Oesterle v A.J. Clark Real Estate Corp.
2015 NY Slip Op 31641(U)
August 28, 2015
Supreme Court, New York County
Docket Number: 153081/13
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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ARNDT OESTERLE,

Plaintiff,

-against-

A.J. CLARK REAL ESTATE CORP., HUDBAR ASSOCIATES, LLC, SAMMY'S RENOVATIONS, INC. N. METRO CONSTRUCTION, INC. a/k/a N. METRO CONSTRUCTION

Defendants.

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A.J. CLARKE REAL ESTATE CORP., HUDBAR ASSOCIATES, LLC,

Third-Party Plaintiffs,

-against-

MET LIFE AUTO & HOME INSURANCE COMPANY,

Third-Party Defendant.

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SAMMY'S RENOVATIONS, INC.

Second Third-Party Plaintiff,

-against-

PREFERRED CONTRACTORS INSURANCE COMPANY RISK RETENTION GROUP, LLC.

Second Third-Party Defendant.

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Index No. 153081/13
Motion Sequence # 002

DECISION & ORDER

Hon. Kelly O'Neill Levy, J.:

Plaintiff ARNDT OESTERLE'S ("Oesterle") April 4, 2013 complaint alleges that on April 14, 2010, defendants SAMMY'S RENOVATIONS, INC. ("Sammy's), A.J. CLARKE REAL ESTATE CORP. ("Clarke"), HUDBAR ASSOCIATES, LLC ("Hudbar"), and N.

METRO CONSTRUCTION, INC. A/K/A N. METRO CONSTRUCTION ("N. Metro") negligently caused a fire which damaged Osterle's property and residence at 72 Barrow Street, New York, New York ("the Building")

On May 28, 2013, Sammy's filed a second third party complaint ("Second TPC") seeking a declaration that N. Metro's insurer, PREFERRED CONTRACTORS INSURANCE COMPANY RISK RETENTION GROUP, LLC ("PCIC"), is obligated to defend Sammy's in connection with Oesterle's suit and to indemnify Sammy's against any judgment recovered against it in connection therewith.

PCIC now moves pursuant to CPLR 3211(a)(1),[1] CPLR 3211(a)(3),[2] and CPLR 3211(a)(7)[3] for an order dismissing the Second TPC in its entirety.

As more fully set forth below, PCIC's motion is granted.

BACKGROUND

Oesterle alleges that, at the time of the fire, the Building was owned by Hudbar and managed by Clarke. At some point prior to April 14, 2010, Clarke and/or Hudbar hired Sammy's as construction manager to perform roof repairs at the Building. In turn, Sammy's subcontracted with N. Metro to carry out the repairs. Oesterle contends that Sammy's and N. Metro's negligence in performing the repairs resulted in the April 14, 2010 fire that damaged his residence and property.

The Second TPC alleges that Sammy's and N. Metro entered in an agreement in or around April of 2010 for N. Metro to perform work on the façade of the Building. (Complaint ¶

[1] CPLR 3211(a)(1) authorizes a party to move to dismiss a cause of action on the ground that "a defense is founded upon documentary evidence."
[2] CPLR 3211(a)(3) authorizes a party to move to dismiss a cause of action if "the party asserting the cause of action has not legal capacity to sue."
[3] CPLR 3211(a)(7) authorizes a party to move to dismiss a cause of action if "the pleading fails to state a cause of action."

4). It further alleges that N. Metro "was required, and did," issue a certificate of liability insurance in connection with "all work at the Building" that named Sammy's as an additional insured on N. Metro's commercial general liability insurance policy ("the Policy"). (Complaint ¶ 7). The Policy covered the period July 16, 2009 to July 16, 2010.

On or about April 14, 2010, N. Metro allegedly "caused a fire by the illegal use of an open torch" while performing roof repairs and/or construction at the Building. (Complaint ¶ 8-9). Thereafter, Sammy's demanded that PCIC defend it in connection with various lawsuits arising from the fire. PCIC declined to do so. PCIC also disclaimed coverage to N. Metro.

Sammy's now seeks a declaration that PCIC is required to defend and indemnify it in connection with this action as well as reimburse it for the costs and legal fees it has incurred thus far. In support of its motion to dismiss, PCIC asserts that Sammy's does not have standing to pursue its claims because Sammy's is not an additional insured under the Policy. PCIC further argues that even if Sammy's was covered, the Policy's heating device exclusion precludes coverage for all claims arising out of the fire.

Sammy's failed to file opposition or appear in court on the return date for oral argument.

DISCUSSION

On a motion to dismiss under CPLR 3211, the court must construe plaintiff's pleadings liberally. *See Leon v Martinez*, 84 NY2d 83, 88 (1994); CPLR 3026. The court must also accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion, accord plaintiff "the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon*, 84 NY2d at 87-88.

A. Sammy's Does Not Have Standing to Assert the Within Claim Against PCIC

In general, a plaintiff has standing to seek a declaratory judgment if "the plaintiff's personal or property rights will be directly and specifically affected." *Wein v City of New York*, 47 AD2d 367, 370 (1st Dept 1975) *mod* 36 NY2d 610 (1975). In the insurance context, however, a party who is not a named insured or an additional insured on the face of the policy is not entitled to coverage. *Tribeca Broadway Assoc., LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 (1st Dept 2004). Accordingly, a non-party to the insurance policy "acquires no right to enforce the insurer's obligation until a judgment against the insured has been rendered and remains unsatisfied." *Abdalla v Yehia*, 246 AD2d 373, 374 (1st Dept 1998). *See Lang v Hanover Ins. Co.*, 3 NY3d 350, 355 (2004) (holding that an injured plaintiff "has no common-law right to seek relief directly from a tortfeasor's insurer"); *Sabatino v Capco Trading, Inc.*, 27 AD3d 1019, 1021 (3d Dept 2006) ("[A] stranger to an insurance policy may not bring an action for a declaratory judgment concerning the extent of an insurer's duty to defend").

Here, the Policy defines a named insured as "the Member identified on the Declarations of the Policy" and only N. Metro is specified thereon. (Policy, p. 1, 9). Moreover, the additional insureds endorsement is blank, and the Policy contains no further information about any other insureds, named or additional. (Policy, p. 70). While Sammy's alleges that N. Metro "was required, and did, issue a certificate of liability insurance" naming Sammy's as an additional insured to the Policy (Complaint ¶ 7), "[a] certificate of insurance is only evidence of a carrier's intent to provide coverage [and] is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists." *Tribeca*, 5 AD3d at 200. Therefore, Sammy's is a stranger to the Policy and has no standing to enforce PCIC's obligations thereunder.

B. The Policy's Heating Device Exclusion Precludes Coverage of Plaintiff's Claim

To succeed on a motion to dismiss under CPLR 3211(a)(1), the movant must submit documentary evidence that "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002). If the documentary evidence "disproves an essential allegation of the complaint, dismissal . . . is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action." *Mill Fin., LLC v Gillett*, 122 AD3d 98, 103 (1st Dept 2014). Bare legal conclusions and factual claims that are "flatly contradicted by the evidence" are not presumed to be true and are not accorded every favorable inference. *Palazzolo v Herrick, Feinstein, LLP.*, 298 AD2d 372, 372 (2d Dept 2002).

The interpretation of an insurance policy is a question of law for the court unless the policy's language is ambiguous. *Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 32 (1st Dept 1979) *affd sub nom.* 49 NY2d 924 (1980); *see also Cont. Ins. Co. v Atl. Cas. Ins. Co.*, 603 F3d 169, 180 (2d Cir 2010) (internal quotation marks omitted) ("Ambiguity exists if the policy provisions could suggest more than one meaning when viewed objectively by a reasonable intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business."). Although the policy must be construed in favor of the insured, unambiguous provisions "must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement." *Roundabout Theatre Co., Inc. v Cont. Cas. Co.*, 302 AD2d 1, 6 (1st Dept 2002).

Exclusion K to the Policy unambiguously precludes coverage for any property damage claims "arising out of, resulting from, caused by, contributed to, or in any way related to the use

of fire or heating devices . . . including heat wand, welding, open flame, torch, heaters, or other type of heat application." (Policy, p. 46). The Policy's language is clear and affords no other interpretation - property damage that *is in any way related* to the use of a torch or other heating device is precluded from coverage. Insofar as the Second TPC asserts that N. Metro caused the fire "by the illegal use of an open torch" while performing repairs to the Building (Complaint ¶ 9), it is evident that Sammy's claims are not covered under the Policy.[4]

Accordingly, it is hereby

ORDERED that PREFERRED CONTRACTORS INSURANCE COMPANY RISK RETENTION GROUP, LLC's motion to dismiss is granted; and it is further

ORDERED that the Second Third-Party Complaint is dismissed in its entirety.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

Dated: August 28, 2015
New York, New York

Kelly O'Neill Levy

Kelly O'Neill Levy, A.J.S.C.

HON. KELLY O'NEILL LEVY

[4] Given Sammy's failure to oppose this motion, the court need not address PCIC's concern that "Sammy's may attempt to rely on New York's late disclaimer statute [NY Ins. L § 3420(d)] to argue that PCIC is precluded from raising Exclusion K because of the alleged 'delay' in responding to its tender." (See PCIC's Memorandum of Law dated April 13, 2015, p. 7). The court also need not address PCIC's claim that NY Ins. L § 3420(d) is inapplicable given that PCIC is chartered under Montana Law pursuant to the Federal Liability Risk Retention Act of 1986. *Id.*