

<b>Concordia Gen. Contr. Co., Inc. v Preferred Mut. Ins. Co.</b>
2014 NY Slip Op 33531(U)
December 8, 2014
Supreme Court, Putnam County
Docket Number: 2851/13
Judge: Lewis J. Lubell
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To commence the 30 day statutory time period 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 PUTNAM

-----X  
CONCORDIA GENERAL CONTRACTING CO., INC.,

Plaintiff,

-against -

PREFERRED MUTUAL INSURANCE COMPANY,  
ZBIGNIEW KOSINSKI and ZBIGNIEW KOSINSKI  
d/b/a ZYGY RENOVATIONS,

Defendants.

-----X  
LUBELL, J.

DECISION & ORDER

Index No. 2851/13

Sequence No. 1-3  
Motion Date 9/29/14

The following papers were considered in connection with **Motion Sequence #1** by plaintiff for an Order pursuant to CPLR 3212 granting summary judgment in favor of the plaintiff and against the defendant Preferred Mutual Insurance Company declaring that it is obligated to defend and indemnify the plaintiff in the underlying personal injury action and also must reimburse defense costs to the plaintiff and its insurer; and **Motion Sequence #2** by defendants Zbigniew Kosinski and Zbigniew Kosinski d/b/a Zygy Renovations for an Order pursuant to CPLR 3212 for summary judgment dismissing plaintiff's third cause of action in its entirety; and **Motion Sequence #3** by defendant Preferred Mutual Insurance Company for an Order pursuant to CPLR 3212 granting summary judgment upon the ground that there are no triable issues of fact and that defendant is entitled to judgment dismissing the complaint and any and all cross-claims as a matter of law and for such other and further relief as this Court deems just and proper:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-I	1
NOTICE OF CROSS MOTION/AFFIRMATION/EXHIBITS A-F	2
NOTICE OF CROSS MOTION/AFFIRMATION/AFFIDAVIT/ EXHIBIT A-B	3
AFFIRMATION IN OPPOSITION AND REPLY/EXHIBIT A	4
REPLY AFFIRMATION/EXHIBIT A	5

Plaintiff Concordia General Contracting Inc. ("Concordia") brings this declaratory judgment action for judgment declaring that defendant Preferred Mutual Insurance Company ("PMI") is obligated to defend and indemnify Concordia under a Commercial General Liability policy of insurance (the "Insurance Policy") issued by PMI to Zygy Renovations. Defense and indemnification is sought in connection with injuries sustained by defendant Zbigniew Kosinski ("Kosinski") d/b/a Zygy Renovations, a subcontractor of Concordia in an underlying construction project (see infra). These injuries form the basis of a separate personal injury/Labor Law action commenced by Kosinski against various defendants, including Concordia, which is captioned Zbigniew Kosinski et al. v. Brendan Moran Custom Carpentry, Inc. et al. (Putnam Cty Index No. 3014/12; the "PI Action") [the "PI Action"]).

Kosinski commenced the PI Action to recover damages for personal injuries he allegedly sustained on February 1, 2012, when he fell from a ladder while performing work on a construction project (the "Construction Project") on property owned by PI Action defendant, Lynn DeGregorio (the "Owner") and which is located at 103 Mills Road, North Salem, New York (the "Premises"). In connection with the Construction Project, the Owner hired PI Action defendant Brendan Morgan Custom Carpentry, Inc. (the "General Contractor") which, in turn, engaged PI Action defendant and plaintiff herein, Concordia, to perform work at the Premises. Concordia, in turn, engaged defendant Zygy Renovations as a carpentry subcontractor.

Zygy Renovations is a sole proprietorship owned and operated by Kosinski "d/b/a Zygy Renovations." At all times relevant to the PI Action and this action, Zygy Renovations had no employees. As part of Zygy Renovations' deal with Concordia, Zygy Renovations, through signature of Kosinski, executed an agreement with Concordia entitled "Hold Harmless Agreement", dated September 29, 2008 (the "Hold Harmless Agreement"). This one-page agreement provides, among other things, that Zygy Renovations will maintain and procure general liability insurance (the "Insurance Policy") in the amount of \$1,000,000 and will

. . . indemnify and hold harmless [Concordia] and Owner from any and against all claims or causes of action, damages, losses, or expenses, including attorneys fees from any claim or damages for bodily injury . . . This indemnification shall extend [to] claims resulting from performance of [Zygy Renovations] and shall apply only to the

extent that the claim or loss is caused in whole or in part by the negligent act or omission of [Zygy Renovations] or any of its agents or employees . . . [Zygy Renovations] also agrees that [Concordia] will be named as Additional Insured and that such Insurance will apply as Primary Insurance.

Through this declaratory action, Concordia seeks to be indemnified and held harmless in the PI Action by PMI pursuant to the Hold Harmless Agreement between itself and Zygy Renovations.

In addition to rejecting Concordia's tender of defense and indemnification on the grounds that Concordia was not an additional insured under the Insurance Policy and that the Worker's Compensation and Employer's Liability exclusions prohibited same, PMI denied Concordia's tender upon its assertion that the Hold Harmless Agreement is not an "insured contract" as defined in the Insurance Policy with Zygy Renovations, as Concordia claims. While there is an exclusion in the Insurance Policy for contractual liability (such as is assumed by Zygy Renovations in its contract with Concordia), there is an exception to the exclusion for an "insured contract."

"Insured Contract" is defined in an endorsement to the Insurance Policy which is entitled "Amendment of Insured Contract Definition". It reads:

That part of any other contract or agreement pertaining to your business . . . under which you assume tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided that "bodily injury" and "personal property" is caused, in whole or in part, by you or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Upon review and consideration of the applicable law, the pertinent provisions of the Insurance Policy including its exclusions and exceptions thereto, and the arguments advanced by the respective parties, the Court concludes that the definition of "Insured Contract" is clear and unambiguous and does not encompass the Hold Harmless Agreement such as would allow coverage to Concordia as an exception to the contractual liability exclusion to the policy. This determination is made upon, among other things, according the exception to the exclusion a strict and narrow

construction, construing any ambiguity against the insurer and in favor of coverage (Breed v. Ins. Co. of N. Am., 46 NY2d 351, 354-355 [1978]) and upon consideration of the "reasonable expectation and purpose of the ordinary businessman" (Ace Wire & Cable Co., Inc. v. Aetna Cas. & Sur. Co., 60 NY2d 390, 398 [1983] citing Bird v. St. Paul Fire & Mar. Ins. Co., 224 N.Y. 47, 51 [1918])).

In short, the tort liability assumed in the Hold Harmless Agreement by Kosinski, d/b/a Zygy Renovations, on behalf of Concordia for "bodily injury" sustained by "a third person or organization" cannot be fairly read to encompass "bodily injury" sustained by Kosinski, a party to the Hold Harmless Agreement.

Any assertion that Kosinski and Zygy Renovations are separate entities is wholly rejected by the Court. Zygy Renovations is simply a d/b/a of Kosinski. As such, it is not a separate legal entity.

Finally, to the extent that Concordia relies on its purported status as an Additional Insured, Concordia has failed to rebut PMI's prima facie showing of its entitlement to judgment in its favor on that issue. Having ruled as such, the Court need not address the Workers Compensation and Employer's Liability exclusions upon which PMI also relies.

Defendant Zbigniew Kosinski d/b/a Zygy Renovations' motion for summary judgment dismissing Concordia's third cause of action for breach of contract is granted.

To the extent relevant to the third cause of action, the Hold Harmless Agreement obligates Kosinski to indemnify and hold harmless Concordia from all claims or causes of action for bodily injury "to the extent that the claim or loss is caused in whole or in part by the negligent act or omission of [Zygy Renovations] . . ."

In the Court's April 14, 2014, written Decision & Order resolving the various summary judgment motions made in the PI Action, the Court expressly found that Kosinski was entitled to summary judgment in his favor on his absolute liability Labor Law §240(1) claim. In connection with that determination, the Court also concluded that Kosinski's conduct did not constitute a unilateral misuse of the devices provided to him such as would constitute the sole proximate cause of the accident, nor were his actions so extraordinary as to constitute a superseding cause of the accident nor did he decline to use appropriate safety devices. Nonetheless, upon denying Kosinski summary judgment on his Labor Law §241(6) claim, the Court expressly found that there were

questions of "fact as to whether Plaintiff failed to proceed with reasonable care under the existing conditions".

Notwithstanding the Court's section 241(6) finding, Kosinski has prevailed on his Labor Law §240(1) claim against Concordia, as well as against all defendants. As such, whether Kosinski is "responsible, in whole or part, for the accident is irrelevant. It is well settled that contributory negligence and assumption of risk are not defenses to the imposition of absolute liability under Labor Law § 240 (1)" (Rose v. Mount Ebo Assoc., Inc., 170 AD2d 766, 768 [3d Dept 1991] citing Zimmer v. Chemung County Performing Arts, 65 NY2d 513, 521-522). Thus, to allow Concordia to go forward with a claim in this action (or a counterclaim in the PI Action) that calls into question Kosinski's culpable conduct as to his own injury would "vitiating the purpose of Labor Law § 240(1)" liability upon which Kosinski has already prevailed in the PI Action (see, Rose v. Mount Ebo Assoc., Inc., 170 AD2d 766, 769 [3d Dept 1991]).

Based upon the foregoing, it is hereby

ORDERED, that Concordia's motion for summary judgment in its favor and against defendant Preferred Mutual Insurance Company declaring that it is obligated to defend and indemnify the plaintiff in the underlying personal injury action and that it must reimburse defense costs to the plaintiff and its insurer is hereby denied; and it is further,

ORDERED, that the motion for summary judgment of Zbigniew Kosinski and Zbigniew Kosinski d/b/a Zygy Renovations for summary judgment dismissing plaintiff's third cause of action in its entirety is granted; and it is further,

ORDERED, that the motion by Preferred Mutual Insurance Company for an Order dismissing the complaint and any and all cross-claims is granted.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York  
December 8 , 2014

S/

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