

<b>County of Nassau v Technology Ins. Co., Inc.</b>
2014 NY Slip Op 34025(U)
November 24, 2014
Supreme Court, Nassau County
Docket Number: 603075/14
Judge: Denise L. Sher
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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

COUNTY OF NASSAU and NASSAU COUNTY  
DEPARTMENT OF PUBLIC WORKS, an agency of the  
COUNTY OF NASSAU,

TRIAL/IAS PART 34  
NASSAU COUNTY

Plaintiffs,

Index No.: 603075/14  
Motion Seq. No.: 01  
Motion Date: 09/08/14

- against -

TECHNOLOGY INSURANCE CO., INC. and  
LOOKS GREAT SERVICES, INC.,

Defendants.

**The following papers have been read on this motion:**

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibit	2
Reply Affirmation and Exhibit	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant Looks Great Services, Inc. (“LGS”) moves, pursuant to CPLR § 3211(a)(4), for an order dismissing plaintiffs’ Verified Complaint as against it. Plaintiffs oppose the motion.

Plaintiffs commenced the action by filing and serving a Summons and Verified Complaint on or about June 30, 2014. *See* Defendant LGS’s Affirmation in Support Exhibit A.

Counsel for defendant LGS submits that “[t]he County alleges that there was an agreement with LGS which obligated LGS to obtain insurance covering the County as additional insured.... After Hurricane Sandy struck Nassau County, LGS performed emergency services for

the County removing trees etc. Plaintiff alleges that on December 19, 2012, either LGS or a sub-subcontractor or subcontractor Jewell Transport Inc. operated a tractor trailer on the Long Island Expressway that was involved in a motor vehicle accident.... The County alleges they have been sued as a result of that accident and the carrier for LGS, Technology Insurance Co. has declined the request for defense and indemnity.... The County has identified one such case as the Murphy case filed in Nassau County under index number 479/2014.... [T]he supplemental summons and complaint in the Murphy action... names the County and LGS as defendants, among others.... Annexed hereto as Exhibit C is a copy of the answer and cross claims served by the County in (*sic*) Murphy case. The pleading contains six cross claims against LGS and the other defendants.... The fifth cross claim seeks to recover against LGS based upon a contract or agreement wherein LGS purportedly agreed to hold harmless and indemnify the County for the claims in the Murphy suit. The sixth cross claim seeks to recover against LGS based on the County's claim that LGS was obligated to obtain insurance naming the County as additional insured. As a result of this alleged breach of contract or agreement, the County seeks damages. Turning to the case at bar, there is one cause of action against LGS which is the third cause of action.... In that cause of action, the County alleges that LGS breached an agreement by failing to maintain insurance for the County and failing to defend and indemnify them. LGS submits that the claims in the third cause of action are identical to the existing claims already made by the County in their previously filed answer in their fifth and sixth cross claims. That action was commenced originally on 1/16/14 and the County served their answer and cross claims on June 9, 2014." *See* Defendant LGS's Affirmation in Support Exhibits A-D.

Counsel for defendant LGS adds that "[i]n the case at bar, plaintiff seeks a declaration of coverage against Technology Insurance Co. The breach of agreement cause of action against LGS

is similar if not identical to the pending cross claims by the County in the Murphy lawsuit where the County and LGS are both defendants.... The County has its 5<sup>th</sup> and 6<sup>th</sup> cross claims in the Murphy suit seeking the same relief against LGS as they now seek in the third cause of action. Dismissal of the case against LGS only, will not prejudice the County and will avoid extra time and expense litigating the same claims twice. Further, dismissal of this action against LGS will avoid the possibility of inconsistent results.”

In opposition to defendant LGS’s motion, counsel for plaintiffs submits “LGS argues that this action is ‘identical’ to the cross-claims for indemnification and contribution contained in Murphy v. Jewell Transportation, Nassau Co. Index No. 479/2014, which is one of two personal injury actions that has been filed, to date, in connection with a 35-car pileup allegedly caused by one of LGS’s subcontractors. LGS’s arguments are factually inaccurate and lack legal merit. LGS cannot be dismissed from this action because they are a necessary and indispensable party to the coverage dispute with Technology Insurance Co.; it is well established that insurance coverage questions cannot be joined with a personal injury action; this commercial dispute is substantially broader than any single personal injury claim arising from LGS’s subcontractors’s negligence; and, contrary to LGS’s claims, the declaratory judgment and breach of contract claims in this action are not ‘identical’ to the indemnification and contribution claims in Murphy as they involve different parties, different causes of action, and different damages.”

Counsel for plaintiffs argues that “[t]he causes of action against LGS in this case are not the same as, and cannot be fully adjudicated as part of, the cross-claims in Murphy. Plaintiff’s Answer in Murphy,..., merely contains cross-claims for contractual and common law indemnification and contribution as against LGS and the other co-defendants in that action. The cross-claims are specifically limited to the costs of and potential damages in the Murphy action.

This action, in contrast, contains two causes of action affecting LGS: one for declaratory judgment regarding Plaintiffs' status as an additional insured under LGS' insurance policy with TIC; and one for breach of contract against LGS. The claims in this action are applicable to the entire universe of cases and claims arising out of the December 19, 2012 motor vehicle accident, not only the Murphy case. The other co-defendants in the Murphy action are not named parties in this action; and TIC is not a party in the Murphy case. This action is not 'between the same parties and for the same cause of action,' and thus CPLR §3211(a)(4) is not applicable. By their nature, the claims in this action must be litigated separately from the underlying personal injury actions."

Counsel for plaintiffs adds that "LGS is a necessary party in connection with respect to Plaintiff's declaratory judgment cause of action, and thus must be included in this action, but TIC is not and cannot be a party in the underlying personal injury actions. [citations omitted]."

CPLR §3211(a)(4) reads, "[m]otion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:... 4. there is another action pending between the same parties for the same cause of action in a court of any state of the United States; the court need not dismiss upon this ground but may make such order as justice requires;..."

In the matter of *Robert Murphy, Mary Beth Murphy, Sunlye Oh, Sarah Oh and Leo Van Assendelft v. Jewell Transport, Inc., Raymond G. Simoneau, III, "Looks Great" Services, Inc. County of Nassau, Nassau County Department of Public Works, New York Paving Inc. and GGG Construction Corp.*, Index No. 479/14, defendant County of Nassau filed two cross-claims (its Fifth and Sixth cross-claims) against defendant LGS for contractual indemnification and insurance coverage. *See* Defendant LGS's Affirmation in Support Exhibit C. The Fifth Cross-Claim states, in pertinent part,

“[t]hat if plaintiffs were caused to sustain injuries and/or damages at the time and place set forth in the Complaint through any carelessness, reckless and/or negligence other than the plaintiffs’ own, such damages were sustained in whole or in part by any reason of the carelessness, recklessness and negligence and/or negligent acts of omission or commission of co-defendants, its agent(s), servant(s) and or employee(s). That co-defendants and these answering defendants duly entered into a contract/agreement/lease wherein co-defendants agreed to hold harmless, fully indemnify and assume the defense of these defendants and that such contract/agreement/lease was in full force and effect on the date of the incident made the subject of this litigation.... That by reason of the foregoing, co-defendants will be liable to fully indemnify these defendants for the amount of any recovery which may be obtained herein by plaintiffs against these answering defendants....” *Id.*

The Sixth Cross-Claim states, in pertinent part,

“[t]hat if plaintiffs are entitled to recovery from these answering defendants, then co-defendants will be obliged to fully indemnify these answering defendants pursuant to the terms of the contract/agreement/lease which provided that this answering defendant shall be named as an additional insured on the policy or policies of liability insurance obtained by co-defendant; that in the event said co-defendants failed to procure such insurance coverage for this answering defendant then, pursuant to Kinney v. G.W. Lisk Co., 76 N.Y.2d 215 (1990) said co-defendants shall be liable for an shall indemnify and hold this defendant harmless for any an all amounts awarded to said plaintiffs, as well as all costs, disbursements and other damages associated with this litigation.” *Id.*

In the instant action, plaintiffs have brought a cause of action against defendant LGS for a declaratory judgment regarding plaintiffs’ status as an additional insured under defendant LGS’s insurance policy with defendant Technology Insurance Co., Inc., and a cause of action for breach of contract.

In the *Murphy* matter, adjudication of the cross-claims asserted against defendant LGS are contingent upon a finding that *those specified plaintiffs* “were caused to sustain injuries

and/or damages at the time and place set forth in the Complaint through any carelessness, reckless and/or negligence other than the plaintiffs' own, such damages were sustained in whole or in part by any reason of the carelessness, recklessness and negligence and/or negligent acts of omission\or commission of co-defendants, its agent(s), servant(s) and or employee(s)" (emphasis added). *See id.* Plaintiffs' causes of action in the instant matter before this Court pertain to *any and all possible claims that may be brought* against plaintiffs as a result of the December 19, 2012 accident (emphasis added).

Accordingly, the Court does not find that the *Murphy* matter and the instant action have the same causes of action pending between plaintiffs and defendant LGS.

Therefore, defendant LGS's motion, pursuant to CPLR § 3211(a)(4), for an order dismissing plaintiffs' Verified Complaint as against it is hereby **DENIED**.

It is further ordered that the parties shall appear for a Preliminary Conference on January 8, 2015, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:



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DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
November 24, 2014

**ENTERED**

NOV 28 2014  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE