

**Alexander's Rego Shopping Ctr., Inc. v Safety Natl.
Cas. Corp.**

2018 NY Slip Op 34536(U)

October 26, 2018

Supreme Court, Queens County

Docket Number: Index No. 704045/17

Judge: Diccia T. Pineda-Kirwan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable DICCIA T. PINEDA-KIRWAN
Justice

IA PART 36

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ALEXANDER'S REGO SHOPPING CENTER,
INC., and VORNADO REALTY TRUST,

Index No.: 704045/17
Motion Date: 7/5/18
Motion Cal. #: 1
Seq. No.: 1

Plaintiff(s),

-against-

SAFETY NATIONAL CASUALTY CORPORATION,
and BED BATH & BEYOND INC.,

Defendant(s).
-----X

FILED
NOV 16 2018
COUNTY CLERK
QUEENS COUNTY

The following numbered papers read on this motion by plaintiffs, Alexander's Rego Shopping Center, Inc. ("ARSCI") and Vornado Realty Trust ("Vornado") (hereinafter together the landlord plaintiffs); and the cross motion by defendants, Safety National Casualty Corporation ("Safety National") and Bed Bath & Beyond Inc. ("BB&B") (hereinafter together the tenant defendants), all for summary judgment pursuant to CPLR 3212 and declaratory judgment pursuant to CPLR 3001.

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits.....	EF 3 - 20
Notice of Cross-Motion-Affidavit-Exhibits.....	EF 22 - 30
Replying.....	EF 31 - 37

Upon the foregoing cited papers and after conference, it is ordered that the motion and cross motion are determined as follows:

The landlord plaintiffs filed the instant declaratory judgment and breach of contract action seeking a declaration of insurance coverage (including defense and indemnification) in connection with an underlying personal injury action entitled *Sanchez v The City of New York, et al.*, bearing Queens County Index Number 700876/2013. The accident at issue occurred at Rego Park Shopping Center ("Shopping Center") and involved the alleged malfunction of a freight elevator located in an area designated as the Third Floor Service Area. The underlying plaintiff alleged that while he was loading garbage onto the freight elevator, the elevator's pull-down gates unexpectedly began to close and struck him in the head.

On or about December 12, 1996, BB&B entered into an agreement with ARSCI's predecessor in interest, Alexander's of Rego Park, Inc. ("landlord") c/o Vornado to lease a portion of the Shopping Center. Pursuant to the terms of the lease, BB&B obtained a commercial general liability insurance policy with Safety National, naming the landlord as an additional insured. The landlord also purchased commercial general liability insurance with RLI Insurance Company ("RLI").

After the underlying accident, Safety National acknowledged receipt of a claim from RLI on or about September 14, 2016, and disclaimed coverage on the basis that the accident "occurred in the service/common area and [the] insured is not responsible for maintenance or service of this area" and "Alexander's Rego Shopping Center Inc./Vornado Realty is the sole party responsible for this area."

In the instant motion, the landlord plaintiffs move for summary judgment on their claim seeking insurance coverage with respect to the underlying action, or in the alternative, their breach of contract claim. The tenant defendants cross-move for summary judgment, contending that Safety National does not owe any coverage to plaintiffs for the underlying action because the underlying accident did not arise out of the demised premises and the lease did not require insurance in such instance.

“An action for a declaratory judgment as to the rights of the insured vis-à-vis his or her insurance carrier is the appropriate means of resolving a coverage dispute.” (*McDonald v Shore*, 100 AD3d 602, 603 [2d Dept 2012]; see *Iacobellis v A-1 Tool Rental, Inc.*, 65 AD3d 1015 [2d Dept 2009].) When analyzing a dispute over insurance coverage, the court should first look to the language of the policy. (See *Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162 [2005]; *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221 [2002].) As with the construction of all contracts, “unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court.” (*Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177 [2008], quoting *White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007].) In the context of an insurance coverage dispute, “[g]enerally, it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage.” (*Consolidated Edison Co. of NY, Inc.*, 98 NY2d at 218; see *York Restoration Corp. v Solty's Constr., Inc.*, 79 AD3d 861, 862–863 [2d Dept 2010].)

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) “The court’s function on a motion for summary judgment is ‘to determine whether material factual issues exist, not to resolve such issues.’” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010]; see *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015].) “To grant summary judgment it must clearly appear that no material and triable issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is ‘arguable.’” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal citations omitted]; see *Stukas v Streiter*, 83 AD3d 18 [2011].) Summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.” (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2015] [internal citations omitted].)

In support of their motion, the landlord plaintiffs rely on Section 9 (d) (2) of the lease, which states:

“[BB&B] hereby indemnifies and agrees to save Landlord harmless from and against any and all Claims, which either (i) arise from or are in connection with the possession, use, occupation, management, repair, maintenance or control of the Premises, or any portion thereof, by Tenant or Tenant’s agents, contractors or employees, ... or (iv) result in injury to person or property or loss of life sustained in or about the Premises, except, in connection with the events described in this

subsection (iv), if caused by the negligence, acts or omissions of Landlord or Landlord's agents, contractors or employees. Tenant shall defend any actions, suits and proceedings which may be brought against Landlord with respect to the foregoing or in which Landlord may be impleaded. Tenant shall pay, satisfy and discharge any judgments, orders and decrees which may be recovered against Landlord in connection with the foregoing."

The landlord plaintiffs contend that coverage is owed because the underlying accident happened in an area that BB&B was licensed to use under the lease and it occurred "in the course of an activity necessarily incidental to the operation of the space leased by the employer."

However, Section 9 (d) (3) of the lease states:

"Landlord hereby indemnifies and agrees to save Tenant harmless from and against any and all Claims, which either (i) arise from or are in connection with the possession, use, occupation, management, repair, maintenance or control of the Shopping Center, or any portion thereof, by Landlord or Landlord's agents, contractors or employees, ... or (iv) result in an injury to person on property or loss of life sustained in the Common Areas, except, in connection with the events described in this subsection (iv), if caused by the negligence, acts or omissions of [BB&B] or [BB&B's] agents, contractors or employees."

Section 1 (n) of the lease defines "Shopping Center" as the property at the northwest corner of 62nd Road and Queens Boulevard, Queens and contains approximately three hundred sixty thousand square feet of floor area. "Common Areas" is defined in Section 1 (b) to include the Third Floor Service Area.

The landlord plaintiffs failed to establish coverage under the policy. (*See Fliegman v Traveler's Property Cas. Ins. Co.*, 15 AD3d 536 [2d Dept 2005].) Although Safety National, in its September 14, 2016 letter, acknowledged that the landlord plaintiffs were additional insured under the policy, the landlord plaintiffs failed to demonstrate that the location where the accident occurred was covered. Furthermore, Sections 16 (a) and 58 (F) of the lease state, respectively, that the "Landlord shall procure and maintain in full force and effect ... commercial general liability insurance with regard to the Common Areas" and the "Landlord shall (i) maintain, clean, repair and, as required, replace all portions of the Third Floor Service Area."

While any ambiguities in construing an insurance policy must be resolved in favor of the insured and against the insurer (*Yeshiva Viznitz v Church Mut. Ins. Co.*, 132 AD3d 853 [2d Dept 2015]), the court does not find the terms of the lease concerning the Third Floor Service Area to be ambiguous. Therefore, the landlord plaintiffs failed to establish coverage and Safety National is entitled to a declaration that it is not obligated to defend and indemnify the landlord plaintiffs in connection with the underlying personal injury claims.

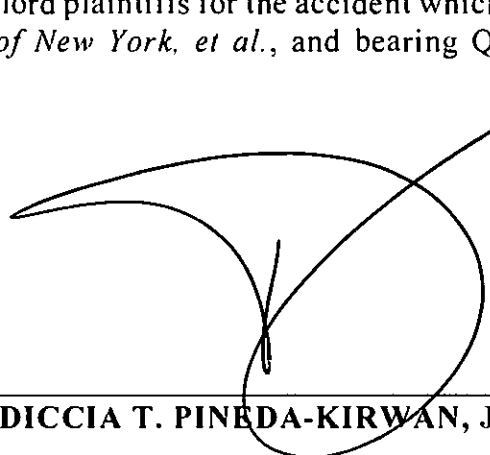
In light of the foregoing determination, the remaining branches of the landlord plaintiffs' motion against Safety National need not be addressed.

The court will now turn to the landlord plaintiffs' claim against BB&B for failure to procure insurance. "A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with." (*Tingling v C.I.N.H.R., Inc.*, 120 AD3d 570 [2d Dept 2014], quoting *DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011].) Here, the lease did not require BB&B to purchase insurance for the Third Floor Service Area. According to Section 15 (a) of the lease, BB&B was required to procure and maintain commercial general liability insurance with regard to the Premises, defined in Section 1 (j) as "the area cross-hatched on Exhibit B, containing approximately forty-five thousand (45,000) square feet of Floor Area and approximately one thousand five hundred (1,500) square feet of non-selling space on the mezzanine level for non-selling office purposes." On the other hand, Section 16 (a) of the lease directs the landlord to procure and maintain commercial general liability insurance for the Common Areas, which include the Third Floor Service Area. Therefore, the landlord plaintiffs failed to demonstrate that they are entitled to summary judgment in this claim.

Accordingly, the landlord plaintiffs' motion seeking summary judgment is denied in its entirety. The tenant defendants' cross motion seeking the same relief is granted and the complaint is dismissed.

Therefore, it is declared that Safety National does not owe an obligation to provide a defense or liability coverage to the landlord plaintiffs for the accident which gave rise to the action entitled *Sanchez v The City of New York, et al.*, and bearing Queens County Index Number 700876/2013.

Date: October 26, 2018



DICCIA T. PINEDA-KIRWAN, J.S.C.

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