Skoczylas v 270 W. End Tenants Corp.
2014 NY Slip Op 32466(U)
September 17, 2014
Supreme Court, New York County
Docket Number: 157928/2012
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11
--X
HENRYK SKOCZYLAS,

Index No. 157928/2012

Plaintiff,

-against-

270 WEST END TENANTS CORP. and HALSTEAD MANAGEMENT COMPANY, LLC, ED RHUBART, ALAN SIRVINT, and AMR ELECTRICAL CONTRACTING CORP.

Defendants.
--X
270 WEST END TENANTS CORP. and HALSTEAD MANAGEMENT COMPANY, LLC,

Third-Party Index No. 590462/2013

Third-Party Plaintiffs,

-against-

EXCEPTIONAL CONTRACTING, LLC.,
ED RHUBART and ALAN SIRVINT,

Third-Party Defendants.
--X
JOAN A. MADDEN

In this action for damages arising out of a construction accident, third-party defendant Exceptional LLC ("Exceptional") moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the third-party complaint, and any and all cross-claims and counterclaims that may be asserted against it. Defendants/Third-party plaintiffs 270 West End Tenants Corp. ("West End") and Halstead Management Company, LLC ("Halstead") oppose the motion and cross move for an order, pursuant to CPLR 3212, granting summary judgment

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declaring that: (1) the relevant Owner/Contractor Agreement with Exceptional constitutes a written agreement requiring Exceptional to purchase additional insured coverage with $1 million per occurrence limits for West End and Halstead; (2) the scope of the additional insured coverage promised by Exceptional is for all claims arising out of the work performed or to be performed in connection with the Agreement, including coverage for any independent acts or omissions in negligence or strict liability on the part of the additional insureds; (3) Exceptional is in breach of contract for failing to purchase additional insured coverage for West End and Halstead commensurate with additional insured coverage promised in the Agreement. Defendant/third-party defendants Ed Rhubart ("Rhubart") and Alan Sirvint ("Sirvint") oppose Exceptional's motion and support West End's and Halstead's cross-motion.

For the reasons below, Exceptional's motion for summary judgment is granted in part and denied in part, and West End's and Halstead's cross-motion is denied.

Background

In this action, plaintiff Henryk Skoczylas ("Skoczylas" or "plaintiff") alleges that he sustained an electrical shock injury to his hand on July 27, 2012, while working as a carpenter employed by Exceptional at renovation project in Apartment 1S ("the Apartment") at 270 West End Avenue ("The Building"). West End owns the Building and Halstead is its managing agent.

On or about February 29, 2012, Rhubart and Sirvint, who own the Apartment, entered into an Owner/Contractor Agreement with Exceptional ("Agreement") in connection with the renovation project. With respect to Exceptional's obligation to procure insurance, the Agreement reads in pertinent part:

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OTHER REQUIREMENTS

. . .

- Copy of contractor's liability insurance naming "270 West End Tenants Corp", Halstead Management Co. LLC, Terra Holdings, Alan Sirvint & Edward Rhubart" as "additional insureds" in the minimum amounts of $1,000,000 bodily injury and $1,000,000 property damage.

At that time, Exceptional already had a commercial general liability insurance policy in effect (effective August 21, 2011 to August 21, 2012) through Travelers Casualty Insurance Company of America ("Travelers") bearing policy number I-680-8937N249-ACJ-09 (hereinafter "the Travelers policy"). On the same day that Rhubart and Sirvint entered into the Agreement with Exceptional, a certificate was issued naming West End, Halstead, Sirvint, Rhubart, and Terra Holdings as additional insureds under the Travelers policy. It appears that the certificate was provided by Exceptional's insurance broker to Halstead, as the certificate holder. The certificate indicates that Exceptional had a commercial general liability policy with $1 million per occurrence limits from Travelers for the period 8/21/11 through 8/21/12 during which policy period the alleged accident occurred. The certificate, consistent with the additional insured coverage provision in the Agreement, also provides that:

> Certificate holder is listed as additional insured per written contract along with the following: Halstead Management Company, LLC, 270 West End Tenants Corp, Terra Holdings, Apartment Owners: Edward Rhubart and Alan Sirvint.

The Travelers policy itself addresses additional insureds through a blanket additional insured coverage endorsement, which reads in pertinent part:

> 1. WHO IS AN INSURED – (Section II) is amended to include any person or organization that you [Exceptional, as the named insured] agree in a written contract requiring insurance" to include as an additional insured on this Coverage Part, but:
>
> a) Only with respect to liability for "bodily injury", "property damage" or "personal

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injury"; and

b) If, and *only to the extent that, the injury or damage is caused by acts or omissions of you or your subcontractor in the performance of "your work"* to which the "written contract requiring insurance" applies. The person or organization does not qualify as an additional insured with the respect to the independent acts of such person or organization.

CGL Form, CG D2 48 08 05 ("Blanket Add'l Insured") (emphasis added).

In this action, plaintiff asserts causes of action for violation of Labor Law sections 240(1), 241(6), 200, and for common law negligence. In their third-party complaint, West End and Halstead assert causes of action against Exceptional for common law contribution, common law indemnification, contractual indemnification, and for breach of contract. The breach of contract claim alleges that Exceptional breached its agreement to obtain an insurance policy naming them as additional insureds. Rhubart and Sirvint have asserted a cross claim for contribution as against Exceptional alleging that if they are liable to the plaintiff then the damages "were sustained in whole or in part by reason of the negligence and/or breach of warranty and/or contract by [Exceptional][and that they] are entitled to contribution, apportionment and indemnification from and against [Exceptional] for all or part of any verdict or judgment that plaintiff may recover against [them]." (Third-Party Answer, ¶24)

After the commencement of this action, Rhubart and Sirvint sent a formal notice of tender to Travelers.[1] Travelers acknowledged additional insured status of Rhubart and Sirvint under the Travelers policy but claimed that such coverage is excess to all other policies.

Exceptional now moves for summary judgment dismissing the third-party complaint and

[1] It is unclear from the record whether West End and Halstead have sought coverage from Travelers.

any cross claims or counterclaims against it. With respect to the claims for contribution and common law indemnification, Exceptional argues that based on Skoczylas' bill of particulars, his alleged injuries do not constitute a "grave injury" and therefore these claims are barred under section 11 of the Workers' Compensation Law. As for the claim for contractual indemnification, Exceptional argues that the admissible evidence,[2] which includes a copy of the Agreement, conclusively establishes that it has no contractual obligation to indemnify West End or Halstead. As for the breach of contract claim, Exceptional argues that Agreement only required it to provide a copy of a certificate naming third-party plaintiffs as additional insureds, and to the extent it was required to procure insurance, the Travelers policy satisfies this obligation.

West End and Halstead oppose the motion on various grounds, including that there are issues of fact as to whether plaintiff sustained a grave injury, and that an obligation to contractually indemnify them can be implied from Exceptional's agreement to obtain insurance naming them as additional insureds. With respect to the breach of contract claim, West End and Halstead argue that under the plain meaning of the Agreement, Exceptional was required to procure insurance naming them as additional insureds, and that the record establishes that Exceptional breached the Agreement as the Travelers policy is limited to claims arising out of acts and omissions by Exceptional and no other person or entity. Thus, West End and Halstead cross move for summary judgment on the breach of contract claim and seek various declaratory

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[2] See Exceptional's Notice to Admit, ¶1 ("Please take notice that . . . Exceptional Contracting, LLC. . . . hereby requests the parties to admit, . . . the genuineness of the following document: 1. Owner/Contractor Agreement dated the 29th day of February 2012 between Rhubart/Sirvint and Exceptional Contracting LLC for work in their apartment . . ."); See also CPLR 3213(a). It is undisputed that no party responded to Exceptional's notice to admit and therefore, the matter is deemed admitted.

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relief.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case . . ." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that the material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

As for the claims for common law indemnification and contribution, Workers' Compensation Law prohibits such claims brought by a third party against an employer absent a "grave injury." N.Y. Workers Comp. L. §11. Injuries qualifying as grave are to be narrowly defined in light of the legislative history of Workers' Compensation Law §11, which was specifically enacted to provide "relief in the form of immunization from tort liability to employers, . . . who provide workers' compensation coverage." Castro v. United Container Machery Group, Inc., 96 N.Y.2d 398, 401 (2001).

To constitute a grave injury with respect to hand injuries in particular, the injury must result in a permanent and total loss of the use of the hand.[3] See id. (holding that loss of multiple

[3]Section 11 of the Workers Compensation Law provides:

> An Employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting with the scope of his or her employment for such employer unless such third person provides through competent medical evidence that such employee has sustained a "grave injury." Which shall mean only one or more of the following: death, permanent and total loss of

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fingertips did not amount to a "grave injury"); Trimble v. Hawker Dayton Corp., 307 A.D.2d 452 (3d Dep't 2003) (holding that plaintiff's disabled crushed hand was not a "grave injury"); Kraker v. Consolidated Edison Co., Inc., 23 A.D.3d 531 (2d Dep't 2005) (holding a substantial loss of use of hand insufficient to meet standard of "grave injury" under Workers' Compensation Law).

On a motion for summary judgment, a plaintiff's verified bill of particulars may be used to establish a prima facie showing that a plaintiff did not suffer a "grave injury." Marshall v. Arias, 12 A.D.3d 423, 424 (2d Dep't 2004); Fleischman v. Peacock Water Co., Inc., 51 A.D.3d 1203 (3d Dep't 2008). Here, Skoczylas' bill of particulars lists various injuries to different fingers and tendons in the hand resulting in "pain, swelling and loss of motion and function of the left ring finger, left hand and left upper extremity; pain and suffering; and loss of enjoyment of life." Verified Bill of Particulars, ¶8. However, as plaintiff fails to allege in his verified bill of particulars (or his complaint) that he suffered an injury that could be considered "grave" under the statute and absent additional proof from West End or Halstead to the contrary, Exceptional is entitled to summary judgment dismissing all claims for common law contribution and indemnification as barred by Workers' Compensation Law. See e.g. Ibarra v. Equipment Control, Inc., 268 A.D.2d 13 (2d Dept 2001).

With respect to third-party plaintiff's claim for contractual indemnification, "contracts

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> use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

N.Y. Workers Comp. L. §11.

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will not be construed to indemnify a person against his own negligence unless such intention is expressed in unequivocal terms." Kurek v. Port Chester Hous. Auth. 18 N.Y.2d 450, 456 (1966) (citing Thompson-Starrett Co. v. Otis Elevator Co., 271 N.Y. 36, 41 [1936]). Moreover, "[a]n agreement to procure insurance is *not* an agreement to indemnify or hold harmless, and the distinction between the two is well recognized." Kinney v. G.W. Lisk Co., Inc., 76 N.Y. 2d 215 (1990); see also Roblee v. Corning Community College, 134 A.D.2d 803 (3d Dept 1987), lv. denied 72 N.Y.2d 803 (1988).

Here, as there is no indemnity clause in the contract (See Exhibit D) and as the genuineness of the Agreement has been conclusively established (See Notice to Admit, ¶1), it cannot be said that Exceptional's intention to indemnify is expressed in unequivocal terms. Nor can an obligation to indemnify or hold harmless, be implied from provision in the Agreement related to Exceptional's obligation to procure insurance. Roblee v. Corning Community College, 134 A.D.2d 803(holding that "a contract to procure or provide insurance coverage is clearly distinct from and treated differently than an agreement to indemnify"). Accordingly, any claims for contractual indemnification against Exceptional must be dismissed as a matter of law.

The remaining issue concerns the viability of a breach of contract claim relating to Exceptional's obligation to procure insurance under the Agreement which requires Exceptional to provide a "[c]opy of [its] liability insurance naming 270 West End Tenants Corp, Halstead Management Co. LLC, ... Alan Sirvint & Edward Rhubart as additional insureds in the minimum amounts of $1,000,000 bodily injury and $1,000,000 property damage."

Exceptional first argues that whether or not it obtained additional insurance coverage for West End, Halstead and Sirvint and Rhubart in compliance with the Agreement, it satisfied its

obligation under this provision by merely providing a copy of the certificate of insurance naming West End, Halstead, Rhubart and Sirvint as additional insureds. Under the construction argued by Exceptional, Exceptional had no obligation to obtain insurance but only needed to provide a copy of the certificate of insurance. This argument is without merit as such a construction would render the provision meaningless. See Suffolk County Water Authority v. Village of Greenport, 21 A.D.3d 947, 948 (2d Dep't 2005) (stating that under "basic principles of contract construction [an] interpretation which renders language in the contract superfluous is unsupportable, citing, Lawyers' Fund for Client Protection of State of N.Y. v. Bank Leumi Trust Co. of N.Y., 94 N.Y.2d 398, 404 [2000]). In this connection, the court notes that a certificate of insurance naming a party as an additional insured is insufficient to confer coverage. Tribeca Broadway Assocs., LLC v. Mount Vernon Fire Ins. Co., 5 AD3d 198, 200 (1st Dept 2004)(finding that "[a] certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists").

The only remaining issues concern the scope of the insurance coverage that Exceptional was required to procure under the Agreement. "[A] breach may . . . occur where insurance has been procured, if the insurance coverage procured does not match the coverage promised in the insurance procurement agreement." Roffi v. Metro North Commuter R.R., 2001 WL 1568319 (S.D.N.Y. 2001) (applying New York law); See Nrecaj v. Fisher Liberty Co., 282 A.D.2d 213, 214 (1st Dep't 2001); Clapper v. County of Albany, 188 A.D.2d 774, 775 (3d Dep't 1992).

New York courts have held that when, as here, there is a provision in the contract requiring the promisor to name the promisee as an additional insured to their general liability

insurance policy, such promise inherently includes an obligation to procure coverage for all acts arising out of the work performed, regardless of who was at fault, or whether such broad coverage is expressly provided for in the contract. See Bachrow v. Turner Const. Corp., 46 A.D. 3d 388 (1st Dept 2007) (holding that a subcontractor agreement with a general contractor and owner requiring subcontractor to name them as additional insured required "[subcontractor] to procure insurance covering [general contractor] for all liabilities arising out of [subcontractor's] work, including liabilities caused by [general contractor's] own acts of negligence); Lenze v. Lehrer McGovern & Bovis, Inc., 245 A.D.2d 209 (1st Dept 1997) (contractor was required to obtain additional insurance coverage for plaintiffs' injuries regardless of who was culpable); Roblee v. Corning Community College, 134 A.D.2d at 803 (holding that absent express language to the contrary, the obligation of contractor to obtain additional insured coverage for college extended to providing coverage for liability arising out college's own acts of negligence and not only acts of the contractor); Cf. Nuzzo v. Griffin Technology Inc., 212 A.D.2d 980 (4th Dept 1995) (holding that an insurance policy only covering acts caused by the promisor's negligence was sufficient to satisfy an insurance-procurement contractual obligation that did not specify scope of coverage).

Thus, Exceptional was required to obtain additional insurance coverage for plaintiff's injuries regardless of who was at fault. Here, Exceptional apparently obtained additional insurance coverage for its own acts, but did not obtain coverage for the acts of West End, Halstead, Rhubert or Sirvint. Since it has not been determined which entities or individuals, if any, were at fault, it cannot be ascertained at this stage whether the coverage Exceptional obtained complies with its contractual obligation such that its motion for summary judgment

dismissing the breach of contract claim should be granted. Accordingly, Exceptional's motion for summary judgment must be denied.

Likewise, the cross motion by West End and Halstead for summary judgment on their breach of contract claim for failure to provide coverage must be denied since the issue of the extent of coverage Exceptional was required to provide cannot be ascertained prior to a determination as to the fault of each potentially liable party. Nor can summary judgment be granted with respect to West End's and Halstead's argument that Exceptional breached its contractual obligation to obtain coverage based on Travelers' letter limiting its liability on the grounds that the Travelers policy is excess over all other available insurance coverage in the absence of a written agreement providing that the additional insurance coverage must be on a primary basis.[4] The record is insufficient at this juncture to make such a determination, and the letter from Travelers alone, even if considered a denial of coverage, does not provide a basis for finding a breach of contract by Exceptional. See Roffi v. Metro North Commuter R.R., 2001 WL 1568319 at 8 (noting that "the refusal of an insurer to provide coverage promised in a contract does not, in itself, constitute a breach of contract on the part of the promisor."); see also Murphy v. University Club, 200 A.D.2d 532, 533 (1st Dep't 1994).

Conclusion

In view of the above it is

ORDERED that third-party defendant Exceptional's motion for summary judgment is granted to the extent of dismissing the third-party claims or cross claims and/or counterclaim

[4]Indeed, as noted above, it is unclear from the record whether West End and Halstead sought coverage under the Travelers policy.

against it for contribution and common law and contractual indemnification and is otherwise denied; and it is further

ORDERED that the cross motion by defendant/third-party plaintiffs 270 West End Tenants Corp. and Halstead Management Company LLC is denied; and it is further

ORDERED that the action shall continue; and it is further

ORDERED that the parties shall appear on October 16, 2014, at 9:30am for a preliminary conference in Part 11, Room 31, 60 Centre Street, New York, NY.

DATED: September 17, 2014