State of New York v Laquila Group, Inc.
2017 NY Slip Op 30113(U)
January 17, 2017
Supreme Court, Kings County
Docket Number: 510527/2015
Judge: Martin M. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
Part 38

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THE STATE OF NEW YORK,

Plaintiff(s) **Index no. 510527/2015**

-against- **DECISION/ORDER**

THE LAQUILA GROUP, INC.,

Defendant(s)

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Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion and cross motion for summary judgment

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed	1
Notice of Cross Motion and Affidavits Annexed	2
Answering Affidavits	
Replying Affidavits	3 & 4
Sur-Reply Affidavits	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

In the underlying action, Edwin Alvarez, an employee of defendant, allegedly suffered personal injury in a trip and fall while working for defendant on a highway construction project on the Staten Island Expressway. Mr. Alvarez brought an action in the Court of Claims against the State of New York. That action was tried to the court, but at this juncture this court is not aware of any decision having been rendered.

In this action, plaintiff seeks indemnification for any verdict, judgment or settlement and disbursements, expenses and counsel fees resulting from the Court of Claims action. Plaintiff moves for summary judgment on its contractual indemnification claims. Defendant cross moves to dismiss the complaint asserting that under the terms of the insurance policy obtained by defendant for plaintiff, the plaintiff is not entitled to seek contribution from defendant's insurer.

There is no question that the State of New York is entitled to indemnity from defendant for the personal injury claim arising from the work. The contract between the parties provides in Section 107-9C, in relevant part:

"Obligation to Indemnify by the Contractor.
The Contractor shall indemnify and save harmless the state...from suits, claims, actions, damages and costs, of every name and description resulting from work under this contract..."

Defendant claims are somewhat more attenuated. Defendant asserts that under the terms of the contract with the plaintiff, it was required to obtain an insurance policy for the plaintiff. Defendant obtained the policy from Arch Insurance Group. Defendant paid a premium of $89,890.00 for the policy which provides coverage of $1,000,000.00 per occurrence. Paragraph 8 of the policy entitled "Other Insurance" provides, in relevant part:

"The insurance afforded by this policy is primary insurance and we will not seek contribution from any other insurance available to you except if the other insurance is provided by a contractor other than the designated "contractor"..."

Defendant asserts that as the insurers are the actual parties in interest, in effect plaintiff's claim for indemnification is plaintiff's insurer seeking contribution from defendant's insurer and urges this court to look beyond the actual parties.

While the terms are most often conjoined and sometimes used incorrectly, the concepts of indemnity and contribution are not synonymous. Black's Law Dictionary (10th ed. 2014), defines indemnity, in relevant part as "A duty to make good any loss, damage, or liability incurred by another". It defines contribution, again in relevant part as, "the right to demand that another who is jointly responsible for a third party's injury supply part of what is required to compensate the third party. — Also termed right of contribution...One tortfeasor's right to collect from joint tortfeasors when, and to the extent that, the tortfeasor has paid more than his or her proportionate share to the injured party, the shares being determined as percentages of causal fault."

> "The conceptual basis of contribution and indemnity have been traced many times before (see, e.g., Glaser v Fortunoff of Westbury Corp., 71 NY2d 643, 646; Guzman v Haven Plaza Hous. Dev. Fund Co., supra, at 567-568; D'Ambrosio v City of New York, supra; McDermott v City of New York, 50 NY2d 211, 216-217). Briefly, in contribution, the tort-feasors responsible for plaintiff's loss share liability for it. Since they are in pari delicto, their common liability to plaintiff is apportioned and each tort-feasor pays his ratable part of the loss. In indemnity which arises commonly in cases involving vicarious liability (see, e.g., Rogers v Dorchester Assocs., 32 NY2d 553, supra [duty to maintain premises]; Logan v Esterly, 34 NY2d 648 [public highway construction]; Traub v Dinzler, 309 NY 395 [automobile owner and driver]; see generally, Restatement [Second] of Torts § 886B [2]) a party held legally liable to plaintiff shifts the entire loss to another. The right to do so may be based upon an express contract, but more commonly the indemnity obligation is implied, as it is here, based upon the law's notion of what is fair and proper as between the parties. (Mas v Two Bridges Assoc., 75 N.Y.2d 680, 554 N.E.2d 1257, 555 N.Y.S.2d 669 [1990])

Thus, contribution has aspects of an equitable concept to it, which allows a party to shift the costs among the parties responsible for a loss in proportion to their responsibility for the loss. Indemnity is more of a legal or, as in this case, contractual concept that permits one party to shift the entire cost to another party.

It is clear that had The Laquila Group been named as an additional insured in the Arch policy under the Pennsylvania General Insurance Company rule Arch could not seek indemnity from Laquila. "Additional insured" is a recognized term in insurance contracts, with an understanding crucial to our conclusion in this case. As cases have recognized, the "well-understood meaning" of the term is "an 'entity enjoying the same protection as the named insured' " (Del Bello v General Acc. Ins. Co., 185 AD2d 691, 692 [1992], quoting Rubin, Dictionary of Insurance Terms 7 [Barron's 1987]; see also Jefferson Ins. Co. v Travelers Indem. Co., 92 NY2d 363, 372 [1998]; Wong v New York Times Co., 297 AD2d 544, 547 [2002]). (Pecker Iron Works of New York, Inc. v. Traveler's Insurance Company, 99 N.Y.2d 391, 786 N.E.2d 863, 756 N.Y.S.2d 822, 2003 N.Y. Slip Op. 11030.)

"An insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered. This rule applies even where the insured has expressly agreed to indemnify the party from whom the insurer's rights are derived and has procured separate insurance covering the same risk." (Pennsylvania General Insurance Company v. Austin Powder Company et al., 68 N.Y.2d 465, 502 N.E.2d 982, 510 N.Y.S.2d 67 [1986]).

The Arch policy, however, provides that The Laquila Group Inc. is the designated contractor. The Laquila Group Inc. is not named as an additional insured in the Arch policy. Laquila obtained the policy at issue and paid the premiums. It had the opportunity to have itself named as an additional insured and did not do so.

It is well worth noting that in regard to Laquila's indemnification of the State of New York, the Arch policy provides in Paragraph 12, entitled "Transfer of Rights of Recovery Against Others to Us", in relevant part:

If the insured has rights to recover all or part of any payment we have made under this policy those rights are transferred to us."

The position defendant urges on this court is to enforce the provisions of the Arch policy as to paragraph 8 but ignore the provisions of paragraph 12. "'An insurance contract should not be read so that some provisions are rendered meaningless' (County of Columbia v Continental Ins. Co., 83 NY2d 618, 628 [1994]; see Nautilus Ins. Co. v Matthew David Events, Ltd., 69 AD3d 457, 460 [2010]; Bretton v Mutual of Omaha Ins. Co., 110 AD2d 46, 49 [1985], affd 66 NY2d 1020 [1985])." (Vassar College v Diamond State Insurance Company, 84 A.D.3d 942, 923 N.Y.S.2d 124, 267 Ed. Law Rep. 313, 2011 N.Y. Slip Op. 04042 [2d Dept. 2011]).

Paragraph 8 and paragraph 12 in the Arch policy are not in direct conflict with each other. Paragraph 8 only address contribution from other insurance policies. Paragraph 12 is an assignment of rights of recovery in other cases, in this case under the indemnity provision in the contract between the parties. The court declines to view the insurers as the real parties in interest. Under the contract between the parties the State of New York is entitled to indemnification from The Laquila Group, Inc. regardless of whether Laquila obtained insurance to cover the loss.

For the foregoing reasons, plaintiff's motion for summary judgment on its claim for indemnification must be granted and defendant's cross motion to dismiss the complaint must be denied.

Dated: January 17, 2017

Hon. Martin M. Solomon
J.S.C.