

WWP Owner, LLC v Zwicker Elec. Co., Inc.
2013 NY Slip Op 30421(U)
February 19, 2013
Supreme Court, Queens County
Docket Number: 21350/2011
Judge: James J. Golia
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course of his employment by Zwicker Electric while at the premises known as 825 Eighth Avenue, New York, New York, owned by defendant WWP. It is alleged that WWP hired Structure Tone as a contractor, which in turn hired Zwicker Electric to perform electrical work pursuant to purchase orders dated October 15, 2007 and January 14, 2008. Defendant Zwicker Electric served an answer, asserting various affirmative defenses.

Defendant SNIC served an answer to the complaint herein, asserting various affirmative defenses and interposing a counterclaim against plaintiffs seeking a judgment declaring that it is not obligated to defend or indemnify plaintiffs with respect to the claims in the *Farago* action. Plaintiffs served a reply to the counterclaim of defendant SNIC.

With respect to that branch of the motion by defendant SNIC to dismiss the complaint asserted against it by plaintiff Structure Tone, defendant SNIC admits that it issued a commercial general liability policy (the SNIC policy) to Zwicker Electric, policy number TUV440147-00, effective for the policy period May 1, 2007 through May 1, 2008, with limits of \$1 million per occurrence and a \$2 million general aggregate. Defendant SNIC also admits that by letter dated April 26, 2011, it agreed to defend Structure Tone in the *Farago* action as an additional insured under the SNIC policy, subject to a reservation of rights to disclaim coverage to Structure Tone in the event the “Wrap-Up Exclusion” endorsement applied to bar coverage. Defendant SNIC asserts that in view of such agreement, plaintiff Structure Tone has failed to state a cause of action against it.

In considering a motion to dismiss a complaint for failure to state a cause of action (*see* CPLR 3211[a][7]), the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court’s function is to determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Morone v Morone*, 50 NY2d 481, 484 [1980]; *Rochdale Vil. v Zimmerman*, 2 AD3d 827 [2d Dept 2003]). The criterion is whether the proponent of the pleading has a cause of action, not whether it has stated one (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Although defendant SNIC has agreed to defend Structure Tone in the underlying action as an additional insured under the SNIC policy, such agreement is subject to a reservation of rights and therefore that portion of the complaint which seeks to declare that SNIC has a duty to defend plaintiff Structure Tone is not completely resolved. Additionally, the agreement, is irrelevant to the portion of the complaint which seeks to declare that SNIC has a duty to indemnify Structure Tone in the *Farago* action. The issue of whether SNIC has a duty to indemnify Structure Tone in the *Farago* action remains a justiciable controversy for which plaintiff Structure Tone may seek declaratory relief. That branch of the motion by

defendant SNIC to dismiss the complaint asserted against it by plaintiff Structure Tone is denied.

With respect to the branch of the motion seeking summary judgment against plaintiff WWP, it is well established that 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 demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

The SNIC policy lists Zwicker Electric as the named insured. Plaintiff WWP is not an “insured” as that term is defined in Section II of the SNIC policy, and is not specifically listed as an additional insured in “Endorsement No. 2” and “Endorsement #3,” endorsements to the SNIC policy. The SNIC policy also includes an endorsement denominated “ADDITIONAL INSURED-OWNERS, LESSEES or CONTRACTORS-(FORM B)” (CG 20 10 11 85) which provides:

“This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization	As Required by written contract
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(if no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of “your work” for that insured by or for you.

This insurance shall apply as primary insurance as respects any Person, Organization, Partnership or Joint Venture named above, and any other insurance available to such Person, Organization, Partnership or Joint Venture shall be excess and not contributory with the insurance afforded by this policy.”

No entry appears in the Schedule of this endorsement, and WWP is not named in the Declarations. Furthermore, this endorsement affords additional insured coverage only to those persons or organizations with which Zwicker Electric contractually agreed to procure such insurance coverage and only with respect to liability arising out of Zwicker Electric's work for such persons or organizations or for itself. The Zwicker Electric purchase orders do not call for Zwicker Electric to have WWP, as owner, added as an additional insured to Zwicker Electric's commercial general liability policy.

Defendant SNIC, thus, has established its prima facie entitlement to summary judgment in its favor by demonstrating that plaintiff WWP is not a named insured under Section II of the SNIC policy and does not qualify for additional insured coverage under the endorsements to the SNIC policy (*see Christ the King Regional High School v Zurich Ins. Co. of North America*, 91 AD3d 806, 807 [2d Dept 2012] [intent to obtain additional insurance coverage must be "expressly and specifically stated"]). The burden shifts to plaintiff WWP to raise a triable issue of fact.

Plaintiff WWP does not point to any provision in Section II of the SNIC policy or the endorsements to the policy to establish that it is an insured or additional insured thereunder. Rather, it relies upon the "the ZWICKER Certificate of Insurance," naming Structure Tone as the certificate holder, to assert it has been afforded additional insured coverage under the SNIC policy. Plaintiff WWP points to the language which appears on such certificate, within in the section denominated "DESCRIPTION OF VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS," indicating "[a]s per written contract, Additional ... status encompasses General Liability... and/or the building owners/managers." Plaintiff WWP claims to be the owner of the premises where the accident occurred.

This certificate of insurance is insufficient evidence that plaintiff WWP is an additional insured under the SNIC policy. Plaintiff WWP is not listed as a holder of the certificate, and the certificate by itself is insufficient to show that Zwicker Electric purchased the required insurance, or that the certificate amended, altered, or extended the coverage afforded by the policy to WWP. It expressly states that it was issued as "a matter of information only and confers no rights upon the certificate holder," and "does not amend, extend or alter the coverage afforded by the [SNIC policy]" (*see McGill v Polytechnic University*, 235 AD2d 400 [2d Dept 1997]). That Zwicker Electric is required, pursuant to the purchase orders, to defend and indemnify WWP has no bearing on whether WWP qualifies as an additional insured under the SNIC policy in the first instance (*see Kinney v Lisk Co.*, 76 NY2d 215 [1990]; *Mathew v Crow Constr. Co.*, 220 AD2d 490 [2d Dept 1995]; *see also McGill v Polytechnic Univ.*, 235 AD2d 400 [2d Dept 1997]). To be an additional insured under the SNIC policy, Zwicker Electric had to have contractually agreed to provide

liability insurance coverage to WWP (*see School Constr. Consultants, Inc. v ARA Plumbing & Heating Corp.*, 63 AD3d 1029 [2d Dept 2009]). Plaintiff WWP has failed to demonstrate Zwicker Electric did so.

As a consequence, defendant SNIC is entitled to summary judgment in its favor on that portion of its counterclaim seeking to declare it owes no duty to defend or indemnify plaintiff WWP in connection with the claims asserted by the plaintiff in the *Farago* action. Therefore, the branch of the motion by defendant SNIC for summary judgment on its counterclaim is granted only to the extent of granting summary judgment in favor of defendant SNIC on that portion of its counterclaim asserted against plaintiff WWP. Accordingly, it is:

ORDERED, DECLARED and Adjudged that defendant SNIC is not obligated to defend or indemnify plaintiff WWP with respect to the claims asserted in the *Farago* action.

This constitutes the order of the Court.

Dated: February 19, 2013

James J. Golia, J.S.C.