

**WDF Inc. v Harleysville Ins. Co. of N.Y.**

2019 NY Slip Op 32931(U)

October 3, 2019

Supreme Court, New York County

Docket Number: 653108/2017

Judge: Margaret A. Chan

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

**PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM**

*Justice*

-----X INDEX NO. 653108/2017

WDF INC.,

Plaintiff,

MOTION DATE 11/20/2017,  
08/01/2019

- v -

MOTION SEQ. NO. 001 002

HARLEYSVILLE INSURANCE COMPANY OF NEW YORK,

Defendant.

**DECISION + ORDER ON  
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, 60, 61, 90, 91, 92, 93

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 002) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 89

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL

This is an action for a declaratory judgment. Plaintiff, WDF Inc. (WDF), moves in motion sequence 001 for summary judgment pursuant to CPLR 3212 on its claims seeking a declaration for the following: to obligate defendant, Harleysville Insurance Company of New York (Harleysville), in defending and indemnifying WDF for the claims in the settled underlying Labor Law action *Mulvena v Turner Construction Co.*, Index No. 14946/2011, in Kings County (*Mulvena*); to name WDF as an additional insured under the general liability policy procured by Vamco Sheet Metal, Inc. (Vamco); to require Harleysville to reimburse WDF for its own defense in the *Mulvena* action; to state that the insurance policies otherwise available to WDF are excess over the Harleysville policies and that WDF need not contribute to the Harleysville policies; and to direct that WDF is entitled to an inquest for damages, including legal fees, disbursements, costs, and expenses. Harleysville opposes WDF's motion.

In motion sequence 002, Harleysville moves pursuant to CPLR 602 to consolidate this action with another action in Kings County entitled *WDF Inc v Vamco Sheet Metal Inc.*, Index No. 509600/2019 and to strike the note of issue in the instant action. WDF opposes Harleysville's motion.

In the underlying *Mulvena* action that was commenced in May 2011, plaintiff Kevin Mulvena sought damages for personal injuries he sustained in two incidents, on May 21 and May 27, 2010, while performing construction-related work at the John Jay College of Criminal Justice expansion project, located in the city, county and state of New York. The general contractor in *Mulvena*, defendant Turner Construction Company (Turner), retained co-defendants Five Star Electric Co. (Five Star) to perform electric work, and WDF to perform plumbing work. WDF hired Vamco to fabricate and install sheet-metal HVAC duct work for the project. Kevin Mulvena was Vamco's employee at the time of the alleged accidents.

Kevin Mulvena's complaint alleged that defendants Turner, Five Star, and WDF were negligent and violated Labor Law §§ 200 and 241(6). Turner commenced a third-party action against WDF and Vamco for contribution and indemnification alleging that WDF's negligence caused plaintiff's injuries. WDF cross-claimed against Vamco for contractual indemnification.

The contract between WDF and Vamco (WDF-Vamco contract) required Vamco to procure an insurance policy, name WDF as an additional insured on the insurance policy, and keep in full force and effect insurance coverage throughout the term of the construction project (NYSCEF # 44 at 18 - Exhibit C to the Subcontract entitled "WDF, Inc. Standard Insurance Requirement"). Vamco purchased the Commercial Package Policy with Harleysville (Harleysville policy) (NYSCEF # 45).

On September 27, 2012, WDF tendered a demand for Vamco and Harleysville to defend and indemnify WDF in the *Mulvena* action. On October 22, 2012, Harleysville refused WDF's demand to defend and cover WDF on the grounds that the Harleysville policy required a finding of negligence against Vamco in order to trigger the additional insurance coverage (NYSCEF # 47). Harleysville also based its denial on the premise that the Harleysville policy was excess.

The parties in *Mulvena* each moved for summary dismissal of the claims against them. As relevant to the instant action, Vamco cross-moved for summary judgment dismissing WDF's cross-claim seeking defense and indemnification in *Mulvena*. By Decision and Order dated November 7, 2018, the justice presiding over *Mulvena* granted Vamco's cross-motion and dismissed WDF's cross-claims against Vamco for contractual indemnification finding that:

"With regard to that branch of Vamco's motion seeking summary judgment dismissing WDF's cross claim for contractual indemnification, the court notes that the indemnification clause contained in the Vamco contract specifically limits Vamco's defense and indemnity obligation to claims, suits and cause of action arising out of Vamco's 'use of any of WDF's tools or equipment or any

combination of them.' Inasmuch as it is undisputed that neither of plaintiff's accidents involved WDF's tools or equipment, this indemnification provision was not triggered. Therefore, that branch of Vamco's motion seeking summary judgment dismissing WDF's cross claim for contractual indemnification is granted, and said claim is dismissed" (NYSCEF # 65 at 10).

Hence, the *Mulvena* court found that the indemnification provision in the WDF-Vamco contract does not entitle WDF to a defense or indemnification by Vamco.

Since WDF's instant declaratory judgment claim relies on the identical provision that it had relied on in its cross-claim against Vamco in *Mulvena*, declaring here and now that Vamco's insurer, Harleysville, is obligated to defend and indemnify WDF in the *Mulvena* action would result in an end-run around the decision in *Mulvena*. Hence, the branch of WDF's motion for a declaration that Harleysville is obligated to defend and indemnify WDF is denied.

In a letter memorandum to the court, WDF argues that the dismissal of WDF's cross-claim for indemnification against Vamco does not require a dismissal of the branch of its motion for defense costs. This argument is meritless as WDF does not consider the effect of the dismissal of WDF's claim for a defense by Vamco that was rendered in the *Mulvena* action.

WDF contends that this court is permitted to make additional findings of fact regarding Vamco's negligence since the *Mulvena* court did not rule on Vamco's negligence. Specifically, WDF contends that the court may determine whether WDF is an additional insured pursuant to the WDF-Vamco contract using the framework set out in *Burlington Ins. Co. v NYC Transit Auth* (29 NY3d 313, 317 [2017]). In *Burlington*, the court found that where "an insurance policy is restricted to liability for any bodily injury 'caused, in whole or in part,' by the 'acts or omissions' of the named insured, the coverage applies to injury proximately caused by the named insured" (*id.*).

However, WDF's argument that Vamco was a proximate of *Mulvena*'s accident need not be addressed since the *Mulvena* court in the underlying action had determined that the indemnification provision contained in the Harleysville policy was not triggered (*see Servidone Const. Corp. v. Sec. Ins. Co. of Hartford*, 64 NY2d 419, 425 [1985] [holding that an insurer's duty to indemnify requires a determination that the insured is liable for a loss covered by the policy]; *Town of Oyster Bay v Employers Ins. of Wausau*, 269 AD2d 387, 389 [2d Dept 2000] [holding that denial of coverage appropriate where the accident not covered by the insurance policies at issue]).

In any event, the court finds that Vamco was not an additional insured under the WDF-Vamco contract. While WDF submitted undisputed evidence demonstrating that Vamco directed and controlled Kevin Mulvena's work and that Vamco had responsibility of Mulvena's worksite, there is no evidence on the record indicating negligence on Vamco's part (see Burlington Ins. Co. v NYC Transit Auth., 29 NY3d 313, 317 [2017]; Pioneer Cent. Sch. Dist. v Preferred Mut. Ins. Co., 165 AD3d 1646, 1647 [4th Dept 2018] [finding that plaintiff was not an additional insured under the policy inasmuch as the underlying plaintiff's injuries were not proximately caused by the insured]; see also M & M Realty of New York, LLC v Burlington Ins. Co., 170 AD3d 407, 408 [1st Dept 2019]).

Since the branches of WDF's motion for a declaration that Harleysville is obligated to defend and indemnify WDF and that WDF is an additional insured are denied, the balance of WDF's motion seeking legal fees, a declaration that other policies of insurance are in excess over the Harleysville policy, and a declaration that WDF is entitled to an inquest of damages, are moot as is Harleysville's motion to consolidate this action with another action in Kings County and vacate the note of issue.

As there are no material issues of facts in dispute, and there are no remaining causes of action, the complaint is dismissed. And, upon searching the record, no further relief is sought by either party. Accordingly, this case is dismissed. Accordingly, it is hereby

ORDERED that plaintiff WDF Inc.'s motion pursuant to CPLR 3212 for summary judgment is denied in its entirety; the complaint is dismissed; it is further

ORDERED that defendant Harleysville Insurance Co. of New York's motion is denied as moot; it is further

ORDERED that plaintiff WDF, Inc. shall serve a copy of this order with notice of entry upon defendant Harleysville Insurance Co. of New York's within 20 days of entry; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant Harleysville Insurance Co.

10/3/2019  
DATE

  
MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE