

**Zurich Am. Ins. Co. v Blackman Plumbing Supply Co., Inc.**

2019 NY Slip Op 30945(U)

April 1, 2019

Supreme Court, New York County

Docket Number: 650059/2018

Judge: Tanya R. Kennedy

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT HON. TANYA R. KENNEDY**

**PART 63**

*Justice*

-----X

ZURICH AMERICAN INSURANCE COMPANY,

**INDEX NO. 650059/2018**

Plaintiff,

**MOTION SEQ.  
NO.**

**001**

- v -

BLACKMAN PLUMBING SUPPLY COMPANY,  
INC.,

**DECISION**

Defendant.

-----X

The decision on Defendant’s motion for an order to dismiss the complaint pursuant to CPLR 3211(a)(1),(7) (10), 1001 and 1003, is decided as follows:

**FACTUAL AND PROCEDURAL BACKGROUND**

Blackman Plumbing Supply Company, Inc., (“Defendant”) distributes plumbing equipment and heating and cooling systems (Complaint, ¶3). Since 1996, more than 200 personal injury actions have been commenced against Defendant, alleging that Defendant marketed, distributed, and/or sold products that contain asbestos (“Asbestos Actions”) (*id.*, ¶7).

Cosmopolitan Mutual Insurance Company (“CMIC”) issued commercial general liability policies to Defendant from the period of 1958 to 1981 (*id.*, ¶9). Zurich American Insurance Company (“Plaintiff”) issued commercial general liability policies to Defendant from October 17, 1981 to October 17, 1984 (*id.*, ¶10). Amerisure Companies (“AC”) issued commercial liability policies to Defendant for the period of 1984 to 1987 (*id.*, ¶12). Lastly, Kemper Insurance Company (“KIC”) issued general liability policies to Defendant for a period of 1987 to 1992 (*id.*, ¶13).

Defendant tendered the Asbestos Actions to Plaintiff, CMIC, AC, and KIC, seeking defense and indemnity coverage, which Plaintiff, AC, and KIC provided (*id.*, ¶¶14-15). However, CMIC did not provide coverage because it entered into liquidation in 1980 (*id.*, ¶¶16-17). Defendant filed a notice of claim in the liquidation proceeding to compel the Liquidator to provide defense and indemnity coverage allocable to the CMIC policies (*id.*, ¶16).

On May 4, 2016, Defendant entered into a \$225,000 settlement agreement and release (“Settlement”) with the Liquidator, the acting Superintendent of Financial Services of the State of New York, and the Administrator of the New York Property/Casual Insurance Security Fund (*id.*, ¶25). KIC entered into liquidation in 2012 and in 2013 ceased participation in the defense or settlement of the Asbestos Actions (*id.*, ¶¶33-34).

After the settlement, Plaintiff requested that Defendant (a) reimburse Plaintiff for the portion of past defense costs and settlements and/or judgments, which Plaintiff paid, that were allocable to the CMIC policy periods and (b) contribute towards CMIC’s allocable share of future settlements or judgments (*id.*, ¶28). Defendant failed to comply with such request and Plaintiff then commenced this action seeking a declaratory judgment to determine: (a) the appropriate allocation of covered defense and indemnity costs and expenses in connection with the Asbestos Actions and (b) reimbursement of any overpayment Plaintiff tendered on Defendant’s behalf in connection with the Asbestos Actions (*id.*, ¶44).

Defendant argues that Plaintiff’s complaint seeking declaratory judgment is hypothetical in nature because it requests the court’s determination of both past and future allocation and reimbursement (Defendant’s Memorandum of Law in Support of Motion, p. 7). Defendant also argues that the complaint should be dismissed because it fails to name necessary parties (*id.*, p. 8). As such, Defendant moves to (a) dismiss the complaint based upon documentary evidence and the

failure to state a cause of action and (b) dismiss the first cause of action for a declaratory judgment for failure to state a valid claim and for failing to join necessary parties.

Plaintiff argues in opposition that Defendant is responsible for the share of defense fees and costs incurred in connection with the Asbestos Actions allocable to CMIC under the terms of the Settlement and seeks a declaration regarding Plaintiff's entitlement to reimbursement for overpayments which exceeded its allocable share (Complaint, ¶44). Plaintiff further argues that Defendant has failed to contribute to the defense or settlement of the Asbestos Actions, as well as to reimburse Plaintiff for payments allocable to KIC and CMIC (*id.*, ¶¶41).

Plaintiff also seeks equitable contribution and argues that Defendant assumed CMIC's obligation to pay defense costs and expenses allocated to the CMIC policies when it accepted the \$225,000 settlement payment from CMIC's Liquidator (*id.*, ¶¶51, 57). Further, Plaintiff argues that Defendant is responsible for the share of any settlement or judgment incurred in connection with the Asbestos Actions allocable to an insolvent insurer, such as CMIC and KIC (*id.*, ¶37).

Further, Plaintiff seeks restitution of any overpayment of defense costs and expenses which exceed Plaintiff's allocable share it incurred on Defendant's behalf in the Asbestos Actions (*id.*, ¶44). Plaintiff contends that (a) the parties have a direct contractual relationship arising out of the general liability policies; (b) Plaintiff funded the defense and settlements of the Asbestos Actions allocable to the CMIC policies in an amount greater than the settlement payment Defendant received from the Liquidators; (c) Plaintiff paid settlements and/or judgments of the Asbestos Actions allocable to the KIC policies; (d) Defendant incurred a benefit and has been unjustly enriched to Plaintiff's detriment; and (e) Plaintiff is entitled to a ruling that it would be against equity and good conscience to permit Defendant to retain the benefits it obtained (*id.*, ¶¶59, 61, 62, 63, 64).

## DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(1), the movant is required to establish that the documentary evidence conclusively refutes the party's claim (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]).

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211(a)(7), the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference" (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016] citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). However, where the documentary evidence submitted flatly contradicts the plaintiff's factual claims, the entitlement to the presumption of truth and favorable inferences are both rebutted (*see Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 [1st Dept 2001], *affd as mod Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002); *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

As an initial matter, defendant fails to present documentary evidence which utterly refutes material allegations in the complaint and establishes a defense as a matter of law pursuant to CPLR 3211(a)(1). Therefore, the branch of the motion to dismiss pursuant to CPLR 3211(a)(1) is denied.

It is well established in declaratory judgment actions, that on a motion to dismiss for failure to state a cause of action, "the only question is whether a proper case is presented for invoking jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him" (*see Fillman v. Axel*, 63 AD2d 876, 876 [1st Dept 1978] [internal quotation marks and citations omitted]). However, this does not prevent the courts from reaching the merits of a declaratory judgment on a motion to dismiss (*id.*). "If no issue of fact is raised by the pleadings, or if the facts are conceded, a proper case is presented for judgment on the merits

on defendant's motion to dismiss the complaint" (*id.* [internal quotation marks and citations omitted]).

In this action, there are no issues of fact preventing the court from reaching the merits of Plaintiff's declaratory judgment action. Although the pleading is to be given a liberal construction, allegations consisting of bare legal conclusions are not afforded such consideration (*see Simkin v Blank*, 19 NY3d 46, 52 [2012]).

Plaintiff seeks a declaration that it is entitled to reimbursement for overpayments which exceed its allocable share because Defendant failed to apply the \$225,000 settlement payment from CMIC to reimburse Plaintiff. However, while referencing the Settlement, Plaintiff failed to present any documentary evidence demonstrating its entitlement to those funds.

Plaintiff contends that (a) Defendant failed to contribute to the defense or settlement of the Asbestos Actions, and (b) Plaintiff has incurred, and will continue to incur substantial monetary damages. As such, Plaintiff maintains that it is entitled to a declaratory judgment regarding the future allocation of defense costs and expenses for the Asbestos Actions.

However, "a request for a declaratory judgment is premature if the future event is beyond the control of the parties and may never occur" (*New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531 [1977]). Plaintiff contends that Defendant will deny its obligation to pay future costs based upon Defendant's denial of past costs (Plaintiff's Memorandum of Law in Opposition, p. 7). This contention presents a hypothetical scenario that Defendant, in the future, will refuse to contribute to the defense and indemnification claims. A court's determination on a future event "would be merely advisory since it can have no immediate effect and may never resolve anything" (*New York Pub. Interest Research Group v Carey*, *supra* at 531). Therefore, Plaintiff's complaint

fails to adequately state a cause of action, pursuant to CPLR 3211(a)(7) and the Court need not address the remaining branches of defendant's motion.

Therefore, considering the foregoing, it is

ORDERED that the defendant's motion is granted to the extent of dismissing the complaint, pursuant to CPLR 3211(a)(7).

This constitutes the Decision and Order of the Court.

April 1, 2019  
DATE

Hon. Tanya R. Kennedy  
TANYA R. KENNEDY, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

APPLICATION:

CHECK IF APPROPRIATE:

**HON. TANYA R. KENNEDY**

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

- OTHER
- REFERENCE