

Maurisaca v Bowery at Spring Partners, L.P.

2015 NY Slip Op 32221(U)

July 16, 2015

Supreme Court, Queens County

Docket Number: 702405/12

Judge: Valerie Brathwaite Nelson

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE VALERIE BRATHWAITE NELSON IA Part 7

Justice

JUAN MAURISACA, x

Index

Number: 702405/12

Plaintiff,

Motion

-against-

Date: July 16, 2015

BOWERY AT SPRING PARTNERS, L.P.,
CONDOMINIUM BOARD OF THE NOLITA
PLACE CONDOMINIUM, MIDBORO
MANAGEMENT, INC., BAKERS DOZEN
ASSOCIATES LLC, EMM GROUP HOLDINGS
LLC, and THE WALSH COMPANY, LLC,

Motion Sequence No.: 8

Motion Calendar No.: 100

Defendants. x

THE WALSH COMPANY, LLC,

Third-Party Plaintiff,

-against-

MISSION DESIGN & MANAGEMENT,

Third-Party Defendant. x

THE WALSH COMPANY, LLC,

Second Third Party Plaintiff,

-against-

SCOTTSDALE INSURANCE COMPANY,

Second Third Party Defendant. x

The following numbered papers read on this motion by The Walsh Company, LLC (Walsh), for summary judgment in its favor pursuant to CPLR 3212; and, alternatively,

for summary judgment in favor of Walsh on its third-party action against Mission Design & Management and awarding contractual indemnification to Walsh and, alternatively, for summary judgment in favor of Walsh on its second third party action against Scottsdale Insurance Company (Scottsdale), and for an order declaring that Walsh is covered on a primary basis under the subject insurance policy issued by Scottsdale and a declaration that Scottsdale has breached its obligation under the contract of insurance and that Scottsdale is obligated to defend Walsh and indemnify Walsh for any judgment or settlement in the underlying action and awarding a money judgment in favor of Walsh, including costs and disbursements and attorney's fees incurred in defending the instant action; and cross motion by Scottsdale for summary judgment in its favor dismissing the second third-party complaint pursuant to CPLR 3212.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	EF98-EF124
Notice of Cross Motion - Affidavits - Exhibits.....	EF126-EF139
Answering Affidavits - Exhibits.....	EF140
Reply Affidavits	EF148- EF149,151-152

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This declaratory judgment action arises out of an underlying action for personal injuries sustained on September 20, 2012, at a construction site located in New York City. On that date, plaintiff was employed by Mission Design & Management (Mission). Plaintiff was engaged in the construction of a restaurant and nightclub located at 199 Bowery, in New York City (the premises). The space in which the restaurant was being constructed was located in a condominium building. The condominium association is a defendant in the action, to wit, "Condominium Board of Nolita Place Condominium". The condominium was managed by Midboro Management, Inc. (Midboro); and the individual condominium unit in which the restaurant was located was owned by Bowery at Spring Partners, L.P. (Bowery).

Bowery had leased this space to the entities that were going to own and operate the restaurant, namely, Bakers Dozen Associates LLC (Bakers Dozen), and EMM Group Holding LLC (EMM). Prior to the start of construction, Bakers Dozen/EMM retained the services of Walsh to provide construction management services for the project. Walsh's role in the project was solely as an advisor and observer of the work being done for the restaurant owner and to assist the restaurant owner in the implementation of the

construction project. Bakers Dozen/EMM retained the services of plaintiff's employer, Mission, as a general contractor to perform the actual construction work. It is undisputed that Walsh was not responsible for the means, methods or techniques of the construction work; nor did it perform any construction activities. Walsh had no authority to supervise, control or direct the work and had no duty concerning safety and no authority to direct or stop ongoing work.

