

Houston Cas. Co. v Cavan Corp. of NY, Inc.
2016 NY Slip Op 31532(U)
August 1, 2016
Supreme Court, New York County
Docket Number: 651981/2014
Judge: Gerald Lebovits
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

HOUSTON CASUALTY COMPANY,

Plaintiff,

-against-

CAVAN CORPORATION OF NY, INC., NEW PUCK,
LLC, PUCK RESIDENTIAL ASSOCIATES, LLC and
KUSHNER COMPANIES, LLC,

Defendants,

CAVAN CORPORATION OF NY, INC.,

Third-Party Plaintiff,

-against-

THE DUCEY AGENCY, INC.

Third-Party Defendant.

Index No.: 651981/2014

DECISION/ORDER

Motion Seq. Nos. 002 and
003

Third-Party Action

Index No.: 595609/2014

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing third-party defendant The Ducey Agency, Inc.'s (Ducey) motion for partial summary judgment, defendant/third-party plaintiff Cavan Corporation of NY, Inc.'s (Cavan) cross-motion for partial summary judgment, plaintiff's cross-motion for summary judgment, and plaintiff's motion for summary judgment.

Papers

Numbered

Third-Party Defendant Ducey's Notice of Motion	1
Third-Party Defendant Ducey's Memorandum of Law in Support	2
Defendant Cavan's Notice of Cross-Motion.....	3
Plaintiff's Notice of Cross-Motion for Summary Judgment.....	4
Plaintiff's Memorandum of Law in Opposition to Third-Party Defendant Ducey's Motion and in Support of Plaintiff's Cross-Motion.....	5
Plaintiff's Affirmation in Opposition to Defendant Cavan's Cross-Motion	6
Plaintiff's Memorandum of Law in Opposition to Defendant Cavan's Cross-Motion	7
Lisa Hess's Affidavit in Support of Plaintiff's Opposition to Defendant Cavan's Cross-Motion	8
Jill Fraser's Affidavit in Support of Plaintiff's Opposition to Defendant Cavan's	

Cross-Motion	9
Defendants New Puck LLC, Puck Residential Associates, LLC and Kushner Companies' Affirmation in Support of Third-Party Defendant Ducey's Motion and Defendant Cavan's Cross-Motion, and in Opposition to Plaintiff's Cross-Motion	10
Third-Party Defendant Ducey's Affirmation in Opposition to Plaintiff's Cross-Motion.....	11
Third-Party Defendant Ducey's Memorandum of Law in Opposition to Plaintiff's Cross-Motion	12
Third-Party Defendant Ducey's Affirmation in Support of Defendant Cavan's Cross-Motion	13
Third-Party Defendant Ducey's Affirmation in Support of Defendant Cavan's Cross-Motion and in Response to Plaintiff's Opposition	14
Third-Party Defendant Ducey's Memorandum of Law in Support of Defendant Cavan's Cross-Motion and in Response to Plaintiff's Opposition	15
Plaintiff's Notice of Motion	16
Jill Fraser's Affidavit in Support of Plaintiff's Motion	17
Lisa Hess's Affidavit in Support of Plaintiff's Motion	18
Plaintiff's Memorandum of Law in Support of Plaintiff's Motion.....	19
Third-party Defendant Ducey's Affirmation in Opposition to Plaintiff's Motion	20
Tom Torpey's Affidavit in Opposition to Plaintiff's Motion	21
Defendant Cavan's Affirmation in Opposition to Plaintiff's Motion and in Reply to Plaintiff's Opposition to Defendant Cavan's Cross-Motion.....	22
Defendants New Puck LLC, Puck Residential Associates, LLC and Kushner Companies' Affirmation in Opposition to Plaintiff's Motion	23
Third-party Defendant Ducey's Memorandum of Law in Opposition to Plaintiff's Motion.....	24
Plaintiff's Reply Memorandum of Law in Support of Plaintiff's Motion against Defendant Cavan.....	25
Plaintiff's Reply Memorandum of Law in Support of Plaintiff's Motion against Third-party Defendant Ducey	26
Plaintiff's Reply Memorandum of Law in Support of Plaintiff's Motion against Defendants New Puck LLC, Puck Residential Associates, LLC and Kushner Companies	27

DLA Piper LLP, New York (Aidan M. McCormack and Cyril E. Smith of counsel), for plaintiff.
Keidel, Weldon & Cunningham, LLP, New York (Howard S. Kronberg of counsel), for third-party defendant.

Wilkofsky, Friedman, Karel & Cummins, New York (Mark L. Friedman of counsel), for defendant/third-party plaintiff Cavan Corporation of NY.

Ahmuty, Demers & McManus, Albertson (Andrew S. Richmond of counsel), for defendants New Puck LLC, Puck Residential Associates, LLC and Kushner Companies.

Gerald Lebovits, J.

Third-party defendant Ducey's motion, sequence 2, and plaintiff's motion, sequence 3,

are consolidated for disposition.¹

On or about October 24, 2013, Richard Wilson was allegedly injured while working for J.D. Wilson Construction Corporation. On or about November 19, 2013, Wilson commenced an action seeking damages because of the alleged accident: *Richard Wilson v New Puck, LLC, Puck Residential Associate, LLC, Kushner Companies, LLC, Cavan Corporation of NY, Thistle Contracting, Inc. d/b/a TCI Contracting*, Index No. 160849/2013, New York State Supreme Court, New York County (*Wilson* action). (McCormack Affidavit, Exhibit C.) The complaint provides that New Puck, LLC, Puck Residential, LLC, Kushner Companies, LLC and/or defendant Cavan hired Wilson Corp.; Wilson was employed by Wilson Corp. at the time of the accident, and Cavan was the general contractor and/or construction manager for the project. The complaint also provides that defendants failed to properly supervise, control, and maintain the project, and violated §§ 200, 240 (1), and 241 (6) of New York Labor Law. (*Id.*) No dispute exists that plaintiff issued commercial general liability insurance to Cavan, with a policy period of April 1, 2013, to April 1 2014 (HCC insurance). (Fraser Affidavit, Exhibit C.)

Plaintiff started the current action for declaratory relief asserting that plaintiff has no coverage obligation under the HCC insurance for the underlying *Wilson* action. Puck entities moved by order to show cause on July 17, 2015, to add the Puck entities, as well as other parties, as defendants. On January 4, 2016, Hon. Paul Wooten partially granted the motion and amended the complaint to include the Puck entities as defendants. Third-party defendant Ducey now moves under CPLR 3212 for partial summary judgment against plaintiff. Defendant/third-party plaintiff Cavan cross-moves for partial summary judgment against plaintiff. Plaintiff cross-moves for summary judgment against Cavan and Ducey. Plaintiff moves under CPLR 3212 for summary judgment against Cavan.

I. Third-Party Defendant Ducey’s Motion for Partial Summary Judgment Against Plaintiff and Plaintiff’s Cross-Motion against Ducey

Third-party defendant Ducey’s motion against plaintiff is denied. Ducey moves under CPLR 3212 for partial summary judgment against plaintiff, seeking the court to declare that plaintiff has a duty to defend defendant/third-party plaintiff Cavan in the underlying *Wilson* action. Ducey’s motion is procedurally defective: “While a third-party defendant may in his

¹ Defendant /third-party plaintiff Cavan, by letter dated July 28, 2016, referred this court to a July 18, 2016, case entitled *US Specialty Ins. Co. v SMI Construction Management, Inc.*, Index No. 652305/2014, New York State Supreme Court, New York County, and provided the transcript from the oral argument. This court will not consider this submission for the following reasons: (1) the summary-judgment motions here were argued on June 28, 2016, and all papers were fully submitted; thus, at the time of Cavan’s letter, the motions were sub judice; (2) the *SMI* decision has no bearing on the present matter before this court; (3) the *SMI* action involves a different insurance carrier and different insurance policy than the ones here; and (4) the facts of the *SMI* action are substantially different from this action: In the *SMI* action, the insured, according to Hon. Ellen Coin, “shows that it was not receiving a specified fee for this project, but was responsible for paying subcontractor and was paid for the cost of the work plus override.” (Transcript at 14.) Here, the insured has not shown sufficient evidence that it was not receiving a specified fee for the project.

answer assert against the original plaintiff any defenses available to the third-party plaintiff against the plaintiff's claim . . . he may counter claim against the plaintiff only where the plaintiff has amend[ed] his complaint to assert a claim against the third-party defendant." (*Well Built Motor Repairs, Inc. v Utog Fed. Credit Union*, 225 NYS2d 297, 297 [2d Dept 1962].) No action exists between plaintiff and Ducey. Plaintiff has not amended its complaint to assert a claim against Ducey. To obtain the relief it seeks, Ducey would need to commence a separate fourth-party action against plaintiff. Thus, Ducey's motion for partial summary judgment against plaintiff is denied.

Plaintiff cross-moves under CPLR 3212 for summary judgment against Ducey to dismiss Ducey's claims against plaintiff. Given the facts as discussed above, plaintiff's cross-motion against Ducey is granted.

II. Defendant Cavan's Cross-Motion for Partial Summary Judgment against Plaintiff

Defendant Cavan's cross-motion against plaintiff is denied as academic. Cavan cross-moves under CPLR 3212 for partial summary judgment against plaintiff for the court to declare that plaintiff has a duty to defend Cavan in the underlying *Wilson* action. Cavan's cross-motion is academic. No dispute exists that by letter dated June 24, 2014, plaintiff agreed to provide Cavan with a courtesy interim defense in the *Wilson* action and assigned defense counsel. (Hess Affidavit, Exhibit D.) On July 31, 2014, Cavan's assigned defense counsel filed a Verified Answer on Cavan's behalf in the *Wilson* action. (McCormack Affidavit, Exhibit D.)

III. Plaintiff's Motion and Cross-Motion against Cavan

Plaintiff's motions, sequences 2 and 3, are denied. Plaintiff cross-moves in sequence 2 and moves in sequence 3 under CPLR 3212 for summary judgment against Cavan for the court to declare that plaintiff has no coverage obligation under the HCC insurance for the underlying *Wilson* action. Plaintiff has offered insufficient evidence to show its entitlement to judgment as matter of law. Even though plaintiff has not satisfied its burden of proof, Cavan has sufficiently shown that material issues of facts exist. For a court to grant a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact about the claim or claims at issue. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].)

The following facts are not in dispute. On or about July 31, 2012, Puck Residential and Cavan entered into the Construction Management Agreement (CMA). (McCormack Affidavit, Exhibit A.) On or about April 4, 2013, Cavan entered the Trade Contractor Agreement (TCA) with Wilson Corp. for the renovation of 295 Lafayette Street, New York, New York (Puck project). (McCormack Affidavit, Exhibit B.) Plaintiff issued the HCC insurance to Cavan, with a policy period of April 1, 2013, to April 1, 2014. (Fraser Affidavit, Exhibit C.) The exclusion provision of the HCC insurance provides that "[t]his insurance does not apply to Construction Management 'Bodily Injury' or 'property damage' arising out of 'construction management' . . . 'Construction management' means the planning, coordinating, supervising, or controlling of construction activities while being compensated on a fee basis by an owner or developer." (*Id.*)

Plaintiff argues that Cavan signed the CMA and TCA for the project, both of which plainly state that Cavan was acting as the construction manager (CM) for the project, thus excluded from the HCC insurance's coverage. The CMA provides:

"This Agreement shall describe the work (the 'Work') to be performed by CM in connection with the Project. Work shall include (i) full construction management duties with respect to the Project CM shall bear the full responsibility of supervising, administering, coordinating and managing the Work performed by Trade Contractors. . . . (McCormack Affidavit, Exhibit A, Article 1, 2.)

The TCA provides: "CONSTRUCTION MANAGER: CCNY INC [Cavan] with an address of 261 W 35th ST, SUITE 400 NEW YORK, NY 10001." (McCormack Affidavit, Exhibit B.)

This court, however, finds that material issues of facts exist about whether Cavan was a CM or general contractor (GC), and whether the provision entitled "EXCLUSION – CONSTRUCTION MANAGEMENT FOR A FEE" only applies to CM, or also applies to GC. (Fraser Affidavit, Exhibit C [emphasis in original].) Both CM's and GC's work involves "the planning, coordinating, supervising, or controlling of construction activities." (Fraser Affidavit, Exhibit C.) CM and GC, however, are separate and distinct titles with different responsibilities and relationships to a construction project. (*Balthazar v Full Circle Const. Corp.*, 268 AD2d 96, 98 [1st Dept 2000].) The Court of Appeals has held that "[t]he label of construction manager versus general contractor is not necessarily determinative." (*Walls v Turner Const. Co.*, 4 NY3d 861, 864 [2005].) Determinative factors of defining GC include: (1) the specific contractual terms creating agency, (2) the absence of a general contractor, (3) the duty to oversee the construction site and the trade contractors, and (4) the authority to control activities at the work site and to stop any unsafe work practices. (*Id.*)

During the effective dates of the HCC insurance policy, Ducey sent a series of emails inquiring about whether it was covered under the policy, beginning on June 24, 2013. In its response, plaintiff stated that as long as Cavan was not acting as a "True CM" or "Actual CM," Cavan will be covered. (Kronberg, Exhibit E.) Plaintiff's underwriting guidelines provide that "Construction managers are very challenging exposures in that they have broad responsibility for the worksite but have limited power to enforce safety or other measures." (Fraser Affidavit, Exhibit E.) Here, even though the CMA labeled Cavan as a CM, it required Cavan to

"[h]ire, supervise and coordinate all direct and subconstructed work . . . Review all subcontractor invoices and consolidate same; into Cavan monthly billing If necessary, complete any unfinished Preparatory Work Bear the full responsibility of supervising, administering, coordinating and managing work on the Project Have full privity of contact with all trade contractors." (McCormack Affidavit, Exhibit A.)

In the Puck project, Cavan was not only monitoring, but also hiring, supervising, and controlling all subcontractors. (O'Donnell Affidavit.) Cavan had the duty to implement and enforce safety

programs. (McCormack Affidavit, Exhibit A.) Cavan's expert witness states that in the construction industry, the title of an entity in an agreement is of no consequence; plaintiff's definition of CM is exactly what a GC does on a project. (Rinaldi Affidavit, at 3-5.) Thus, Cavan has sufficiently shown that material issues of facts exist about whether Cavan is CM or GC, and whether the "Construction Management for a fee exclusion" applies to GC.

Plaintiff further argues that Cavan is barred from coverage because of the late notice. Plaintiff, however, has not made a prima facie showing of entitlement to judgment as a matter of law. Disputes exist about whether Crump is plaintiff's agent, and when Crump notified plaintiff about Wilson's accident. Section IV (2) of the HCC insurance requires the insured to notify plaintiff "as soon as practicable of an 'occurrence' or an offense which may result in a claim" and "if a claim is made or 'suit' is brought against any insured." (Fraser Affidavit, Exhibit C.)

Plaintiff asserts that Cavan first notified plaintiff about Wilson's accident more than seven weeks after the accident. (Hess Affidavit, ¶ 12.) Cavan, however, argues that plaintiff received notice from Ducey approximately one month, if not less, after the accident. Cavan informed Ducey about the loss and all criteria required under the HCC policy within two business days of the accident. (Gina Hille Affidavit.) Cavan gave Ducey written notice of the claim on November 13, 2013; according to Ducey, Ducey forwarded written notice of the claim to Lora Sisson of Crump, plaintiff's agent, on November 25, 2013 — one month from the October 24, 2013, accident. (Torpey Affidavit, at 6, 7.) But plaintiff, in its reply papers, argues that Crump, a wholesale broker, is not its agent and, thus, that Cavan's notice to Crump does not satisfy Cavan's notice obligation under the HCC policy.

It is unknown whether Crump notified plaintiff, and, if so, when it notified plaintiff. Disputes also exist about whether Crump is plaintiff's agent and when Crump notified plaintiff about Wilson's accident.

Even assuming that Cavan delayed in giving notice to plaintiff, plaintiff has offered insufficient evidence to show that it has been prejudiced by the delay. Insurance Law § 3420 (a) (5) provides:

"A provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured, injured person or any other claimant, unless the failure to provide[d] timely notice has prejudice the insurer, except as provided in paragraph four of this subsection."

Plaintiff argues that it has been prejudiced because it was forced to incur fees and costs in providing a courtesy interim defense for Cavan because of Cavan's default in the *Wilson* action. Because time has passed, plaintiff was also prevented from interviewing other witnesses or employees when their memories would be most fresh. According to plaintiff, Cavan's failure to immediately forward the *Wilson* complaint also prejudiced plaintiff's ability to evaluate the suit timely to determine plaintiff's potential exposure when the litigation was still "fresh" and plaintiff could have been more willing to negotiate a reasonable settlement. (Hess Affidavit, ¶ 28.)

With the exception of defendants' motion to amend the answer, however, nothing of legal significance has occurred in the *Wilson* action. (Friedman Affidavit, Exhibit 2.) Plaintiff has not alleged which witnesses it has interviewed and in what way plaintiff was frustrated by the late notice. Thus, plaintiff has offered insufficient evidence to show prejudice.

Plaintiff also argues that the HCC insurance is in excess to the Preferred Contractors Insurance (PCIC). This court disagrees. Under the HCC insurance policy, the HCC insurance is excess over "any other primary insurance available to you [Cavan] covering liability for damages arising out of the premises or operations . . . for which you [Cavan] have been added as an additional insured by attachment of an endorsement." (Fraser Affidavit, Exhibit C.) Plaintiff asserts that Cavan is an additional insured under the PCIC insurance contract issued to Wilson Corp. for the period of May 3, 2013, to May 3, 2014. (Hess Affidavit, Exhibit B.) The PCIC policy, however, is "excess to any other valid and collectible insurance available to the insured whether such other insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is specifically written to apply in excess of this particular policy." (*Id.*) It specifically disclaimed additional insured coverage with respect to the claims against Cavan involving JD Wilson Construction Corp., and PCIC specifically denied additional insured coverage for Cavan. (Friedman Affidavit, Exhibit 5.) Thus, no other primary insurance is available to Cavan.

Therefore, material issues of fact exist which require a trial: (1) whether Cavan is a CM or GC; (2) whether the "Construction Management for a fee exclusion" applies to GC; (3) whether Crump is plaintiff's agent; (4) when Crump notified plaintiff about Wilson's accident; and (5) whether plaintiff was prejudiced by Cavan's alleged late notice.

According, it is ORDERED that third-party defendant The Ducey Agency, Inc.'s motion (sequence 2) against plaintiff is denied and plaintiff's cross-motion against third-party defendant The Ducey Agency, Inc. is granted; and it is further

ORDERED that defendant Cavan Corporation of NY, Inc.'s cross-motion (sequence 2) for partial summary judgment against plaintiff is denied; and it is further

ORDERED that plaintiff's cross-motion (sequence 2) against defendant Cavan Corporation of NY, Inc. is denied; and it is further

ORDERED that plaintiff's motion (sequence 3) against defendant Cavan Corporation of NY, Inc. is denied; and it is further

ORDERED that counsel for plaintiff is directed to serve a copy of this decision with notice of entry on all parties and the County Clerk's Office, which is directed to enter judgment accordingly. This constitutes the court's decision and order.

Dated: August 1, 2016


J.S.C.

HON. GERALD LEBOVITS
J.S.C.