SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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RESEARCH FOUNDATION CUNY,

Plaintiff,

-against-

FIRST MERCURY INSURANCE COMPANY, NATURE'S FINEST SERVICES, INC. and NATURE'S FINEST SECURITY, LLC,

Defendants.

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DECISION AND ORDER

Index No. 152287/2013

HON. ANIL C. SINGH, J.:

Defendant First Mercury Insurance Company (FMIC) moves for summary judgment dismissing the complaint. Plaintiff Research Foundation CUNY (RF) cross-moves for summary judgment. Defendants Nature's Finest Services, Inc and Nature's Finest Security, LLC (together, NFS) cross-move for summary judgment.

RF is a non-profit educational corporation based in New York City. NFS is its subcontractor authorized to provide security services for RF. Prior to December 21, 2009, FMIC, an insurance company, issued a commercial general liability policy to NFS, effective from November 14, 2009 to November 14, 2010. On December 21, 2009, a student, Baleria Guzman, was allegedly sexually assaulted by an employee of the "Prep Academy." The parties have acknowledged that the employee was a then employee of NFS. Subsequently, Baleria Guzman's guardian, Angelito Guzman, commenced a lawsuit in Supreme Court, Kings County, entitled *Matter of Guzman v City of New York,* Index No. 15846/11 (the underlying suit). RF and NFS are among the defendants in the underlying suit.

RF brings this action against FMIC and RF, claiming that in the underlying suit, RF is being sued for negligent supervision, intentional and negligent infliction of emotional distress and negligence. RF seeks a declaratory judgment that FMIC has a duty to defend and indemnify RF in the underlying suit, because RF is deemed an additional insured in the policy that FMIC issued to NFS. RF also seeks damages, including attorneys' fees, from FMIC based on expenses RF has incurred in defending itself in the underlying suit, which is ongoing. RF alternatively seeks a declaratory judgment that NFS has a duty to defend and indemnify RF in the underlying suit and to procure additional insurance coverage for RF.

FMIC seeks summary judgment dismissing the complaint, based on the following grounds: According to FMIC, RF is entitled to additional insurance coverage under NFS's policy only if there was a written contract between RF and NFS on the date of the alleged assault, December 21, 2009. FMIC contends that, based on deposition testimony, no such contract existed on that date. There is proof of a written contract between these parties, but it is dated March 29, 2010 and "the dates of performance" are from September 1, 2009 to January 31, 2010. FMIC states that there is no evidence of an earlier written contract between these parties. In the absence of such an agreement, FMIC avers that it has no duty to provide services to RF in RF's capacity as an additional insured in NFS's policy.

FMIC also contends that RF lacks standing to sue because it is presently being defended in the underlying suit by another insurance company, United Educators. FMIC argues that since this insurer is paying for all of RF's defenses costs, RF has no financial interest in bringing its action here, and this action must be dismissed. FMIC also claims that RF's pursuit of indemnity is premature at this time and must be dismissed.

RF opposes the motion and cross-moves for summary judgment against defendants. RF contends that it has standing to sue, stating that it has procured and maintained its United Educators policy at significant expense and that its coverage has no bearing on this case. RF asserts that it is entitled to sole primary coverage from FMIC based on the FMIC policy.

RF claims that it sought coverage from FMIC by letter dated December 23, 2010. FMIC disclaimed coverage by letter dated February 3, 2011. According to RF, FMIC acknowledged in its disclaimer letter that there was additional insured coverage for RF, but denied such coverage by referring to various exclusions under the policy, including the intentional acts, criminal acts and late notice provisions. The letter did not address the issue of a written contract between RF and NFC.

RF states that there is no provision in the policy which requires a written contract to have been fully executed at the time of an incident like the alleged assault. In fact, RF contends that since 2003, RF and NFC were contractually bound for performance pursuant to a written contract. RF avers that the contracts between the parties were frequently executed after the period of performance had commenced or was completed. Moreover, RF argues that, as of November 2009, NFC had procured a policy from FMIC, and caused a certificate of insurance to be issued which expressly stated that RF was a named additional insured on the policy.

RF avers that FMIC has a duty to defend RF based on its policy's supplemental payments provision. According to RF, the provision unambiguously requires FMIC to defend RF in the underlying suit as an indemnitee of NFC, regardless of its status as an additional insured. In addition, the policy allegedly provides primary coverage to RF.

RF seeks summary judgment on its declaratory judgment claim against FMIC. Alternatively, it seeks a declaratory judgment against NFC that NFC breached its contractual

duty to RF by failing to procure insurance for RF, and seeks as well a hearing to assess resulting damages from the breach.

NFC cross-moves for summary judgment dismissing the complaint, declaring that it has no contractual obligation to indemnify RF or to procure insurance coverage for RF. NFC argues that the lack of a written contract between itself and RF in effect at the time of the alleged assault precludes RF from coverage under the subject policy. According to NFC, the contract that was finally executed by the parties did not contain any provision in which indemnity or insurance procurement would apply retroactively. NFC notes that the written agreement included a merger provision, which would expressly exclude any additional provisions in the agreement. NFC claims that this contract, by its terms, must be considered a complete integrated document.

NFC denies any responsibility for procuring insurance for RF. It also claims that RF's failure to promptly provide a contract for NFC to execute resulted in RF's failure to attain timely additional insurance coverage.

In reply, RF asserts that the existence of a written contract is not dispositive in determining whether an agreement exists between two parties. RF asserts that the contract was reduced to writing after NFC had commenced and substantially performed its work, but that the contract was in effect prior to its written execution. RF contends that the retroactive argument raised by NFC is not relevant. RF also argues that the FMIC policy does not require indemnity contracts to be executed in before a claim arises.

In its opposition to RF's cross motion, FMIC asserts that RF, in citing the Supplementary Payments provision as proof of its entitlement to a defense from FMIC, fails to provide evidence that it satisfied all of the conditions of that provision. FMIC reasserts its position that RF lacks standing to sue. FMIC also asserts that the existence of a certificate of liability insurance is not

binding since the certificate was issued for information purposes only, conferring no rights upon the holder.

In reply to FMIC, RF reasserts that the policy does not require a written contract to be executed prior to an incident like the alleged assault. RF claims that it has satisfied the conditions pursuant to the Supplementary Payments provision in the policy and is entitled to a defense from FMIC.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues." *Birnbaum v Hyman,* 43 AD3d 374, 375 (1st Dept 2007). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [citation omitted].'" *People v Grasso,* 50 AD3d 535, 545 (1st Dept 2008). "Where a defendant is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of facts in dispute and thus that it is entitled to judgment as a matter of law." *Flores v City of New York,* 29 AD3d 356, 358 (1st Dept 2006). "Once the defendant demonstrates its entitlement to summary judgment, the burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the granting of summary judgment." *Id.*

The court will first determine whether RF has standing to sue defendants. "Standing involves a determination of whether the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution [internal quotation marks and citations omitted]." *Matter of Graziano v County of Albany,* 3 NY3d 475, 479 (2004).

RF has commenced a declaratory judgment action that is related to another ongoing action in which it is a defendant, allegedly liable for negligent conduct. The action before this court would resolve significant issues as they relates to the negligence action, primarily whether RF is entitled to legal representation by an insurer. A declaratory judgment may be used only for a "justiciable" controversy; that is, the court must have jurisdiction over the subject matter and the dispute must be genuine rather than academic. *See* CPLR 3001; *Watson v Aetna Cas. & Sur. Co.*, 246 AD2d 57, 62 (2d Dept 1998). This action is valid, in its relationship with the underlying suit. RF, as plaintiff, has standing to bring this suit, alleging a genuine controversy in which it has a cognizable interest.

The next matter is whether RF is legally an additional insured under NFS's policy and entitled to representation by FMIC in the underlying suit. There are two contracts involved, the insurance policy issued by FMIC to NFS and the agreement between NFS and RF. The court

> "should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby [internal quotation marks and citation omitted]."
> *Kass v Kass,* 91 NY2d 554, 566 (1998).

The FMIC policy issued to NFS includes an endorsement titled "Additional Insured- Owners, Lessees or Contractors-Scheduled Person or Organization." It provides the following:

> "A. Section II- Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for 'bodily injury', 'property damage' or 'personal and bodily injury' caused, in whole or in part, by:
> 1. Your acts or omissions; or
> 2. The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for additional insured(s) at the location(s) designated above."

FM 000019.

This provision identifies the "additional insured" as "[a]ny person or organization as required by written contract." *Id.*

Defendants move for summary judgment dismissing the complaint on the ground that the written contract between the insured, NFS, and any potential additional insured, like RF, must exist at the time of an incident which is covered under the policy. Otherwise, they contend, RF cannot benefit as an additional insured under the policy. There is no question that no such written contract existed between NFS and RF on December 21, 2009. This is confirmed by the deposition testimony of Sheryl Courtney, a senior associate counsel of RF, who asserted that there was no such agreement until the end of NFS's performance, and that the agreement was not fully executed until March 29, 2010. The contract that does exist, and which is submitted by FMIC, was not executed until March 29, 2010, although it expressly covers the performance of NFS between September 1, 2009 to January 31, 2010. In other words, this contract covers work already executed by NFS. No other written agreement between RF and NFS has been submitted.

There is, apparently, no evidence showing a written agreement covering RF and NFS at the time of the incident and, pursuant to the policy, RF is not entitled to any additional insured coverage. The written agreement between RF and NFS cannot serve to retroactively implicate the FMIC policy. RF's reliance on FMIC's disclaimer letter is of no avail. The letter disclaimed coverage on grounds unrelated to the lack of a written agreement. However, since there was no written agreement between RF and NFS, there was no coverage at the time of the alleged assault, and FMIC cannot be made accountable to RF on the basis of waiver or estoppel. In the absence of coverage, these equitable remedies are ineffective. *See Nicoletta v Berkshire Life Ins. Co.*, 99

AD3d 567, 567 (1st Dept 2012); *Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 38 (1st Dept 2006). Therefore, RF has no entitlement to defense or indemnification from FMIC, and FMIC's motion for summary judgment dismissing the complaint is granted.

The existence of a certificate of insurance is not binding as the certificate expressly provides that no rights to coverage are conferred to the holder. Therefore, RF, as a certificate holder, does not have any entitlement to coverage from FMIC.

The final issue concerns whether NFS can be held accountable to RF. RF alleges that NFS breached its contractual obligations to RF in failing to procure insurance. In the absence of a written agreement at the time of the alleged incident, NFS cannot be bound by the terms of that agreement. Moreover, there is apparently no legal obligation independent of that agreement that would bind NFS. RF has not sufficiently made out the terms of an oral agreement between the parties to procure insurance coverage for RF. Moreover, the court notes that in the written agreement between RF and NFS dated March 29, 2010, which was subsequent to the assault, does not contain an insurance procurement provision (*see* Independent Contractor's Agreement for Security Services at ¶8). Therefore, NFS's motion for summary judgment shall be granted and NFS is dismissed from this suit. Accordingly, it is

ORDERED that defendant First Mercury Insurance Company's motion for summary judgment is granted and the complaint is severed and dismissed with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ADJUDGED and DECLARED that First Mercury Insurance Company has no obligation to defend or indemnify plaintiff Research Foundation CUNY in the underlying suit, entitled *Matter of Guzman v City of New York,* Index No. 15846/11; and it is further

ORDERED that plaintiff Research Foundation CUNY's cross motion for summary judgment is denied; and it is further

ORDERED that defendants Nature's Finest Services, Inc. and Natures's Finest Security, LLC's cross motion for summary judgment is granted and complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly

Date: October 2, 2014
New York, New York

Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE