

Tishman Interiors Corp. v Harleysville Worcester Ins. Co.
2015 NY Slip Op 30364(U)
March 16, 2015
Supreme Court, New York County
Docket Number: 159958/2013
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X
TISHMAN INTERIORS CORPORATION,

Plaintiff,

-against-

DECISION/ORDER
Index No. 159958/2013
Seq. No. 001

HARLEYSVILLE WORCESTER INSURANCE
COMPANY AND MICHAEL MAZZEO ELECTRIC
CORP.,

Defendants.

-----X
KATHRYN E. FREED, J.S.C:

RECITATION, AS REQUIRED BY CPLR2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
TISHMAN’S NOTICE OF MOTION AND AFFS. ATTACHED.....	1,2 (Exs. A-K)
MAZZEO’S NOTICE OF CROSS MOTION AND AFFS. ATTACHED...	3,4 (Exs. A-H)
HARLEYSVILLE’S MEMORANDUM OF LAW IN OPPOSITION.....	5
HARLEYSVILLE’S NOT. OF CROSS MOT. AND AFFS. ATTACHED..	6,7 (Exs. A-J)
TISHMAN’S AFF. IN OPP. TO CROSS MOTIONS.....	8 (Ex. A)

UPON THE FORGOING CITED PAPERS, THIS DECISION/ORDER OF THE MOTION IS AS FOLLOWS:

In this declaratory judgment action, plaintiff Tishman Interiors Corporation (“Tishman”) moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor and declaring, pursuant to CPLR 3001, that defendant Harleysville Worcester Insurance Company (“Harleysville”) owes it, as well as other related non-party entities, “primary, non-contributory additional insured coverage and/or coverage as contractual indemnitees under the [Harleysville] policy issued to [defendant] Michael Mazzeo Electric Corp. (“Mazzeo”) for the underlying action of *Mahon v Prudential Investment Management, Inc.*, et al, pending in this Court under index number

102477/12, including defense, indemnification, and reimbursement of all defense costs and fees. Tishman's Notice of Motion, at 1. In the alternative, Tishman seeks a judgment that Mazzeo breached its contractual duty to procure an adequate policy of insurance naming Tishman as an additional insured.

Mazzeo cross moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Harleysville opposes Tishman's motion and cross moves, pursuant to CPLR 2201, to stay this action until the final disposition of an action entitled *Tishman Interiors Corp. v Harleysville Worcester Insurance Corp.*, pending in this Court under index number 151267/13. In the alternative, Harleysville seeks an order granting it summary judgment dismissing the complaint against it and declaring that it does not owe a duty to defend Tishman in the *Mahon* action until the limits of Tishman's own policy are exhausted.

After oral argument, a review of the papers presented, and all relevant statutes and case law, this Court **grants** Tishman's motion in part, **grants** Mazzeo's cross motion, and **denies** Harleysville's cross motion.

FACTUAL AND PROCEDURAL BACKGROUND:

In the *Mahon* action, plaintiff, an employee of Mazzeo, alleges that he was injured on May 24, 2011 while working as an electrician, at a construction project at 100 Park Avenue ("the premises"). The premises were allegedly owned by Prudential Investment Management, Inc., SL Green Realty Corp., and SL Green Realty Acquisition LLC (hereinafter collectively "the non-party owner entities"), although the contract for renovation of the premises lists AECOM Technology

Corporation as owner. Ex. C.¹ Tishman was the construction manager for the project and Mazzeo was its subcontractor. Mahon was allegedly injured when he slipped and fell on dust, grit and debris on an interior stairwell at the premises. Paragraph 8 of the contract between Tishman and Mazzeo, as well as paragraph 2(B)(7) of the insurance rider thereto, required Mazzeo to obtain a commercial general liability (“CGL”) policy covering Tishman as an additional insured. Ex. C. Paragraph 2(B)(8) of the insurance rider required that:

“[c]overage is to be endorsed to reflect that the insurance provided is to be primary and non-contributory for [Mazzeo], Owner, and [Tishman].”

Ex. C.

Mazzeo procured the required coverage from Harleysville under policy number MPA59826H. Ex. D. A certificate of insurance lists Tishman as an additional insured on Mazzeo’s CGL policy “on a primary and non-contributory basis when required under a written [c]ontract or [a]greement.” Ex. E.

