

Bhatti v Chahid

2017 NY Slip Op 30559(U)

February 1, 2017

Supreme Court, Queens County

Docket Number: 707263/15

Judge: Timothy J. Dufficy

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

ORIGINAL

Short Form Order/Declaration

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X

BADAR BHATTI,

Plaintiff,

Index No.: 707263/15

Mot. Date: 11/4/16

-against-

Mot. Cal. No. 12

Mot. Seq. 1

MOHAMMED CHAHID and THE COLOCY 29
CONDOMINIUM,

Defendants.

-----X

MOHAMMED CHAHID,

Third-Party Plaintiff,

-against-

R.K. RETAIL BUSINESS, INC., MD SHAHABURBUR
RAHMAN, LIG INSURANCE COMPANY and F A
ALLAN INSURANCE BROKERAGE,

Third-Party Defendant.

-----X

The following papers read on this motion by defendant Kookmin Best Insurance Company f/k/a Leading Insurance Group Insurance Company, Ltd., s/h/a **LIG INSURANCE COMPANY (LIG)** for an order pursuant to CPLR 3211(a)(1),(7) dismissing the complaint against Kookmin Best Insurance Company f/k/a Leading Insurance Group Insurance Company, Ltd., s/h/a LIG Insurance Company for failure to state a cause of action and based on documentary evidence; and for summary judgment declaring that LIG has no duty to defend or to indemnify third-party plaintiff Mohammed Chahid or R.K. Retail in the underlying action.

PAPERS
NUMBERED

Notice of Motion-Affirmation-Exhibits

EF 13-22

Memorandum of Law.....

Affirmation in Opposition-Exhibits

EF 36-42

Upon the foregoing papers, it is ordered that the motion is granted.

The underlying claim in this insurance coverage dispute involves a lawsuit against Mohammed Chahid (Chahid) and The Colony 29 Condominium for personal injuries allegedly sustained by Badar Bhatti in an accident, on the premises at 29-12 30th Avenue, Astoria, New York, on November 29, 2014. Bhatti alleged that Chahid negligently maintained and used the premises, which he owned and operated. Chahid filed a third-party action against LIG seeking a declaration that LIG is obligated to defend and indemnify him in the underlying action. The third-party action alleges that Chahid leased the subject premises to third-party defendants R.K. Retail Business Inc. and MD Shahabur Rahman (Retail), and that the latter entities had an obligation under a written lease to procure general liability coverage on his behalf. Essentially, Chahid claims that he qualifies as an additional insured under the LIG policy issued to Retail. Chahid further claims that LIG cancelled the policy without his knowledge, despite the fact that he was an additional insured on the policy. The policy in question was effective from September 12, 2014 to October 24, 2014. The policy listed only Retail as a named insured, and did not have a general blanket additional insured endorsement, or express additional insured endorsement naming Chahid. The insurance binder, dated 9/12/2014, expiring the same day, 9/12/2014, did not name Chahid under the box for additional insured. The policy was cancelled for non-payment of premium, on October 24, 2014, after a 15-day notice was sent to Retail on October 6, 2014.

On a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211 (a)(7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (Guggenheimer v Ginzburg, 43 NY2d 268 [1977]; see Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Hense v Baxter, 79 AD3d 814, 815 [2d Dept 2010]). "The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference" (Hense v Baxter, *supra* at 815).

In contrast, a motion to dismiss, pursuant to CPLR 3211(a)(1), may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (see Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002];

Granada Condominium III Assn. v Palomino, 78 AD3d 996 [2d Dept 2010]). Whether to treat a motion to dismiss pursuant to CPLR 3211 as a motion for summary judgment pursuant to CPLR 3212, is within the Court's discretion (*see* Sokol v Leader, 74 AD3d 1180 [2d Dept 2010]; Bronner v Butterfield, 2 AD3d 475 [2d Dept 2003]). Therefore, while CPLR 3211 (c) permits the court, after adequate notice to the parties, to treat a motion pursuant to CPLR 3211 as one for summary judgment, it is not required to do so (*see* Siddiqui v Nationwide Mut. Ins. Co., 255 AD2d 30 [3d Dept 1999]; SPI Communications v WTZA-TV Assocs. Ltd. Partnership, 229 AD2d 644 [3d Dept 1996]). It is well settled that the party claiming the existence of insurance coverage has the burden of proving its entitlement (*see* Kidalso Gas Corp. v Lancer Ins. Co., 21 AD3d 779, 780-781 [1st Dept 2005]; Moleon v Kreisler Borg Florman Gen. Constr. Co., 304 AD2d 337 [1st Dept 2003]).

"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 AD3d 198, 200 [1st Dept 2004]; *see* Sevenson Envtl. Servs., Inc. v Sirius Am. Ins. Co., 74 AD3d 1751 [4th Dept 2010]). Moreover, where a certificate of insurance offered to establish coverage states that it "issued as a matter of information only and confers no rights upon the certificate holder [and] does not amend, extend or alter the coverage afforded by the [general liability] policies listed below" such certificate is insufficient, in and of itself, to establish that a defendant is an additional insured (Home Depot U.S.A., Inc. v National Fire & Mar. Ins. Co., 55 AD3d 671, 673 [2d Dept 2008]; *see* School Const. Consultants. Inc. v ARA Plumbing & Heating Corp., 63 AD3d 1029, [2d Dept 2009]; ALIB, Inc. v Atlantic Cas. Ins. Co., 52 AD3d 419 [1st Dept 2008]).

Here, the third-party plaintiff offered only one of two pages of a temporary certificate without the conditions, and that certificate expired the same day, which was months before the underlying plaintiff's accident. Hence, there has not been a prima facie showing of the availability of coverage.

Although an insurance company that issues a certificate of insurance naming a particular party as an additional insured may be estopped from denying coverage where the party reasonably relies on the certificate of insurance to its detriment (*see* Sevenson

Envtl. Services. Inc. v Sirius Am. Ins. Co., *supra* at 1753; Lenox Realty v Excelsior Ins. Co., 255 AD2d 644, 679 [3d Dept 1998], *lv denied* 93 NY2d 807 [1999]; Bucon, Inc. v Pennsylvania Mfg. Assn. Ins. Co., 151 AD2d 207 [3d Dept 1989]), the party claiming estoppel must establish that they reasonably relied on the certificate, and that they lacked knowledge of and the means of knowledge of the truth of the assertions contained therein (*see* Brelsford v USAA, 289 AD2d 847, 849 [3d Dept 2001]; Park East Constr. Corp. v Alliance Maintenance & Mgt., Inc., 2012 N.Y. Misc. LEXIS 5288, *5-9, 2012 NY Slip Op 32787(U), 3-4 [Supt. Ct. NY Co. 2012]). Those elements have not been established in the instant matter.

Nor did the carrier continue to accept or retains premiums, or otherwise ratify or act consistently with the existence of the contract, after learning the facts necessary to declare the policy void and return the premium (*see* Burdick v American Modern Home Ins. Co., 6 Misc 3d 1030[A] [Sup Ct, Oneida County 2005])

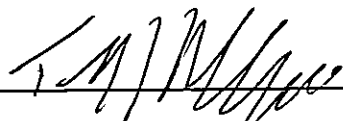
At the time of the underlying plaintiff's accident, the third-party plaintiff was not listed as an insured or additional insured under the policy. The temporary certificate, which expired the same day on its face, was not in effect due to the cancellation of the underlying policy for nonpayment about a month prior to the accident. Therefore, LIG had no duty to defend or indemnify Chahid (Frank v Continental Cas. Co., 123 AD3d 878 [2d Dept. 2014]; Vikram Constr., Inc. v Everest Natl. Ins. Co. 139 AD3d 720 [2d Dept. 2016]).

Accordingly, for all of the foregoing reasons, it is hereby,

ORDERED, that the motion by defendant Kookmin Best Insurance Company f/k/a Leading Insurance Group Insurance Company, Ltd., s/h/a LIG Insurance Company for an order pursuant to CPLR 3211(a)(1),(7) dismissing the complaint against Kookmin Best Insurance Company f/k/a Leading Insurance Group Insurance Company, Ltd., s/h/a LIG Insurance Company for failure to state a cause of action and based on documentary evidence; and for summary judgment declaring that LIG has no duty to defend or to indemnify Third-Party plaintiff Chahid or R.K. Retail in the underlying action. is granted; and it is further,

ORDERED AND DECLARED, that LIG has no duty to defend or to indemnify Third-Party plaintiff Chahid or R.K. Retail in the underlying action.

Dated: February 1, 2017



TIMOTHY J. DUFFICY, J.S.C.

FILED
FEB 15 2017
COUNTY CLERK
QUEENS COUNTY