

**National Union Fire Ins. Co. of Pittsburgh, PA v
Mission Design & Mgt.**

2018 NY Slip Op 30931(U)

May 14, 2018

Supreme Court, New York County

Docket Number: 653960-2015

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA,

Plaintiff,

DECISION AND ORDER

Index No. 653960-2015

-against-

MISSION DESIGN & MANAGEMENT, BOWERY
AT SPRING PARTNERS, L.P., NOLITA PLACE
CONDOMINIUM, MIDBORO MANAGEMENT, INC.,
BAKERS DOZEN ASSOCIATES LLC, EMM GROUP
HOLDINGS LLC, THE WALSH COMPANY, LLC,
SCOTTSDALE INSURANCE COMPANY,
NATIONAL FIRE INSURANCE COMPANY OF
HARTFORD, CENTURY SURETY COMPANY and
JUAN MAURISACA

Defendants.

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Melissa A. Crane, J.S.C.,

This case involves an insurance coverage dispute among three companies that issued insurance policies to defendant Mission Design & Management Inc. (Mission). By this motion (sequence number 002), National Union Fire Insurance Company of Pittsburgh, PA (Plaintiff or National) seeks an order awarding it summary judgment and declaring that it has no duty to defend or indemnify Mission, as well as granting it a default judgment against certain non-appearing defendants. Defendant Century Surety Company (Century) opposes the motion and cross-moves for leave to file an amended answer to Plaintiff's complaint. Defendant Scottsdale Insurance Company (Scottsdale) also opposes the motion and generally adopts the opposition arguments Century made. For the reasons stated herein, plaintiff's motion is granted, the cross motion is denied.

BACKGROUND

Based on the parties' pleadings, the following facts are undisputed. Plaintiff issued an insurance policy for workers compensation and employers' liability to Mission (National Union Policy). Mission is a defendant in this action and a third-party defendant in an underlying personal injury action pending in the New York State Supreme Court of Queens County, titled *Juan Maurisaca v Bowery at Spring Partners, et al.*, index number 702405/2012 (Underlying Action). Maurisaca commenced the Underlying Action because of an accident that occurred, in September 2012, at a construction site located at 199 Bowery Street, New York City. The Underlying Action seeks recovery for injuries Maurisaca allegedly sustained when he fell from scaffolding. Maurisaca asserts that he was a Mission employee at the time of the accident. He claims that the various defendants in the Underlying Action were negligent and violated sections of the Labor Law.

The Walsh Company LLC (Walsh), a defendant in the Underlying Action, commenced a third-party action against Mission, in June 2013, asserting claims sounding in breach of contract to procure insurance, common law indemnity and contribution, and contractual indemnity. Bakers Dozen Associates LLC (Bakers Dozen) and EMM Group Holdings LLC (EMM Group), also defendants in the Underlying Action, filed a second third-party action against Mission and Scottsdale, that had issued a general liability policy to Mission, alleging that Mission owed Bakers Dozen and EMM Group contractual, common law indemnity and contribution.

Thereafter, National commenced this action in December 2015, seeking a declaration that it is not obligated to provide coverage to, or defend or indemnify Mission, under the National Union Policy. Subsequently, pursuant to various stipulations, National discontinued the declaratory judgment action against the following defendants: National Fire Insurance Company

of Hartford, Walsh, Nolita Place Condominium, Midboro Management Inc. and Bowery at Spring Partners LP.

In response to this declaratory judgment action, defendant Century, that had issued a commercial policy of excess liability insurance to Mission, filed an answer to the complaint. Scottsdale, that had issued a commercial general liability policy to Mission, filed its answer to the complaint. It is undisputed that each of the insurance policies issued to Mission by Plaintiff, Century and Scottsdale, was in effect at the time of Maurisaca's alleged accident.

ANALYSIS

I. Summary Judgment and Declaratory Relief

In this motion, plaintiff seeks an order of this court, pursuant to CPLR 3212 and 3001, awarding it summary judgment and declaring that it has no obligation to defend or indemnify Mission, based upon the exclusion of coverage provision of its insurance policy (i.e. the National Union Policy). With respect to the contractual indemnity and the breach of contract for failing to procure insurance claims asserted against Mission in the third-party actions, plaintiff argues for dismissal based upon the terms of the National Union Policy. Specifically, plaintiff points to part two of the National Union Policy, under the heading titled employer's liability insurance, that excludes coverage for "liability assumed under a contract." (Horowitz affirmation (NYSCEF #43), exhibit M (NYSCEF #56) (National Union Policy), page 3). Thus, plaintiff asserts that, given the exclusion, the National Union Policy does not provide coverage for claims against Mission based upon contractual indemnity and breach of contract. Plaintiff relies primarily upon *National Union Fire Ins. Co. of Pittsburgh, Pa. v 221-223 W. 82 Owners Corp.*, 120 AD3d 1140, 1141 (1st Dept 2014) (insurer not required to defend or indemnify insured where policy excludes coverage for liability assumed under a contract).

Century contends that to deny coverage, an insurer must give a timely disclaimer under Insurance Law § 3420 (d), and plaintiff has not produced a written letter evidencing a timely disclaimer. Similarly, Scottsdale argues that to prevail, plaintiff must first demonstrate that it issued either a timely reservation of rights or a timely disclaimer to Mission. Scottsdale further argues that, if plaintiff's disclaimer was untimely, it is not entitled to summary judgment and must continue to contribute toward the defense of Mission in the Underlying Action. Century and Scottsdale appear to concede that, except for the late disclaimer, plaintiff's insurance policy would not otherwise apply.

Century and Scottsdale's argument that Insurance Law § 3420 (d) applies is unavailing. First, Insurance Law § 3420 (d) does not apply to claims between insurance companies (*See Public Service Mutual Ins. Co. v Tower Ins. Co of New York*, 1112 AD3d 476 [1st Dep't 2013]; *see also Zurich Am. Ins Co. v Wasau Business Ins. Co.*, 206 FSupp 3d 818, 828 [SDNY 2016], *aff'd*, 710 Fed. App 3d [2d Cir. Oct. 5, 2017]). Moreover, the claims against Mission, plaintiff's insured in the Underlying Action, are for breach of contract, common law contribution and common law indemnity. Insurance Law § 3420 (d) only applies to underlying claims for bodily injury or death (*see Preserver Ins. Co. v Ryba*, 10 NY3d 635 [2008]; *Accord KeySpan Gas E. Corp. v Munich Reins. Am. Inc.*, 23 NY3d 583, 590 [2014] [noting § 3420 (d) only applies to claims involving death and bodily injury, but not to breach of contract claims]; *Johnson v Atlantic Cas. Ins. Co.*, 2015 WL 5021953 at *5, 2015 US Dist. LEXIS 111829 at *11-12 (WD NY 2015) (following *Preserver* and finding that section 3420 (d) was inapplicable and holding that the insurer was not barred from disclaiming coverage simply as a result of the passage of time).

The cases upon which Century relied at oral argument: *State of New York v General Star Indem. Co.*, 299 AD2d 537 (2d Dept 2002); 474431 *Assocs. v AXA Global Risk US Ins. Co.*, 18 AD3d 604 (2d Dept 2005); and *Star Ins. Co. v Hazardous Elimination Corp.*, 2007 WL 316569 (ED NY 2007) (transcript of oral argument [NYSCEF #76], at 6-9) are inapplicable. These citations all predate the Court of Appeals decisions in *Preserver* (2008) and *Key Span* (2014), or rely on facts that are distinguishable. Near the end of oral argument, Century reiterated that *Preserver* relied on the inapplicability of §3420, because the policy in that case was not issued for delivery in New York (transcript at 16). However, the Court of Appeals specifically concluded that, even if the policy were issued for delivery in New York, *Preserver* could still deny coverage for a breach of contract claim as Insurance Law 3420 (d) requires timely disclaimer only for denials of coverage for death or bodily injury. (*Preserver*, 10 NY3d at 642 [emphasis added]).

Plaintiff also moves for summary judgment and declaratory relief with respect to its coverage obligations concerning the common law indemnity and contribution claims asserted against Mission in the third-party action. Specifically, plaintiff asserts that the National Union Policy only provides coverage for common law claims if the plaintiff in the Underlying Action (Maurisaca) suffered a grave injury within the meaning of section 11 of the Workers Compensation Law.

Plaintiff asserts that Maurisaca did not suffer a grave injury within the meaning of section 11 of the Workers Compensation Law, that defines “grave injury” as one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia . . . total and permanent blindness . . . deafness . . . an acquired injury to the brain caused by an external physical force

resulting in permanent total disability. The legislature intended or this list to be exhaustive. (*see Castro v United Container Mach. Group*, 96 NY2d 398, 402 [2001] [citation omitted]).

Plaintiff points to, among other things: Maurisaca's initial and supplemental bills of particulars from the Underlying Action that do not list any injury constituting a grave injury (Horowitz affirmation, ¶¶ 24-25, exhibits B and C). The most serious injuries Maurisaca alleged involve disc herniations and subsequent surgery, that do not qualify as grave injuries (*id.*, ¶ 28). His head injury with a subsequent concussion is not a traumatic brain injury or otherwise a grave injury (*id.*, ¶ 30). Indeed, that Maurisaca was able to testify for many hours in depositions without issue is evidence that he did not sustain a traumatic brain injury (*id.*, ¶ 32, exhibit N). The neurologist's report concluded that Maurisaca did not sustain neurological injuries (*id.*, ¶ 35, exhibit O); and the vocational-earning report reflected that Maurisaca is able to perform light duty work and in a wide range of occupations (*id.*, ¶ 36; exhibit P). In addition, plaintiff points out that Maurisaca's lawyer has been duly served with the summons and complaint in this declaratory judgment action, but Maurisaca has failed to appear. (*Id.*, ¶ 45, exhibit R). Further, Century and Scottsdale do not contest that Maurisaca did not sustain a grave injury within the meaning of the statute (Kohane affirmation in opposition, ¶ 17; transcript (NYSCEF #76) at 13 (to the extent there is no grave injury . . . that would be barred by workers compensation . . . The only [disputed] issue is the contractual claim, indemnification claim)).

Based upon the foregoing, plaintiff has made a *prima facie* showing and is entitled to a declaration that the injuries Maurisaca sustained do not qualify as grave injuries within the meaning of section 11 of the Workers Compensation Law. Accordingly, Plaintiff has no obligation to defend or indemnify Mission for the common law indemnity and contribution claims asserted against it in the third-party actions.

II. Default Judgment

This motion also seeks entry of a default judgment against defendants Mission, Bakers Dozen, EMM Group and Maurisaca, who have not appeared in this declaratory judgment action. Pursuant to CPLR 3215 (f), [a]n applicant for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of defaulting defendant s failure to answer or appear.

Based upon the affidavits of service of the summons and complaint in this action (Horowitz affirmation, ¶ 45, exhibits Q, R and S), as well as the docket maintained in this action, these defendants have been duly served, the time to interpose an answer to this declaratory judgment action and their time to appear in this action has expired. Accordingly, as plaintiff has already demonstrated, *prima facie*, that its coverage does not apply, plaintiff is entitled to entry of a default judgment against the defaulting defendants.

III. Cross Motion for Leave of Court to Amend

Century's cross motion seeks leave of court, pursuant to CPLR 3025 (b), to amend its answer to assert two affirmative defenses/counterclaims: (1) plaintiff has waived its ability to rely upon the Contractual Liability exclusion pursuant to New York Insurance Law ¶ 3420 (d); and (2) any insurance coverage afforded to Mission under the Mission Policy would be primary to Century's pure excess coverage.

As discussed, Century's argument that ¶ 3420 (d) of the Insurance Law requires plaintiff to provide a timely disclaimer with respect to the contractual indemnity and breach of contract claims is without merit. Therefore, any amendment seeking to add section 3420 (d) as a defense or counterclaim is equally devoid of merit. Moreover, as discussed, any argument that the

National Union Policy afforded coverage for a personal injury claim that does not constitute a grave injury within the meaning of section 11 of the Workers Compensation Law is equally unavailing. Therefore, any amendment seeking a declaration that the National Union Policy would be primary to Century's pure excess coverage is irrelevant.

Accordingly it is

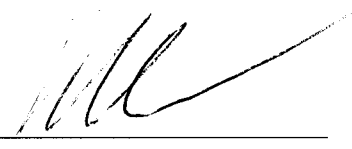
ORDERED that plaintiff's motion for summary judgment is granted, and the Clerk is directed to enter judgment in favor of plaintiff and against defendants Century Surety Company and Scottsdale Insurance Company; and it is further

ORDERED that plaintiff's motion for entry of a default judgment against non-appearing defendants Mission Design & Management Inc., Dozen Associates LLC, EMM Group Holdings LLC and Juan Maurisaca is granted, and the Clerk is directed to enter judgment on the complaint in favor of plaintiff and against these defendants; and it is further

ORDERED that the cross motion of defendant Century Surety Company for leave of court to amend its answer is denied; and it is further

ADJUDGED and DECLARED that plaintiff is not obligated to defend or indemnify Mission Design & Management Inc. or any party in connection with the third party actions and the pending underlying personal injury action *entitled Juan Maurisaca v Bowery at Spring Partners, LP*, index number 702405/2012 (Sup Ct, Queens County).

DATED: 5/14/, 2018

J.S.C. 

Melissa A. Crane
HON. MELISSA A. CRANE
J.S.C.