

3300 Kossuth Partners, LLC v Hospitals Ins. Co.

2018 NY Slip Op 34078(U)

March 23, 2018

Supreme Court, Westchester County

Docket Number: Index No. 64407/17

Judge: David F. Everett

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This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for appeals as of right under CPLR 5513 (a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
3300 KOSSUTH PARTNERS, LLC,

Plaintiff,

-against-

HOSPITALS INSURANCE COMPANY,

Defendant.

-----X
EVERETT, J.

Index No. 64407/17
Motion Sequence No. 001, 002
Decision and Order

The following papers were read on the motion:

001 Notice of Motion by Order to Show Cause/Affidavit in Supp/Exhibit A/
Affidavit in Supp/Exhibits A-J (docs 20-36)

Affirmation in Opp and in Reply/Exhibits A-K (docs 47-58; 65-76)

002 Notice of Cross Motion/Affirmation in Opp to Notice of Motion and in Supp of
Cross Motion/Exhibits A-D (docs 38-44)

Affidavit in Opp to Cross Motion/Exhibits A-B (docs 62-64)

Under motion sequence number 001, plaintiff 3300 Kossuth Partners, LLC (Kossuth) moves, by order to show cause, for orders compelling defendant Hospital Insurance Company, Inc., s/h/a Hospital Insurance Company (HIC) to: (1) defend it in the underlying lawsuit titled *Gonzalez v 3300 Kossuth Partners, LLC and Montefiore Medical Center*, currently pending in Bronx County, under Bronx County Index No. 30117/16 (Bronx Action); (2) reimburse it for court costs, expenses and legal fees incurred by Kossuth as a result of defending against the Bronx Action; and (3) reimburse it for the court costs, expenses and legal fees incurred by it in connection with the filing of the instant motion. Under motion sequence number 002, HIC

moves for an order, pursuant to CPLR 3001 and 3212, granting summary judgment and declaring that HIC has no duty to defend or indemnify Kossuth in the Bronx Action. The motions, under motion sequence numbers 001 and 002, are consolidated for disposition. Upon the foregoing papers, the motion is granted to the extent set forth below, and the cross motion denied.

The following facts are taken from the pleadings, motion papers, affidavits, documentary evidence and the record, and are undisputed unless otherwise indicated.

Plaintiff commenced this declaratory judgment action by filing a summons and complaint in the Office of the Westchester County Clerk on September 20, 2017. Issue was joined by service of HIC's answer with affirmative defenses on or about October 19, 2017, after which the parties served their respective motions.

The underlying facts, as relevant to the motion, are that the plaintiff in the Bronx Action, Evelyn Gonzalez (Gonzalez), commenced that action, against Kossuth and Montefiore Medical Center (Montefiore) to recover damages for physical injuries she allegedly sustained when, on May 13, 2015, she was caused to trip and fall due to the defective condition of the sidewalk in front of premises located at 3300 Kossuth Avenue, Bronx, New York (Premises). At all relevant times, the Premises were owned by Kossuth and leased by Montefiore. As part of its answer to Gonzalez's complaint, Montefiore cross-claimed against Kossuth for contribution and/or indemnification according to their respective degrees of negligence as determined at trial. As part of Kossuth's answer to Gonzalez's complaint, Kossuth cross-claimed against Montefiore for common law contribution, indemnification, an apportionment of damages, and for breach of its contractual obligation to defend, indemnify and hold Kossuth harmless from and against the claims asserted by Gonzalez.

With regard to Montefiore's contractual obligations to Kossuth, by lease agreement dated December 21, 1989 (Lease Agreement) with rider (Rider), Montefiore leased the Premises from its prior owner/landlord, nonparty McLean-Webster Corporation. On April 22, 2015, the Lease Agreement, which had been extended on multiple occasions (September 30, 1999, September 29, 2001, September 29, 2004, September 29, 2006, and September 29, 2009), and assigned, at some prior time, to non party Wakefield Nereid Corporation, was assigned to Kossuth.

Pursuant to Lease Agreement ¶ SECOND, Montefiore agreed to:

“forever indemnify and save harmless the Landlord for and against any and all liability, penalties, damages, expenses and judgments arising from injury during said term to person or property of any nature, occasioned wholly or in part by any act or acts, omission or omissions of the Tenant, or of the employees, guests, agents, assigns or undertenants of the Tenant and also for any matter or thing growing out of the occupation of the demised premises or of the streets, sidewalks or vaults adjacent thereto.”

Pursuant to Rider ¶ 5, Montefiore, as tenant, was obligated, at its sole cost and expense, to make all non-structural repairs necessary to maintain the Premises in good condition. Rider

¶ 13 requires Montefiore, as tenant:

“to provide on or before the commencement date and to keep in force during the term hereof, the following insurance coverage: (1) for the benefit of Landlord and Tenant, a comprehensive policy of liability insurance protecting the Landlord and Tenant against any liability whatsoever occasioned by accident on or about the demised premises or any appurtenances thereto. . . . and the limits of liability thereunder shall not be less than the amount of TWO MILLION (\$2,000,000.00) Such insurance may be carried under a blanket policy or policies covering the demised premises and other locations of Tenant, if any”

After commencement of the Bronx Action, on or about March 9, 2016, by letter addressed to HIP and dated June 16, 2015, prior counsel for Kossuth formally tendered the

matter for defense and indemnification, as per the terms of the Lease Agreement and the terms of the general liability policy issued by HIP to Montefiore, that was in effect at the time of Gonzalez's alleged accident (Policy). The tender letter, which was sent to HIP by certified mail, was accompanied by copies of an insurance certificate naming Kossuth as an additional insured on the Policy, and of a letter that Kossuth received from Gonzalez's attorney on or about May 29, 2015, advising it that Gonzalez was claiming that she sustained personal injuries as a result of the condition of the sidewalk in front of the Premises. Kossuth asserts that it did not receive a written reply to its tender.

By letter dated April 21, 2016, current counsel of record for Kossuth advised counsel for Montefiore that, as per the Lease Agreement and Rider ¶ 13, Montefiore had obtained liability insurance, as per the insurance certificate, for Kossuth's benefit. The letter also requested that counsel for Montefiore obtain permission from the insurance carrier (HIP) to allow it (Montefiore's counsel) to interpose an answer on Kossuth's behalf no later than April 29, 2016. Counsel for Montefiore did not interpose an answer on Kossuth's behalf, either before or after April 29, 2016.

In its April 28, 2016, combined discovery demand in the Bronx Action, Kossuth sought a copy of the pertinent insurance policies (aff in opp and in reply, exhibit C, ¶ 7). By letter dated May 16, 2016, counsel for Montefiore objected to the demand (*id.* exhibit D).

Coverage with respect to the Bronx Action was confirmed by counsel for Montefiore. By letter dated January 13, 2017, counsel for Montefiore specifically advised counsel for Gonzalez that: "Montefiore Medical Center was insured during the policy period January 1, 2015 to January 1, 2016 through Hospital Insurance Company under Policy No. 15A-7000006-HP in the

amount of \$1.3 million/\$3.9 million.” Coverage by HIP for Montefiore in the Bronx Action was also admitted by HIP via its October 19, 2017 verified answer to Kossuth’s complaint in the instant declaratory judgment.

Kossuth’s further attempt in the Bronx Action to obtain a copy of the Policy from Montefiore, by notice for discovery and inspection dated October 16, 2017 (*id.* exhibit E), was ignored by Montefiore, via its counsel’s letter response dated November 6, 2017 (*id.* exhibit F).

Prior to serving the instant motion by order to show cause, counsel for Kossuth exchanged several emails with counsel for HIC, between October 25, 2017 and November 10, 2017, regarding Kossuth’s request for a copy of the Policy, and its request for an answer on the question of whether HIC is acknowledging that it has a duty to defend Kossuth in the Bronx Action. It is clear from the motion papers, and from counsel’s argument in open court on December 20, 2017, that HIC has taken the position that it has no duty to defend or to indemnify Kossuth in the Bronx Action.

In opposition to Kossuth’s motion and in support of its cross motion, HIP argues, at length, about the failure of Kossuth to provide written notification as required under Policy § VI, ¶ L, to HIP’s current designee “FOJP Service Corporation, 289 East 28th Street, New York, New York 10016,” or to forward to its designee FOJP a copy of the Bronx Action summons and complaint.

Here, there is no question that Montefiore was obligated under the Lease Agreement and Rider to provide Kossuth, as landlord, with a defense, and to indemnify and hold it harmless for injuries occurring to persons, by accident, in or about the Premises or its appurtenances during the lease term, to the extent it is free from negligence. There is also no question that the

Gonzalez event occurred during the term of the Lease Agreement and Rider. Turning to the question of whether Kossuth is an additional insured on the Policy issued to Montefiore: “[i]t is well settled that whether a third party is an additional insured under a policy is determined from the intention of the parties to the policy, as determined from the four corners of the policy itself” (*140 Broadway Prop. v Schindler E. Co.*, 73 AD3d 717, 718 [2nd Dept 2010] [internal quotation marks and citation omitted]).

The blanket additional insured endorsement in the HIP Policy extends coverage to:

“any entity . . . whose inclusion as an insured is required by any contract or agreement entered into with such entity . . . by the Named Insured, but only with respect to the vicarious liability of such entity . . . solely by reason of acts or omissions of the Named Insured in the performance of the contract or agreement that are covered under this Coverage Part B and not with respect to any other liability of such entity”

(Policy, Coverage Part B, § II [K] [9]).

Inasmuch as the Lease Agreement and Rider require Montefiore to defend and indemnify Kossuth under a comprehensive policy of liability insurance protecting the Kossuth, as landlord, and Montefiore, as tenant, against any liability whatsoever occasioned by accident on or about the Premises or any appurtenances thereto, and the Policy does in fact provide such coverage for any entity that it is contractually required to cover with respect to its vicarious liability, Kossuth is entitled to a defense and indemnification in the Bronx Action.

HIP’s assertion that Kossuth failed to comply with the notification provisions set forth in the Policy, by failing to provide written notification to FOJP, is unavailing. Kossuth provided written tender to HIP for a defense and indemnification by its letter dated June 16, 2015. The Court finds no merit to HIP’s position, given that the information regarding this notice condition

was set forth in the Policy, which, despite Kossuth's multiple requests, appears not to have been produced prior to its inclusion in HIP's motion papers.

Additionally, the Court notes HIP's acknowledgment, in paragraph nine of counsel's affirmation, that Kossuth had informed it, on or about June 16, 2015, of the Gonzalez event and tender, and the sworn affidavits of Teresa McAuliffe (McAuliffe), an employee of Kossuth, and of Rella Fogliano (Fogliano), a managing member of Kossuth. In her affidavit, McAuliffe attests to having received two phone calls on April 19, 2016, from HIP adjusters Rick Salsano and Sarah Toonda, during which discussions were held regarding the Gonzalez complaint and the possibility that HIP would provide representation for Kossuth in the Bronx Action. HIP does not disavow these phone calls. The fact that these discussions took place as early as April 2016, precludes the likelihood that HIP was prejudiced by the manner in which it was noticed by Kossuth. The Fogliano affidavit contains her sworn statement that Kossuth never received a response from HIP to its requests for a defense and indemnification in the Bronx Action. HIP does not dispute this either.

Without issuing a determination as to whether, or to what extent, either Kossuth or Montefiore was responsible for the condition of the sidewalk that allegedly caused Gonzalez's accident and injuries, the Court finds that HIC, which received notice of the Gonzalez event and lawsuit as early as June 16, 2015, failed to timely disclaim coverage, and that Kossuth is entitled to a defense and indemnification in the Bronx Action.

Finally, Kossuth is entitled to recover reasonable legal fees incurred in connection with its defense in the Bronx Action, but it is not entitled to "recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy" (*New York Univ. v*

Continental Ins. Co., 87 NY2d 308, 324 [1995] [internal citations omitted]; and see *Serio v Public Serv. Mut. Ins. Co.*, 7 AD3d 277, 279 [1st Dept 2004]).

Accordingly, it is

ORDERED that the branch of plaintiff 3300 Kossuth Partners, LLC's motion that seeks an order declaring that defendant Hospitals Insurance Company, Inc., s/h/a Hospital Insurance Company is obliged to provide defense and indemnification coverage for 3300 Kossuth Partners, LLC, in the action of *Gonzalez v 3300 Kossuth Partners, LLC and Montefiore Medical Center*, under Bronx County Index No. 30117/16, is granted; and it is further

ADJUDGED and DECLARED that Hospitals Insurance Company, Inc., s/h/a Hospital Insurance Company is obliged to provide defense and indemnification coverage for 3300 Kossuth Partners, LLC, a defendant in the action of *Gonzalez v 3300 Kossuth Partners, LLC and Montefiore Medical Center*, under Bronx County Index No. 30117/16; and it is further

ORDERED that the branch of plaintiff's motion that seeks reimbursement for the court costs, expenses and legal fees incurred by it as a result of defending against *Gonzalez v 3300 Kossuth Partners, LLC and Montefiore Medical Center*, under Bronx County Index No. 30117/16, is granted; and it is further

ORDERED that counsel shall appear in the Settlement Conference Part, courtroom 1600, Westchester County Courthouse, 111 Dr. Martin Luther King, Jr., Blvd., White Plains, New York, on Tuesday, April 24, 2018 at 9:15 a.m., to schedule a hearing to determine the reasonable attorneys' fees to which plaintiff is entitled to recover in connection with its defense in said action; and it is further

ORDERED that the branch of plaintiff's motion that seeks reimbursement for the court

costs, expenses and legal fees incurred by it in connection with the instant declaratory action is denied; and it is further

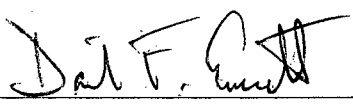
ORDERED that defendant's cross motion is denied; and it is further

ORDERED that all arguments raised in the motion and cross motion that have not been directly addressed in the above decision have been considered by the Court and are denied as lacking in merit.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
March 23, 2018

ENTER:



HON. DAVID F. EVERETT, A.J.S.C.

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