

Union Mut. Fire Ins. Co. v Patti
2019 NY Slip Op 31841(U)
June 25, 2019
Supreme Court, New York County
Docket Number: 651009/2018
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM
Justice

-----X INDEX NO. 651009/2018
UNION MUTUAL FIRE INSURANCE COMPANY, 06/20/2018,
Plaintiff, MOTION DATE 06/22/2018
- v - MOTION SEQ. NO. 001 002

RAJVINDER PATTI, AMERICAN'S REAL HOME IMPROVEMENT, INC., UNITED SPECIALTY INSURANCE COMPANY, LUIS PATINO-GALINDO, **DECISION, ORDER AND JUDGMENT**
Defendants.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 50, 51, 52, 53, 55

were read on this motion to DISMISS / SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 29, 47, 49, 54

were read on this motion to DISMISS

Upon the foregoing papers, defendants United Specialty Insurance Company and American's Real Home Improvement, Inc.'s motions to dismiss are granted and plaintiffs' cross-motion for summary judgment against defendant Rajvinder Patti is granted.

Background

Defendant Rajvinder Kaur Patti ("Patti") owned the premises located at 57-39 Van Doren Street, Corona, New York (the "Premises"). On October 17, 2015, defendant Luis H. Patino-Galindo alleged that he was struck by a door that fell from a balcony at the Premises while American's Real Home Improvement, Inc. ("American") was performing construction on the premises (the "Underlying Incident"). On October 20, 2015, American contracted to perform Construction work for Patti on the Premises, despite having already commenced work. On January 31, 2018, Patino-Galindo commenced an action in New York Supreme Court, Queens County, under Index No. 701577/2018 (the "Underlying Action").

In the Underlying Action, Patino-Galindo alleges that American and Patti were negligent in performing construction work at the Premises, causing him to be injured. Union Mutual Fire Insurance Company ("Union Mutual"), the plaintiff in this action, had issued a Commercial General Liability Policy to Patti (the "Union Mutual Policy"). After receiving notice of the

Underlying Action, Union Mutual disclaimed coverage for Patti based upon an exclusionary endorsement. Union Mutual continues to defend Patti in the Underlying Action pending resolution of the coverage issues.

The Complaint

In this action, Union Mutual sues for a judgment against Patti declaring that Patti is not covered under the Union Mutual Policy for the claims made by Patino-Galindo in the Underlying Action, and that Union Mutual has no obligation to defend or indemnify Patti and may withdraw from defending Patti in the Underlying Action. Union Mutual also seeks a judgment against United Specialty Insurance Company ("USIC"), American's insurer, declaring that USIC is required to defend and indemnify Patti as an additional insured under USIC's policy with American ("USIC policy") in the Underlying Action. Patti has cross-claimed against USIC for a judgment declaring that USIC is obligated to defend, and indemnify Patti. Patti also has cross-claimed against American for breach of contract by failing to name Patti as an additional insured under the USIC policy.

USIC and American now move, pursuant to CPLR 3211(a)(1), (3), and (7), to dismiss Union Mutual's causes of action against them based on documentary evidence, lack of standing, and failure to state a cause of action. American also moves, pursuant to CPLR 3211(1), (3), and (7), to dismiss Patti's cross-claim against American based on documentary evidence, lack of standing, and failure to state a cause of action.

In opposition, Union Mutual claims that the documentary evidence submitted raises factual disputes that cannot be decided on a motion to dismiss. Union Mutual also cross-moves, pursuant to CPLR 3212, for summary judgment against Patti.

The Union Mutual Policy

Patti's Union Mutual Policy contains the following Independent Contractors or Subcontractors coverage endorsement:

This policy shall only afford independent or subcontractor's coverage when all of the following conditions have been met:

- 1) With respect to work performed on your behalf by independent contractors or subcontractors, if (1) each such independent contractor or subcontractor carries insurance providing coverage for the "bodily injury" or "property damage" that would be subject to the exclusions in paragra[h] 2... and; (2) such insurance provides coverage and limits at least equal to that provided by this policy but for the exclusions in paragra[h] 2... and; (3) **you have been named as an additional insured on such insurance coverage**, then the exclusions in paragra[h] 2... shall not apply and this policy shall be excess over such insurance.

Otherwise;

- 2) This insurance does not apply to "bodily injury" or "property damage" **arising out of any and all work performed by independent contractors and subcontractors**, regardless of whether such work is performed on your behalf or whether such work is

performed for you or for others. This exclusion applies regardless of where such work is performed.

NYSCEF Doc No. 12 (emphasis added). Thus, Patti is entitled to coverage under the Union Mutual Policy for bodily injury arising out of work performed by American if and only if American carries insurance that provides coverage and Patti has been named as an additional insured under that policy.

The USIC Policy

American's USIC Policy contains the following additional insured endorsement:

Blanket Additional Insured:

Section III. – Who is An Insured is amended to include as additional insured:

- 1) Any person or organization for whom [American is] performing operations when [American] and such person or organization have agreed **in writing** in a contract or agreement that such person or organization be added as an additional insured on [American's] policy.

NYSCEF Doc No. 17 (emphasis added). Thus, Patti is an additional insured under the USIC policy if and only if American and Patti so agreed in writing prior to the date of the Underlying Incident.

Discussion

USIC and American's Motions to Dismiss

Dismissal pursuant to CPLR 3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes a defense as a matter of law to the asserted claims. Leon v Martinez, 84 NY2d 83, 88 (1994); accord; Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 82-83 (1st Dep't 2013) (“[d]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law”).

Dismissal pursuant to CPLR 3211(a)(7) is warranted where, after accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. Leon v Martinez, *supra*, 84 NY2d at 87-88; see also EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) (“[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus” in determining a motion to dismiss for failure to state a cause of action). A complaint survives a motion to dismiss for failure to state a cause of action if it gives the court and the parties “notice” of what is intended to be proved and the material elements of a cause of action. CPLR 3013.

The USIC Policy provides that American may include as an additional insured any person for whom it works, but only if American and the additional insured “have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on [the] policy.” The agreement between Patti and American does not contain an insurance procurement provision and does not require either party to indemnify or insure the other. In its complaint,

Union Mutual does not allege that a written agreement between American and Patti adding Patti as an additional insured exists, but instead argues that the documentary evidence fails to resolve all factual issues because Patti was issued a certificate of insurance under the USIC policy.

However, the certificate of insurance issued to Patti expressly states that no rights are conferred upon the certificate holder and requires an endorsement for the certificate holder to be an additional insured. In Southwest Mar. & Gen. Ins. Co. v Preferred Contrs. Ins. Co., 143 AD3d 577 (1st Dep't 2016), the First Department concluded that a certificate of insurance, in conjunction with an ambiguous phrase within the form that required additional insureds to be scheduled, was relevant to whether plaintiff's exclusion from additional insured endorsements was an inadvertent error. Here, there are no other ambiguities suggesting that plaintiff's exclusion from being named as an additional insured was in error.

Furthermore, the agreement between Patti and American, as well as the certificate of insurance issued to Patti, both post-date the Underlying Incident, which, as noted above, allegedly occurred on October 17, 2015. A party claiming insurance coverage "bears the burden of proving entitlement and is not entitled to coverage if not named as an insured or an additional insured on the face of the policy." National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, PA, 33 AD3d 570, 570-71 (1st Dep't 2006).

In National Abatement Corp. the plaintiffs argued that a contract adding them as additional insureds that post-dated the underlying personal injury action was evidence indicating that the parties intended to be bound. However, the court affirmed the defendant insurer's motion to dismiss, holding that a contract which post-dates an underlying incident has no bearing on whether there is a written contract pursuant to a policy endorsement. *Id.* at 571. Here, even if the certificate of insurance that USIC issued to Patti could demonstrate that American intended to include Patti as an additional insured, it has no bearing on whether there was a "written contract" pursuant to the USIC policy, because the certificate did not exist at the time of the underlying incident. As such, USIC and American are not obligated to indemnify Patti. Moreover, documentary evidence refutes Union Mutual's claims against USIC and American.

Even assuming, arguendo, that documentary evidence does not defeat Union Mutual's claims against USIC and American, its claims against them would still be dismissed for lack of standing under CPLR 3211(a)(3).

Dismissal pursuant to CPLR (a)(3) is warranted where "the party asserting the cause of action has not legal capacity to sue." (CPLR 3211 [a][3]). In order to have standing, a party seeking a declaratory judgment must show that the plaintiff's personal or property rights are at issue. Wein v. City of New York, 47 AD2d 367, 370 (1st Dep't 1975).

Union Mutual fails to establish standing to pursue a declaration against USIC and American because it is a stranger to the USIC Policy. A party who (1) is a stranger to an insurance contract; (2) is not in privity with the insurer; and (3) is not a third-party beneficiary of the insurance contract lacks standing to enforce the insurer's obligations under the policy. Clarendon Place Corp. v Landmark Ins. Co., 182 AD2d 6, 8-9 (1st Dep't 1992). Union Mutual alleges that because Patti is an additional insured under the USIC Policy, Union Mutual has

standing to seek a declaration of the obligations of American and USIC with respect to coverage for Patti in the underlying action. However, the USIC Policy, the agreement between Patti and American, and the certificate of insurance provide unambiguous documentary evidence that Patti was not a party to the USIC Policy. Thus, Union Mutual is a stranger to the USIC policy and lacks standing to enforce either party's obligations under the policy.

Patti's Cross-Claims Against USIC and American

Patti's cross-claims for breach of contract against American and for a declaratory judgment against USIC are also dismissed because the documentary evidence conclusively establishes that American did not include Patti as an additional insured under the USIC Policy and American was not obligated to do so under the Agreement. The Agreement between American and Patti does not require either party to indemnify or insure the other. Additionally, even if the Agreement did require American to include Patti as an additional insured, American would not be liable for failing to add Patti as an additional insured because the Agreement post-dates the injury. A party is not entitled to coverage if it is not named as an insured or additional insured on the face of the policy as of the date of the accident for which coverage is sought. York Restoration Corp. v. Solty's Constr., Inc., 79 AD3d 861, 862 (2nd Dep't 2010). As Patti does not allege that the Agreement applies retroactively, American is not liable to indemnify Patti for an incident that occurred prior to its contractual agreement with Patti. Furthermore, as Patti was not named as an additional insured under the USIC Policy, USIC is not liable to defend and indemnify Patti in the Underlying Action. Thus, documentary evidence refutes Patti's claims against USIC and American.

Union Mutual's Cross Motion for Summary Judgment

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dep't 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062, 619 (1993). Once this initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Union Mutual is entitled to summary judgment against Patti because there is no genuine, triable issue of fact. In the underlying action, it is undisputed that Patino-Galindo's injuries arose from the construction occurring at the Premises. The Independent Contractors and Subcontractors Conditions Endorsement in the Union Mutual Policy excludes coverage for bodily injury arising out of any and all work performed by independent contractors, unless Patti has been named as an additional insured under the independent contractor's insurance policy. Based on the documentary evidence discussed above, Patti was not named as an additional insured under the USIC policy. As such, the exclusions contained in the Independent or Sub-Contractors Condition Endorsement of the Union Mutual Policy bar coverage for the injuries that arose from American's construction, and Union Mutual's cross-motion for summary judgment is granted.

Conclusion

Accordingly, the motions to dismiss by defendants USIC and American are granted; plaintiff's cross-motion for summary judgment is granted. The Court hereby declares as follows:

- 1) Union Mutual Fire Insurance Company is not obligated to defend and indemnify Rajvinder Kaur Patti for an injury that arose during construction occurring at the property located at 57-39 Van Doren Street, Corona, New York on October 17, 2015; and
- 2) Union Mutual Fire Insurance Company may withdraw from the defense of Rajvinder Kaur Patti in the lawsuit titled *Luis H. Patino-Galindo vs. American's Real Home Improvement, Inc., Rajvinder Kaur Patti*, Index No.: 701577/2018, New York Supreme Court, Queens County; and
- 3) United Specialty Insurance Company is not obligated to defend and indemnify Rajvinder Kaur Patti for an injury that arose during construction occurring at the property located at 57-39 Van Doren Street, Corona, New York on October 17, 2015; and
- 4) American's Real Home Improvement, Inc. is not liable for breach of contract by failing to name Rajvinder Kaur Patti as an additional insured under its policy with United Specialty Insurance Company.

6/25/2019

DATE

HON. ARTHUR F. ENGORON

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE