

Mira v Scottsdale Ins. Co.

2013 NY Slip Op 33098(U)

November 29, 2013

Supreme Court, Suffolk County

Docket Number: 09-48189

Judge: Peter H. Mayer

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY**COPY****PRESENT:**Hon. PETER H. MAYER
Justice of the Supreme CourtMOTION DATE 4/23/13 (#005)
MOTION DATE 5/30/13 (#006)
MOTION DATE 6/11/13 (#007)
ADJ. DATE 8/2/13
Mot. Seq. #005 - MotD
Mot. Seq. #006 - MD
Mot. Seq. #007 - MotD-----X
CARLOS A. MIRA,

Plaintiff,

- against -

SCOTTSDALE INSURANCE CO., BAGATTA
ASSOCIATES, INC., INSURANCE
INTERMEDIARIES, INC., LONG ISLAND
MANAGEMENT SERVICES, INC.,Defendants.
-----XCREEDON & GILL, P.C.
Attorney for Plaintiff
24 Woodbine Avenue, Suite 14
Northport, New York 11768FAUST GOETZ SCHENKER & BLEE
Attorney for Defendant Scottsdale Ins. Co.
Two Rector Street, 20th Floor
New York, New York 10006WILSON, ELSER, MOSKOWITZ, EDELMAN &
DICKER LLP
Attorney for Defendant Bagatta Assoc.
3 Gannett Drive
White Plains, New York 10604TROMELLO, McDONNELL & KEHOE
Attorney for Defendant Long Is. Mgt. Servs.
P.O. Box 9038
Melville, New York 11747

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendant Bagatta Associates, Inc., dated March 28, 2013, and supporting papers (including Memorandum of Law); (2) Notice of Motion by defendant Long Island Management Services, Inc., dated May 6, 2013, and supporting papers; (3) Notice of Motion by defendant Scottsdale Insurance Company, dated May 21, 2013, and supporting papers; (4) Affirmation and Affidavit in Opposition by the plaintiff, dated July 12, 2013, and supporting papers (#005); (5) Affirmation and Affidavit in Opposition by the plaintiff, dated July 12, 2013, and supporting papers (#006); (6) Affirmation and Affidavit in Opposition by the plaintiff, dated July 12, 2013, and supporting papers (#007); (7) Affirmation in Partial Opposition by defendant Bagatta Associates, Inc., dated June 24, 2013, and supporting papers (#006); (8) Affirmation in Partial Opposition by defendant Long Island Management Services, Inc., dated April 17, 2013, and supporting papers (#005); (9) Reply Affirmation of Bagatta Associates, Inc., dated August 1, 2013, and supporting papers; (10) Reply Affirmation of Long Island Management Services, Inc., dated

July 23, 2013, and supporting papers; and (11) Reply Affirmation of Scottsdale Insurance Company, dated August 1, 2013, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motions are decided as follows: it is

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Bagatta Associates, Inc. for an order pursuant to CPLR 3212, granting summary judgment dismissing the plaintiff's second cause of action and all cross claims against it, is granted to the extent of granting summary judgment dismissing the complaint against it, and is otherwise denied; and it is further

ORDERED that the motion by defendant Long Island Management Services, Inc. for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross claims against it and in its favor on its cross claim for common-law indemnification against defendant Bagatta Associates, Inc., is denied; and it is further

ORDERED that the motion by defendant Scottsdale Insurance Company for an order pursuant to CPLR 3212, dismissing the complaint and all cross claims against it, is granted to the extent of granting summary judgment dismissing the complaint against it, and is otherwise denied.

This is an action to recover damages arising out of a fire on March 1, 2008 which destroyed the plaintiff's condominium unit located at the Lexington Village Condominium in Bay Shore, New York.

The plaintiff pleads three causes of action in his complaint. The first, for breach of contract, is against Scottsdale Insurance Company ("Scottsdale"), which issued a commercial property insurance policy to the Lexington Village Condominium ("Lexington"); the plaintiff alleges that he and the other unit owners were third-party beneficiaries of the policy, and that Scottsdale failed to pay for the replacement and reconstruction of the plaintiff's unit as required under the policy. The second, based in negligence, is against Bagatta Associates, Inc. ("Bagatta"), the insurance broker which procured the policy on behalf of Lexington; the plaintiff alleges that Bagatta failed to obtain the insurance required to adequately insure the property against loss because it failed to provide accurate underwriting information to Scottsdale, including the correct square footage of the building in which the plaintiff's unit was located, and that it failed to recognize that the policy, once issued, was inadequate. The third, also based in negligence, is against Long Island Management Services Inc. ("LIMS"), the managing agent for the property; the plaintiff alleges that LIMS failed to provide accurate underwriting information to Scottsdale, to Bagatta, and to Insurance Intermediaries Inc., the underwriter, including the correct square footage of the building in which the plaintiff's unit was located, and that it failed to recognize that the policy, once issued, was inadequate. As to each cause of action, the plaintiff claims to have been damaged by a complete loss of the unit, by the continued obligation to pay mortgage fees and interest on the unit, and by a loss of income caused by the inability to rent the unit.

In their answers, Scottsdale and LIMS plead cross claims for common-law indemnification and contribution against each of their respective codefendants. Bagatta does not plead any cross claims.

By order dated April 10, 2012, the court directed that this action be joined for trial with a related action entitled *Lexington Vil. Condominium v Scottsdale Ins. Co.* (Sup Ct, Suffolk County, Index No. 09-7651).

Now, discovery having been completed and a note of issue having been filed, Scottsdale, Bagatta, and LIMS each separately and timely move for summary judgment.

The court finds that Scottsdale established its prima facie entitlement to summary judgment by demonstrating, based on a copy of the policy which it issued to Lexington, that the plaintiff was not an intended third-party beneficiary under the policy. It is settled law that a third party may sue as an intended beneficiary on a contract such as an insurance policy but that an incidental beneficiary may not (e.g. *Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 389 NYS2d 327 [1976]). “In order for a third party to enforce a policy of insurance, it must be demonstrated that the parties intended to insure the interest of [the third party] who seeks to recover on the policy” (*Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 33, 418 NYS2d 76, 80 [1979], *affd* 49 NY2d 924, 428 NYS2d 675 [1980]; *accord State of New York v American Mfrs. Mut. Ins. Co.*, 188 AD2d 152, 593 NYS2d 885 [1993]). “The intention to benefit the third party must appear from the four corners of the instrument,” and “[t]he intention to cover the third party must be that of both parties to the insurance contract” (*Stainless, Inc. v Employers Fire Ins. Co.*, *supra* at 33, 34, 418 NYS2d at 80; *see Tilden Commercial Alliance v 2nd Edition Originals*, 242 AD2d 702, 664 NYS2d 951 [1997]). Here, the plaintiff was not named as an insured, nor is there any reference in the policy to the plaintiff or to any of the unit owners (*see State of New York v American Mfrs. Mut. Ins. Co.*, *supra*).

It was incumbent on the plaintiff, therefore, to demonstrate, by the submission of proof in evidentiary form, an issue of fact whether the parties to the insurance contract intended that he be more than a mere incidental beneficiary (*see id.*). This the plaintiff failed to do. While the plaintiff, citing the by-law provisions requiring the condominium’s board of managers to procure fire insurance at the unit owners’ expense and appointing the board of managers (for certain limited purposes) as the agent for each unit owner,¹ contends that the by-laws manifest the necessary intent to make the unit owners the intended beneficiaries of the policy, he points to no ambiguity in the policy itself as might otherwise

¹ Pursuant to article III of the condominium’s by-laws, the “affairs of the Condominium” are governed by a board of managers, among whose powers are “[t]o insure and keep insured the Common Properties and Units in accordance with Article VII of these By-Laws.” Article VII, section 5 obligates the board of managers to obtain and maintain, *inter alia*, fire insurance “insuring the Buildings including all of the Units, together with all heating and other service machinery contained therein (but not including wall, ceiling or floor decorations or covering or furniture, furnishings, fixtures, equipment or other personal property supplied or installed by Unit Owners), covering the interest of the Condominium, the Board of Managers and all Unit Owners and their mortgagees, as their interests may appear, in an amount equal to the full replacement value of the Property.” Article VII, section 1 provides that the cost of premiums on all insurance policies required to be obtained and maintained by the board of managers shall be included in the common charges and expenses assessed and allocated among the unit owners.

justify the admission of extrinsic proof to interpret its meaning (*see id.*; *Stainless, Inc. v Employers Fire Ins. Co.*, *supra*). Nor, in any event, has he demonstrated that those by-laws are in any respect binding on Scottsdale.

Accordingly, Scottsdale is entitled to summary judgment dismissing the complaint against it, and Scottsdale's own cross claims for common-law indemnification and contribution are dismissed as academic. However, as Scottsdale failed in its moving papers to articulate a basis for dismissing the cross claims for common-law indemnification and contribution against it, its motion is denied to that extent.

The court further finds that Bagatta established its prima facie entitlement to judgment as a matter of law by demonstrating, irrespective of any mistakes it may have made in procuring the policy, that it owed no duty to the plaintiff and that the plaintiff was not a third-party beneficiary of any agreement between Bagatta and Lexington to procure insurance. According to the deposition testimony of Frank Bagatta, the owner of the agency, it was engaged by LIMS to place insurance on behalf of Lexington. As a general matter, the duty of an insurance broker runs only to its customer and not to a third party with whom the broker is not in privity of contract and who is not an intended beneficiary of the contract (*see Arredondo v City of New York*, 6 AD3d 328, 775 NYS2d 150 [2004]; *American Ref-Fuel Co. of Hempstead v Resource Recycling*, 248 AD2d 420, 671 NYS2d 93 [1998]). "Under New York law, a duty directly assumed to benefit one person does not extend to third parties who are not intended beneficiaries of the undertaking to perform, even if it is foreseeable that someone else might be damaged by the [malfeasance or] nonfeasance" (*Oathout v Johnson*, 88 AD2d 1010, 451 NYS2d 932, 933 [1982]).

