SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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D.C. DEVELOPER LLC and AJR ARCHITECTURE P.C.,

Plaintiffs,

- v -

ENDURANCE AMERICAN SPECIALITY INSURANCE COMPANY,

Defendant.

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Index No. 161627/2014

DECISION and ORDER
Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

This is an action to compel defendant, Endurance Specialty Insurance Co. ("Endurance") to defend and indemnify plaintiffs, D.C. Developer LLC ("DC Developer"), and AJR Architecture P.C. ("AJR")(collectively, "Plaintiffs") in a property damage action captioned *Huang v. D.C. Developer LLC, et. al.*, S. Ct. Kings County, Index No. 17410/2013 ("the Underlying Action"), as additional insureds under an insurance policy issued by Endurance to non-party Matic Construction Corp. ("Matic").

Non-Party Kai Xiong Huang ("Huang") is the owner of property located at 911 60th Street, Brooklyn, NY ("the Premises"). D.C. Developer owns the adjoining property located at 913 60th Street, Brooklyn, NY ("the Adjoining Premises").

On April 20, 2013, D.C. Developer retained Matic to perform certain construction work at the Adjoining Premises pursuant to a construction contract dated April 30, 2013 ("DC Developer/Matic Contract") signed by Wing Ken Chow, on behalf of DC Developer/Owner, and by Toh Shann Hwang, on behalf of Matic/Contractor. The Contract provides that Matic "shall hold harmless and indemnify owner and the Architect free and from any Liability, Claim and responsibility arising from any Liability, Claim and responsibility arising from contractor duties contained herein, including but not limited to general liability as to workers, employees and pedestrians on about the premises and project."

On or about September 30, 2013, Kai Xiong Huang ("Huang") commenced an action against D.C. Developer, AJR, Matic Construction Corp., ("Matic") and Kings Star Construction Co. Inc. ("Kings Star") alleging negligent construction and damage to Huang's property located at 911 60th Street, Brooklyn, NY ("the Premises") ("the Underlying Action").

Upon the commencement of the Underlying action on Huang, Matic and Plaintiffs notified Endurance of the action and requested that Endurance provide DC Developer and AJR with a defense and indemnification in the Underlying Action. By later dated August 7, 2014, Endurance sent Plaintiffs a letter denying coverage to Plaintiffs on the Matic Policy.

Endurance undertook to defend and indemnify Matic in the Underlying Action, pursuant to an insurance policy issued by Endurance to Matic ("the Matic Policy"). The additional insured endorsement of the Endurance Policy states "[w]ho Is An Insured is amended to include as an insured any person or organization for whom you [Matic] are performing operations when you [Matic] and such person have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your [Matic's] policy." Endurance did not undertake to defend and indemnify DC Developer and AJR because the DC Developer/Matic Contract contains no provision which gives additional insured status to Plaintiffs or to any other entity on the Matic's Policy.

Endurance now moves for summary judgment, pursuant to CPLR 3212, dismissing Plaintiffs' Complaint in its entirety. Endurance submits the attorney affirmation of Joel M. Simon. Annexed to Simon's affirmation are the following exhibits: the Complaint; Answer; Commercial General Liability Declaration for the Policy issued by Endurance to Matic; discovery demands propounded by Endurance; a Notice of Admit that was served upon Endurance; April 28, 2015 Preliminary Conference Order; Plaintiffs' Responses to Endurance's discovery demands; a letter sent by Rockville Risk Management, the designated Third Party Administrator for Endurance, dated January 20, 2015, to DC Developer denying coverage; Article 8 and Attachment B of Contract; Form A201-1997, para. 11.3.3, and the Additional Insured Endorsement.

In opposition to Endurance's motion for summary judgment, Wing K. Chow, the managing member of DC Developer and an officer of AJR, and Shann Hwang, vice president of Matic, submits an affidavit. Plaintiffs submit, inter alia, a copy of a Certificate of Liability Insurance issued by Success Insurance Agency Inc., as producer. The Certificate names Matic as insured, Endurance as "Insurer A," and

RSUI Indemnity Company as "Insurer B." The Certificate lists DC Developer and AJR as certificate holder. The Certificate states, "This certificate issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies below. This certificate of insurance does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder."

