

Mack-Cali Realty Corp. v NGM Ins. Co.

2013 NY Slip Op 33719(U)

January 16, 2013

Sup Ct, Westchester County

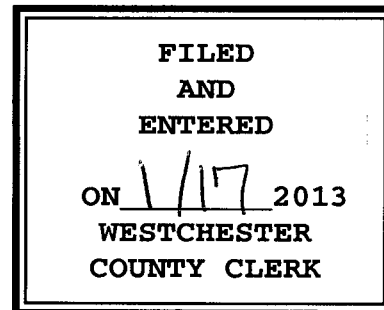
Docket Number: 50233/2012

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.



**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
MACK-CALIREALTY CORPORATION and MACK-CALICW
REALTY ASSOCIATES, LLC,

Plaintiff,

-against-

NGM INSURANCE COMPANY,

Defendant.
-----X

Index No. 50233/2012
Decision & Order
Motion Sequences 1&2

The following papers were received and considered in deciding the present motion:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation in Support/Exhibits	1-3
Plaintiffs' Memorandum of Law in Support	4
Notice of Cross-Motion/Affirmation in Opposition to Motion and in Support of Cross-Motion/Exhibits	5-7
Defendants' Memorandum of Law	8
Affirmation in Opposition to Cross-Motion and in Further Support of Motion	9
Memorandum of Law in Opposition to Cross-Motion and in Further Support of Motion	10
Defendants' Reply Affirmation	11

The underlying action to the present motion is for injuries sustained by Plaintiff John M. Kubicsko, an employee of United Parcel Service (UPS), who allegedly fell and was injured while delivering packages to the premises located at 3 Westchester Plaza, Elmsford New York on July 8, 2009. Westchester County Electric, Inc. (hereinafter "Westchester Electric") occupies the lower level space at the premises pursuant to the lease between Plaintiff, Mack-Cali's predecessor in interest, Robert Martin Company, LLC and Westchester Electric as tenant. On or about May 6, 2010, Mr. Kubicsko commenced an action under Index No. 19179/2010 naming Westchester Electric and Plaintiff as Defendants in his lawsuit. In his complaint, Mr. Kubicsko alleges that he sustained personal injuries while he was making a delivery in the course of his employment with United Parcel Service (UPS) and was stepping up on to the loading docks/entrance landing at the premises when the dock bumper collapsed causing Mr. Kubicsko to fall and sustain serious personal injuries. Mr. Kubicsko complains that Defendants, Westchester Electric and Mack-Cali were negligent in improperly and carelessly mounting a dock bumper at the loading dock.

On November 11, 2010, Mack-Cali tendered in writing its defense and indemnity of Mr. Kubicsko's lawsuit to Defendant, NGM Insurance Company (NGM). In a letter dated December 9, 2010, NGM wrote to Plaintiff that it did not see any liability on the insured (Westchester Electric) and denied Plaintiff's tender. NGM further contended that under the lease, Mack-Cali was responsible for the grounds and structural maintenance and that Westchester Electric was only responsible for the interior of the premises. As such, NGM contended it had no involvement and no liability in the accident. As a result of NGM's failure to defend Plaintiff, Plaintiff commenced the instant action by filing a summons and complaint on January 9, 2012. Issue was joined when Defendant's answered Plaintiff's complaint on February 29, 2012. Plaintiff now moves for partial

summary judgment arguing: that NGM is obligated to defend Mack-Cali Entities in the underlying personal injury action, and reimburse Mack-Cali for past defense costs; that the NGM policy at issue provides coverage to Mack-Cali; and that a hearing is needed to liquidate the amount of the Mack-Cali past defense costs in Mr. Kubicsko's personal injury action. In opposition to Plaintiff's motion, NGM cross-moves for summary judgment and dismissing Plaintiff's complaint.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. *Id.*; *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320(1986). To obtain summary judgment it is necessary that the movant establish its claim via the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor. CPLR 3212(b). Here Plaintiff argues that Defendant is obligated to defend Plaintiff as an "additional insured" under the terms of Defendant's policy with Westchester Electric. Defendant cross-moves for judgment as a matter of law and dismissal of the complaint because there is no duty for Defendant to indemnify Plaintiff in the personal injury action.