The plaintiff, in opposition, failed to raise a triable issue of fact. The plaintiff claims, in part, that privity exists because the board of managers was acting as agent for the unit owners in procuring insurance. In support of his claim, the plaintiff cites excerpts of the condominium's by-laws designating the board of managers as the agent for each unit owner to "adjust all claims arising under insurance policies" and to "execute and deliver releases upon the payment of claims." Whatever else the import of those provisions, however, they do not serve to establish that the plaintiff was in privity of contract with Bagatta. Nor has the plaintiff demonstrated that the existence of such fraud, collusion or other special circumstance as to permit recovery in the absence of privity (*see Griffin v DaVinci Dev.*, 44 AD3d 1001, 845 NYS2d 97 [2007]). As to the plaintiff's further claim that the unit owners were intended under the by-laws to be the beneficiaries of all contracts made by Lexington, the record is devoid of evidence that it was the intention of Bagatta to benefit the unit owners, that Bagatta knew that the unit owners were the intended beneficiaries of the coverage, or that any of the unit owners were involved in obtaining the coverage (*see Stainless, Inc. v Employers Fire Ins. Co.*, *supra*; *cf. Dominion Fin. Corp. v Asset Indem. Brokerage Corp.*, 60 AD3d 461, 874 NYS2d 115 [2009]).

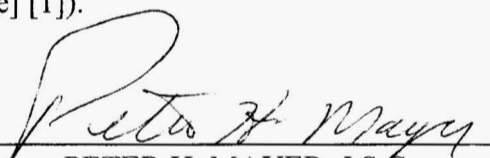
Accordingly, Bagatta is also entitled to summary judgment dismissing the complaint against it. As with Scottsdale, however, Bagatta is not entitled to summary judgment dismissing the (remaining) cross claims for common-law indemnification and contribution against it because it failed to address those claims in its moving papers.

As to LIMS, however, the court finds that it failed to support its motion with affidavits or other evidentiary proof sufficient to demonstrate its prima facie entitlement to summary judgment. A managing agent is subject to liability in tort if, under the terms of the management agreement, it displaces the owner's duty of care to third parties and substitutes its liability for that of its principal (*Yellow Book of N.Y. v Shelley*, 74 AD3d 1333, 904 NYS2d 216 [2010]). Even in situations where the agent may not be said to have assumed or undertaken such a duty, it may be held liable to third parties for affirmative acts of negligence (*Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 825 AD3d 28 [2006], *overruled on other grounds Fletcher v Dakota, Inc.*, 99 AD3d 43, 948 NYS2d 263 [2012]; *Jones v Archibald*, 45 AD2d 532, 360 NYS2d 119 [1974]). Here, although LIMS claims it owed no duty to the plaintiff and that it was not guilty of affirmative negligence, neither the affirmation of its attorney nor the deposition transcripts (of Bagatta Associates, Inc., offered to show that representatives of Bagatta erred in completing Lexington's application for insurance by providing incorrect information regarding the square footage of the plaintiff's building) submitted with its moving papers suffice to establish those claims. Instead, it appears that the relevant proof—including an affidavit from LIMS's president, Linda Donato, and a copy of the management agreement—is contained in the papers submitted in support of its motion for summary judgment in the related action, returnable August 6, 2013. While its attorney seeks to incorporate those documents by reference, the court is dubious that a litigant may validly incorporate by reference documents filed in a separate (although related) action (*cf. Ackerman v D'Agostino Supermarkets*, 96 AD3d 672, 948 NYS2d 258 [2012]). And even were the court to overlook this irregularity in light of the fact that the motions in this action and in the related action are being decided contemporaneously, it is apparent from the affidavit of service annexed to its moving papers in the related action that LIMS did not serve a copy of those papers on the plaintiff in this action; this, despite the court's direction in its April 10, 2012 order that "all motions shall be served upon counsel for all parties appearing in each joined action." Consequently, the court is constrained to deny LIMS's motion in its entirety.²

The court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: _____

11/29/13


 PETER H. MAYER, J.S.C.

² To be entitled to summary judgment even on its cross claim for common-law indemnification against Bagatta, LIMS would be required to establish that it was not actively negligent. Common-law indemnity "runs only in favor of a party not actively at fault against a party actively at fault" (*Colyer v K Mart Corp.*, 273 AD2d 809, 811, 709 NYS2d 758, 760 [2000]), and summary judgment on such a claim "is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved" (*La Lima v Epstein*, 143 AD2d 886, 888, 533 NYS2d 399, 401 [1988]).