would not change the conclusion, based on legally applicable law, that Founders is entitled to a declaratory judgment. As such, this Court finds that the Amended Answer and Counterclaim is devoid of merit.

The Court has reviewed Counter-Plaintiffs other contentions and finds them to be without merit.

Accordingly, it is

ORDERED that the Plaintiff's motion for a default judgment against DA Shark, Inc. is granted on default; and it is further


ORDERED that the Plaintiff's motion for a declaratory judgment is granted, and Founders Insurance Company is not obligated, and defendant DA Shark, Inc. is not entitled, to indemnification over the sublimit of \$300,000 for the occurrence as alleged

in the underlying complaint commenced by defendants Josh Ingber, Matthew Waldman, and Jimmy Escobar; and it is further

ORDERED that the defendants/Counter-Plaintiffs' Josh Ingber, Matthew Waldman, and Jimmy Escobar's motion is denied in its entirety.

Dated: 2/19/13

ENTER:

  
\_\_\_\_\_

DONNA M. MILLS, J.S.C.

**FILED**

FEB 22 2013  
NEW YORK  
COUNTY CLERKS OFFICE