"A duty to defend exists whenever the allegations in the complaint in the underlying action, construed liberally, suggest a reasonable possibility of coverage, or where the insurer has actual knowledge of facts establishing such a reasonable possibility." *DMP Contr. Corp. v. Essex Ins. Co.*, 76 A.D.3d 844, 845 (1st Dept. 2010). However, any exclusions from said coverage must be specific and clear and any ambiguity is construed against the insurer. *Id.* at 846. Further, the plain meaning of the policy's language may not be disregarded to find an ambiguity where none exists. *Id.* Here

Plaintiff contends that by its terms, the NGM Policy provides additional insured coverage for the Mack-Cali entities in Mr. Kubicsko's personal injury action.

The language in the lease between Plaintiff and Westchester Electric provides

[t]enant agrees to occupy the Temporary Premises at Tenant's sole risk, and will provide and keep in force during the term of this Agreement, comprehensive general public liability insurance against claims arising out of the operations of the Temporary Premises...Tenant shall hold Owner harmless from any claims or injury caused as a result of Tenant's occupancy.

Plaintiff interprets the language of the lease to mean that, pursuant to the lease agreement between the parties, Plaintiff is insured against the instant claim. Plaintiff further contends that the terms of the lease, when read in conjunction with the language of the insurance contract, specifically the portions of same referencing "additional insureds," confirms that Defendant must indemnify Plaintiff in the present claim.

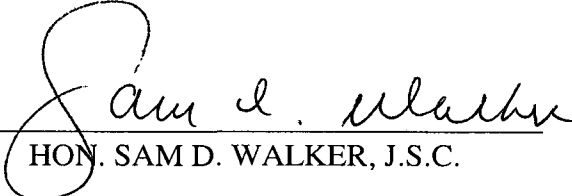
In opposition, and in support of its cross-motion, Defendant argues that the underlying accident did not arise out of the use of the part of the premises leased to Westchester Electric and as such, the policy does not cover Mr. Kubicsko's accident. Defendant contends that the situs of Mr. Kubicsko's accident precludes Plaintiff from claiming entitlement to coverage as the loading dock where Mr. Kubicsko was injured, is a common area maintained by Plaintiff and not part of the space, as it is described in the parties' agreement, leased to Westchester Electric. Defendant further contends that there is no language in the lease between Westchester Electric and Defendant that obligated Westchester Electric to obtain insurance naming the landlord (Plaintiff) as an additional insured. As such, the terms of the lease do not require insurance coverage in favor of the landlord.

Defendant argues that in order for Plaintiff to be entitled to coverage, the liability faced must “arise out of ownership, maintenance or use of that part of the premises leased...” to Westchester Electric. Defendant’s own interpretation of the language of the insurance agreement includes coverage for Plaintiff in the event that an accident occurred out of Westchester Electric’s ownership, maintenance or use of the premises. Certainly, delivery of packages to a tenant operating a business at a premises is an integral if not daily part of said tenant’s use of the premises. Furthermore, as the Court has found that the duty to defend is construed liberally, and exclusions or ambiguity are generally construed against the insurer, [*DMP Contr. Corp., supra*, at 845] this Court finds that the additional insured coverage, as described in the parties’ insurance agreement should include coverage for Plaintiff in the underlying personal injury action.

Accordingly, Plaintiff’s motion for partial summary judgment is hereby GRANTED, and NGM is obligated to defend Mack-Cali Entities in the underlying personal injury action, and the NGM policy is primary to any other coverage Plaintiff may have procured. Furthermore, Defendant’s cross-motion to dismiss Plaintiff’s complaint is hereby DENIED. The parties are directed to appear on February 16, 2013 at 9:30 am Courtroom 1600, to schedule a hearing on damages for Plaintiff’s past defense costs.

To the extent any relief requested in Motion Sequences 1&2 was not addressed by the Court, it is hereby deemed denied. The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
January 16, 2013


HON. SAM D. WALKER, J.S.C.