

313-315 West 125th v Arch Specialty Ins.

2013 NY Slip Op 33312(U)

April 30, 2013

Sup Ct, New York County

Docket Number: 155684/12

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDWARDS
Justice

PART 35

313-315 West 125th

INDEX NO. 155684/12

MOTION DATE 4/16/13

MOTION SEQ. NO. 001

-v-

ARCH SPECIALTY INS

The following papers, numbered 1 to , were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

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

In this declaratory judgment action, defendant/third-party defendant A. Login Insurance Brokerage ("Login Brokerage") moves pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the third-party complaint of defendant/third-party plaintiff Katselnik & Katselnik Group, Inc. ("Katselnik") and pursuant to CPLR 3211(c) to treat its motion as one for summary judgment.

Factual Background

This action arises out of a workplace accident involving Miguel Delgado.

Mr. Delgado sued 313-315 West 125th Street L.L.C. ("313") and Plaza Circle Enterprises, LLC ("Plaza") (collectively, "313/Plaza") and his employer, Katselnik for injuries he allegedly sustained while working at a construction project (the "Delgado action"). Katselnik was a subcontractor at the construction site pursuant to an agreement (the "the Katselnik Agreement or "Agreement") with 313/Plaza. 313/Plaza then commenced a third-party action against Katselnik seeking contractual indemnification, and alleging that Katselnik breached the Agreement by failing to procure and provide 313/Plaza with the required amount of comprehensive general liability in accordance with the Katselnik Agreement.

Thereafter, 313/Plaza commenced this action against Arch Specialty Insurance Company ("Arch Insurance") and Katselnik, alleging that Arch Insurance breached its obligation to defend and indemnify 313/Plaza for Mr. Delgado's claims pursuant to an insurance policy it issued to Katselnik (the "Arch Policy") and that a declaration affirming such coverage should issue. As against Katselnik, 313/Plaza alleges that Katselnik breached the Agreement by failing to procure the proper amount of comprehensive general liability as required.

Dated: , J.S.C.

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

- 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

In turn, and as relevant herein, Katselnik commenced the subject third-party action for contribution, alleging that Login Brokerage was its insurance broker for the purposes of obtaining all policies of insurance coverage Katselnik was legally required to have, including those required under the Katselnik Agreement. As such, Login Brokerage procured the Arch Policy for Katselnik, for which Katselnik timely paid all premiums. When Katselnik entered into its Agreement with 313/Plaza, Katselnik requested that Login Brokerage provide a Certificate of Insurance identifying 313/Plaza as additional insureds under the Arch Policy with respect to Katselnik's operations at the Project. Katselnik alleges that Login Brokerage "negligently" "prepared and issued one or more Certificates of Insurance for the Project which failed to properly protect one or both of the Plaintiffs as additional insureds under the Arch Policy, in connection with [Katselnik's] operations at the Project" (Third-party complaint ¶30). Arch Insurance declined to defend 313/Plaza in the Delgado action, and the denial, if upheld, is the result of Login Brokerage's negligence.

Discussion

In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

"Under New York law, a party who has engaged a person to act as an insurance broker to procure adequate insurance is entitled to recover damages from the broker if the policy obtained does not cover a loss for which the broker contracted to provide insurance, and the insurance company refuses to cover the loss" (*Bruckmann, Rosser, Sherrill & Co., L.P. v Marsh USA, Inc.*, 65 AD3d 865, 885 NYS2d 276 [1st Dept 2009] *citing Long Is. Light. Co. v Steel Derrick Barge "FSC 99,"* 725 F2d 839, 841 [2d Cir 1984]). Thus, "[a]n insurance agent or broker can be held liable in negligence if he or she fails to exercise due care in an insurance brokerage transaction. Thus, a plaintiff may seek to hold a defendant broker liable under a theory of either negligence or breach of contract (*Bruckmann, Rosser, Sherrill & Co., L.P. v Marsh USA, Inc.*, 65 AD3d 865, 885 NYS2d 276 [1st Dept 2009] *citing Bedessee Imports, Inc. v Cook, Hall & Hyde, Inc.*, 45 AD3d 792, 793-794, 847 NYS2d 151 [2007]).

Here, assuming the truth¹ of the allegations in the third-party, and with a liberal reading of

¹ Further, the Court declines to treat Login Brokerage's motion as one for summary judgment pursuant to CPLR 3211(c). Although Login Brokerage sought, as alternative relief, summary judgment pursuant to CPLR 3211(c), Katselnik "never indicated that [it] joined defendants in 'deliberately charting a summary judgment course'

the allegations, the Court finds that Katselnik stated a claim for negligence against Login Brokerage for failing to procure adequate coverage as requested. Based on a fair reading of all of the allegations in the third-party complaint, *i.e.*, ¶¶ 16-22; 25-34, Katselnik alleges that Login Brokerage was its insurance broker, responsible for obtaining all of the insurance coverages Katselnik was legally obligated to maintain for its operations, and that the Katselnik Agreement required coverage in favor of 313/Plaza. It is also alleged that the Arch Policy obtained by Logan Brokerage for Katselnik did *not* provide the coverages Katselnik needed, in that Arch Insurance declined to provide 313/Plaza with a defense in the Delgado action. Notably, Katselnik does not specifically identify the grounds under which Arch Insurance declined to defend, and no such specificity is required. It is sufficient that Katselnik alleges facts establishing that Logan Brokerage had duty to procure adequate insurance, the policy obtained by Logan Brokerage did not provide such insurance, and Katselnik suffered damages as a result. Therefore, dismissal for failure to state a cause of action is denied.

