Mt. Hawley Ins. Co. v American Home Assur. Co.
2013 NY Slip Op 33307(U)
January 18, 2013
Sup Ct, New York County
Docket Number: 103856/09
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, Justice — PART 7

MT. HAWLEY INSURANCE COMPANY and 277 PARK AVENUE, LLC.,
Plaintiffs,

- against -

AMERICAN HOME ASSURANCE COMPANY, ONESOURCE HOLDINGS, INC., ONESOURCE SERVICES, INC., and ABM INDUSTRIES, INC.,
Defendants.

INDEX NO. 103856/09

MOTION SEQ. NO. 001

The following papers were read on this motion by defendants for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ■ Yes ☐ No

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Before the Court is a motion by defendants Onesource Holdings, Inc., Onesource Services, Inc. and ABM Industries, Inc. (hereinafter, the Onesource Defendants) for summary judgment dismissing the complaint and for declaratory relief. Also before the Court is a cross-motion by plaintiffs for leave to amend their complaint.

BACKGROUND

The complaint alleges the following: plaintiff Mt. Hawley Insurance Company (Mt. Hawley) insured plaintiff 277 Park Avenue, LLC (277 Park). American Home insured Onesource Holdings, Inc. and Onesource Services, Inc., under policies with effective dates of June 30, 2002 through June 30, 2003. According to the complaint, these policies named 277 Park as an additional insured.

In the course of his employment with Onesource Holdings, Inc., on March 26, 2003 Barry Hill (Hill) suffered injuries while working as a window cleaner at 277 Park's premises. As a result, Hill commenced a personal injury lawsuit in the Supreme Court, Bronx County, entitled *Hill v Stahl, et al.*, Index No. 22528/03 (Hill lawsuit), wherein 277 Park was a named defendant.

Subsequently, on December 4, 2009, a settlement was reached between Hill and 277 Park in the amount of $400,000.00. Mt. Hawley paid the full settlement amount to Hill. In the case before this Court, plaintiffs seek recovery from the defendants on the basis that American Home is liable for damages incurred by its refusal to defend and indemnify 277 Park pertaining to the Hill lawsuit. Plaintiffs also allege that the Onesource Defendants refused to provide defense and indemnification to 277 Park, which they claim was an additional insured in the policies.

In addition to damages, plaintiffs seek a declaratory judgment declaring that 277 Park is entitled to additional insured coverage under the Onesource policies, and that Mt. Hawley is entitled to reimbursement with respect to the settlement and related defense costs in the underlying Hill action.

The Onesource Defendants move for summary judgment dismissing the complaint as asserted against them, claiming that 277 Park was never covered in the Onesource policies as an additional insured. They assert that for an additional insured endorsement to be added to any existing policy, the insured's broker would have to submit a written request to American Home for the form to be added to the policy. Onesource Defendants claim that this never occurred, that no such written request exists in the underwriting file, and that Onesource's broker was not authorized to issue the additional insured endorsement.

In support of their motion, the Onesource Defendants provide a certified copy of the 2002-2003 Onesource policy, produced by American Home, which does not include the additional insured endorsement. The Onesource Defendants submit deposition testimony of American Home's underwriter, Phil Stafford, who testified that no such endorsement was issued. Onesource Defendants also submit deposition testimony from Karla Palmer (Palmer), a sales executive employed by non-party Ibex, Inc./ Certificates Now (Ibex). Onesource's insurance broker Murphy & Jordan was a client of Ibex. Palmer testified that she issued an

additional endorsement on behalf of Murphy & Jordan, adding 277 Park as an additional insured, but admitted that only American Home had the authority to issue such documents. Moreover, she testified that Ibex would not have issued the document pursuant to a request from the Onesource Defendants.

The Onesource Defendants argue that, in the absence of any proof that 277 Park was an additional insured under the policies at bar, they are not liable to plaintiffs to any degree, and should be dismissed from this action. They also move for a declaration that 277 Park is not an additional insured under the aforesaid policies.

In separate papers, American Home "cross-moves" for summary judgment, and for the same declaratory judgment as sought by the Onesource Defendants. In supporting the Onesource Defendants' motion, American Home argues that it never authorized or issued an additional insured endorsement on behalf of 277 Park. American Home also argues that it had the sole authority to issue such documents. Ibex, which issued the endorsement, acknowledged, through the testimony of Palmer, that it never acted on behalf of American Home, nor had it informed American Home of its issuance of the endorsement.

Plaintiffs oppose defendants' motions and cross-move for leave to amend the complaint. In their opposition, plaintiffs claim that they were in possession of endorsement CG 20 10 11 85, which specifically named 277 Park as an additional insured in the policies at bar. Defendants argue that this endorsement was not included in the policies. Plaintiffs refer to another endorsement, 61712, which they claim is a part of the policies, and which would allegedly cover 277 Park as an insured. Plaintiffs also claim that the Onesource Defendants had agreed to insure 277 Park. According to plaintiffs, Onesource's contractual obligation to furnish coverage to 277 Park is an issue of fact precluding summary judgment. Specifically, plaintiffs state that, as Onesource was providing window cleaning services pursuant to an agreement, at which time Hill was employed by Onesource as a cleaner, the agreement

allegedly required that the owners' designated insurance be maintained. Plaintiffs contend that insurance guidelines in effect at the time of Hill's accident by their terms, required Onesource to name 277 Park as an additional insured.

Plaintiffs cross-move for leave to amend their complaint to include endorsement 61712 as part of the policies, arguing that this would provide indisputable proof of 277 Park being an additional insured. They insist that there would be no prejudice if the cross-motion is granted.

In reply, the Onesource Defendants argue that plaintiffs are improperly altering the legal theory of this case through the proposed amendment. The Onesource Defendants claim that, because plaintiffs are amending the complaint for the second time, and because they have delayed in cross-moving, the Onesource Defendants would suffer prejudice were the cross-motion to be granted. Moreover, they assert that plaintiffs have provided no excuse for the three-year delay in seeking to amend. The policy endorsement which plaintiff seeks to include in the amended complaint allegedly had been in their possession at the time of the initial complaint. The Onesource Defendants also aver that plaintiff did not submit an affidavit of merit to support the cross-motion.

The Onesource Defendants state that, by seeking to amend, plaintiffs have conceded that the policies at bar do not include 277 Park as an additional insured. They contend that plaintiffs are attempting to create an issue of fact which does not exist. According to them, after extensive discovery, there is no proof that they were expressly required to provide 277 Park with additional insured coverage. They conclude that, because plaintiffs' opposition argument lacks merit, their motion should be granted in full. American Home opposes plaintiffs' cross-motion on similar grounds as the Onesource Defendants, claiming prejudice, failure to show a reasonable excuse for delay, and lack of merit.

In reply plaintiffs proffer that the defendants were well aware that plaintiffs were seeking coverage based on the existence of an agreement. They refer to a written agreement, dated

June 6, 1995, which they claim, at least raises an issue as to whether the Onesource Defendants were obliged to insure 277 Park at the time of Hill's accident. This agreement was drafted between Total Building Maintenance, Inc. (TBM), an alleged predecessor of the Onesource Defendants, and the previous owner, Stahl Park Corporation, and it relates to window washing services to be conducted at the premises currently owned by 277 Park. The specific reference to insurance in this agreement provides that TBM "also maintains the designated insurance required by the owners." Plaintiffs deny that they are introducing a new legal theory through amendment. They also state that the delay was reasonable, since there was discovery conducted to examine both endorsements, that is, endorsement 61712, not specified in the current complaint, as well as endorsement CG 20 10 11 85, which was set forth in the original complaint.

DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

As an initial matter, the Court finds that American Home has failed to properly cross-move for summary judgment, as there is nothing before the Court which indicates that American Home ever served a notice of cross-motion. However, in deciding Oncesource Defendants' motion for summary judgment the Court may, in its discretion, search the record and grant summary judgment to non-moving party (*see* CPLR 3212[b]; *see also Atiencia v MBBCO II, Inc.*, 75 AD3d 424 [1st Dept 2010] ["A court, in the course of deciding a motion, is empowered to search the record and award summary judgment to a nonmoving party"]; *Mini Mint Inc.v Citigroup Inc.*, 83 AD3d 596 [1st Dept 2011]; *Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429 [1996]).

From the papers provided by the parties, it appears that the policies provided for the Onesource Defendants during the aforementioned period did not include any endorsement with respect to 277 Park. The reference to a second endorsement is raised by plaintiffs in their motion for leave to amend. What plaintiffs must ultimately demonstrate is that these defendants were obligated to procure additional insurance to cover 277 Park. Otherwise, the contractual obligation to defend and indemnify 277 Park in the Hill action is not binding.

"[L]eave to amend a pleading is, in the absence of prejudice or surprise to the opposing party, freely granted" (*Oil Heat Institute of Long Island Ins. Trust v RMTS Assoc. LLC*, 4 AD3d 290, 293 [1st Dept 2004]). "To establish prejudice 'there must be some indication that the

defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position'" (*id.* at 294, quoting *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]). "[L] eave to amend a pleading should generally be freely granted, but the party seeking amendment has the burden of establishing the merit of the proposal. Leave to amend a complaint should be denied where the claim is palpably insufficient" (*Manhattan Real Estate Equities Group LLC v Pine Equity NY, Inc.*, 27 AD3d 323, 323 [1st Dept 2006], citing *Bencivenga & Co. v Phyfe*, 210 AD2d 22 [1st Dept 1994]).

Here, defendants contend that plaintiffs' cross-motion should not be granted because it would result in prejudice. They claim that plaintiffs knew of the 61712 endorsement for a number of years, but did not move to amend until this particular time, after extensive discovery and after the filing of the Note of Issue. Defendants state that plaintiffs have introduced for the first time a new legal theory in the amended complaint, the alleged agreement to procure coverage to 277 Park.

A copy of the 61712 endorsement is submitted by plaintiffs. The endorsement provides the following:

> Section II -Who is an insured, 1. Is amended to add:
> (1) Any person or organization to whom you (insured) become obligated to include as an additional insured in this policy, as a result of any contract or agreement you enter into which requires you to furnish insurance to that person or organization of the type provided by this policy, but only with respect to liability arising out of your operations of premises owned by or rented to you.

Plaintiffs have submitted with the motion papers a copy of a letter agreement, dated June 6, 1995. This is the agreement that was drafted between TBM, an alleged predecessor of the Onesource defendants, and the previous building owner, Stahl Park Avenue Corporation. Neither entity is a party in this action. There is no evidence that any of the parties in this action assumed any of the terms of this agreement, or that any rights under the agreement were assigned to them.

"When parties set down their agreement in a clear, complete document, their writing should, as a rule, be enforced according to its terms" (*Gladstein v Martorella*, 71 AD3d 427, 429 [1st Dept 2010]). "A contract should be 'read as a whole and every part will be interpreted with reference to the whole,' and, if possible, it will be so interpreted as to give effect to its general purpose" (*Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469, 471 [1st Dept 2008] [citations omitted]).

"Where a third party seeks the benefit of coverage, the terms of the contract must clearly evince such intent" (*Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, 388 [1st Dept 2006]). The terms of the 1995 agreement do not provide that the Onesource Defendants are specifically obligated to provide additional coverage to 277 Park. There is insufficient evidence to bind the Onesource Defendants to the 1995 agreement.

The reference to certain insurance guidelines is made by plaintiffs. A copy of these guidelines, dated November 2006, is provided by plaintiffs, but there is no evidence showing any connection between these guidelines and the 1995 agreement. There is no indication that defendants in this action could be legally bound to the terms of the Guidelines.

The Court finds that the arguments for amendment are insufficient to raise an issue as to defendants' obligation to insure 277 Park. Because the 1995 agreement does not relate to the coverage of 277 Park, the provision in the additional insured endorsement is not applicable in this case. Therefore, the proposed amended complaint is palpably insufficient, and the Court will not grant leave to amend.

Based on the evidence, the Court will grant the motion of the Onesource Defendants and in its discretion, searches the record and also grants summary judgment to defendant American Home, thereby dismissing the complaint in its entirety and declaring that these parties were not obligated to procure insurance for 277 Park, and that 277 Park was not designated as an additional insured under the aforesaid insurance policies.

[* 9]

CONCLUSION

Accordingly, it is

ORDERED that the motion brought by the Onesource Defendants is granted and the complaint is dismissed as against these defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court; and it is further,

ADJUDGED and DECLARED that the Onesource Defendants did not owe coverage to plaintiff 277 Park Avenue, LLC, in reference to the action, entitled *Hill v Stahl, et. al.*, Sup Ct, Bronx County, Index No. 22528/03; and it is further,

ORDERED that the Court, in searching the record, grants summary judgment to non-moving defendant American Home Assurance Company, and the complaint is dismissed as against this defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further,

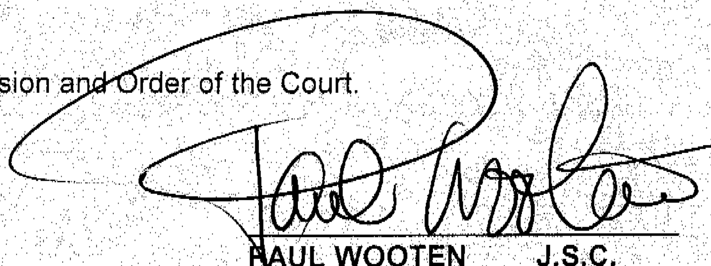
ADJUDGED and DECLARED that American Home Assurance Company is not entitled to reimburse plaintiffs in reference to this action, entitled *Hill v Stahl, et. al,* Sup Ct, Bronx County, Index No. 22528/03; and it is further,

ORDERED that plaintiffs Mt. Hawley Insurance Company's and 227 Park Avenue, LLC's cross-motion for leave to amend the complaint is denied; and it is further,

ORDERED that counsel for the Onesource Defendants is directed to serve a copy of this order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 1/18/13



PAUL WOOTEN J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**