

**408-410 Greenwich St., LLC v American States Ins.
Co.**

2014 NY Slip Op 30837(U)

April 2, 2014

Supreme Court, New York County

Docket Number: 158096/13

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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408-410 GREENWICH STREET, LLC,

Plaintiff,

Index No.
158096/13

Mot. Seq. 001

- against -

Decision and
Order

AMERICAN STATES INSURANCE COMPANY,
SAFECO INSURANCE COMPANY OF AMERICA,
and AAA METAL and GLASS INC.,

Defendants.

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

On or about September 4, 2013, Plaintiff 408-410 Greenwich Street, LLC (“Plaintiff” or “408-410 Greenwich Street”), commenced this action seeking insurance coverage from defendants American States Insurance Company (“American States”) and Safeco Insurance Company of America (“Safeco”) for an underlying action entitled *Freddy Cortez v. 408-410 Greenwich Street, LLC, Basile Denali Construction LLC, and AAA Metal and Glass, Inc.*, Index No. 111402/10, also pending in the Supreme Court of the State of New York, New York County (the “Underlying Action”).

In the Underlying Action, Freddy Cortez (“Cortez”) alleges that he suffered bodily injury arising out of a worksite accident that occurred December 5, 2007 at the premises known as 408-410 Greenwich Street, New York, New York (“the subject premises”). Cortez’s employer was a subcontractor at the project hired by defendant, AAA Metal and Glass Inc. Plaintiff 408-410 Greenwich Street was the

owner and developer for the Project.

In this action, Plaintiff 408-410 Greenwich Street seeks coverage as an additional insured on the commercial general liability insurance policy issued by American States with policy number, 01 CG 393 196, with a policy period from August 2, 2007 to August 2, 2008 to AAA Metal & Glass Inc.

Plaintiff's Complaint alleges four causes of action. The first cause of action alleges that American States improperly disclaimed liability coverage to Greenwich. The second cause of action alleges that as a result of American States' coverage denial, Greenwich has and will incur attorneys' fees and expenses and seeks a money judgment from American States for its attorneys' fees. The third cause of action alleges that Safeco improperly disclaimed liability coverage to Greenwich. The fourth cause of action alleges that as a result of Safeco's coverage denial, Greenwich has and will incur attorneys' fees and expenses and seeks a money judgment against Safeco for its attorneys' fees.

Defendants American States Insurance Company ("American States") and Safeco American States Insurance Company ("Safeco") now moves for an Order dismissing Plaintiff's Complaint, pursuant to CPLR 3211(a)(1), (7), and (10), for an Order as follows: (1) dismissing the third and fourth causes of action, which are against Safeco, on the grounds that Safeco did not issue the insurance policy; and/or (2) dismissing the Complaint on the grounds that Plaintiff failed to join a necessary and indispensable party, its insurer, the real party in interest, who has been paying for the defense of the underlying action; and/or (3) dismissing plaintiff's request for recovery of their attorneys' fees.

Defendants submit the attorney affirmation of Michael L. Ihrig II. Annexed to Ihrig's affirmation is a copy of the Complaint and the Policy. Defendants contend that "[t]here is no dispute that American States issued the policy in question. Safeco did not issue the policy and is not a party to the insurance contract." Defendants further contend, "The term 'Safeco Insurance' on the top of certain pages to the policy is nothing more than a Trade Name under which

American States operates. ‘Safeco Insurance Company of America’ is not identified as the obligated insurance company any place in the policy.”

Defendants further contend that since it appears that Illinois Union Insurance (“Illinois Union”), rather than Greenwich, is paying for Greenwich’s defense, Illinois Union is the real party at interest.

In opposition, Plaintiff submits the attorney affirmation of Jessica G. Price. Plaintiff contends that Defendants’ attorney’s affirmation which asserts that “Safeco” is solely a trade name under which American States operates is unsupported by any documents or affidavits. Plaintiff points out that the applicable insurance contract has “Safeco” printed on every page of the applicable policy, that Safeco responded to the tender letters of Plaintiff on two occasions, and that the applicable Certificate of Insurance for AAA Metal & Glass, effective on the date of the accident, names Safeco Insurance as the insurance carrier.

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (1) a defense is founded upon documentary evidence;
 - (7) the pleading fails to state a cause of action;
 - (10) the court should not proceed in the absence of a person who should be a party.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). 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, the four corners of the Complaint set forth a claim against Defendants. Furthermore, Defendants have failed to establish their entitlement to dismissal under pursuant to CPLR §3211(a)(1). The documentary evidence as provided by Defendants does not flatly contradict the legal conclusions and factual allegations of the Complaint.

In order to warrant dismissal for failure to join a necessary party, the moving party must demonstrate that joinder is necessary to accord full relief to the parties presently joined or that the non-party would be inequitably affected by any judgment that might result in this action. *Amsellen v. Host Marriot Corp.*, 280 A.D.2d 357, 359 [1st Dept 2001]. Here, Defendants have failed to demonstrate that Illinois Union is a necessary party to this action.

Wherefore it is hereby

ORDERED that Defendants’ motion to dismiss is denied.

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

DATED: APRIL 2, 2014



EILEEN A. RAKOWER, J.S.C.