Admiral Indemnity Co. v Travelers Cas. Ins. Co. of Am.
2015 NY Slip Op 31136(U)
June 29, 2015
Supreme Court, New York County
Docket Number: 162526/14
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK , IAS PART 11

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ADMIRAL INDEMNITY COMPANY, 270 WEST END TENANTS CORP. and HALSTEAD MANAGEMENT COMPANY, LLC,

Index No. 162526/14

Plaintiffs,

-against-

TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA and EXCEPTIONAL CONTRACTING, LLC,

Defendants.

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JOAN A. MADDEN

Defendant Exceptional Contracting, LLC ("Exceptional") moves to dismiss this declaratory judgment action pursuant to CPLR 3211(a) on the grounds that the complaint fails to state a cause of action, there is another action pending before this court under Index No. 157928/12 ("underlying action"), and the allegations are contradicted by documentary evidence. Plaintiffs Admiral Indemnity Company ("Admiral"), 270 West End Tenants Corp. ("West End"), and Halstead Management Company, LLC ("Halstead") oppose the motion on the grounds that Exceptional is a necessary party to the action, the claims in this action are not duplicative of the claims in the underlying action, and documentary evidence does not establish Exceptional's right to dismissal. For the reasons set forth below, Exceptional's motion to dismiss is granted.

BACKGROUND

The underlying action seeks damages arising out of a construction accident. Henryk Skoczylas ("Skoczylas"), the plaintiff in the underlying action, alleges that he sustained an injury to his hand on July 27, 2012, while working for Exceptional, a contractor, as a carpenter on a renovation project in Apartment 1S ("the Apartment") at 270 West End Avenue ("the Building").

West End is the owner of the Building and Halstead is the management company for the Building.

On or about February 29, 2012, Ed Rhubart ("Rhubart") and Alan Sirvint ("Sirvint"), the owners of the Apartment, entered into an Owner/Contractor Agreement ("the Agreement") with Exceptional in connection with the renovation project. With respect to Exceptional's obligation to procure insurance, the Agreement reads in pertinent part:

> OTHER REQUIREMENTS:
> - Copy of contractor's liability insurance naming "270 West End Tenants Corp", Halstead Management Co. LLC, Terra Holdings, Alan Sirvint & Edward Rhubart" as "additional insureds" in the minimum amounts of $1,000,000 bodily injury and $1,000,000 property damage.

At that time, Exceptional already had a commercial general liability insurance policy in effect (effective August 21, 2011 to August 21, 2012) through Travelers Casualty Insurance Company of America ("Travelers") bearing policy number 1-680-893TN249-ACJ-09 ("the Travelers policy"). On the same day that Rhubart and Sirvint entered into the Agreement with Exceptional, a certificate was issued naming West End, Halstead, Sirvint, Rhubart, and Terra Holdings as additional insureds under the Travelers policy. Exceptional's insurance broker provided the certificate to Halstead, as the certificate holder. The certificate indicates that Exceptional had a commercial general liability policy with $1 million per occurrence limits from Travelers for the period 8/21/11 through 8/21/12, during which period the alleged accident occurred. The certificate, consistent with the additional insured coverage provision in the Agreement, also provides that:

> Certificate holder is listed as additional insured per written contract along with the following: Halstead Management Company, LLC, 270 West End Tenants Corp., Terra Holdings, Apartment Owners: Edward Rhubart and Alan Sirvint.

The Travelers policy addresses additional insureds through a blanket additional insured coverage endorsement, which reads in pertinent part:

> 1. WHO IS AN INSURED – (Section II) is amended to include any person or organization that you [Exceptional, as the named insured] agree in a written contract requiring insurance to include as an additional insured on this Coverage Part, but:
> a) Only with respect to liability for "bodily injury", "property damage" or "personal injury"; and
> b) If, and *only to the extent that, the injury or damage is caused by acts or omissions of you or your subcontractor in the performance of "your work"* to which the "written contract requiring insurance" applies. The person or organization does not qualify as an additional insured with the respect to the independent acts of such person or organization.

CGL Form, CG D2 48 08 05 ("Blanket Add'l Insured") (emphasis added).