With respect to the indemnification provision contained in the Contract, Chow states, "It was my understanding that this provision was sufficient to reflect the agreement between DC Developer LLC and Matic Construction Corp. that Matic Construction Corp. would procure insurance for the job and that DC Developer LLC and AJR Architecture PC would be named additional insured on the policy." Chow states, "When I received the certificate of insurance which named DC Developer and AJR Architecture PC as certificate holders, I assumed that the policy was correctly issued pursuant to our agreement and understanding." Chow states that after DC Developer and AJR were sued in the Underlying Action, he contacted Success Insurance Agency "and was again reassured that my companies were covered under Matic's insurance policy as additional insureds." Chow states that at his request, Success Insurance Company requested that Endurance defend and indemnify DC Developer and AJR in the Underlying Action. Chow states that after Endurance refused to defend and indemnify, he "again contacted Success Insurance Company and requested an explanation" and Success Insurance provided him with its "Request for Additional Insured Endorsement" which it submitted to Endurance's insurance broker. The "Request for Additional Insured Endorsement" was returned to Success Insurance with the notation "OK to issue" and signed by a person named "Minh."

With respect to the indemnification provision contained in the Contract, Hwang also states, "It was my understanding that this provision was sufficient to reflect the agreement between DC Developer LLC and Matic Construction Corp. that Matic Construction Corp. would procure insurance for the job and that DC Developer LLC and AJR Architecture PC would be named additional insured on the policy." Hwang further states, "Indeed, why would Matic Construction Corp. agree to indemnify the owner and architect without procuring insurance for them." Hwang further states, "When Matic Construction Corp. applied for insurance coverage with Success Insurance Agency, Matic Construction Corp. requested that DC Developer LLC and AJR Architecture PC be named in the policy as additional insured."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce

sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

"An insurance policy is a contract between the insurer and the insured. Thus, the extent of the coverage (including a given policy's priority vis-a-vis other policies) is controlled by the relevant policy terms...." (*Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.*, 2008 NY Slip Op 3150, *5 [1st Dept. 2008]). "A certificate of insurance is "only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists." (*Tribeca Broadway Assocs., LLC v. Mount Vernon Fire Ins. Co.*, 5 A.D. 3d 198 [1st Dept 2004]).

Here, Endurance issued a policy of insurance to Matic. The policy contains an additional insured endorsement, which states in relevant part:

> A. Section II- **Who Is An Insured** is amended to include as an insured any person or organization for whom you are performing operations when you and such person have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy.

In *AB Green Gansevoort v. Peter Scalamandre & Sons, Inc.,* 102 A.D. 3d 425, 426 [1st Dept 2013]), at issue was an insurance policy that also provided that an organization is added as an additional insured under the policy "when you and such ... organization have agreed in writing in a contract or agreement that such ... organization be added as an additional insured on your policy." In interpreting this provision and applying it to the facts before the Court, the Court stated:

> 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 Green cannot seek coverage from Liberty 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.

(*AB Green Gansevoort*, 102 A.D. 3d at 426).

Here, there is no evidence of any written agreement between Matic, the insured, and DC Developer and AJR, directing Matic to add DC Developer and AJR as an additional insureds. While the Contract entered between DC Developer, as owner, and Matic, as contractor, contains a contractual indemnity provision, the Contract does not contain a provision that requires Matic to add DC Developer or AJR as an additional insured. "Absent such an agreement, the plain terms of policy have not been met" and DC Developer and AJR cannot seek coverage from Endurance as additional insureds. (*AB Green Gansevoort*, 102 A.D. 3d at 426).

To the extent that Plaintiffs seek to rely upon the Certificate of Insurance as a basis of coverage, "A certificate of insurance is merely evidence of a contract for insurance, not conclusive proof that the contract exists, and not, in and of itself, a contract to insure." (*Horn Maint. Corp. v. Aetna Cas. & Sur. Co.*, 225 A.D.2d 443, 444 [1st Dept 1996]). The certificate of insurance provided by Plaintiffs "is not sufficient, standing alone as it does here, to prove coverage as a matter of law." (*Horn Maint. Corp.*, 225 A.D.2d at 444).

Wherefore, it is hereby

ORDERED that Endurance's motion for summary judgment is granted; and it is further

ORDERED that the action is dismissed in its entirety and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: MARCH 11 2016

MAR 11 2016

EILEEN A. RAKOWER, J.S.C.