American Empire Surplus Lines Ins. Co. v Endurance Am. Specialty Ins. Co.
2016 NY Slip Op 30606(U)
April 6, 2016
Supreme Court, New York County
Docket Number: 159963/14
Judge: Cynthia S. Kern

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY,

Plaintiff,

Index No. 159963/14

-against-

DECISION/ORDER

ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY,

Defendant.

----------x

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff American Empire Surplus Lines Insurance Company ("American") commenced the instant declaratory judgment action against defendant Endurance American Specialty Insurance Company ("Endurance") arising out of a separate personal injury action in which American is providing a defense to the defendant in that action. Plaintiff now moves for an Order pursuant to CPLR § 2221(d)(2) granting it leave to reargue a decision by this court denying plaintiff's motion for partial summary judgment and granting defendant summary judgment dismissing the complaint and upon reargument, granting plaintiff partial summary judgment on its complaint and denying defendant summary judgment. For the reasons set forth below, reargument is granted, but upon reargument, this court adheres to its original determination.

The relevant facts are as follows. In or around 2014, non-party Marcos Rene Sosa ("Sosa") commenced an action against non-party Dayton Towers Corporation ("Dayton") to recover for personal injuries Sosa allegedly sustained when he slipped and fell due to ice and snow on the roof of a building while performing construction work (the "incident") at the premises located at 105-00 Shorefront Parkway, Queens, New York (the "subject premises") (hereinafter referred to as the "underlying action"). Prior to the incident, Dayton, the owner of the subject premises, contracted with Skyline Restoration, Inc. ("Skyline"), as general contractor, to perform work at the subject premises. Thereafter, in an agreement dated March 22, 2013, Skyline contracted with All Day Restoration Inc. ("All Day"), Sosa's employer, to perform restoration work on the exterior facades at the subject premises (the "All Day Subcontract").

American, Skyline's insurer, then commenced the instant declaratory judgment action seeking, *inter alia,* a declaration that Endurance, All Day's insurer, is obligated to defend and indemnify Dayton as an additional insured on a primary basis in the underlying action and that American's obligations, if any, with respect to the defense and indemnification of Dayton in the underlying action, are excess to those of Endurance. Thereafter, plaintiff moved for partial summary judgment on its complaint and defendant separately moved for summary judgment and to dismiss any contractual indemnity claims against it. In a decision dated January 7, 2016 (the "Decision"), this court granted defendant's motion for summary judgment and denied plaintiff's motion for summary judgment declaring that Endurance is not obligated to defend or indemnify Dayton in the underlying action on the ground that Dayton is not an additional insured under the Endurance Policy because there is no written contract requiring additional insured coverage to be provided to Dayton.

Plaintiff now moves to reargue the Decision on the ground that the court misapprehended Section 1.2 of the All Day Subcontract, which states as follows:

> Except to the extent of a conflict with a specific term or condition contained in the Subcontract Documents, the General Conditions governing this Subcontract shall be the edition of the AIA Document A201, General Conditions of the Contract of Construction, current as of the date of this Agreement.

Section 11.1.4 of the AIA Document A201 – 2007 General Conditions of the Contract for Construction (the "AIA Document A201"), which is the AIA Document A201 current as of the date of the All Day Subcontract, provides, in relevant part, as follows:

> The Contractor Shall cause the commercial liability coverage required by the Contract Documents to include (1) the Owner, the Architect and the Architect's Consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations;...

Specifically, plaintiff asserts that because the All Day Subcontract incorporates by reference the AIA Document A201, there is a written contract requiring Dayton, the Owner, to be named as an additional insured.

On a motion for leave to reargue, the movant must allege that the court overlooked or misapprehended matters of fact or law. *See* CPLR 2221(d)(2). In the instant action, plaintiff's motion for leave to reargue this court's decision is granted solely based on this court's failure to address *Bussanich v. 310 E. 55th St. Tenants*, 282 A.D.2d 243 (1st Dept 2001) in its prior decision. However, upon reargument, the court adheres to its original decision denying plaintiff's motion for partial summary judgment and granting defendant summary judgment dismissing the complaint as it finds that *Bussanich* further supports the determination that Dayton is not an additional insured under the Endurance Policy because there is no written

contract requiring additional insured coverage to be provided to Dayton. Specifically, the First Department held that "[u]nder New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor." *Bussanich*, 282 A.D.2d at 244. Thus, the reference in the All Day Subcontract to the AIA Document A201, which is a document reflecting prime contract clauses, only incorporates the specifications for the work to be performed and not any requirements regarding insurance provisions such as a requirement that Dayton, as the Owner, be named as an additional insured.

Accordingly, plaintiff's motion to reargue is granted but upon reargument, this court adheres to its original determination. This constitutes the decision and order of the court.

Date: 4/6/16

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.