Del Guidice v 11 Madison Ave. Owner LLC
2018 NY Slip Op 32774(U)
October 29, 2018
Supreme Court, New York County
Docket Number: 159498/2016
Judge: William Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY **PART** IAS MOTION 23EFM

Justice

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NICOLA DEL GUIDICE, JANINE DEL GUIDICE,

Plaintiff,

- v -

11 MADISON AVENUE OWNER LLC,11 MADISON AVENUE OWNER 6 LLC, SL GREEN REALTY CORP., STRUCTURE TONE, INC.,

Defendant.

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11 MADISON AVENUE OWNER LLC, 11 MADISON AVENUE OWNER 6 LLC, SL GREEN REALTY CORP., and STRUCTURE TONE LLC f/k/a STRUCTURE TONE, INC.,

Third-Party Plaintiffs,

-against-

ADCO ELECTRICAL CORP.,

Third-Party Defendant.

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INDEX NO. 159498/2016

MOTION DATE 09/06/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 53, 56, 57, 58, 59

were read on this motion to/for DISMISS

Plaintiff Nicola Del Guidice, an employee of third party defendant ADCO Electrical Corp., (hereinafter "ADCO"), claims he was injured when he tripped over a drain cover in the basement of 11 Madison Avenue on April 22, 2016. Plaintiff commenced an action alleging negligence and Labor Law §§ 200, 240 and 241 violations against the owner 11 Madison Avenue Owner LLC, 11 Madison Owner 6 LLC, SL Green Realty Corp. (collectively "SL Green"), and the general contractor Structure Tone, LLC f/k/a Structure Tone, Inc. (hereinafter "STI").

Pursuant to contract, ADCO is obligated to defend and indemnify STI and SL

Green for injuries arising from ADCO's work. (NYSCEF Doc. Nos. 37 and 38). Additionally, ADCO was required to obtain a general liability insurance policy naming STI and SL Green as Additional Insureds, with limits of $5,000,000 per occurrence (without a self-insured retention or deductible exceeding $25,000) on an exclusive primary basis. (NYSCEF Doc. No. 38). ADCO procured a general liability insurance policy from Scottsdale Insurance Company, now Nationwide, for the policy period from August 30, 2015 to August 30, 2016, with policy limits of $2,000,000 per occurrence, $4,000,000 in the aggregate. (NYSCEF Doc. No. 39). In addition, ADCO purchased an excess general liability from Axis Surplus Insurance Company for the policy period from August 30, 2015 to August 30, 2016, with policy limits of $3,000,000 per occurrence and $6,000,000 in the aggregate. Based upon the contract and general liability policy, ADCO and its insurer Scottsdale Insurance Company, now Nationwide, has agreed to defend and indemnify STI and SL Green, as Additional Insureds under the insurance policy. (NYSCEF Doc. Nos. 40, 41 and 42).

On January 23, 2018, the owner, SL Green and the general contractor, STI, commenced a third-party action against ADCO seeking defense, indemnity, contribution and/or additional insured coverage in connection with plaintiff's claims for damages arising out of injuries he allegedly sustained on April 22, 2016. (NYSCEF Doc. No. 27). SL Green and STI contend that ADCO, has only agreed to indemnify up to the amount of the Nationwide primary policy, which is $2 million (and includes ADCO'S self-insured retention of $250,000, which, it is alleged, must still be bonded). Nationwide has not however, agreed to indemnify the third-party plaintiffs for any amount over $2 million and as such, SL Green and STI contend that the third-party complaint states a valid claim for relief because it is conceivable that there may be exposure to third-party plaintiffs in excess of the primary policy limit of $2 million.

ADCO now moves to dismiss the third-party complaint pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7), and on the basis of the anti-subrogation rule. SL Green and STI oppose the motion. For the reasons that follow, the motion to dismiss is denied.

STANDARD OF REVIEW/ANALYSIS

The public policy behind the anti-subrogation rule is to prevent an insurer from representing conflicting interests where it is called upon to defend or indemnify two insureds who are covered under the same policy for the same risk. *North Star Reins. Corp. v. Continental Ins. Co.*, 82 NY2d 281, 293, 624 N.E.2d 647, 604 N.Y.S.2d 510 (1993). The reason for the rule is that an insurer should not be in a position where, at the peril of one of its insureds, it can manipulate the litigation to minimize its liability or trigger the coverage of another policy. *National Union Fire Ins. Co. v. State Ins. Fund*, 222 AD2d 369, 371, 636 N.Y.S.2d 31 (1st Dept. 1995) (anti-subrogation rule does not apply where insurer does not have opportunity to manipulate or control litigation to detriment of its insured); *Kazmierczak v. Town of Clarence*, 292 AD2d 846, 738 N.Y.S.2d 472 (4th Dep't 2002) (anti-subrogation rule inapplicable where third-party plaintiff and third-party defendant not insured by same insurer for same risk).

It is well settled that an insurer may recover from a third-party for the defense and indemnification that the insurer provides to its insured's indemnitees, where the insurer does not also insure the third-party and where the third-party agreed to indemnify the insured for any loss arising out of the contract. (See *Fitch v Turner Constr. Co.*, 241 AD2d 166, 671 N.Y.S.2d 446 [1st Dept. 1998].) Such recovery does not violate the anti-subrogation rule. (*id.* at 171.); See also, *White v. Hotel D'Artistes*, 230 A.D.2d 657, 646 N.Y.S.2d 793 (1st Dept. 1996).

SL Green and STI concede that there is no right of subrogation against ADCO up to the amount for which it has obtained insurance and has agreed to indemnify the third-party plaintiffs;

however, third-party plaintiffs contend that the motion to dismiss should be denied because ADCO has not agreed to defend and indemnify SL Green and STI with respect to any settlement or judgment for an amount in excess of $2 million, which may be entered on a primary, non-contributory basis and for which ADCO can demonstrate that there is valid insurance.

The anti-subrogation rule applies "to the extent that any verdict in favor of the plaintiff does not exceed the limits" of the insurance policy. See *Yong Ju Kim v. Herbert Const. Co.*, 275 Ad2d 709, 713 N.Y.S.2d 190 (2d Dept. 2000); *Mitchell v. NRG Energy Inc.*, 142 AD3d 1366, 38 N.Y.S.3d 860 (4th Dept. 2016) (New York law does not bar insurance companies from seeking indemnification for settlements or judgments that exceed the limits of an insurance policy.).

Here, SL Green and STI have accepted ADCO's offer of defense and indemnification up to the limits of insurance provided by the Nationwide primary policy, i.e., $2 million, however, the record demonstrates that based on the allegations set forth in the Bill of Particulars, it is possible that any settlement or judgment in this matter may exceed the primary policy limits. (NYSCEF Doc. No. 35). Accordingly, the third-party complaint is permissible and states a cause of action for indemnity with respect to any settlement or judgment for an amount in excess of $2 million. See *Yong Ju Kim v. Herbert Const. Co.*, 275 Ad2d 709, 713 N.Y.S.2d 190 (2d Dept. 2000); *Mitchell v. NRG Energy Inc.*, 142 AD3d 1366, 38 N.Y.S.3d 860 (4th Dept. 2016).

In addition, contrary to ADCO's contention, the breach of contract claim should not be dismissed as SL Green and STI have demonstrated that the agreement required ADCO to procure a general liability insurance policy naming STI and SL Green as Additional Insureds, with limits of $5,000,000 per occurrence (without a self-insured retention or deductible exceeding $25,000) on an exclusive primary basis. (NYSCEF Doc. No. 38). Instead, ADCO procured a primary policy with limits of $2 million and an excess policy with policy limits of $3 million.

Accordingly, ADCO has not demonstrated that it complied with its contractual obligation to procure a general liability policy with limits of $5 million on an exclusive primary basis. On a motion to dismiss, the facts alleged in the complaint are accepted as true and the plaintiff is entitled to the benefit of every favorable inference. *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 634, 357 N.E.2d 970, 389 N.Y.S.2d 314 (1976); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC*, 19 AD3d 273, 275, 798 N.Y.S.2d 14 (1st Dept. 2005).

Finally, ADCO has not met its burden to dismiss the common-law claims alleging that plaintiff has not sustained a "grave injury". See, *Altonen v. Toyota Motor Credit Corp.*, 32 AD3d 342, 344, 820 N.Y.S.2d 263 (1st Dept. 2006). Discovery in this matter is still ongoing with respect to the extent and nature of plaintiff's injuries. ADCO's motion is denied without prejudice to its right to move for summary judgment on this issue, at the close of discovery. Accordingly, it is

ORDERED that the ADCO's motion to dismiss the third-party complaint is denied; and it is further,

ORDERED that the parties shall appear for a conference before the court on November 13, 2018 at 9:30 AM in Room 307 of the courthouse at 80 Centre Street, New York, New York.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

10/29/2018
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:		CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
		GRANTED	[X] DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE