

Travelers Indem. Co. v Zurich Am. Ins. Co.
2015 NY Slip Op 30451(U)
March 30, 2015
Supreme Court, New York County
Docket Number: 159535/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER

PART 15

Index Number : 159535/2013
TRAVELERS INDEMNITY
vs
ZURICH AMERICAN INSURANCE
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/30/15
MAR 30 2015

[Signature] J.S.C.

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
THE TRAVELERS INDEMNITY COMPANY,
CAULDWELL-WINGATE COMPANY, INC. and
CAULDWELL-WINGATE COMPANY, LLC,

Plaintiffs,

- v -

ZURICH AMERICAN INSURANCE COMPANY and
NASTASI & ASSOCIATES, INC.,

Defendants.
-----X

HON. EILEEN A. RAKOWER, J.S.C.

Index No.
159353/2013

**DECISION
and ORDER**

Mot. Seq. #001

Plaintiffs, the Travelers Indemnity Company (“Travelers”), Cauldwell-Wingate Company, Inc., and Cauldwell-Wingate Company, LLC (collectively, “Cauldwell”) (and together with Travelers, collectively, “Plaintiffs”), bring this action for a declaration that defendant Zurich American Insurance Company (“Zurich”) is obligated to defend and to indemnify Cauldwell in connection with the personal injury action captioned, *Eversfield v. Brush Hallow Realty, LLC et al.* (the “Underlying Action”), and to reimburse Plaintiffs for past defense costs incurred in defending the Underlying Action. Plaintiffs claim that Zurich issued a general liability policy (the “Zurich Policy”) to defendant Natasi & Associates, Inc. (“Natasi”), and that Cauldwell is an additional insured under the Zurich Policy. Plaintiffs claim that the Zurich policy therefore obligates Zurich to defend and indemnify Cauldwell in connection with the Underlying Action. Additionally, Plaintiffs seek a declaration that Natasi and/or Zurich is responsible for any deductible owed under the Zurich Policy.

Natasi interposed an answer to Plaintiffs’ complaint on March 21, 2014. Zurich interposed an answer to Plaintiffs’ complaint on December 10, 2013.

Natasi now moves for an Order, pursuant to CPLR § 3212(a), granting summary judgment in favor of Natasi and dismissing Plaintiffs’ complaint as against

Natasi on the basis of collateral estoppel. In support, Natasi submits: the affidavit of Lauren Elizabeth Smith (“Smith”), counsel for Natasi; Plaintiffs’ summons and complaint; Natasi’s answer; Zurich’s answer; the Request for Judicial Intervention; copies of Natasi’s letters dated May 20, 2014, and June 14, 2014, demanding that Plaintiffs voluntarily discontinue the instant action as against Natasi; and, a copy of the commercial general liability insurance policy issued to Natasi by Zurich (the “Zurich Policy”).

Plaintiffs oppose. In support, Plaintiffs submit: the attorney affirmation of Joanne M. Engeldrum (“Engeldrum”); a copy of the Third-Party Complaint filed against Natasi in the Underlying Action; a copy of the affidavit of Jennifer McNaught (“McNaught”), Natasi’s Risk Manager, submitted in support of Natasi’s motion for summary judgment in the Underlying Action; a copy of the trial court’s order in the Underlying Action dismissing all claims against Natasi; a copy of the Second Department’s Decision and Order reversing the trial court’s decision and reinstating the claim for contractual indemnification; a copy of the Stipulation of Discontinuance of the claims for common law and statutory negligence under Labor Law § 200 against Natasi in the Underlying Action; and, a copy of the Zurich Policy.

As an initial matter, the relevant procedural history is as follows: on or about June 26, 2007, Robert Eversfield (“Claimant”) filed the Underlying Action against Brush Hollow, LLC (“Brush Hollow”) and Cauldwell seeking damages for injuries allegedly resulting from a fall while exiting a portable restroom. Claimant alleged that the subject restroom was improperly placed at a construction project (“Project”) at premises located at 1 Brush Hollow Road, Westbury, New York (“Premises”). On or about September 17, 2007, Cauldwell and Brush Hollow filed a third-party complaint in the Underlying Action asserting claims for breach of contract for failure to procure insurance, contractual indemnification and common law contribution and indemnification as against Natasi. Natasi moved for summary judgment seeking to dismiss the claims asserted against it, and the trial court granted Natasi’s motion. On appeal, the Second Department reversed the trial court’s decision and reinstated Cauldwell’s and Brush Hollow’s claim contractual indemnification against Natasi. Thereafter, Cauldwell and Brush Hollow agreed to voluntarily discontinue their claim for contractual indemnification against Natasi because the sole remaining claims against Cauldwell and Brush Hollow in the Underlying Action were for common law negligence and statutory negligence under Labor Law § 200 for which Cauldwell and Brush Hollow cannot be indemnified.

Turning now to Natasi’s motion for summary judgment, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to

judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

Nastasi argues that summary judgment is warranted because Plaintiffs are collaterally estopped from bringing the instant claim for a declaratory judgment against Natasi. Natasi argues that Plaintiffs' claim was previously litigated and decided in the Underlying Action. Natasi argues that all claims relating to Natasi's insurance obligations to Cauldwell were dismissed in the Underlying Action.

Plaintiffs, in turn, argue that the Underlying Action addressed Nastasi's insurance procurement and contractual indemnification obligations to Cauldwell pursuant to the Subcontract. Plaintiffs argue that the court in the Underlying Action held that Nastasi did not breach the Subcontract because Natasi procured the Zurich Policy including Cauldwell as an additional insured. However, Plaintiffs argue that the instant action concerns Cauldwell's claim for additional insured coverage under the Zurich Policy and whether Zurich and/or Nastasi is responsible for any deductible owed under that policy for Cauldwell's additional insured coverage. Plaintiffs argue that Nastasi's responsibility to satisfy the deductible, if any, arises out of the Zurich Policy, which was not addressed, litigated, or decided in the Underlying Action.

The doctrine of collateral estoppel, "precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." (*Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500 [1984]). Here, Natasi fails to demonstrate that the issue of Natasi's responsibility for any deductible owed for Cauldwell's additional insured coverage was clearly raised in the Underlying Action. Additionally, insofar as the issue of Nastasi's responsibility for the deductible under the Zurich Policy is distinct from the issue of whether Nastasi procured additional insured coverage for Cauldwell, Natasi fails to demonstrate that former was litigated or decided against Cauldwell in the Underlying action. Accordingly, Natasi does not meet its burden of establishing entitlement to judgment as a matter of law, and summary judgment is not warranted at this time.

Wherefore, it is hereby

ORDERED that Natasi's motion for summary judgment is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: March 3, 2015

MAR 30 2015
MAR 30 2015



EILEEN A. RAKOWER, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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The doctrine of collateral estoppel, "precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." (*Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500 [1984]). Here, Natasi fails to demonstrate that the issue of Natasi's responsibility for any deductible owed for Cauldwell's additional insured coverage was clearly raised in the Underlying Action. Additionally, insofar as the issue of Nastasi's responsibility for the deductible under the Zurich Policy is distinct from the issue of whether Nastasi procured additional insured coverage for Cauldwell, Natasi fails to demonstrate that former was litigated or decided against Cauldwell in the Underlying action. Accordingly, Natasi does not meet its burden of establishing entitlement to judgment as a matter of law, and summary judgment is not warranted at this time.

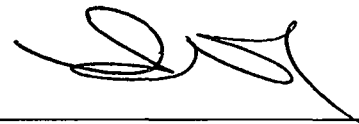
Wherefore, it is hereby

ORDERED that Natasi's motion for summary judgment is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: March 3, 2015

MAR 30 2015
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EILEEN A. RAKOWER, J.S.C.