The *Mahon* action was commenced by the filing of a summons and complaint on April 19, 2012. Ex. B. By correspondence dated January 2, 2013, Tishman tendered its defense in the *Mahon* action to Harleysville. Ex. G. Harleysville did not disclaim coverage to Tishman.

By order dated March 5, 2015 in the matter of *Tishman Interiors Corporation v Harleysville Worcester Insurance Company*, et al, index number 151267/13, this Court (Silver, J.) held, inter alia, that in *Polito v SLG 100 Park LLC and Tishman Construction Corp.*, index number 150726/12, another personal injury action arising from work performed at the premises, Harleysville owed Tishman “coverage, including defense and indemnification, on a primary basis as an additional insured” pursuant to the same policy at issue herein, and granted Tishman summary judgment in its

¹Unless otherwise noted, all references are to the exhibits annexed to Tishman’s motion.

declaratory judgment action against Harleysville. Harleysville admits that the *Polito* action “involves the exact same coverage issues” (Harleysville’s Memo. of Law, at 8) as those raised herein, “with the exception that in [this] action, Tishman has raised an additional issue as to whether [the non-party owner entities] are also entitled to coverage under the Harleysville [p]olicy.” *Id.*, at n. 4).

Prior to the commencement of the *Polito* action, Tishman moved to obtain relief from an automatic stay imposed by the United States Bankruptcy Court for the Southern District of New York so that it could proceed against the limits of the Harleysville policy. This motion was required because Mazzeo had filed for bankruptcy. By order dated January 13, 2014, the Bankruptcy Court lifted the stay, allowing Tishman to prosecute its claims “only to the extent of [coverage available to Mazzeo], and [Tishman] waive[d] any and all rights to assert a claim against the estates of the [d]ebtors arising from the [a]ction including any deductible.” Ex. H to Mazzeo’s Cross Motion.

POSITIONS OF THE PARTIES:

Tishman argues that its motion must be granted because Harleysville failed to disclaim coverage. In addition, Tishman asserts that, as additional insureds on Mazzeo’s policy, it and the non-party owner entities are entitled to defense and indemnification by Harleysville in connection with the claim alleged in the *Mahon* action. Tishman further maintains that the coverage it and the non-party owner entities are owed by Harleysville is primary to any other coverage they have.

In opposition to the motion and in support of its alternative prayer for summary judgment, Harleysville argues that the policy it issued to Mazzeo for the period of October 13, 2010 to October 13, 2011 is excess to a wrap-up policy issued to Tishman by New Hampshire Insurance Company (“NHIC”) covering work at the project. Harleysville maintains that its policy contains an “Excess

Wrap Endorsement” rendering its policy as excess to any other coverage provided under a wrap-up policy, that the NHIC policy is expressly listed as a wrap-up policy in the declarations page, and that the NHIC wrap-up policy acts as excess only when there is other primary insurance. Harleysville thus claims that it has no duty to defend Tishman until the limits of the NHIC policy are exhausted. It further asserts that its failure to disclaim does not require it to insure Tishman and the non-party owner entities.

In support of its cross motion, Harleysville argues that this action should be stayed pending the outcome of the coverage action pending before Justice Silver in connection with the *Polito* claim (index number 1512676/13) since the coverage issues raised in the captioned action are identical and that a stay would thus avoid inconsistent results.

In support of its cross motion, Mazzeo argues that it is entitled to summary judgment dismissing Tishman’s claim that Mazzeo breached the contract by failing to obtain insurance. Specifically, it maintains that, since Tishman can only recover up to the limits of Mazzeo’s Harleysville policy, it cannot recover against Mazzeo directly and thus the latter is entitled to dismissal.

In reply, Tishman reiterates its argument that it is entitled to primary coverage under the Harleysville policy issued to Mazzeo. It further asserts that Mazzeo is not entitled to dismissal based on the order of the Bankruptcy Court since it is subject to a judgment if it emerges from bankruptcy and because it is a necessary party.

CONCLUSIONS OF LAW:

Tishman's Motion

For the reasons stated in Justice Silver's order dated March 5, 2015, a copy of which is attached hereto, Tishman's motion for summary judgment is granted to the extent that it is entitled to a judgment declaring that it is entitled to primary coverage in the *Mahon* action as an additional insured under the Harleysville policy issued to Mazzeo. This Court specifically notes, as did Judge Silver, the language in Paragraph 8 of the contract between Tishman and Mazzeo, as well as paragraph 2(B)(7) of the insurance rider wherein both require that the that the insurance provided is to be "primary and non-contributory." That branch of Tishman's motion seeking such relief as to the owner entities is denied, however, since they are non-parties and this Court thus cannot grant them declaratory relief. *See 191 Chrystie LLC v Ledoux*, 82 AD3d 681 (1st Dept 2011); *Hermitage Ins. Co. v Bronx Steel Fabricators Inc.*, 42 Misc3d 1229 (A) (Sup Ct New York County 2014). Since Justice Silver determined that Mazzeo procured the required coverage for Tishman, that branch of Tishman's motion seeking summary judgment on its breach of contract claim against Mazzeo based on the latter's alleged failure to procure insurance is denied as moot.

Mazzeo's Cross Motion

Mazzeo's cross motion for summary judgment dismissing Tishman's complaint against it is granted. As Mazzeo points out, the only claim against it by Tishman in the captioned action is for breach of contract arising from Mazzeo's alleged failure to procure insurance. Since Justice Silver held that Mazzeo procured the required insurance for Tishman's benefit, and this Court has adopted Justice Silver's finding, Tishman's breach of contract claim has no basis and is dismissed.

Harleysville's Cross Motion

Harleysville's cross motion for a stay is denied. In asserting that a stay of this action must be granted, Harleysville asserted that a decision on Tishman's motion for summary judgment in the captioned action could lead to inconsistent results since a motion involving the "exact same coverage issues" was pending before Justice Silver. (Harleysville's Memo. of Law, at 8). However, now that Justice Silver has decided these issues, and this Court has adopted his findings that Tishman is entitled to summary judgment declaring that it has primary coverage in the *Mahon* action under the CGL policy issued by Harleysville to Mazzeo, and that Mazzeo's Harleysville policy is not excess to the wrap-up policy issued to Tishman by NHIC, there is no need for the stay. For the same reasons, that branch of Harleysville's cross motion seeking summary judgment declaring that it is not required to provide primary coverage to Tishman as an additional insured on Mazzeo's policy is denied.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the branch of plaintiff Tishman's motion for summary judgment seeking a declaration that it is owed coverage, including defense and indemnification, on a primary basis as an additional insured under defendant Harleysville's policy in the action entitled *Mahon v Prudential Investment Management, Inc.*, New York County index number 102477/12, is granted for the reasons stated in the order of this Court (Silver, J.) dated March 5, 2015 in the matter of *Tishman Interiors Corp. v Harleysville Worcester Insurance Corp.*, New York County index number 151267/13, a copy of which is annexed hereto; and it is further,

ORDERED that Tishman's motion is otherwise denied; and it is further,

ADJUDGED AND DECLARED that plaintiff Tishman is owed coverage, including defense and indemnification, on a primary basis as an additional insured under defendant Harleyville's policy in the *Mahon* action pending in New York County; and it is further,

ORDERED that the branch of Harleyville's cross motion for summary judgment seeking a declaration that it does not owe Tishman a duty to defend in the *Mahon* action until the limits of the NHIC policy are exhausted is denied, as is that branch of Harleyville's cross motion seeking a declaration that it does not have a present obligation to provide additional insured coverage to Tishman, and Harleyville's cross motion is denied in all other respects; and it is further,

ORDERED that Mazzeo's cross motion for summary judgment dismissing the complaint against it is granted in all respects, with costs and disbursements to that defendant as taxed by the Clerk of the court upon the submission of an appropriate bill of costs; and it is further,

ORDERED that Tishman, as movant, is to serve a copy of this order, with notice of entry, upon all parties within 20 days of entry; and it is further,

ORDERED that this constitutes the decision and order of this Court.

DATED: March 16, 2015

ENTER:

A handwritten signature in black ink, appearing to read 'Kathryn E. Freed', written over a horizontal line.

Hon. Kathryn E. Freed, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT