Stakey v Town of Riverhead
2018 NY Slip Op 31221(U)
June 13, 2018
Supreme Court, Suffolk County
Docket Number: 2015-89
Judge: Joseph Farneti

[* 1]

COPY

SHORT FORM ORDER

INDEX No. 2015-89

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 6-8-17 (003)
MOTION DATE 8-3-17 (004)
MOTION DATE 10-26-17 (005)
ADJ. DATE 12-7-17
Mot. Seq. # 003 - MD
004 - MotD
005 - MD

CHRISTINE STAKEY,

Plaintiff,

- against -

TOWN OF RIVERHEAD, WOOLWORTH REVITALIZATION LLC, W.J. NORTHRIDGE CONSTRUCTION CORP., A1 RELIABLE INDUSTRIES CORP., C.M., RICHEY ELECTRICAL CONTRACTORS, INC., GRAY GOLD CONTRACTING, INC., and SEAFORD AVENUE CORP,

Defendants.

WOOLWORTH REVITALIZATION LLC,

Third-Party Plaintiff,

- against -

SEAFORD AVENUE CORP., and LIBERTY MUTUAL INSURANCE,

Third-Party Defendants.

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THE NETHERLANDS INSURANCE COMPANY,

Second Third-Party Plaintiff,

- against -

AMERICAN ALTERNATIVE INSURANCE CORPORATION and WESCO INSURANCE COMPANY,

Second Third-Party Defendants.
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Upon the following papers numbered 1 to ___ read on these motions to sever, to compel discovery, and for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 18 ; Notice of Cross Motion and supporting papers 25 - 35; 44 - 53 ; Answering Affidavits and supporting papers 19 - 20; 21 - 24; 36 - 40; 41; 54 - 75 ; Replying Affidavits and supporting papers 42 - 43; 76 ; Other ___; it is,

ORDERED the motion by plaintiff, the motion by defendant/third-party plaintiff Woolworth Revitalization, LLC, and the motion by second third-party plaintiff Netherlands Insurance Company are consolidated for purposes of this determination; and it is

ORDERED that plaintiff's motion for an order severing the third-party action and the second third party action from plaintiff's direct cause of action and compelling discovery is denied; and it is further

ORDERED that the motion by defendant/third-party plaintiff Woolworth Revitalization, LLC, for an order declaring that defendant/third-party defendant Seaford Avenue Corp., is obligated to defend and indemnify Woolworth Revitalization, LLC, and that it is an additional insured under the Netherlands Insurance Company policies is granted only to the extent indicated, and is otherwise denied; and it is further

ORDERED that the motion by second third-party plaintiff Netherlands Insurance Company for an order declaring that Wesco Insurance Company has a primary duty to defend the Woolworth Revitalization, LLC in the first party action herein is denied.

Plaintiff commenced this action to recover damages for personal injuries she allegedly sustained on July 30, 2014, when she slipped and fell in front of the premises located at 130 East Main Street in Riverhead, New York. Third-party plaintiff Woolworth Revitalization, LLC, alleges that third-party defendant Seaford Avenue Corp. is obligated to defendant and indemnify it, and that it is an additional insured under two Liberty Mutual insurance policies. Second third-party plaintiff Netherlands Insurance

Company alleges that second third-party defendant Wesco Insurance Company owes third-party plaintiff Woolworth Revitalization, LLC, a duty to defendant in the main action. Issue has been joined.

Plaintiff now moves to sever the third-party action and the second third-party action from her first party action. Plaintiff also seeks additional discovery from the defendant Town of Riverhead. In support of the motion, plaintiff submits, among other things, copies of the pleadings, and the deposition transcript of Drew Dillingham. The Town of Riverhead opposes the motion and submits an affidavit of Town Building Inspector Mark Griffin.

Defendant/third-party plaintiff Woolworth Revitalization, LLC ("Woolworth") moves for summary judgment for on its claim for a declaration that defendant/third-party plaintiff Seaford Avenue Corp. ("Seaford") is obligated to defend and indemnify Woolworth in the first party lawsuit based upon common law and contractual obligations. Woolworth also seeks declaration that it is an additional insured under a Netherlands Insurance Company policy and Excelsior Insurance Company policy. Under those policies, Woolworth also seeks declaration that Liberty Mutual is obligated to defend and indemnify it up to the policy limits of $2,000,000.00. In support of the cross motion, Woolworth submits, among other things, copies of the pleadings, an affidavit of Michael Butler, the contract between Woolworth and Seaford, the Netherlands Insurance Company policy, and the deposition transcripts of plaintiff and Michael Butler. In opposition, Seaford submits the deposition transcript of plaintiff and Drew Dillingham. The Netherlands Insurance Company ("Netherlands") opposes the motion and submits a memorandum of law.

Netherlands cross-moves for summary judgment on its claim for a declaration that Wesco Insurance Company ("Wesco") owes Woolworth a primary duty to defend. In support of the cross motion, Netherlands submits copies of the pleadings; an affidavit of Sandra La Rochelle; the Netherlands, Wesco, and Essex insurance policies; the contract between Woolworth and Northridge, the construction manager; the deposition transcript of Michael Butler; and various correspondence. In opposition, Wesco submits copies of the pleadings; the contract between Woolworth and Northridge; the Wesco insurance policy; and the deposition transcripts of plaintiff, Michael Butler, James Sutherland and Kenneth Alveari.

"It is well-established that the grant or denial of a request for severance is a matter of judicial discretion" (***Chiarello v Rio***, 101 AD3d 793, 957 NYS2d 133 [2d Dept 2012]). However, severance should be used sparingly (*see* ***Shanley v Callanan Indus.***, 54 NY2d 52, 444 NYS2d 585 [1981]). In addition, severance should not be ordered where there are common factual and legal issues involved in the claims and the interests of judicial economy will be served by having a single trial (*see* ***Lelekakis v Kamamis***, 41 AD3d 662, 839 NYS2d 773 [2d Dept 2007]; ***Ingoglia v Leshaj***, 1 AD3d 482, 769 NYS2d 40 [2d Dept 2003]). Moreover, severance is not called for where there is the possibility of inconsistent verdicts in the event that the actions are tried separately (***Chiarello v Rio***, *supra*).

Plaintiff's conclusory statements that issues pertaining to liability insurance coverage, the naming of additional insureds, and the construction of insurance policies "do not bear commonality with tort liability" in a trip and fall accident do not establish that there are no common issues of fact and law or that judicial economy is served by having discovery completed separately. Here, there appears to be

common issues of fact and law regarding the insurance policies at issue and the rights and obligations of the parties thereunder, and it appears that the interests of judicial economy and consistency are best served by discovery being completed jointly. It is well-established that it is inherently prejudicial to insurance companies to have the issue of insurance coverage tried before the same jury considering the underlying claims of liability (*see* ***Kelly v Yannotti***, 4 NY2d 603, 176 NYS2d 637 [1958]; ***Christensen v Weeks***, 15 AD3d 330, 790 NYS2d 153 [2d Dept 2005]; ***Schoor Bros. Dev. Corp. v Continental Ins. Co.***, 174 AD2d 722, 573 NYS2d 874 [2d Dept 1991]). Accordingly, the branch of plaintiff's motion to sever the third-party action and the sceond third-party action from the main action is denied, with leave to renew upon completion of discovery.

Turning to that branch of plaintiff's motion seeking additional discovery, plaintiff has failed to provide an affirmation of a good faith effort to resolve the discovery issues raised by the motion (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [a]). Such an affirmation "shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [c]). It does not appear that plaintiff made any effort made to resolve the parties' discovery dispute. "The burden is on the party seeking sanctions based on disclosure issues to comply with Uniform Rules for Trial Cts (22 NYCRR) § 202.7 (a) (2) and (c). If the moving party did not confer with the opposing parties counsel, they should have set forth their reasons for not doing so in the affirmation. The court should not be left to wonder whether any consultation with opposing parties counsel occurred, or be compelled to assume the reasons why no consultation occurred" (***Hutchinson v Langer***, 25 Misc 3d 1235[A], 2009 NY Slip Op 52427[U] [Sup Ct, Kings County 2009]). The application, therefore, is deficient (*see* ***Tine v Courtview Owners Corp.***, 40 AD3d 966, 838 NYS2d 92 [2d Dept 2007]; ***Cestaro v Chin***, 20 AD3d 500, 799 NYS2d 143 [2d Dept 2005]; ***Barnes v NYNEX, Inc.***, 274 AD2d 368, 711 NYS2d 893 [2d Dept 2000]). Accordingly, plaintiff's motion is denied in its entirety.

It is well-settled that the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mars., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, *citing* ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

As to the summary judgment motion by Woolworth, "[t]he duty of an insurer to defend its insured arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim, or when the insurer 'has actual knowledge of facts establishing a reasonable possibility of coverage' " (***Frontier Insulation Contrs. v Merchants Mut. Ins. Co.***, 91 NY2d 169, 175, 667 NYS2d 982 [1997]; *see* ***Continental Cas. Co. v Rapid-American Corp.***, 80 NY2d 640, 593 NYS2d

966 [1993]; ***Bruckner Realty, LLC v County Oil Co., Inc.***, 40 AD3d 898, 838 NYS2d 87 [2d Dept 2007]). To be relieved of its "exceedingly broad" duty to defend (***Colon v Aetna Life & Cas. Ins. Co.***, 66 NY2d 6, 8, 494 NYS2d 688 [1985]), an insurer must establish as a matter of law that there is no possible factual or legal basis upon which it may be obligated to indemnify its insured under any policy provision (***Allstate Ins. Co. v Zuk***, 78 NY2d 41, 45, 571 NYS2d 429 [1991]; *see* ***State Farm Fire & Cas. Co. v Joseph M.***, 106 AD3d 806, 964 NYS2d 621 [2d Dept 2013]; ***Physicians' Reciprocal Insurers v Giugliano***, 37 AD3d 442, 830 NYS2d 225 [2d Dept 2007]; ***George A. Fuller Co. v United States Fid. & Guar. Co.***, 200 AD3d 255, 613 NYS2d 152 [1st Dept 1994]). Distinct from, and more narrow than, the duty to defend, an insurer's duty to indemnify is determined by the actual basis for the insured's liability to a third-party (***Servidone Constr. Corp. v Security Ins. Co. of Hartford***, 64 NY2d 419, 424, 488 NYS2d 139 [1985]). Furthermore, in a dispute over insurance coverage, the insured or additional insured bears the initial burden of establishing coverage (*see* ***Dreyer v New York Cent. Mut. Fire Ins.***, 106 AD3d 685, 964 NYS2d 251 [2d Dept 2013]; ***L&D Serv. Sta., Inc. v Utica First Ins. Co.***, 103 AD3d 782, 962 NYS2d 187 [2d Dept 2013]; ***Bread & Butter, LLC v Certain Underwriters at Lloyd's, London***, 78 AD3d 1099, 913 NYS2d 246 [2d Dept 2010]), while the insurer challenging an indemnity claim bears the burden of proving that the loss does not fall within the policy (*see* ***Servidone Constr. Corp. v Security Ins. Co. of Hartford***, 64 NY2d 419, 445, 488 NYS2d 139; ***Stellar Mech. Servs. of N.Y., Inc. v Merchants Ins. of N.H.***, 74 AD3d 948, 903 NYS2d 471 [2d Dept 2010]; ***New York City Hous. Auth. v Commercial Union Ins. Co.***, 289 AD2d 311, 734 NYS2d 590 [2d Dept 2001]). Moreover, an additional insured enjoys the same protections under a subject insurance policy as the named insured (*see* ***Pecker Iron Works of N.Y., Inc. v Traveler's Ins. Co.***, 99 NY2d 391, 756 NYS2d 822 [2003]).

One seeking indemnification has "committed no wrong but, by virtue of some relationship with the tort-feasor or obligation imposed by law, [is] nevertheless held liable to the injured party" (***Glaser v Fortunoff of Westbury Corp.***, 71 NY2d 643, 646, 529 NYS2d 59 [1988]). The right to indemnification arises out a contract, express or implied, between the indemnitor and indemnitee, and can be sustained only if the indemnitor breached some duty owed to the indemnitee (*see* ***Raquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997]; ***Charles v William Hird & Co., Inc.***, 102 AD3d 907, 959 NYS2d 506 [2d Dept 2013]; ***Mauro v McCrindle***, 70 AD2d 77, 419 NYS2d 710 [2d Dept 1979], *affd* 52 NY2d 719, 436 NYS2d 273 [1980]). Thus, common-law indemnification, which has its roots in the principles of equity, permits one who has been compelled to pay for the wrong of another to recover the damages paid from the actual wrongdoer (*see* ***McCarthy v Turner Const., Inc.***, 17 NY3d 369, 929 NYS2d 556 [2011]; ***17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.***, 259 AD2d 75, 693 NYS2d 554 [1st Dept 1999]). To establish a claim for common-law indemnification, a party must show not only that it was not negligent, but also that the proposed indemnitor was negligent and that such negligence was a proximate cause of the plaintiff's accident, or that the proposed indemnitor had the authority to direct, supervise and control the work giving rise to the plaintiff's injury (*see* ***Wahab v Agris & Brenner, LLC***, 102 AD3d 672, 958 NYS2d 401 [2d Dept 2013]; ***Kielty v AJS Const. of L.I., Inc.***, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]; ***Benedetto v Carrera Realty Corp.***, 32 AD3d 874, 822 NYS2d 542 [2d Dept 2006]). In contrast, the right to contractual indemnification depends on the specific language in the contract, and a promise to indemnify should only be found if "it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (***Hooper Assoc. v AGS Computers***, 74 NY2d 487, 491-492, 549 NYS2d 365 [1989]; *see* ***Reyes v Post &***

Broadway, Inc., 97 AD3d 805, 949 NYS2d 141 [2d Dept 2012]; ***Alfaro v 65 W. 13th Acquisitions, LLC***, 74 AD3d 1255, 904 NYS2d205 [2d Dept 2010]; ***Canela v TLH 140 Perry St., LLC***, 47 AD3d 743, 849 NYS2d 658 [2d Dept 2008]).

Here, Woolworth has established a *prima facie* case of entitlement to summary judgment with regard to Seaford based upon the contract between Woolworth and Seaford for plumbing work dated September 19, 2013, and the separate agreement dated September 23, 2013, in which Seaford agreed to procure commercial general liability coverage with limits of $2,000,000.00, to name Woolworth as an additional insured, and to indemnify and hold Woolworth harmless for claims arising out of Seaford's work. Michael Butler testified that he is the managing partner of Woolworth, that Woolworth did not manage and control the construction work, that Woolworth did not supervise the work, that Woolworth was not negligent, and that the accident arose out of Seaford's work. In opposition to this branch of the motion, Seaford maintains that the motion is premature as examinations before trial of the parties have not yet been completed.

"[S]ummary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (***Williams v D & J School Bus***, 69 AD3d 617, 893 NYS2d 133 [2d Dept 2010]; ***Panasuk v Viola Park Realty***, 41 AD3d 804, 939 NYS2d 520 [2d Dept 2007]; ***Gasis v City of New York***, 35 AD3d 533, 828 NYS2d 407 [2d Dept. 2006]). This is especially true when the facts which would support third-party defendant's position lie within the exclusive knowledge of the third-party defendant. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered as a result of discovery is an insufficient basis for denying the motion (*see generally* ***Lauriello v Gallotta***, 59 AD3d 497, 873 NYS2d 690 [2d Dept 2009]; ***Kimyagarov v Nixon Taxi Corp***. 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007]). In reply to Seaford's opposition to its motion, Woolworth points out that George Luksch, one of two partners of Seaford, testified at his deposition that Seaford is comprised of Luksch and Michael Scott. He admits that Seaford performed excavation of the sidewalk where plaintiff alleged fell, that Seaford employees installed plywood over the sidewalk opening, and that Woolworth did not supervise the work. While Woolworth has failed to supply the deposition transcript of Luksch's testimony, third-party defendant has not raised any triable issue of fact regarding the parties contractual indemnification agreement. Accordingly, that branch of Woolworth's motion for an Order declaring that Seaford shall defend and indemnify Woolworth is granted.

That branch of Woolworth's motion seeking to be declared an "additional insured" under a policy issued by Netherlands to Seaford and a umbrella policy issued by Excelsior is denied with regard to Excelsior. Excelsior is not a party to this action and is a necessary party (***Bello v Employees Motor Corp.***, 240 AD2d 527, 659 NYS2d 64 [2d Dept 1997]). As to Netherlands, the Court is satisfied, from the record presented, that the accident arose from the "ongoing operations" of Seaford (***New York City Housing Auth. v Merchants Mut. Ins. Co.***, 44 AD3d 540, 844 NYS2d 223 [2d Dept 2007]). The indemnification agreement between Woolworth and Seaford, dated September 23, 2013, is signed or "executed' only by Seaford and not Woolworth. However, the standard form agreement between Woolworth and Seaford, dated September 19, 2013, is signed by both parties. Woolworth, therefore, has demonstrated that a written contract was executed prior to the bodily injury, and that it qualifies as an

additional insured under the policy issued by Netherlands. Accordingly, it is adjudged that Netherlands is obligated to defend and indemnify Woolworth.

Finally, Netherlands moves for an Order declaring that second-party defendant Wesco Insurance Company owes third-party plaintiff Woolworth a duty to defend. Netherlands also seeks a declaration that Wesco's obligation to defend Woolworth's is primary to Netherlands own duty defend Woolworth. Netherlands has failed to establish a *prima facie* case of entitlement to summary judgment against Wesco. Kenneth Alveari, an owner of Seaford, testified that Seaford, not Woolworth or Northridge, was responsible for digging the hole in the sidewalk in front of the building, placing the plywood over it, and placing safety cones and tape around it. Plaintiff testified that she caught her toe on the plywood, which caused her to fall. As such, it was the actions of Seaford, not Woolworth or Northridge, which plaintiff's alleged injury "arose from." Accordingly, Netherlands' motion is denied in its entirety.

Dated: June 13, 2018

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

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