Plaintiff's accident occurred while he was utilizing a wheeled scaffold known as a baker's scaffold. He was in the process of Sheet rocking a wall. In order to accomplish this task, it was necessary for plaintiff and his co-worker to continue to move the scaffold as they were installing the Sheetrock. The scaffold was owned by Mission and assembled by its workers. The scaffold had four wheels with each wheel having a locking mechanism. After the Sheetrock was installed at a particular location, plaintiff and his coworker would get off the scaffold, unlock the wheels and move it to a new location. The coworker would check the two wheels on his side of the scaffold and plaintiff would unlock and then relock the other two wheels after it had been moved to its location. Plaintiff describes the accident as he and his coworker were standing on the scaffold in the process of installing a piece of Sheetrock when the scaffold on plaintiff's side moved away from the wall causing plaintiff to fall and sustain injuries. While the parties dispute whether there was anything wrong with the scaffold, Walsh argues that the sole cause of plaintiff's accident was plaintiff's negligence in not locking the two wheels on his side of the scaffold, which caused the accident. In any event, plaintiff's complaint contains causes of action based on common law negligence and violations of Labor Law sections 200, 240 (1) and 241 (6), against the various defendants.

After the filing of the personal injury action against it, Walsh commenced a second third-party action against Scottsdale, claiming that it is entitled to additional insured coverage and a defense and indemnity in the personal injury action from Scottsdale. Here, Walsh moves, inter alia, for summary judgment in its favor. The motion is opposed, in part, by Scottsdale, and Scottsdale cross moves for summary judgment in its favor. The cross motion is opposed by Walsh.

Facts

In the underlying action, Juan Maurisaca alleges that he was injured on September 20, 2012, while working at a construction site located at 199 Bowery Street, in New York City (the premises). As a result of this accident, Maurisaca commenced a personal injury action against Bowery at Spring Partners, L.P., Condominium Board of the Nolita Place Condominium, Midboro Management, Inc., Bakers Dozen Associates, LLC, EMM Group Holdings LLC, and The Walsh Company, LLC. On or about January 25, 2013,

Maurisaca filed an amended verified complaint in the underlying action alleging that he was an employee of Mission Design & Management, Inc. (Mission), at the time of the accident and that he was engaged in the course and scope of his employment with Mission at the premises when he was injured.

As related to the instant motion, Walsh commenced a declaratory judgment action against Scottsdale by the filing of a second third-party summons and complaint in the underlying action. Walsh seeks a declaration that it is entitled to a defense and indemnification as an additional insured under the Scottsdale Policy issued to Mission and, as such Scottsdale is obligated to defend and indemnify Walsh in the underlying action,

On or about January 18, 2012, Bowery and Bakers Dozen entered into a lease agreement with regard to the use and occupancy of the premises (the "Lease Agreement"). On or about February 10, 2012, Walsh submitted a Project Management Services Proposal to EMM Group Holdings LLC (EMM), wherein Walsh, as Project Manager, was to provide project management services to Bakers Dozen, as client in connection with Bakers Dozen's design and construction of a restaurant and night club at the premises (the "Walsh Proposal"). The Walsh Proposal was executed on behalf of EMM on April 12, 2012, by Adam Landsman, the Director of Operations, but is not executed on behalf of Walsh.

Thereafter, on or about June 21, 2012, Bakers Dozen, as Owner, entered into an AIA A101-2007 Standard Form Agreement between Owner and Contractor, with Mission whereby Mission agreed to perform a variety of tasks related to the renovation of the premises, including demolition, masonry and carpentry (the "Mission Contract").

On or about June 21, 2012, Bakers Dozen and Mission also entered into a separate Indemnity Agreement pertaining to the work at the premises.

After the alleged accident, on August 20, 2013, Bakers Dozen and Mission entered into another Indemnity Agreement whereby Mission purported to agree to indemnify various entities in connection with its work at the premises.

Thereafter, on September 3, 2013, a Supplemental Agreement was executed by Mission which contains another indemnity provision regarding the work being performed at the Premises and specifically with regards to the claims set forth in the Underlying Action.

Scottsdale issued a commercial general liability insurance policy to Mission, under policy number BCS0028530, in effect for the policy period August 6, 2012 through

October 5, 2012, when the policy was cancelled by endorsement (the “Scottsdale Policy”).

In connection with the Underlying Action, by electronic correspondence dated August 16, 2013, Century Surety Company (Century), Mission’s excess carrier, forwarded to Scottsdale correspondence dated July 15, 2013, which was received by Century from Walsh’s general liability carrier, “CNA”. In its correspondence, CNA tendered Walsh’s defense and indemnity in the Underlying Action as an additional insured to Century. By correspondence dated August 16, 2013, Scottsdale responded to CNA and advised them that it was in receipt of Walsh’s tender and had undertaken an investigation into the claim. It was requested that CNA forward copies of any additional information available, including contracts and incident reports. By correspondence dated August 29, 2013, Scottsdale advised CNA that coverage was being disclaimed as there was no evidence that Walsh was to be an additional insured to the Scottsdale Policy.

On April 9, 2014, CNA again tendered the defense and indemnity of Walsh as an additional insured to Scottsdale. By correspondence dated April 28, 2014, Scottsdale reiterated its disclaimer of coverage to Walsh, explaining that Walsh did not satisfy the terms of the Scottsdale Policy and had not demonstrated that it was entitled to additional insured status under the policy.

By correspondence dated October 6, 2014, CNA renewed its request that Scottsdale agree to defend and indemnify Walsh based on the terms of the Mission Contract on the ground that Walsh was an additional insured under the Scottsdale Policy. By correspondence dated November 19, 2014, Scottsdale again disclaimed coverage to Walsh because Walsh was not an additional insured under the Scottsdale Policy. In addition, the Contractual Liability exclusion precluded coverage for any claims arising out of the Supplemental Agreement.

Walsh thereupon commenced this declaratory judgment action seeking liability coverage from Scottsdale as an additional insured.

Discussion

The branch of the motion by Walsh which is for summary judgment dismissing all claims and cross claims against it is granted. A construction manager is generally not considered a contractor responsible for the safety of the workers at a construction site pursuant to Labor Law §§ 200, 240 (1) and 241(6), unless it has been delegated the authority and duties of a general contractor, or if it functions as an agent of the owner of the premises (*see Walls v Turner Constr. Co.*, 4 NY3d 861 [2005]; *Russin v Louis N.*

Picciano & Son, 54 NY2d 311, 317–318, [1981]; *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]; *Pino v Irvington Union Free School Dist.*, 43 AD3d 1130 [2007]). “A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured” (*Linkowski v City of New York*, 33 AD3d 971, 974–975 [2006]; *see Walls v Turner Constr. Co.*, 4 NY3d at 863–864; *Russin v Louis N. Picciano & Son*, 54 NY2d at 317–318). To impose such liability, the defendant must have the authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (*see Linkowski v City of New York, supra; Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329, 331–332 [2005]). It is not a defendant's title that is determinative, but the degree of control or supervision exercised (*see generally Aranda v Park E. Constr.*, 4 AD3d 315, 316 [2004]; *see also Armentano v Broadway Mall Props., Inc.*, 30 AD3d 450 [2006]; *Loiacono v Lehrer McGovern Bovis*, 270 AD2d 464 [2000]). The contract Walsh entered into required Walsh to provide construction management services which merely pertained to initial pre-hiring of a general contractor and soliciting bids and making cross-comparative recommendations to the restaurant owner. Original designs had already been prepared and Walsh assisted in the coordination of different plans.

Hoon Lee, the onsite supervisor, acted not only as interpreter from English to Korean for the workers from Mission, but also served as a middleman relative to questions posed by the general contractor, Mission, to the owners and the coordination of the owners, designers and architects’ plans as to the project. Walsh had no involvement with supervising, controlling or directing the work; and had no authority to control the work or stop an unsafe condition. Hoon Lee of Walsh testified that Walsh had no supervisory activities at the project and did not perform any inspection at the project. Furthermore, John Kim, formerly of Mission, testified at his deposition that Walsh’s role as construction manager was to make sure everything went on schedule. Plaintiff testified that he had never heard of the company, Walsh, before. In short, no evidence was submitted demonstrating that Walsh had any control or supervisory role over the work of plaintiff, so as to enable it to prevent or correct any unsafe conditions and, thus, no triable issues of fact were raised as to Walsh's liability (*see Rodriguez v JMB Architecture, LLC*, 82 AD3d 949, 950 [2011]; *Linkowski v City of New York*, 33 AD3d 971 [2007]; *Singh v Black Diamonds LLC*, 24 AD3d 138, 139–140 [2005]; *Loiacono v Lehrer McGovern Bovis*, 270 AD2d 464 [2000]). Accordingly, the branch of the motion which is to dismiss the claims and cross claims against Walsh, is granted.

The branch of the motion which seeks a declaration that Scottsdale is required to defend and indemnify Walsh, is denied. Relatedly, the cross motion by Scottsdale which seeks to dismiss Walsh’s second third-party complaint seeking coverage as an additional insured under the policy issued to Mission, is granted. There must be an express written

agreement between Walsh and Bakers Dozen for Walsh to be an additional insured (*see AB Green Gansevoort, LLC v Scalամandre & Sons, Inc.*, 102 AD3d 425 [2013]; *Linarello v City Univ. of N.Y.* (6 AD3d 192, 195 [2004]). Since Walsh did not produce any written agreement between itself and Bakers Dozen or Mission naming Walsh as an additional insured, under the plain language of the policy, there was no question of fact as to whether an agreement existed between Bakers Dozen or Mission, and Walsh.

The language of the insurance policy at issue in *Linarello* is exactly the same as the policy here. It specifically provides that there must be a written agreement between the insured and the organization seeking coverage to add that organization as an additional insured. No such agreement exists here. Absent such an agreement, the plain terms of the policy have not been met and Walsh cannot seek coverage from Scottsdale as an additional insured. Although policies containing broader language have been found to allow for an agreement naming an additional insured without an express contract between the parties, the language at issue here is restricted to its plain meaning (*cf. American Home Assur. Co. v Zurich Ins. Co.*, 26 Misc 3d 1223[A], 2010 NY Slip Op 50237[U] [Sup Ct, Kings County 2010]). The language of the policy at issue is clear and unambiguous: to qualify as an additional insured under the Scottsdale Policy, Walsh must have entered into a contract or written agreement with Bakers Dozen or Mission which required those parties to name Walsh as an additional insured. There is no evidence that Walsh entered into any contract with either Bakers Dozen or Mission with regards to the construction work taking place at the premises in question. Walsh's lack of privity with these parties is fatal to its claim for coverage.

In opposition, Walsh argues that the title of the provision, “Additional Insured—Owners, Lessees or Contractors—Automatic status when required in construction agreement with you,” automatically made Walsh an additional insured. However, Walsh's reliance on the title of the policy provision is misplaced as a heading “cannot alter . . . the effect of the unambiguous language in the body of the clause itself” (*Albany Med. Ctr. v Preferred Life Ins. Co. of N.Y.*, 19 Misc 3d 209, 215 [Sup Ct, Albany County 2008]; *see also Rivers v Sauter*, 26 NY2d 260, 262 [1970]). Alternatively, Walsh argues that the terms of the policy itself are ambiguous because the policy can be read to mean that the named insured and the party seeking to be an additional insured only need enter into written agreements with another party, not necessarily with each other. Under this interpretation of the policy, there is a question of fact as to whether the incorporation by reference language in the Bakers Dozen/ Walsh Proposal sufficed to establish a written agreement between Mission and Walsh as contemplated by the insurance policy. New York courts interpreting the exact AI Endorsement at issue here have held that additional insured coverage is restricted solely to those persons or organizations with whom the named insured has entered into contract with and agreed to name those persons or

organizations as additional insureds (*see AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc., supra*).

Conclusions

The branch of the motion by Walsh which is for summary judgment in its favor is granted and all claims and cross claims are dismissed as against The Walsh Company, LLC, pursuant to CPLR 3212.

The branch of the motion by Walsh which seeks a declaration of coverage to defend and indemnify it by Scottsdale, is denied.

The cross motion by Scottsdale for summary judgment in its favor is granted and the second third-party complaint is dismissed, pursuant to CPLR 3212.

Dated:

VALERIE BRATHWAITE NELSON, J.S.C.