As to whether dismissal is warranted under CPLR 3211(a)(1), CPLR 3211(a)(1) permits a party to move for judgment dismissing one or more causes of action asserted against him on the ground that “a defense is founded upon documentary evidence.” A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted “only where the documentary evidence utterly refutes [the complaint’s] factual allegations, conclusively establishing a defense as a matter of law” (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intern.*, 80 AD3d 448, 914 NYS2d 145 [1st Dept 2011] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). The test on a CPLR 3211(a)(1) motion is whether the documentary evidence submitted “conclusively establishes a defense to the asserted claims as a matter of law” (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

The documentary evidence submitted, including, but not limited to, the Arch Policy, the Certificate of Insurance issued by Logan Brokerage, and the denial letter issued by Arch Insurance establish Logan Brokerage’s defense as a matter of law.²

The Certificate of Insurance Logan Brokerage issued states:

“Additional insureds with respect to general liability per written contract:

Footnote 1, cont’d.

... , nor does the case involve a purely legal question without any disputed issues of fact” (*Brathwaite v Frankel*, 98 AD3d 444, 949 NYS2d 678 [1st Dept 2012] *citing Wiesen v New York Univ.*, 304 AD2d 459, 460, 758 NYS2d 51 [2003] (internal citations omitted)).

² The Court notes that Katselnik’s email requesting Logan Brokerage to issue a certificate of insurance listing 313 as a certificate holder, does not constitute documentary evidence for purposes of CPLR 3211(a)(1) relief (*Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 948 NYS2d 658 [2d Dept 2012] (letters and emails submitted by Liberty did not constitute “documentary evidence” under CPLR 3211(a)(1) and, thus, should not have been considered by the Supreme Court); *Marin v AI Holdings (USA) Corp.*, 35 Misc 3d 1227(A), 953 NYS2d 550 (Table) [Sup. Ct., New York County 2012]).

313-315 West 125th Street . . . Solil Management. . .”

However, upon denying the tender of 313/Plaza’s defense, Arch Insurance wrote:

“Although the Goldman entities [identified in the letter as 313/Plaza] may be considered additional insureds on the Arch Policy, we have not been provided with any evidence that suggests this loss arose from the actions of K & K Group [Katselnik]. Therefore, Arch will not grant Additional Insured coverage at this time.

* * * * *

Arch acknowledges that the Goldman entities [313/Plaza] may qualify as additional insureds, “but only with respect to liability for ‘bodily injury’ . . . caused, in whole or in part, by Trades’ acts or omissions or the acts or omissions of Trades’ subcontractors.”

After citing to the “Blanket Additional Insured Endorsement,”³ Arch Insurance reiterated that it was not provided with evidence indicating that “this loss arose from the acts of” Katselnik. The denial letter also added that Arch Insurance was not provided with any information regarding the relationship between 313/Plaza and the “owner in the work contract with” Katselnik. The Katselnik Agreement identifies the owner as Solil Management LLC.”

As to Arch Insurance’s first ground for denying coverage, “[e]vidence establishing that a defendant’s negligence was the proximate cause of the harm alleged is essential to proving liability” (*Cosmos, Queens Ltd. v Matthias Saechang Im Agency*, 74 AD3d 682, 904 NYS2d 386 [1st Dept 2010]). Here, the undisputed documentary evidence establishes that Logan Brokerage’s listing of 313 on the Certificate of Insurance, or alleged misrepresentation on such Certificate that 313 was “an additional insured” on the Policy, has no bearing on whether Mr. Delgado’s claim arises out of Katselnik’s “acts or omissions.” The failure of Arch Insurance to provide a defense to 313/Plaza is not the result of any act or omission by Logan Brokerage, but instead, is related solely to the purported lack of evidence indicating that Mr. Delgado’s “bodily injury . . . [was] caused, in whole or in part,” by Katselnik.

Similarly, the second basis for the denial of coverage, *to wit*: that Arch Insurance was not provided with any information regarding the relationship between 313/Plaza and the “owner” Solil Management has no bearing on Logan Brokerage’s acts or omissions in issuing the Certificate of Insurance. There is no indication in the third-party complaint, or in the submissions by Katselnik in opposition to dismissal that Logan Brokerage had any information concerning 313/Plaza’s relationship to Solil Management, the stated “owner” on Katselnik’s Agreement with 313/Plaza.

³ The Blanket Additional Insured Endorsement prescribes as additional insureds those “persons or organizations who are required under written contract with you to be named as an additional insured, but only with respect to liability for ‘bodily injury’ . . . caused . . . by your acts or omissions or the acts or omissions of your subcontractors”

Katselnik failed to raise any issue of fact as to the authenticity of the documentary evidence, or explain how any additional discovery is necessary for it to raise an issue of fact as to Logan Brokerage's liability. The failure of Logan Brokerage to submit the Katselnik Agreement and the fact that discovery has not taken place, are insufficient to support the conclusory claim that additional facts exist, especially since the Katselnik Agreement was submitted in opposition.

The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion (*Flores v City of New York*, 66 AD3d 599, 888 NYS2d 27 [1st Dept 2009]; *Hariri v Amper*, 51 AD3d 146, 854 NYS2d 126 [1st Dept 2008] (A claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment); *Steinberg v Abdul*, 230 AD2d 633, 633 [1st Dept 1996] (“We add that the mere hope, expressed by plaintiffs, that evidence sufficient to establish defendants’ assumption of a duty to plaintiffs’ decedent may be obtained during discovery does not fulfill their obligation to demonstrate the likelihood of such disclosure (CPLR 3212[f]) and, thus, is insufficient to defeat defendants’ motions for summary judgment”); *Pro Brokerage, Inc. v Home Ins. Co.*, 472 NYS2d 661, 662 [1st Dept 1984] (“The plaintiff’s later assertion that further discovery was necessary, not only was set forth in mere conclusory terms, but no attempt was made to explain what further discovery was necessary and to what extent such further discovery would overcome the legal insufficiency of the complaint.”)). In the instant case, there is no showing that further discovery will yield material and relevant evidence.

And, Katselnik’s claim that, had Logan Brokerage first requested a copy of the Katselnik Agreement to confirm that 313/Plaza would in fact be afforded coverage as additional insureds, so that the potential discrepancy between “Owner” in the Arch Policy and “Owner” in the Katselnik Agreement could have been rectified (Affidavit of Arkadi Katselnik, ¶6), is insufficient to thwart dismissal. Katselnik does not point to any provision in the Katselnik Agreement even requiring Katselnik to name 313/Plaza or any party as an additional insured.⁴ And, neither the third-party complaint nor the affidavit of Arkadi Katselnik indicates that Katselnik requested Logan Brokerage to undertake the task of reviewing the Agreement. Instead, Mr. Katselnik attests, generally, that Katselnik informed Logan Brokerage of Katselnik’s “contractual obligations to defend and indemnify Owner pursuant to the K & K Project Agreement” at the time it requested Logan Brokerage to obtain a Certificate of Insurance naming 313/Plaza as additional insured. Mr. Katselnik also states that Logan Brokerage in fact issued the Certificate of Insurance “listing plaintiffs as additional insureds. . . .” The disclaimer letter herein is based on the lack of evidence that Mr. Delgado’s claim arose out of Katselnik’s “acts or omissions” at the worksite, which is wholly unrelated to any discrepancy between the “Owner” in Katselnik Agreement (*i.e.*, Solil Management) and 313/Plaza. It is noted that the Certificate of Insurance also identifies Solil Management as an additional insured, consistent with the Katselnik

⁴ Notably, 313/Plaza’s third-party complaint against Katselnik in the Delgado action (E-file Doc. #4) alleges that section 11.1.4 of the agreement between them required the “Contractor” to procure insurance that included “the Owner” as an additional insured for claims caused in whole or in part by the Contractor’s negligent acts or omissions during the Contractor’s completed operations” (¶11). However, the Agreement submitted in this action contains no such section.

Agreement. Furthermore, Arch Insurance's denial letter cited the failure of *Katselnik* to provide evidence of the relationship between 313/Plaza and Solil Management, and there is no indication that Logan Brokerage had a duty to provide this information to Arch Insurance.

In sum, the documentary evidence establish that Logan Brokerage's act in procuring the Arch Policy and/or issuing the Certificate of Insurance was not a proximate cause of 313/Plaza's lack of coverage thereunder. As such, dismissal is warranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant/third-party defendant A. Login Insurance Brokerage pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the third-party complaint of defendant/third-party plaintiff Katselnik & Katselnik Group, Inc. and pursuant to CPLR 3211(c), is granted pursuant to CPLR 3211(a)(1); and it is further

ORDERED that the third-party complaint as asserted against defendant/third-party defendant A. Login Insurance Brokerage is hereby severed and dismissed, and the Clerk may enter judgment accordingly; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference on June 11, 2013, 2:15 p.m.; and it is further

ORDERED that defendant/third-party defendant A. Logan Insurance Brokerage shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 4/30/13

ENTER:  J.S.C.


Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE