

PVT Fidi LLC v 6232 Assoc. LLC
2013 NY Slip Op 31646(U)
July 19, 2013
Supreme Court, New York County
Docket Number: 151161/2012
Judge: Eileen A. Rakower
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

HON. EILEEN A. RAKOWER

PRESENT: _____

PART 15

Justice

Index Number : 151161/2012
PVT FIDI
vs
6232 ASSOCIATES
Sequence Number : 001
DISMISS ACTION

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). 1, 2, 3

Answering Affidavits — Exhibits _____ | No(s). 4

Replying Affidavits _____ | No(s). 5, 6

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

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

Dated: 7/19/13



HON. EILEEN A. RAKOWER, 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: PART 15

-----X

PVT FIDI LLC,

Index No.
151161/2012

Plaintiff,

DECISION
and ORDER

Mot. Seq. 001

-against-

6232 ASSOCIATES LLC,

Defendant.

-----X

PVT FIDI LLC,

Third-Party Plaintiff,

-against-

MAJOR CONSTRUCTION CO., INC., FIRST
MERCURY INSURANCE COMPANY, SCOTTSDALE
INSURANCE COMPANY, U.S. UNDERWRITERS
INSURANCE COMPANY, U.S. UNDERWRITERS
INSURANCE COMPANY and DELIDAKIS
CONSTRUCTION CO. INC.,

Third-Party Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

This action was commenced by filing of the Summons and Complaint on March 23, 2012. As alleged in the Complaint, on or about August 1, 2011, Plaintiff PVT Fidi LLC ("Plaintiff") entered into an agreement to lease commercial premises located at 32 Water Street, New York, NY from defendant 6232 Associates LLC ("Defendant") for a period of ten years. After taking possession and commencing a gut renovation of the Premises for use as a restaurant, Plaintiff learned that the Premises had significant latent and dangerous structural defects and demanded

Defendant perform the necessary repairs in accordance with the lease. Plaintiff alleges that despite its repeated requests, Defendant failed to make these repairs. Plaintiff alleges that it was forced to vacate the premises in November 2011, and after Defendants' inaction, surrendered the keys to Defendant in February 2012. Plaintiff commenced this action seeking declaratory relief that Defendant's failure to cure the structural defects at the Premises constituted constructive eviction and the condition and issues at the Premises warrant rescission of the lease. Plaintiff also asserts causes of action for breach of contract, implied warranty of fitness for use, and fraudulent inducement.

In its Answer, Defendant interposed counterclaims against Plaintiff for breach of contract and negligence, alleging in its third counterclaim for negligence that Plaintiff performed unauthorized alterations which caused significant damage to the structural elements of the Premises.

On or about June 12, 2012, Plaintiff filed a Third-Party Complaint against Major Construction Co., Inc., the company that Plaintiff had hired to perform the renovations at the Premises, seeking contractual and/or common law indemnification and contribution for Defendant's negligence counterclaim asserted against Plaintiff.

On or about January 31, 2013, Plaintiff filed an Amended Third Party Complaint, naming First Mercury Insurance Company ("First Mercury") and First Mercury's insured Delidakis Construction Co. Inc. ("Delidakis"), as third party defendants, seeking common law indemnification and contribution for Defendant's negligence Counterclaim. Plaintiff alleges that Defendant had contracted with Delidakis to perform renovation work at the Premises. Plaintiff alleges that it "was named as an additional insured under a commercial liability insurance policy issued to Delidakis dated January 31, 2012, policy number FCGL042698," referring to a Certificate of Insurance dated January 31, 2012, and seeks a declaration that it is entitled to coverage for the Counterclaims as an additional insured under the Policy that First Mercury issued to Delidakis (tenth cause of action). Plaintiff also contends that the First Mercury Policy constitutes a binding agreement between Plaintiff and First Mercury, and that First Mercury breached its contractual obligations in failing to provide Plaintiff with a defense for the counterclaims (eleventh cause of action).

First Mercury now moves for an Order, (i) pursuant to CPLR §3211(a)(1) dismissing the Amended Third-Party Complaint of Plaintiff as against First Mercury; and (ii) pursuant to CPLR §3001, declaring that First Mercury is not obligated to defend or indemnify Plaintiff in connection with the claims described in its Amended Third-Party Complaint. Plaintiff and third-party defendant U.S. Underwriters Insurance Company oppose.

In support of its motion to dismiss, First Mercury submits the affirmation of Denise Marra, which submits a copy of the agreement entered on January 24, 2012, prior to Plaintiff's surrender of the Premises, between Defendant and Delidakis to perform certain structural repairs to the Premises which required Delidakis to maintain certain liability insurance coverage in place and to include Defendant and the architect for the project as additional insureds, as well as a copy of the Commercial General Liability policy issued to Delidakis for the period August 25, 2011 to August 25, 2012, under policy number FCGL042698. First Mercury also submits a reply affidavit of Brandon Van Wormer, a Claim Specialist, which avers based on his personal knowledge the validity of the policy and agreement annexed to Massa's affirmation.

CPLR §3211(a)(1) provides, in relevant part, "a party may move for judgment dismissing one or more causes of action asserted against him on the grounds that" ... "a defense is founded upon documentary evidence."

On a motion to dismiss pursuant to CPLR §3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) "When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Here, First Mercury issued a commercial general liability policy to Delidakis for the period August 25, 2011 to August 25, 2012, under policy number FCGL042698. The Policy contains an "Additional Insured- Owners, Lessees Or Contractors-Automatic Status When Required In Construction Agreement With You" endorsement that provides, in relevant part

1. Section II- Who Is An Insured is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an

additional insured only with respect to liability arising out of your ongoing operations performed for that insured.

Accordingly, the additional endorsement contained in the First Mercury Policy extends additional insured coverage only to those entities with whom Delidakis has entered into a contract. Here, Plaintiff has presented a Certificate of Insurance, dated January 31, 2012 describing the First Mercury Policy and designating Plaintiff as an additional insured. Plaintiff alleges that its demand for coverage was made on January 27, 2012, and that four days later, Defendant's counsel forwarded the January 31, 2012 Certificate of Insurance to Plaintiff's counsel. Accordingly, Plaintiff has demonstrated that it has a cause of action. First Mercury has not submitted any documentary evidence that flatly contradicts the certificate of insurance or conclusively establishes a defense to the asserted claims as a matter of law.

Additionally, a declaration pursuant to CPLR §3001 is denied at this juncture.

Wherefore it is hereby

ORDERED third party defendant First Mercury Insurance Company's motion is denied, and it is directed to file and serve its answer within 10 days of service of this Order with notice of entry.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: July 19, 2013



EILEEN A. RAKOWER, J.S.C.