Admiral, the plaintiff in this declaratory judgment action, provided commercial liability coverage for West End and Halstead (as an additional insured) for the period May 15, 2012 – May 15, 2013, bearing policy number #21-2-2793-31-13. Subsequent to the filing of the underlying action, West End and Halstead tendered the matter to Admiral, which retained defense counsel to represent them. In this declaratory judgment action, Admiral, West End and Halstead (together "plaintiffs") seek (1) a declaration that Travelers has a duty to defend West End and Halstead with regard to the underlying action, and (2) declaratory relief regarding the hierarchy of coverage as between Admiral and Travelers.

EXCEPTIONAL'S MOTION

Exceptional now moves to dismiss the complaint against it, arguing that (1) no affirmative relief is sought against it in this action, (2) the third party claim asserted against it in the underlying action for breach of contract with regard to insurance procurement provisions constitutes another action pending, and (3) the allegation that Exceptional refused tender of

insurance is contradicted by the documentary evidence showing that the tender by plaintiff's counsel was to Travelers, Exceptional's insurer, and not to it.

Plaintiffs oppose the motion on various grounds, arguing that (1) in an action for declaratory relief, Exceptional is a necessary party as it has an interest in the outcome based on Exceptional's status as Traveler's insured, (2) documentary evidence does not establish Exceptional's right to dismissal as there remains an issue as to whether Traveler's insurance is excess to Admiral or vice versa, and whether the policies must share equally at the primary level, and (3) the claims in this action are not duplicative of the third party claim in the underlying action.

In reply, Exceptional argues that (1) it is not a necessary party for the resolution of the claims which concern the scope of Travelers' policy coverage, (2) plaintiffs incorrectly argue that a declaration will directly impact the breach of contract claim in the underlying action, and (3) the complaint fails to state any sufficient allegations against Exceptional.

Exceptional's position has merit. First, dismissal is warranted on the ground that the complaint does not seek any affirmative relief against Exceptional. CPLR 3211(a)(7) provides that a party may move for dismissal for failure to state a cause of action upon which relief may be granted. On a motion to dismiss pursuant to CPLR 3211(a)(7), a court must determine "whether the proponent of the pleading has a cause of action, not whether he has stated one." Leon v. Martinez, 84 NY2d 83, 88 (1994) (quoting Guggenheimer v. Ginzburg, 43 NY2d 268 [1977]; Rovello v. Orofino Realty Co., 40 NY2d 633 [2008]). In determining this issue, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable

legal theory." Leon v. Martinez, 84 NY2d 83, 87 (1994). A motion to dismiss for failure to state a cause of action should be granted where there has been no demonstration by the plaintiff that they are entitled to a declaration. Garcia v. Mother Vehicle Accident Indemnification Corporation, 18 AD2d 622 (1st Dept 1963).

Plaintiffs' complaint alleges two causes of action for declaratory relief against Travelers. Plaintiffs seek (1) a declaration that Travelers has a duty to defend West End and Halstead with regard to the underlying action, (2) a declaration that Admiral and Travelers are equally responsible for contributing to the defense of West End and Halstead, and (3) a declaration that Travelers is obligated to share equally with Admiral in indemnifying West End and Halstead for any judgment or settlement in the event it is found that Exceptional's negligence contributed to the injury in the underlying action. Notably, however, the only allegation in the complaint against Exceptional is that it rejected tender of the defense and indemnification of the underlying action on the ground that its own policy's coverage was excess to West End and Halstead's policy's coverage. However, because as Exceptional argues, the evidence shows the defense was tendered to Travelers and not Exceptional and, in any event, as the relief sought relates to Travelers and not Exceptional, this allegation is insufficient to support a claim for declaratory relief against Exceptional.

As for Admiral's argument that Exceptional is a necessary party to this action, as it has an interest in the outcome of the litigation, such argument is unavailing. Necessary parties are those who might be inequitably affected by a judgment in the action or who "ought to be joined" if complete relief is to be accorded to the parties in the action. CPLR 1001(a). A party is necessary to an action if a judicial determination would affect the legal rights and relationships of

that party. Staten Island Hosp. v. Alliance Brokerage Corp., 137 AD2d 674, 677 (2d Dept 1988) (citing State of New York v. Wolowitz, 96 AD2d 47, 55 [2d Dept 1983]). "The primary reason for compulsory joinder of parties is to avoid multiplicity of actions and to protect nonparties whose rights should not be jeopardized if they have a material interest in the subject matter." Joanne S. v. Carey, 115 AD2d 4, 7 (1st Dept 1986).

Under this standard, Exceptional is not a necessary party to this action. First, Exceptional is not necessary for the court to afford full relief to the plaintiffs with respect to the resolution of the claims regarding the scope of Traveler's policy coverage. Moreover, Exceptional's rights will not be jeopardized by dismissing it as a party, nor would a ruling in this action inequitably affect Exceptional's legal rights or relations. Contrary to Admiral's argument, a declaration in this action will not directly impact the third party claim as to whether Exceptional breached its contractual obligation to procure insurance. Specifically, while the third-party claim in the underlying action concerns whether Exceptional obtained insurance in accordance with its agreement with Rhubart and Sirvint, this action concerns the extent of Travelers' duty to defend and indemnify plaintiffs in connection with the underlying action.

Moreover, the decisions cited by Admiral to argue that Exceptional is a necessary party are inapposite as they concern parties with concrete, legitimate interests in the judicial outcome and were necessary for the completion of the matter. See United Serv. Auto Ass'n v. Graham, 21 AD2d 657, 790 (1st Dept 1964) (finding that the intervening party, an automobile liability insurer, had a "real and substantial interest in the matter" because of its potential to be subrogated to the injured parties' rights); Hermitage Insurance Company v. Skyview & Son Construction Corp., 2013 WL 497322 (NY Sup 2013) (finding that the injured party was properly named a

party because he had an interest in the determination of the coverage for his underlying claim); Wrobel v. La Ware, 229 AD2d 861, 862 (3d Dept 1996) (finding that an insurer had a legitimate interest in being a party to the action since the action involved the interpretation of terms of the insurer's own insurance policy and the insurer would be inequitably affected by not being made a party to the action). Unlike the necessary parties in these decisions, Exceptional does not have a substantial interest in the outcome of this declaratory judgment action. Although Exceptional is named as an insured on Travelers' policy, its presence in this action has no bearing on the scope of Traveler's policy coverage in the underlying action.

In any event, it would appear that any relief that could be obtained from Exceptional is sought in the underlying action and thus would be subject any claim in this action against Exceptional to dismissal under CPLR 3211(a)(4). To warrant dismissal under this provision, "the two actions must be 'sufficiently similar' and the relief sought must be the same or substantially the same." Montalvo v. Air Dock Systems, 37 AD3d 567 (2d Dept 2007) (quoting Kent Dev. Co. v. Liccione, 37 NY2d 899, 901 [1975]). There must also be at least a "substantial identity of parties 'which generally is present when at least one plaintiff and one defendant is common in each action.'" Proietto v. Donohue, 189 AD2d 807 (2d Dept 1993) (citing Morgulus v. J. Yudell Realty, 161 AD2d 211, 213 [1st Dept 1990]). As Exceptional argues, the only conceivable claim that could be read from the complaint is that Exceptional breached its contract with regard to insurance procurement provisions. However, this breach of contract claim has already been asserted in the underlying action as a third party claim against Exceptional. Additionally, there is sufficient identity of parties, as there is at least one plaintiff, Exceptional, and at least one defendant, West End and Halstead, that are parties in both this action and the underlying action. Under the circumstances, to the extent it can be argued that this action seeks

relief against Exceptional for breach of its contract to procure insurance, dismissal of such a claim against Exceptional would be warranted on the grounds of another action pending.

Accordingly, as no affirmative relief is sought against Exceptional, which is not a necessary party to this action, and any viable claim against Exceptional has already been asserted in the third party action in the underlying action, Exceptional's motion should be granted.

CONCLUSION

In view of the above, it is

ORDERED that the motion to dismiss by defendant Exceptional Contracting, LLC is granted to the extent of dismissing all claims against defendant Exceptional Contracting, LLC and the Clerk is directed to enter judgment accordingly in favor of Exceptional Contracting, LLC ; and it is further

ORDERED that the caption is amended to reflect the dismissal of the claims against Exceptional Contracting, LLC; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that counsel for defendant Exceptional Contracting, LLC shall serve a copy of this order with notice of entry upon the County Clerk (room 141B) and the Clerk of the Trial Support Office (room 158), who are directed to mark the court records to reflect the change in caption herein; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference in Part 11, room 351, on July 30, 2015, at 9:30 am.

Dated: June 19, 2015

J.S.C.

HON. JOAN A. MADDEN
J.S.C.