

115 Kingston Ave. LLC v Mt. Hawley Ins. Co.

2019 NY Slip Op 30052(U)

January 3, 2019

Supreme Court, New York County

Docket Number: 654456/2016

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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115 KINGSTON AVENUE LLC, and
113 KINGSTON LLC,

Plaintiffs,

Index No.: 654456/2016

-against-

Mot. Seq. Nos. 002 and 004

MT. HAWLEY INSURANCE COMPANY,
UNITED SPECIALTY INSURANCE COMPANY,
NORTHFIELD INSURANCE COMPANY,
BLACKSTONE CONTRACTORS LLC,
HKS CONSTRUCTION CORP.,
KINGS COUNTY DEMOLITION, INC.,

Defendants.

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MELISSA A. CRANE, J.S.C.

This dispute requires the court to interpret policy language concerning coverage for an additional insured. Defendant Mt. Hawley Insurance Company (“Mt. Hawley”) claims additional insured coverage on behalf of its insured, Blackstone Contractors LLC under a “Blanket Additional Insured Endorsement” in a policy that United Specialty Insurance Company (“USIC”) issued to HKS Construction Corp (“HKS”). Mt. Hawley contends that USIC must defend Blackstone on a primary, non-contributory basis in an underlying personal injury action. Meanwhile, plaintiff claims additional insured coverage under the same policy.

At oral argument, on August 29, 2018, USIC withdrew its objection to the lack of authentication of the policy and the court denied the request to vacate the note of issue. Hence the only issue for the court is the coverage question. Accordingly, the court consolidates motions 2 and 4 for disposition.

The personal injury action underlying this coverage dispute arises out of a construction project. Plaintiffs 115 Kingston Avenue LLC 115 Kingston Avenue, LLC, and 113 Kingston Avenue LLC (collectively, “plaintiff” or “Kingston”) was the owner. Blackstone was the

general contractor for the project. Blackstone hired HKS to erect scaffolding at the premises. It is undisputed that the underlying action contains an allegation that the scaffolding was defective. The contract between Blackstone and HKS contains an indemnification provision in favor of Blackstone. In addition, HKS was to name Blackstone and plaintiff as additional insureds:

The Contractor [Blackstone], the owner and their agents are to be named as an additional insured on a primary and non-contributory basis to the Subcontractor's Comprehensive General Liability using appropriate ISO forms that include Premises Operations Liability, Contractual Liability, Advertising and Personal Injury Liability and Products/Completed Operations Liability."

Accordingly, HKS procured a commercial general liability policy containing the following "Blanket Additional Insured" endorsement:

It is agreed that this Policy shall include as additional insureds any person or organization *to* whom the Named Insured [HKS] has agreed by written contract to provide coverage but only with respect to operations performed by or on behalf of the Named Insured and only with respect to occurrences subsequent to the making of such written contract.

USIC's main argument is that there is no coverage for plaintiff, because there was no privity of contract between HKS and plaintiff.

Coverage for Blackstone

USIC does not, because it cannot, contend there is no privity of contract between its insured, HKS, and the entity that hired HKS, Blackstone. Instead, USIC argued in its papers that the contract appended to Blackstone's papers was not authentic. However, at oral argument, USIC withdrew that objection given authentication, albeit late, from Blackstone (see Transcript of oral argument dated 8/29/2018 and received into NYSEF on 9/28/2018 "Tr." at pg. 6 line 6). Accordingly, as there is no dispute that the USIC policy includes defense costs, USIC owes a duty to provide defense costs to Blackstone.

Comparing the “other insurance” clause in the Mt. Hawley policy to that in the USIC policy, it is also clear that USIC must provide defense costs to Blackstone on a primary basis without contribution from Mt. Hawley. USIC’s policy’s “other insurance” provision provides: “This insurance is primary except when Paragraph b. below applies. (USIC policy IV.4.a) “Paragraph b. then provides: “This insurance is excess over . . . (b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations. . . for which you have been added as an additional insured by attachment of an endorsement” (IV.4.b)

The “other insurance” clause in the Mt. Hawley policy states:

This insurance is excess over any other insurance whether primary, excess, contingent or on any other basis that is available to you as an additional insured or contractual indemnitee under a policy issued to a subcontractor.

Because Blackstone is a named insured under its policy with Mt Hawley, rather than an additional insured, paragraph b of the USIC policy does not apply. Meanwhile, Mt Hawley’s policy’s language makes its coverage excess: “this insurance is excess.” Accordingly, as between USIC and Mt. Hawley, it is USIC that has the obligation to provide defense costs to Blackstone, on a primary, noncontributory basis.

Coverage for Kingston

Citing *Gilbane Building Co., v St. Paul Fire and Marine*, 31 NY3d 131 (2018), USIC contends that its additional insured endorsement requires there to be privity of contract between the named insured and the additional insured. Because plaintiff/property owner Kingston was not in privity of contract with the subcontractor, HKS, USIC contends plaintiff cannot qualify as an additional insured.

In *Gilbane*, the additional insured endorsement differed from the additional insured endorsement at issue here with respect to one tiny word-- “with.” The additional insured

endorsement in *Gilbane* states: “Who is an insured is amended to include as an insured any person or organization with whom you have agreed to add as an additional insured. . .” The Court of Appeals ruled that the “with whom” language in the endorsement meant that “the written contract must be ‘with’ the additional insured” and hence, privity of contract was required (*id.* at 135-136).

By comparison, the additional insured endorsement here does not include the word “with.” Instead, it states: “it is agreed that this Policy shall include as additional insureds any person or organization *to* whom the Named Insured [HKS] has agreed by written contract to provide coverage” (emphasis supplied). By utilizing the word “to whom” and “by written contract,” but not using the word “with,” the policy reflects the intent to provide coverage so long as HKS has agreed to provide that coverage in any written contract, not necessarily one where HKS has directly agreed with the additional insured to so provide. Indeed, *Gilbane*’s reasoning supports this result:

Here, the endorsement would have the meaning *Gilbane* JV desires if the word “with” had been omitted. Omitting “with” the phrase would read: “any person or organization whom you have agreed by written contract to add”

(*id.* at 135).

Accordingly, it is

ORDERED THAT that part of plaintiff Kingston’s motion (seq. no 2) for partial summary judgment against United Specialty Insurance Company is granted, and it is further

ADJUDGED, DECREED AND DECLARED that Kingston is an additional insured under United Specialty Insurance Company’s policy, and it is further

ORDERED THAT that part of Kingston’s motion for breach of contract against HKS is denied as moot.

ORDERED THAT Mt Hawley's motion for partial summary judgment against United Specialty Insurance Company is granted, and it is further

ADJUDGED, DECREED AND DECLARED that United Specialty Insurance Company is obligated to defend Blackstone in the underlying action on a primary basis without contribution from Mt. Hawley;

The parties are directed to appear for an inquest on the issue of defenses costs on February 14, 2019 at 10:00 a.m.

Dated January 3, 2019
New York, New York



J.S.C.

HON. MELISSA A. CRANE
J.S.C.