

HRH Constr., LLC v QBE Ins. Co.

2015 NY Slip Op 30331(U)

March 9, 2015

Supreme Court, New York County

Docket Number: 157259/2014

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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HRH CONSTRUCTION, LLC,

Plaintiff,

Index No. 157259/2014

-against-

DECISION/ORDER

QBE INSURANCE COMPANY AND PHOENIX
BUILDING CORP.,

Defendants.

-----x
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

| Papers | Numbered |
|--|----------|
| Notice of Motion and Affidavits Annexed..... | <u>1</u> |
| Answering Affidavits..... | <u>2</u> |
| Replying Affidavits..... | <u>3</u> |
| Exhibits..... | <u>4</u> |

Plaintiff HRH Construction, LLC (“HRH”) has commenced the present action against defendants for a declaratory judgment that defendant QBE Insurance Corporation (“QBE”) has a duty to defend and indemnify plaintiff in connection with a personal injury action commenced by Ronald and Sophie Washington (the “Underlying Action”). HRH has brought the present motion for summary judgment seeking a declaratory judgment that HRH is entitled to additional insured coverage under the QBE policy issued to Phoenix Building Corp. (“Phoenix”). Defendant QBE has brought a cross-motion for summary judgment seeking a declaration that HRH is not an additional insured under the policy issued by QBE to Phoenix. As will be explained more fully below, plaintiff’s summary judgment motion is granted to the extent stated

herein and defendant's summary judgment motion is denied.

In the Underlying Action, the plaintiff claimed that he was injured when he fell on a staircase while he was employed by Empire City Electric, Inc. at a construction project at 45 John Street in New York County (the "Project"). CRM Electric Corp. was hired as an electrical subcontractor at the Project and it subcontracted to Empire City Electric, the employer of the plaintiff in the Underlying Action, to perform electrical work. The Project's owner retained HRH as its "Owner's Representative" and retained Phoenix as its construction manager at the Project, responsible for contracting with and managing the various subcontractors on the Project.

The Owner's written construction management contract with Phoenix required Phoenix to procure additional insured coverage as follows:

Construction Manager shall carry Commercial General Liability Insurance on an occurrence basis covering all operations by or on behalf of Construction Manager arising out of or connected with this Agreement providing insurance The "Your Work" exclusion in such insurance must except damage caused by work done by a subcontractor of the insured. Owner, its subsidiaries and affiliates, its agents and Architect shall be included as Additional Insured under the Commercial General Liability coverage required under this agreement on the CG 20 10 (1985) ISO form or its substantial equivalent...

Construction Manager's insurance shall be primary to and noncontributory with any and all other insurance maintained by or otherwise afforded to Owner, its subsidiaries and affiliates

In accordance with the requirements of the Owner's written construction management contract with Phoenix, Phoenix obtained a policy of commercial general liability insurance with QBE.

The QBE policy contained a blanket Additional Insured Endorsement which included those parties as additional insureds as required by written contract. QBE policy's additional insured endorsement provides as follows:

SCHEDULE

Name of Person or Organization

As required by written contract,

Section II-Who is an insured is amended to include as an Insured the person or organization shown in the Schedule, but only with respect to liability arising out of “your work” for that insured by or for you.

If required by your agreement with such Additional Insured, this insurance shall be primary insurance and non-contributory for that Additional Insured....

Moreover, a certificate of Liability Insurance was issued by Levitt-Fuirst.Ltd. evidencing the insurance Phoenix obtained from QBE and listing HRH as an additional insured. Although QBE is defending Phoenix in the underlying action, it has not agreed to defend HRH as an additional insured under the Phoenix policy.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

As the party seeking additional insured coverage, plaintiff has the burden of proving that there was a written contract that required Phoenix to procure additional insured coverage for HRH as required by the QBE policy. *See Sixty Sutton Corp. v. Illinois Union Ins. Co.*, 34 A.D.3d 386, 388 (1st Dept 2006). “A provision in a construction contract cannot be interpreted as

requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated.” *Trapani v. 10 Arial Way Assoc.*, 301 A.D.2d 644 (2d Dept 2003).

Further, it is well-settled that the trade contract must “clearly evince” an intent to name another party as an additional insured. *See id.* at 388-89 (“Where a third party seeks the benefit of coverage, the terms of the contract must clearly evince such intent”).

In the present case, HRH has established a prima facie right to a declaratory judgment that it is an additional insured under the policy issued by QBE to Phoenix. It is undisputed that the additional insured endorsement in the policy issued by QBE unambiguously provides that additional insured coverage will be provided to entities as “required by written contract.” It is also undisputed that there is a written contract, the agreement between the owner and Phoenix, whereby Phoenix agreed to provide additional insured coverage to the owner’s agents, which would include HRH as the owner’s representative. *See Pinon v. 99 Lynn Avenue, LLC*, 2015 N.Y. Slip Op. 00516 (2d Dept 2015) (movants seeking additional insured status granted summary judgment as they have demonstrated the existence of a written contract expressly requiring insured to name them as additional insureds under the commercial liability policy it obtained from the insurer). It is irrelevant that HRH is not specifically named in the written contract as the written contract specifically includes agents of the owner of the Project.

The argument made by QBE that it has no obligation to provide additional insured coverage to HRH because there is no written contract directly between Phoenix and HRH is without basis. The additional insured endorsement contained in QBE’s policy requires it to include as an insured on its policy anyone who is identified under the schedule set forth within the endorsement and the schedule merely states “As required by written contract.” There is no

requirement that the written contract be between the insured and the party seeking additional insured coverage.

The court also finds that the decision relied on by defendant QBE, *AB Green Gansevoort, LLC v. Peter Scalamandre & Sons, Inc.*, 102 A.D.3d 425 (1st Dept 2013) and the cases to which it cites are distinguishable. The policy in that case specifically provided that there had to be a written agreement between the insured and the party seeking coverage to add that organization as an additional insured. It stated that an organization was added as an additional insured “when you and such ... organization have agreed in writing in a contract or agreement that such ... organization be added as an additional insured on your policy.” *Id.* at 426. The court found that the plain meaning of the foregoing language required that insured and the party seeking additional insured coverage had to have agreed in writing that the entity seeking coverage be added as an additional insured. *Id.* Unlike *AB* and the cases upon which it relies, the language in the QBE policy is much broader and requires coverage when “required by written contract” as opposed to “when you and such organization have agreed in writing in a contract or agreement.” Those cases are therefore distinguishable and not controlling in the instant case.

For the first time in its reply papers to its cross-motion, QBE argues that there must be a written contract between HRH and Phoenix for such coverage to exist based on the language in the additional insured endorsement which provides that “[i]f required by your agreement with such Additional Insured, this insurance shall be primary insurance and non-contributory for that Additional Insured.” Initially this court declines to consider this argument based on the well established principle that “[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new

arguments in support of, or new grounds for the motion.” *Dannasch v. Bifulco*, 184 A.D.2d 415 (1st Dept 1992). However, even if the court were to consider this argument, it would not change the outcome. The portion of the additional insured endorsement which specifically addresses the scope of additional insured coverage unambiguously provides that coverage will be provided “[a]s required by written contract.” The language upon which QBE relies is not contained in the portion of the policy describing what additional insured coverage is provided. Rather, it is contained in the portion describing what type of coverage will be provided for the additional insured. Therefore, it does not determine the extent of such coverage.

Finally, the court finds that HRH is entitled to summary judgment declaring that QBE has a duty to defend it but is not yet entitled to a summary determination as to whether it is entitled to indemnity from QBE before a determination of liability in the Underlying Action. It is undisputed that the duty to defend is broader than the duty to indemnify and arises where the “the allegations of the complaint against the insured fall within the scope of the risks undertaken by the insurer.” *79th Realty Co. v. X.L.O. Concrete Corp.*, 247 A.D.2d 256 (1st Dept 1998). However, “a declaration that the insurer has a duty to indemnify...requires a determination that the underlying accident arose out of the subcontractor’s performance of work under its contract with the general contractor, which must await a determination of liability in the underlying personal injury action.” *Id.* In the instant case, HRH is entitled to a declaration that it is entitled to a defense as the allegations in the Underlying Complaint fall within the scope of risks undertaken by QBE. However, any determination as to indemnification is premature until a determination of liability in the Underlying Action.

Based on the foregoing, HRH’s motion is granted to the extent that it is hereby declared

that it is an additional insured under the QBE policy with Phoenix, that it is entitled to a defense from QBE in the Underlying Action and that it is entitled to reimbursement for defense costs incurred in the main action. It is further ordered that the issue of the amount of attorneys' fees incurred by HRH to date and for which QBE is responsible is referred to a special referee to hear and report with recommendations, unless the parties stipulate to the referee making a determination and it is further ordered that the final determination of this issue is held in abeyance pending receipt of the report and recommendations of the special referee and a motion pursuant to CPLR 4403 or receipt of the determination of the special referee. Within thirty (30) days from the date of this order, counsel for plaintiff shall serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Rm 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

The foregoing constitutes the decision and order of the court.

Dated: 3/9/15

Enter: CK

J.S.C.
CYNTHIA S. KERN
J.S.C.