

Temple Beth Sholom, Inc. v Commerce & Indus. Ins. Co.
2018 NY Slip Op 32158(U)
September 4, 2018
Supreme Court, New York County
Docket Number: 652187/2016
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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TEMPLE BETH SHOLOM, INC., TEMPLE BETH SHOLOM
FOUNDATION, INC., and PHILADELPHIA INDEMNITY
INSURANCE COMPANY

Plaintiffs,

- v -

COMMERCE & INDUSTRY INSURANCE COMPANY,

Defendant.

INDEX NO. 652187/2016

MOTION DATE 08/28/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for JUDGMENT - DECLARATORY

Upon the foregoing documents, it is

ORDERED that the motion of plaintiffs for summary judgment on the first through fifth causes of action of the complaint seeking a declaration that defendant is obliged to provide a defense to, and provide coverage for, the plaintiffs Temple Beth Sholom, Inc. and Temple Beth Sholom Foundation, Inc. (plaintiffs Temple) in the action of Duran vs. Temple Sholom, Inc. and Temple Beth Sholom Foundation, Inc., and T. G. Nickels & Associates, Inc., Index No. 018173/2010, Nassau County Supreme Court (the underlying action), and to reimburse plaintiffs for all attorneys' fees, costs, disbursements and other expenses incurred in the defense of plaintiffs in the underlying action is granted; and it is further

ORDERED that the cross motion of defendant for summary judgment is granted only as to the sixth cause of action of the complaint, and such cause of action is dismissed as duplicative; and it is further

ADJUDGED and DECLARED that defendant Commerce & Industry insurance Company is obligated to provide defense to, and provide coverage for, the plaintiffs Temple Beth Sholom, Inc. and Temple Beth Sholom Foundation, Inc. under policy number 007788204 issued by defendant in the underlying action pending in Nassau County supreme Court and to reimburse plaintiffs for all attorneys' fees, costs, disbursements and other expenses incurred in the defense of plaintiffs to date and continuing in the underlying action; and it is further

ADJUDGED that plaintiffs Temple Beth Shalom, Inc., Temple Beth Sholom Foundation, Inc. and Philadelphia Indemnity Insurance Company, having an address at One Bala Plaza, Suite 100, Bala Cynwyd, PA 19004, do recover from defendant Commerce & Industry Insurance Company, having an address at 175 Wall Street, 18th Floor, New York, New York 10038, costs and disbursements in the sum of \$ _____ as taxed by the Clerk, and plaintiffs shall have execution thereon.

DECISION

In the underlying action, construction worker Duran alleges that he suffered injuries, as an employee of Boyle Associates,

Inc. (Boyle), while performing asbestos removal services at premises owned by plaintiffs Temple on June 25, 2009. He seeks damages for personal injury against plaintiffs Temple and T.G. Nickel & Associates, their general contractor (general contractor) in the underlying action.

Plaintiffs argue that as defendant accepted plaintiffs' tender of their defense without reservation in the underlying action, defendant is obligated to continue to defend and provide coverage to plaintiffs. Plaintiffs cite O'Dowd v American Sur. Co. of NY, (3 NY2d 347, 355 [1957]), which states, in pertinent part:

"It is clear that when an insurer defends an action on behalf of an insured, in his stead, with knowledge of facts constituting a defense to the coverage of the policy, it is thereafter estopped from asserting that the policy does not cover the claim."

See also Albert J. Schiff Asso. v Flack, (51 NY2d 692, 699 [1980]):

"Distinguished from waiver, of course, is the intervention of principles of equitable estoppel, in an appropriate case, such as where an insurer, though in fact not obligated to provide coverage, without asserting policy defenses or reserving the privilege to do so, undertakes the defense of the case, in reliance on which the insured suffers the detriment of losing the right to control its own defense."

Defendant counters by relying upon Federated Department Stores, Inc. v Twin City Fire Ins. Co., 28 AD3d 32, at 36 (1st Dept. 2006), which holds:

“A delay in giving notice of reservation of rights will be excused where it is traceable to the insurer’s lack of actual or constructive knowledge of the available defenses, especially where, in addition to such lack of knowledge, the insurer is misled by misrepresentations into defending the suit. Accordingly, where the insurer does not have knowledge of the insured’s breach until after the insurer has commenced the defense of the action, there is no estoppel through delay where the insurer gives prompt notice upon obtaining such knowledge”.

Here, by letter dated June 12, 2012, defendant accepted plaintiffs’ tender and undertook the defense of plaintiffs in the underlying action based upon the terms of the policy issued pursuant to the subcontract between Boyle and the general contractor. Then, by letter dated May 6, 2013, defendant informed plaintiffs that by the deposition testimony of the witness for the general contractor, it learned that the work that Duran was performing at the time of his alleged injury was done directly under an oral agreement between Boyle Associates, Inc., Duran’s employer, and was additional or extra work, which was not the subject of any change order issued by the general contractor under its subcontract with Boyle. In that letter, defendant further stated that it was continuing the defense of the plaintiffs Temple subject to a reservation of rights, given that there was no agreement between its insured Boyle (Duran’s employer) and the


general contractor, and that thus there was no agreement requiring Boyle to either procure insurance for or to name plaintiffs Temple as additional insured for such additional work.

Federated involved a 20-month versus the 11-month predisclaimer defense at bar, and therefore by that standard, the May 6, 2013 notice provided by defendant at bar was prompt.

However, unlike in Federated, plaintiffs made no misrepresentation concerning the existence of a subcontract between defendant's insured, Duran's employer Boyle, and plaintiffs Temple's general contractor. Moreover, defendant had at least constructive notice of the contractual relationship between its insured and plaintiffs Temple, or its insured and the general contractor, when it undertook representation of plaintiffs Temple, since certainly its insured Boyle knew that it contracted directly with plaintiffs Temple at the time of its employee's accident.

In addition, that in the underlying action defendant failed to move for summary judgment in favor of the general contractor, but waited until the midst of the jury trial in the underlying action to move for a directed verdict in favor of the general contractor establishes that plaintiffs Temple relied to their

detriment upon their representation by defendant and lost control of their defense. Defendant's representation of the plaintiffs Temple was entirely in conflict with that of its defense of the general contractor, which was absolved from any liability in the underlying action upon the court's grant of defendant's motion for directed verdict in the general contractor's favor.

<u>9/4/2018</u> DATE		 DEBRA A. JAMES, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE