

Downing St. Devs., LLC v Harleystown Ins. Co.

2016 NY Slip Op 30204(U)

January 22, 2016

Supreme Court, New York County

Docket Number: 156315/2013

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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DOWNING STREET DEVELOPERS, LLC and
CITADEL CONSTRUCTION CORP.,

Index No. 156315/2013

Plaintiffs,

- against-

HARLEYSVILLE INSURANCE COMPANY and
J.M. HALEY CORP.

DECISION AND ORDER

Motion Seq. No.: 001
& 002

Defendants.

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DORIS LING-COHAN, J.S.C.:

Motion sequence numbers 001 and 002 are consolidated for disposition. The two motions, and one cross motion are for summary judgment, in the within declaratory judgment action, in which plaintiffs Downing Street Developers, LLC (Downing) and Citadel Construction Corp. (Citadel) seek a declaration that they are each entitled to a defense and indemnification in an action captioned *Jose Dominguez v Downing Street Developers, LLC, Citadel Construction, LLC and JBD Scaffolding Company*, bearing index no. 106741/2011, that is pending in this court (the underlying action).

Plaintiffs in the declaratory judgment action are, respectively, the owner and general contractor of a construction site at 22-26 Downing Street in Manhattan, where the injuries claimed in the underlying action allegedly occurred.

Plaintiffs argue that they are each additional insureds under commercial general liability policy number MPA2M4668 issued by defendant Harleysville Insurance Company (Harleysville) to defendant J. M. Haley Corp. (Haley). Alternatively, plaintiffs argue that they are entitled to contractual indemnification and a defense in the underlying action.

By contract dated January 15, 2009 (Exhibit A to Baharvar Affirmation), Downing engaged Citadel to act as general contractor. Exhibit 1 to the Downing-Citadel contract requires Citadel to purchase and maintain commercial general liability insurance, "which shall include a blanket contractual liability insuring the indemnification obligations of the [Downing-Citadel] Agreement" (*id.*, Exhibit 1). That agreement provides:

"[Citadel] agrees and shall cause its subcontractors to agree to indemnify, defend and hold harmless [Downing] . . . from (i) any and all . . . actions . . . arising from . . . any negligent, willful or wrongful act resulting in bodily injury, by [Citadel]; (ii) the work or any breach of this Agreement . . . [or] (iii) any failure to comply with any laws or regulations affecting the Work"

(*id.* Exhibit K).

By contract dated March 6, 2009 (Exhibit A to complaint), Citadel engaged nonparty Kaback Enterprises, Inc., to perform HVAC work at the site. The Citadel-Kaback contract contains the following indemnification provision, as pertinent:

"Excepting only the responsibility of Citadel

for its own acts of gross negligence, to the fullest extent permitted by law, [Kaback] shall indemnify and hold harmless the Citadel indemnities from and against any claims, damages, losses, fines, liabilities, payments and expenses (including but not limited to attorneys fees) arising out of and in connection with injuries . . . resulting from or connected to subcontractor's performance of the work, arising out of the work by subcontractor or anyone directly or indirectly employed by subcontractor (including . . . subcontractors of the subcontractor) or anyone else for whose acts subcontractor may be liable"

(exhibit A to complaint at 4).

By contract dated April 30, 2009 (Exhibit B to Complaint), Kaback subcontracted some of its HVAC work to Haley. Paragraph 1 of the Kaback-Haley subcontract requires Haley to obtain liability insurance with an endorsement naming Kaback as an additional insured on a primary and non-contributory basis (*id.* ¶ 1). Paragraph 6 requires Haley to indemnify Kaback and hold it harmless

"from any and all . . . suits, damages . . . attorney's fees, costs, expenses and disbursements related to . . . personal injuries . . . arising out of . . . the performance of the work of [Haley]"

(*id.*).

Harleysville has accepted tender of the defense and indemnification of Kaback as an additional insured, but denies that it has any obligation to provide defense or indemnification to either Citadel or Downing.

Endorsement CG-7254 of the Harleysville policy amends

section II (A) of the policy, captioned, "Who Is An Insured," to include as an insured

"any person or organization for whom you are performing operations only as specified under a written contract . . . that requires that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability caused, in whole or in part, by the acts or omissions of the Named Insured, or those acting on behalf of the Named Insured, in the performance of the Named Insured's ongoing operations for the additional insured only as specified under the "written contract"

(Exhibit D to Guttman Affirmation).

Section C (2) (c) of that indorsement provides further that "[t]his insurance does not apply to the additional insured's [Kaback] liability to indemnify, defend or hold harmless a third party" (*id.*).

Haley moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint (motion sequence no. 001). Harleysville also moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint (motion sequence no. 002).

In a declaratory judgment action, a motion for summary judgment dismissing the complaint should be treated as a motion for a declaration in the moving party's favor (see *Arrow Louver & Damper Corp. v Newsday, Inc.*, 86 AD2d 513, 513 [1st Dept 1982]).

Plaintiffs cross-move for summary judgment, pursuant to CPLR 3212, seeking a judgment declaring that they are entitled to a

defense and indemnification in the underlying action from Harleysville, as additional insureds under the Harleysville policy, or, alternatively, they are entitled to contractual defense and indemnification from Haley.

In the alternative, plaintiffs seek a declaration that Haley breached its contractual duty to procure insurance naming them as additional insureds, and that such insurance would be primary over any insurance carried by plaintiffs.

Plaintiffs also contend that Harleysville failed to disclaim coverage in a timely manner as required by Insurance Law § 3420, however, there is no merit to this contention. "An additional insured endorsement is an addition, rather than a limitation, of coverage. If the claim falls outside the policy's coverage . . . the insurer is not required to disclaim [internal citation omitted]" (*National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 571 [1st Dept 2006]).

The complaint contains two causes of action. The first cause of action alleges that Harleysville breached its duty to defend and indemnify plaintiffs in the underlying action. The second cause of action alleges that Haley breached its duty to procure insurance naming plaintiffs as additional insureds. The complaint seeks a judgment declaring that plaintiffs are additional insureds under the Harleysville policy, and that Harleysville has a duty to defend and indemnify plaintiffs in the

underlying action. Alternatively, the complaint seeks a judgment declaring that plaintiffs are entitled to a defense and indemnification from Haley in the underlying action, as well as damages from Haley for its breach of its duty to procure insurance.

Harleysville has accepted the tender of defense and indemnity by Kaback as an additional insured, but has denied that either Downing or Citadel qualify as additional insureds under the Policy. Kaback plainly qualifies as an additional insured under the applicable endorsement in the Harleysville policy as an "organization for whom [Haley] is performing operations only as specified under a written contract . . . that requires that such [organization] be added as an additional insured on your policy" (exhibit E to Guttman affirmation).

Plaintiffs, however, do not qualify as additional insureds under that provision because there is no allegation or evidence that Haley was performing work under a written contract for either Downing or Citadel (see *Linarello v City Univ. at New York*, 6 AD3d 192 [1st Dept 2004]; *West 64th St. LLC v Axis Us Ins.*, 63 AD3d 471 [1st Dept 2009]). Put simply, there is no privity of contract between Haley, as a subcontractor of Kaback, and either Downing or Citadel. Therefore plaintiffs' claims against Harleysville fail in all respects.

With respect to Haley, there is no privity of contract

between Haley and either plaintiff. Therefore, plaintiffs have failed to demonstrate that Haley had any duty to procure insurance naming either of them as an additional insured, much less that Haley breached such a duty (see *Nicotra Group, LLC v Am. Safety Indem. Co.*, 48 AD3d 253 (1st Dept 2008)).

As such, Harleysville has demonstrated its entitlement to a declaration that it has no duty to defend or indemnify either plaintiff as an additional insured, and Haley is entitled to a declaration that it did not breach any duty to procure insurance naming either plaintiff as an additional insured, and that Haley has no contractual duty to defend or indemnify either plaintiff in the underlying action.

Accordingly, it is

ORDERED that the motion for summary judgment dismissing the complaint (sequence no. 001) pursuant to CPLR 3212 by defendant J. M. Haley Corp. is granted to the extent that it is

ADJUDGED AND DECLARED that defendant J. M. Haley Corp. has no duty to defend or indemnify plaintiffs Downing Street Developers, LLC or Citadel Construction Corp. in the underlying action, captioned *Jose Dominguez v Downing Street Developers, LLC, Citadel Construction, LLC and JBD Scaffolding Company*, bearing New York County index no. 106741/2011; and it is further

ADJUDGED AND DECLARED that defendant J. M. Haley Corp. is not liable to Downing Street Developers, LLC or Citadel

Construction Corp. for failing to procure insurance that would name plaintiffs as additional insureds and would provide a defense and indemnification in the underlying action, captioned *Jose Dominguez v Downing Street Developers, LLC, Citadel Construction, LLC and JBD Scaffolding Company*, bearing New York County index no. 106741/2011; and it is further

ORDERED that the motion for summary judgment dismissing the complaint (sequence no. 002) pursuant to CPLR 3212 by defendant Harleysville Insurance Corp. is granted to the extent that it is

ADJUDGED AND DECLARED that defendant Harleysville Insurance Corp. has no duty to defend or indemnify plaintiffs Downing Street Developers, LLC or Citadel Construction Corp. in the underlying action, captioned *Jose Dominguez v Downing Street Developers, LLC, Citadel Construction, LLC and JBD Scaffolding Company*, bearing New York County index no. 106741/2011; and it is further

ORDERED that the cross motion of plaintiffs Downing Street Developers, LLC and Citadel Construction Corp., seeking a judgment declaring that they are entitled to a defense and indemnification in the underlying action from Harleysville as additional insureds under the Harleysville policy, or alternatively, that they are entitled to contractual defense and indemnification from Haley, or, alternatively seeking a declaration that Haley breached its contractual duty to procure

insurance naming them as additional insureds, and that such insurance would be primary over any insurance carried by plaintiffs, is denied in its entirety; and it is further

ORDERED that the Clerk shall enter a judgment of dismissal, with costs and disbursements, upon proof of service of a copy of this order, with notice of entry.

Dated:

1/22/16


Doris Ling-Cohan, J. S. C.

J:\Summary Judgment\BYsubjectCLIPS\INDEMNIFICATION\Downing street.

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