SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

TRIAL PART 23
NASSAU COUNTY

WESCO INSURANCE COMPANY,

Plaintiffs,

-against-

MOTION # 01
INDEX # 603721/19
MOTION SUBMITTED:
SEPTEMBER 10, 2019
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X X X

A 1 CONSTRUCTION SERVICE, INC., ISLAND TREES UNION FREE SCHOOL DISTRICT and GERMAN SALAZAR,

Defendants.

The following papers having been read on this motion:

Notice of Motion/Order to Show Cause.....1
Cross Motion/Answering Affidavits.....2, 3
Reply Affidavits.....

Plaintiff moves for summary judgment against Island Trees UFSD pursuant to CPLR 3212 and for default judgment against Salazar and A-1 Construction pursuant to CPLR §3215.

Background

The relief sought in this action is for a judgment declaring that plaintiff has no duty "to defend or indemnify A-1 or the school district in either of two actions currently pending in this court." These two actions arise out of a personal injury allegedly sustained by Salazar during exterior renovation of a building owned and controlled by the school district. Salazar's injuries allegedly occurred while he was performing masonry work on a scissor lift. During the course of work he was struck by falling bricks. The complaints in the underlying actions allege that Salazar was employed by a subcontractor of A-1. Plaintiff insured A-1 under a contractor's liability policy. At the request of A-1 plaintiff's agent issued an insurance ACORD

certifying that the school district and others were named on the policy as "Additional Insured" (Exhibit A, Okert aff.)

Arguments

Plaintiff asserts that the school district is not covered under the terms of the policy, since it is not specifically named in the policy. Plaintiff argues that the insurance certificates do not confer the status of an insured to a party who is not named as an insured in the policy citing *Tower Ins. of N.Y. v Amsterdam Apts.*, LLC, 82 A.D.3d 465, 918 N.Y.S.2d 106, 2011 (1st Dept, 2011). In *Tower* (*supra*) the Second Department denied coverage to the putative insured; but in that case there was no issue concerning an insurance certificate.

Plaintiff also asserts entitlement to summary judgment based upon the express terms of the policy issued to A-1. Page four of the declarations portion of the policy lists as "Classification Codes: Painting - Interior of Buildings, Carpentry - Interior, Dry Wall or Wallboard Installation, and Identity Recovery." Beside each of these classifications is a premium amount. At the bottom of the page these premiums are totaled. The policy also contains an endorsement entitled "Classification Limitation Endorsement" which states, "Coverage under the contract is specifically limited to those classification codes listed in the Policy. No coverage is provided for any classification code or operation performed by the Named Insured not specifically listed in the Declaration of this Policy."

In a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see*, *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557[1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986].Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980], *supra*). In

the case at bar plaintiff has made this *prima facie* showing shifting to the burden to defendants.

Defendants argue that the insurance certificates estop plaintiff from denying coverage. "[B]y issuing the certificate of insurance in which plaintiff was named as an additional insured, [the insurer] was estopped from denying coverage for plaintiff... plaintiff had relied upon the amended certificate in permitting [its contractor] to proceed with the work and in electing not to obtain its own coverage... Plaintiff's reliance upon the certificate was reasonable, despite the form language in the preamble of the certificate, now emphasized by [the insurer] that the certificate did not 'amend, extend or otherwise alter the terms and conditions of insurance coverage contained in the policy'" (*Bucon, Inc. v Pennsylvania Mfg. Assn. Ins. Co.* 151 A.D.2d 207, 547 N.Y.S.2d 925 [3rd Dept, 1989]). In light of the certificates, plaintiff's argument that A-1 and the school district are not covered by the policy because they are not named on the policy itself is at best tenuous and is certainly not a basis for summary judgment. "In our view, an issue of fact exists as to whether [the insurer] had agreed to provide plaintiff, as well as Marker, coverage under the policy. The contractual liability endorsement ran only to [the contractor's] liability, not plaintiff's. The certificate of insurance naming plaintiff as an additional insured is evidence of [the insurer's] agreement to provide plaintiff coverage, but it is neither conclusive proof of the existence of such a contract nor, in and of itself, a contract to insure plaintiff" (*see, Hartford Acc. & Indem. Co. v Transamerica Ins. Co.*, 141 AD2d 423, 426; *Hill v Johnson*, 35 AD2d 407, 410, *lv denied* 28 NY2d 484; *Blue Cross v Ayotte*, 35 AD2d 258, 260)" *Bucon, supra*).

Defendants also assert that once an insurer is estopped from denying a party's status as an insured, the insurer is also estopped from denying that a particular risk is covered. "In this State, once the foundational facts for an estoppel have been established, liability of an insurer may be imposed, even for a loss falling outside the risks insured under the policy or beyond the policy limits. That an estoppel against an insurer can arise out of the issuance of a certificate of insurance has been recognized here, as well as in other jurisdictions" (*Draper v Oswego County Fire Relief Assn.*, 190 NY 12, [1907, internal citations omitted]). In *Draper* the insurer denied coverage on the grounds that its insured violated a condition of the policy. Nevertheless, the insurer engaged in attempting to adjust the claim at great expense to the insured

in providing proof of damages and other ancillary expenses relying on the insurer's implied agreement to settle the claim. That reliance was the basis of the estoppel.

In *Bucon* (*supra*) the court addressed the nature of the disclaimer on the insurance certificate[1] which is the same disclaimer in the certificates issued in the case at bar. "*This caveat could only have been reasonably interpreted by plaintiff as referring to terms and conditions of the coverage actually provided both [the insured] and plaintiff under the policy* and any exclusions from such actual coverage, not a warning that an examination of the policy would negate the existence of any coverage for plaintiff, the very fact certified to by [the insurer]" (*Id.*, emphasis supplied).

Conclusion

Section 11.1 of the General Provisions portion of the contract between A-1 and the school district required A-1 to purchase and maintain "such insurance a will protect the Contractor from the claims [later enumerated] which may rise out of or result from Contractor's operations and contemplated operations under the Contract and for which the Contractor may be liable." Apparently A-1 never obtained the required policy. Instead it furnished an insurance certificate on a policy issued by plaintiff, which did not cover the type of work being performed. None of the cases cited by defendants hold that the issuance of an insurance certificate can by estoppel convert the nature of the coverage under the policy. The certificate estopped plaintiff from claiming that the policy did not cover the school district. But the certificate did not change the coverages or exclusions under the policy and as in *Bucon, supra*, it gave the district the *caveat* that coverage was limited to "terms and conditions of coverage" provided in the policy.

Plaintiff's motion for summary judgment against the school district is granted. Since the defaulting defendants mirrored the school district's arguments as their meritorious defense, summary judgment against those defendants is likewise granted.

It is hereby

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[1] That the certificate did not amend, extend or otherwise alter the terms and conditions of insurance coverage contained in the policy.

DECLARED that Wesco Insurance Company has no duty to defend or indemnify A-1 Construction Services, Inc., Island Trees Union Free School District or German Salazar in connection with *German Salazar v. Island Trees Memorial Middle School, et al* (bearing index numbers 610234/2018) and the action entitled *German Salazar v. A-1 Construction Service, Inc., et al* (bearing index number 616234/2018).

This constitutes the decision and order of the court.

ENTER

DATED: December 16, 2019

HON. JACK L. LIBERT
J.S.C.

ENTERED
DEC 18 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE