

Da Silva v Champ Constr. Corp.
2017 NY Slip Op 31960(U)
September 11, 2017
Supreme Court, Kings County
Docket Number: 506852/13
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of September, 2017.

P R E S E N T:

HON. DEBRA SILBER,
Justice.
-----X

DEVAIR DA SILVA,
Plaintiff,

- against -

CHAMP CONSTRUCTION CORP., 57 GRAHAM CORP.,
LES LEV CORP. and CP & ASSOCIATES CONSTRUCTION
CORP.,

Defendants.
-----X

CHAMP CONSTRUCTION CORP.,
Third-Party Plaintiff,

- against -

A. LOGAN INSURANCE BROKERAGE and SCOTT
HANDWERGER,

Third-Party Defendants.
-----X

DECISION/ORDER

Index No. 506852/13

MOT. SEQ. # 4, 6

The following papers numbered 1 to 8 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-3</u> <u>4-6</u>
Opposing Affidavits (Affirmations) _____	<u>5-6</u> <u>7</u>
Reply Affidavits (Affirmations) _____	<u>7</u> <u>8</u>

Upon the foregoing papers, defendant/third-party plaintiff, Champ Construction Corp. (Champ), moves for an order, pursuant to CPLR 3212, granting it summary judgment on its third-party complaint as against third-party defendants A. Logan Insurance Brokerage (Logan Brokerage) and Scott Handwerger (Handwerger).

Third-party defendants, Logan Brokerage and Handwerger, cross-move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing Champ's third-party complaint.

Background

Champ's Workers Compensation Insurance

Handwerger is the principal of Logan Brokerage, an insurance brokerage company. According to the verified third-party complaint (Exhibit K to the cross-motion) at ¶ 10, Logan Brokerage allegedly contracted with Champ on or about October 31, 2013 to procure workers' compensation insurance coverage for Champ, a construction company, for a job Champ was about to start.

However, Champ alleges in its opposition to the cross-motion and in support of its motion that Logan Brokerage and Handwerger allegedly represented to Champ months earlier that they had obtained workers' compensation insurance coverage for Champ, for the period July 10, 2013 through July 10, 2014, by providing Champ (on an unspecified date) with a Certificate of Liability Insurance, dated July 23, 2013 (Insurance Certificate), which Champ alleges was fraudulent. It must be noted herein that the only conclusion one can reach on these alleged facts is that Champ did not attempt to procure the workers' compensation insurance until after plaintiff's accident in August 2013, and then sought to obtain coverage retroactively.

The Insurance Certificate clearly provides at the top of the document in capital letters that:

“THIS CERTIFICATE IS 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” [Emphasis added].

Notwithstanding the above, Champ claims that when one of Champ’s employees was injured on August 14, 2013, Champ then discovered for the first time that Logan Brokerage had failed to obtain workers’ compensation insurance coverage for Champ for the specified time period, which it alleges commenced on July 10, 2013, when they started the job.

The Underlying Personal Injury Action

On or about November 5, 2013, Da Silva commenced a personal injury action against 57 Graham Corp. (57 Graham),¹ Les Lev Corp.² and CP and Associates Construction Corp. (CP),³ and asserted causes of action against them for negligence and violations of the New York Labor Law and the Industrial Code.

On or about February 19, 2014, Da Silva amended his complaint to add Champ, his employer, as a defendant. The amended complaint alleges that Da Silva was employed by Champ on the date of the accident, that Champ failed to obtain workers’ compensation insurance coverage and Da Silva “has not received any workers’ compensation benefits as a result of his work-related accident on August 14, 2013” (amended complaint at ¶¶ 28-30). Further, plaintiff claims he sustained a “grave injury” as defined in § 11 of the Workers’ Compensation Law.

At the time of Da Silva’s work-related accident, Champ was a subcontractor at a construction project at 57 Graham Avenue in Brooklyn. Champ was retained by defendant CP, the general contractor for the construction project, pursuant to an August 6, 2013

¹ The property owner.

² By an April 25, 2014 stipulation, the action was discontinued as against Les Lev Corp.

³ The general contractor.

subcontract (Subcontract). Under the Subcontract, Champ agreed to indemnify and hold CP harmless for personal injury claims arising out of its construction work. Champ also agreed to obtain general liability insurance naming CP and the property owner as additional insureds. However, Champ did not execute the subcontract until December 9, 2013 and CP never executed it. Further, the contract provides that it is not valid unless the parties also signed “Subcontractor General Conditions Version 2012-003,” and that document was not signed by either party. Thus, by Order dated May 10, 2017, the undersigned dismissed the declaratory judgment action (*Colony v American et al*, 501911/15) brought by CP’s insurance company against Champ and Champ’s insurance company, which had disclaimed coverage. The court found there was no duty to defend or indemnify Champ by its general liability insurer as the policy was not a policy for workers’ compensation insurance and specifically excluded coverage of Champs’ employees.

Further, by implication, the court found there was no enforceable contract which could be the basis of a claim for contractual indemnification against Champ, although that claim is asserted in the cross-claim in this action, not in the *Colony* action.

CP answered the amended complaint and asserted cross claims against Champ for common-law and contractual indemnification and breach of contract for failing to procure general liability insurance naming it as an additional insured.⁴ Defendant 57 Graham answered the amended complaint and asserted cross claims against CP and Champ for common-law and contractual indemnification and breach of contract for failing to procure general liability insurance naming it as an additional insured. Champ answered the amended complaint and asserted cross claims against 57 Graham, Les Lev Corp. and CP for common-law indemnification and contribution.

⁴ Presumably, CP also meant to include workers’ compensation insurance in this claim.

Champ's Third-Party Action

On or about February 13, 2015, Champ commenced this third-party action against Logan Brokerage and Handwerger by filing a third-party summons and a verified third-party complaint. The third-party complaint alleges that “on or about October 31, 2013, SCOTT HANDWERGER acted as an insurance broker and was responsible for procuring insurance for CHAMP” (third-party complaint at ¶ 10). The third-party complaint asserts five causes of action for: (1) breach of contract; (2) negligence; (3) fraud; (4) common-law indemnification; and (5) contribution.

In support of Champ’s breach of contract claim, the third-party complaint alleges that Logan Brokerage and Handwerger “agreed to procure” workers’ compensation insurance on Champ’s behalf; and “provided to . . . CHAMP, a Certificate of Liability Insurance for a policy of [w]orkers [c]ompensation insurance, *as evidence of* [their] compliance in obtaining [w]orkers [c]ompensation insurance for CHAMP”; and “[h]ad [they] complied with their contractual obligations and procured [w]orkers['] [c]ompensation insurance for CHAMP, plaintiff would not be able to assert a direct cause of action against CHAMP” (third-party complaint at ¶¶ 20, 22 and 28 [emphasis added]).

In support of Champ’s negligence claim, the third-party complaint alleges that Logan Brokerage and Handwerger “negligently provided to . . . CHAMP, a Certificate of Liability Insurance for a policy of [w]orkers['] [c]ompensation insurance . . .” and that the “failure to procure [w]orkers['] [c]ompensation insurance for CHAMP” and “[p]roviding the Certificate of [w]orkers [c]ompensation insurance to CHAMP . . . when such policy was not in effect” are “evidence of negligence . . .” (*id.* at ¶¶ 35, 38 and 40).

In support of Champ’s fraud claim against Handwerger, the third-party complaint alleges that “HANDWERGER represented to . . . CHAMP, that [w]orkers [c]ompensation

insurance for the period of July 10, 2013 through July 10, 2014 had been obtained”; Champ “relied on HANDWERGER’s representations that the Certificate of Insurance presented to it was a true and accurate copy/representation of the [w]orkers[’] [c]ompensation insurance policy in place . . .”; and “HANDWERGER knew that the Certificate of [w]orkers [c]ompensation insurance he presented to CHAMP was false” (*id.* at ¶¶ 51, 56 and 58).

On or about May 1, 2015, Logan Brokerage and Handwerger filed a joint answer to Champ’s third-party complaint, denied the material allegations therein and alleged that “the certificate of workers’ compensation insurance provided to Champ was a sample certificate and was not in any way a representation that such insurance was procured, or would be procured, by third-party defendants on behalf of Champ” (third-party defendants’ answer to third-party complaint at ¶¶ 25, 39, 52, 53, 56, 58 and 73).

The Instant Motion And Cross-Motion

Champ now moves for an order granting it summary judgment on its third-party complaint. Nicola Ciampone, Champ’s principal, attests that “Champ contracted with Logan through Handwerger for [w]orkers’ [c]ompensation insurance for the period of July 10, 2013 through July 10, 2014”; Logan and Handwerger provided the Certificate of Liability Insurance . . . representing that [w]orkers’ [c]ompensation insurance coverage had been obtained”; “Logan and Handwerger . . . provided fraudulent certificates of insurance”; and “Third-Party Defendants’ failure to procure [w]orkers’ [c]ompensation insurance on behalf of Champ was a breach of contractual obligations.”⁵ Champ submits: (1) a copy of the Insurance Certificate described, and (2) a series of vague emails between Handwerger and an unidentified individual named “John” from Champ, none of which reference the project

⁵ See ¶¶ 3, 4, 7 and 9 of the March 8, 2017 affidavit of Nicola Ciampone submitted in support of Champ’s summary judgment motion (Ciampone Affidavit).

where Da Silva was injured. They indicate a course of conduct between these parties for numerous projects Champ was working on during the period July 23, 2013 to October 20, 2013, and nothing more.

Without citing any documentary or testimonial evidence, Champ's counsel asserts that "[t]here is no dispute that the parties entered into a contract whereby Third-Party Defendants were to provide Third-Party Plaintiff with [w]orkers' [c]ompensation coverage . . ."; "[t]here is no dispute that payments were made by Third-Party Plaintiff to Third-Party Defendant for said coverage" and "Third-Party Defendant, in breach of the contract, provided Third-Party Plaintiff with a fraudulent certificate of insurance."⁶

Logan Brokerage and Handwerger, in opposition to Champ's motion and in support of their cross motion, submit Handwerger's affidavit in which he asserts that "Logan vehemently denies any alleged wrongdoing with respect to its attempts to procure workers' compensation on behalf of Champ . . ."⁷ They also submit an attorney affirmation arguing that Champ's claims are legally insufficient because Champ failed to submit any documentary or testimonial evidence proving, among other things, that there was a valid contract between the parties or that a legal duty was owed to Champ by Logan or Handwerger.

They further contend that Champ cannot establish that it sustained any damages because an August 3, 2015 Workers' Compensation Board decision reflects that: (1) Da Silva filed a claim for, and received, workers' compensation benefits, and (2) CP's insurer

⁶ See ¶¶ 14-16 of the March 8, 2017 affirmation of Adam S. Cohen, Esq., submitted in support of Champ's summary judgment motion (Cohen Affirmation).

⁷ See ¶ 3 of Handwerger's May 2, 2017 affidavit submitted in opposition to Champ's summary judgment motion and in support of the cross motion (Handwerger Cross-Moving Affidavit).

was required to pay for those benefits, as it was the general contractor, pursuant to a decision of the Workers' Compensation Board dated January 11, 2016. Third-party defendants argue that Champ is thus shielded from any direct claims by Da Silva.

Discussion

(1)

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

“The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez*, 68 NY2d at 324; *see also Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real*

Estate Brokers v Oppenheimer, 148 AD2d 493 [1989]; *see also Zuckerman*, 49 NY2d at 562).

(2)

Logan Brokerage and Handwerger are entitled to summary judgment dismissing Champ's third-party complaint in its entirety because Champ alleges that it contracted with Logan Brokerage and Handwerger to procure workers' compensation insurance for it *on or about October 31, 2013* (*see* third-party complaint at ¶ 10), which is subsequent to Da Silva's August 14, 2013 accident. Consequently, Logan Brokerage and Handwerger cannot be held legally responsible for Champ's lack of workers' compensation insurance on August 14, 2013, if they were not obligated to procure such insurance until October 31, 2013.

Although the July 23, 2013 Insurance Certificate pre-dated Da Silva's accident by three weeks, there is no indication of the date it was provided to Champ, and the Insurance Certificate specifically states that it "IS ISSUED AS A MATTER OF INFORMATION ONLY[:] CONFERS NO RIGHT UPON THE CERTIFICATE HOLDER [and] DOES NOT CONSTITUTE A CONTRACT . . ." It was therefore, as a matter of law, unreasonable for Champ to rely on the Insurance Certificate for workers' compensation insurance coverage in light of the clear disclaimer therein (*see Greater New York Mut. Ins. Co. v White Knight Restoration, Ltd.*, 7 AD3d 292, 293 [2004] ["the causes of action for fraud and negligent misrepresentation, based on the inaccurate certificates, were properly dismissed because it was unreasonable to rely on them for coverage in the face of their disclaimer language . . ."]; *cf. Benjamin Shapiro Realty Co., LLC v Kemper Nat. Ins. Companies*, 303 AD2d 245, 246 [2003] *lv. denied* 100 NY2d 573 ["where, as here, certificates of insurance contain disclaimers that they are for information only, they may not be used as predicates for a claim of negligent misrepresentation"]).

While an insurance agent or broker can be held liable in negligence if he or she fails to exercise due care in an insurance brokerage transaction, and a plaintiff may seek to hold a defendant broker liable under a theory of either negligence or breach of contract, (*Bruckmann, Rosser, Sherrill & Co., L.P. v Marsh USA, Inc.*, 65 AD3d 865, 866 [2009]; see also *Katz v Tower Ins. Co. of New York*, 34 AD3d 432, 432 [2006] [holding that “[a]n insurance agent or broker may be held liable under a theory of negligence for failing to procure insurance”]) when the plaintiff didn’t seek coverage until after an accident and then sought the coverage to be retroactive, there is no valid claim against an agent or broker for failing to provide insurance on these terms.

To be clear, “in order for a broker to be held liable, ‘a plaintiff must demonstrate that the broker failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that it breached the agreement or because it failed to exercise due care in the transaction’” (*Katz*, 34 AD3d at 432 [quoting *Mickey’s Rides-N-More, Inc. v Anthony Viscuso Brokerage, Inc.*, 17 AD3d 328, 329 (2005)]; see also *Femia v Graphic Arts Mut. Ins. Co.*, 100 AD3d 954, 955 [2012] [same]). Furthermore, “[t]o set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided . . .” (*Am. Bldg. Supply Corp. v. Petrocelli Grp., Inc.*, 19 NY3d 730, 735 [2012]). “[I]nsurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so . . .” (*id.* [internal quotations omitted]; see also *Femia*, 100 AD3d at 955 [same]).

As Champ has failed to establish that it made a specific and timely request to Logan Brokerage or Handwerger for workers’ compensation insurance coverage, as it states in its verified third-party complaint that it did not request Handwerger to obtain the insurance until

October 31, 2013, Champ has failed to state a cause of action for which relief may be granted.

Accordingly, it is

ORDERED that the cross motion by third-party defendants Logan Brokerage and Handwerger for summary judgment dismissing Champ's third-party complaint is granted; and it is further

ORDERED that defendant/third-party plaintiff Champ's motion for summary judgment on its third-party complaint against Logan Brokerage and Handwerger is denied as academic.

This constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**