

Mosqueda v Ariston Dev. Group
2018 NY Slip Op 31715(U)
March 26, 2018
Supreme Court, New York County
Docket Number: 159551/2013
Judge: Kelly A. O'Neill Levy
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**KELLY O'NEILL LEVY
JSC**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

-----X

HERIBERTO MOSQUEDA,

Plaintiff,

DECISION AND
ORDER

- against -

Index No. 159551/2013
Mot. Seq. 002 & 003

ARISTON DEVELOPMENT GROUP and KENNETH
COLE PRODUCTIONS, INC.,

Defendants.

-----X

KENNETH COLE PRODUCTIONS, INC.,

Third-Party Plaintiff,

- against -

Third-Party Index No.
595789/2017

NORTHEAST AGENCIES, INC. and GASTON GOMEZ,

Third-Party Defendants.

-----X

KELLY O'NEILL LEVY, J.:

Motion sequence numbers 002 and 003 in this personal injury Labor Law case are hereby consolidated for disposition.

Under motion sequence 002, third-party defendant Northeast Agencies, Inc. (hereinafter, Northeast) seeks to dismiss the third-party complaint alleging failure to procure insurance pursuant to CPLR § 3211(a)(7). Defendant/third-party plaintiff Kenneth Cole Productions, Inc. (hereinafter, Kenneth Cole) opposes. Under motion sequence 003, non-party insurance company Utica First Insurance Company (hereinafter, Utica First) moves, pursuant to CPLR §§ 2304 and 3103, to quash, limit, and/or for a protective order against a subpoena served by Kenneth Cole. Kenneth Cole opposes.

BACKGROUND

In the main action, Plaintiff Heriberto Mosqueda, an employee of Rago NY Corp. (hereinafter, Rago), alleges that he was injured as a result of a July 20, 2013 accident at a construction project at 601 West 50th Street in Manhattan, a premises owned by Kenneth Cole. Defendant Ariston Development Group (hereinafter, Ariston) hired Rago to provide certain work at the construction project and as part of its agreement was required to obtain insurance coverage naming Kenneth Cole as an additional insured. By decision and order dated July 12, 2016, this Court granted plaintiff's motion for summary judgment against Kenneth Cole based on Labor Law § 240(1).

In the third-party action, Kenneth Cole claims that a certificate of liability insurance issued by third-party defendants, insurance broker Northeast and insurance agent Gaston Gomez (hereinafter, Gomez), on September 23, 2013 stated that Kenneth Cole was named as an additional insured on Utica First Policy No. ART503053800, with effective dates August 16, 2012 to August 16, 2013 and policy limits of \$1,000,000.00 per occurrence and a general aggregate limit of \$2,000,000.00. Kenneth Cole claims that in response to a tender of its defense to Utica First, it was advised that it was not named as an additional insured under the policy, and that Utica First would not defend or indemnify Kenneth Cole with respect to the pending first-party action. Kenneth Cole alleges that it relied upon third-party defendants to provide the coverage stated to exist in the Certificate of Liability Insurance and that third-party defendants were negligent in their failure to procure the proper insurance. Northeast moves to dismiss the third-party action for failure to state a cause of action arguing, among other things, that Kenneth Cole does not have privity to sue third-party defendants. Kenneth Cole opposes.

Kenneth Cole, upon receiving Utica First's denial of coverage, served a subpoena on Utica First on or about October 4, 2017 to obtain its claims file, underwriting file, and policy (hereinafter, the subpoena). Utica First moves, pursuant to CPLR §§ 2304 and 3103, to quash, limit, and/or for a protective order against the subpoena served by Kenneth Cole. Utica First claims that it has no relationship with Kenneth Cole, and that this type of pre-suit discovery is not permitted and is improper. Kenneth Cole opposes.

DISCUSSION

The court first turns to Northeast's motion to dismiss the third-party action.

CPLR § 3211(a)(7) permits the court to dismiss a complaint that fails to state a cause of action. The complaint must be liberally construed and the plaintiff given the benefit of every favorable inference. *See Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion. *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002). If the court "determine[s] that the plaintiff [is] entitled to relief on any reasonable view of the facts stated, [its] inquiry is complete" and the complaint must be declared legally sufficient. *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 318 (1995). While factual allegations in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to the presumption of truth. *Summit Solomon & Feldesman v. Lacher*, 212 A.D.2d 487, 487 (1st Dep't 1995). The test is not whether the complaint states a cause of action but whether the pleader has, in fact, a cause of action. *Scarlett Letters, Inc. v. Compugraphic Corp.*, 61 A.D.2d 930, 930 (1st Dep't 1978).

Kenneth Cole claims that the third-party defendants were negligent in their failure to procure proper insurance coverage. In New York, an insurance agent or broker owes no duty to a property owner or contractor that was supposed to be named as an additional insured by a subcontractor, regardless of whether the broker acted recklessly. *See Greater N.Y. Mut. Ins. Co. v. White Knight Restoration*, 7 A.D.3d 292, 293 (1st Dep't 2004). A broker's duty is to its customer and not to additional insureds. *Federal Ins. Co. v. Spectrum Ins. Brokerage Servs.*, 304 A.D.2d 316, 317 (1st Dep't 2003). It is unreasonable as a matter of law to claim reliance on a certificate of insurance in the face of the disclaimer language that typically appears on such certificates. *See Benjamin Shapiro Realty Co. v. Kempter Nat'l Ins. Co.*, 303 A.D.2d 245, 246 (1st Dep't 2003).

Kenneth Cole argues that it should be given an opportunity to show a special relationship and privity between Northeast and Gomez through discovery. Kenneth Cole alleges that Gomez is an independent contractor, not an employee of Northeast, and that he has not filed a response to the present motion. Kenneth Cole argues that it is unclear who signed the certificate of insurance (Third Party Complaint Ex. "B"), but that it appears to be Gomez, and that it must conduct discovery to determine whether Gomez had in fact signed the certificate of insurance and if so, whether he had implied or actual authority to sign it. The discovery sought by Kenneth Cole and the nature of the relationship between Northeast and Gomez is unrelated to the purported relationship between Northeast and Kenneth Cole. Regardless of the nature of the relationship between Northeast and Gomez, it is undisputed that Kenneth Cole had no relationship with either of them. The question of who signed the certificate of insurance is not relevant, as reliance on such certificate is not justifiable as a matter of law, nor would a signature on a certificate of insurance by Gomez establish any basis for an implied contract with Kenneth

Cole, regardless of the relationship between Northeast and Gomez. Therefore, the court finds these arguments to be without merit.

Here, there are no allegations that third-party defendants had any direct relationship with Kenneth Cole and, as a purported additional insured, no duty was owed to it. Rago was responsible for procuring insurance coverage naming Kenneth Cole as an additional insured. Moreover, Kenneth Cole cannot claim reliance on the allegedly erroneous certificate of insurance since such reliance is misplaced. The certificate of insurance (Third Party Complaint Ex. "B") states that it confers no rights on the certificate holder, is for informational purposes only, and "does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder." Thus, there is no special relationship or privity between Kenneth Cole and third-party defendants, and third-party defendants owe no duty to Kenneth Cole relating to its insurance coverage. Therefore, the court dismisses the third-party complaint for failure to state a cause of action.

Utica First's Motion to Quash Subpoena

Utica First moves, pursuant to CPLR §§ 2304 and 3103, to quash, limit, and for a protective order against the subpoena served by Kenneth Cole. The motion to quash the subpoena is granted, to the extent that Utica First shall only be required to provide a copy of the Utica First policy identified under Item number 1 in the October 4, 2017 subpoena on or before April 26, 2018.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that Third-Party Defendant Northeast Agencies, Inc.'s motion to dismiss the third-party complaint, pursuant to CPLR § 3211(a)(7), alleging of negligent procurement of proper insurance against Third-Party Defendants Northeast Agencies, Inc. and Gaston Gomez (mot. seq. 002) is granted; and it is further

ORDERED that non-party Utica First Insurance Company's motion, pursuant to CPLR §§ 2304 and 3103, to quash the subpoena served by Defendant/Third-Party Plaintiff Kenneth Cole Productions, Inc. (mot. seq. 003) is granted in part as discussed above; and it is further

ORDERED that the remainder of the action shall continue.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

3/26/18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

**KELLY O'NEILL LEVY
JSC**

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: