

**MD CBD 180 Franklin LLC v State Natl. Ins. Co.**

2020 NY Slip Op 30430(U)

February 5, 2020

Supreme Court, New York County

Docket Number: 651332/2019

Judge: Francis A. Kahn III

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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. FRANCIS A. KAHN, III PART IAS MOTION 14

Justice

INDEX NO. 651332/2019

MD CBD 180 FRANKLIN LLC,
Plaintiff,

09/17/2019,
09/17/2019,
09/17/2019,
09/17/2019

- v -

MOTION DATE

STATE NATIONAL INSURANCE COMPANY, 168
FRANKLIN HOLDINGS, LLC, BRITT REALTY,
LLC, LIBERTY INSURANCE UNDERWRITERS,
INC., NAVIGATORS INSURANCE COMPANY, ISSAC &
STERN ARCHITECTS, P.C., A & F FIRE PROTECTION
CO., INC., MEC GENERAL CONSTRUCTION, NETT
PROJECT LLC, P & B HEATING & AIR CONDITIONING
CORP., TRIED N' TRUE PLUMBING & HEATING CO., TOP
SHELF ELECTRIC CORP., MAR-SAL CONTRACTING
INC., MAG BUILDERS INC.

MOTION SEQ. NO. 001 003 006
007

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21,
31, 57, 88, 102, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121,
171

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48,
49, 50, 51, 52, 53, 54, 58, 89, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136,
173, 174

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 006) 79, 80, 81, 82, 83,
84, 91, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 167, 168

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 007) 93, 94, 95, 96, 97,
98, 99, 100, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 172

were read on this motion to/for DISMISS

Upon the foregoing documents the motions are determined as follows:

The within action arises out of the sale of a parcel of improved real property located at
168 Franklin Street, Brooklyn, New York. Defendant 168 Franklin Holdings, LLC ("168
Franklin") sold the premises, which was in the midst of a construction project, to Plaintiff 180

Franklin, LLC. The gravamen of Plaintiff's action is to recover monetary damages based upon alleged damages existing in the conveyed real property.

As concerns the within motions, in addition to 168 Franklin, Plaintiff has sued Defendants Issac & Stern Architects, P.C. ("Issac & Stern"), State National Insurance Company ("State National") and Britt Realty, LLC ("Britt Realty"). Defendant Issac & Stern was engaged under contract by 168 Franklin to serve as the architect on the project. Defendant State National was the underwriter of policies of insurance obtained by 168 Franklin. Defendant Britt Realty was retained by 168 Franklin to, *inter alia*, provide supervision of subcontractors on the construction project as well as certain project management.

Defendant 168 Franklin moves pursuant to CPLR §3211[a][1] and [7] to dismiss Plaintiff's complaint. As against 168 Franklin, Plaintiff pleads two causes of action claiming breach of contract based upon an alleged failure to obtain insurance ["Fifth"] and common-law indemnification ["Sixth"]. Subsequent to this motion, Plaintiff withdrew its Sixth cause of action.

The branch of Defendant 168 Franklin's motion to dismiss Plaintiff's breach of contract cause of action is denied as movant was required, but failed, to establish it procured the promised insurance which precisely matched the coverage promised (*see Nrecaj v Fisher Liberty Co.*, 282 AD2d 213, 214 [1st Dept 2001]). Under Section 7[F] of the contract of sale 168 Franklin was required to "maintain in full force and effect . . . all liability and casualty insurance policies" with "full replacement cost coverage" until the closing. Additional insurance was required to be maintained "from and after the Closing until completion of the Punch List Work".

In support of the motion, Plaintiff did not rely on evidentiary proof to conclusively establish that the required insurance was obtained. Instead, Movant relied on Plaintiff's factual statements in the complaint, which, contrary to movants assertions, do not establish, as a matter of law, 168 Franklin satisfied its contractual obligation to provide "full replacement" insurance covering Plaintiff's claimed losses. Actually, when the whole complaint is construed and its allegations assumed to be true, Plaintiff pleads precisely the opposite. In any event, since Movant's insurer, Defendant State National, has disclaimed under these policies and Plaintiff seeks declaratory judgment in this action against State National for coverage under the disputed policies, the issue of whether 168 Franklin properly procured the required insurance is unresolved.

Defendant 168 Franklin's argument that Plaintiff released it from its breach of contract claims in under Section 19.14 of the contract is inapposite as that section also states the release referred to "does not apply to the representations of Seller expressly set forth in this agreement". Further, movant's construction of the parties' contract would inappropriately render the insurance procurement provision meaningless (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]["A reading of the contract should not render any portion meaningless"]; *Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [The court should "construe the agreements so as to give full meaning and effect to the material provisions"]).

Defendants Issac & Stern and Britt Realty move pursuant to CPLR §3211[1] and [7] to dismiss Plaintiff's complaint. As against each of these Defendants, Plaintiff pleads two causes of action claiming negligence ["Seventh and Ninth"] and breach of contract ["Eighth and Tenth"]. Plaintiff's breach of contract claims arise out of contracts originally entered into between Defendant 168 Franklin and Issac & Stern and Britt Realty. These agreements were assigned, on consent, to Plaintiff under the contract of sale and on consent of the Movants in separate documents executed subsequently to the contact of sale. Before submission of this motion, Plaintiff discontinued its Seventh and Ninth causes of action.

The sole argument proffered by Defendants Issac & Stern and Britt Realty in support of the branches of its motions to dismiss Plaintiff's breach of contract causes of action is that the release in Section 19.14 of the contract bars the breach of contract claims. That section provides, in pertinent part, that:

"BUYER, FOR ITSELF AND ITS AGENTS . . . HEREBY RELEASES, ACQUITS AND FOREVER DISCHARGES SELLER AND . . . [its] AGENTS . . . FROM ANY AND ALL RIGHTS, CLAIMS, DEMANDS, CAUSES OF ACTIONS, LOSSES, DAMAGES, LIABILITIES, COSTS AND EXPENSES . . . WHETHER KNOWN OR UNKNOWN, LIQUIDATED OR CONTINGENT OTHER THAN AS EXPRESSLY SET FORTH HEREIN . . . WHICH BUYER HAS OR MAY HAVE IN THE FUTURE, ARISING FROM OR RELATING TO (i) ANY DEFECTS (PATENT OR LATENT) OF THE SUBJECT PREMISES WHETHER THE SAME ARE THE RESULT OF NEGLIGENCE OR OTHERWISE, OR (ii) ANY OTHER CONDITIONS, INCLUDING, WITHOUT LIMITATION, ENVIRONMENTAL AND OTHER PHYSICAL CONDITIONS, AFFECTING THE SUBJECT PREMISES"

Movants argue that as the architect/general contractor contractually retained by Defendant 168 Franklin at the time of execution of the contract, it was an "agent" of the "seller" and thereby released from liability for any property damages Plaintiff seeks to recover for as damages under its breach of contract cause of action.

Contrary to movants' assertions the documentary and other evidence does not "conclusively" establish as a matter of law, as it must (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005]; *Allen v Gordon*, 86 AD2d 514, 515 [1<sup>st</sup> Dept 1082], *aff'd* 56 NY2d 780 [1982]), each was an agent of 168 Franklin under the terms of the contract. Nowhere in the contract are Movants expressly identified as agents of the seller nor is the term "Agent", except for the term "Escrow Agent", even defined. Also, Movants proffer no definitive evidence independent of the contract that either was an agent of the Seller. In any event, since all 168 Franklin's rights in its contracts with Movants were consensually assigned to Plaintiff under Section 10.06 of the contract of sale, interpreting the release under Section 19.14 as movants suggest would, as similarly noted *supra*, impermissibly defeat the purpose of the assignment (*see Beal Sav. Bank v Sommer, supra; Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, *supra*).

Defendant State National moves pursuant to CPLR §3211[a][1] and [7] to dismiss Plaintiff's complaint. As against State National, Plaintiff pleads three causes of action, two for

declaratory judgment based upon State National's disclaimer of coverage under a policy of insurance ["First and Second"] and breach of contract ["Third"]. Plaintiff seeks a declaration that Defendant State National is required to provide coverage for Plaintiff's property damages losses at the subject premises under a commercial general liability policy (No. PUG1300772) it issued to named insureds 168 Franklin and Britt Realty. Plaintiff alleges in the complaint and the moving papers it is an additional insured under the State National policy.

Here, the policy at issue is a model ISO contract (No. GC 00 01 10 01) which covers bodily and property injury and contains duties to defend and indemnify the insureds when they become legally obligated to pay damages. The policy also includes an "owned property" exclusion which provides the policy does not apply to "property damage" that an "insured" owns.

The policy at issue is in name and terms a commercial general liability policy which provided third-party, not first-party coverage (*see Great N. Ins. Co. v. Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 687-88 [1999], citing 1 Holmes, Appleman on Insurance 2d § 3.2, at 342 ["[I]f the insurer's duty to defend and pay runs to a third-party claimant who is paid according to a judgment or settlement against the insured, then the insurance is classified as 'third-party insurance'"]). There are no express terms, or even terms by implication, in the policy indicating it is a "first-party policy" or a "builder's risk policy" covering property the losses alleged to have been incurred by Plaintiff (*see Great N. Ins. Co. v. Mount Vernon Fire Ins. Co.*, supra; *cf Rhino Excavating Corp. v. Assurance Co. of Am.*, 20 Misc. 3d 1107[A][Sup Ct Nassau Cty 2008]).

There has been no proof proffered to contradict, as a matter of law, that, as alleged in the complaint, Plaintiff 168 Franklin is a named insured and Plaintiff is an additional insured under the policy. Thus, whether the property damage losses were incurred when either party was the owner, Plaintiff's property damage losses are not covered based upon the "owned property" exclusion (*see Vineyard Sky, LLC v Ian Banks, Inc.*, 123 AD3d 461 [1<sup>st</sup> Dept 2014]; *Gap, Inc. v Fireman's Fund Ins. Co.*, 11 AD3d 108 [1<sup>st</sup> Dept 2004]). Plaintiff's assertion that its claim is a third-party one because it has been asserted against 168 Franklin for damage to Plaintiff's premises misconstrues the issue to be attended. As noted above, under that theory, Plaintiff would be owner of the property and as an additional insured under the policy at issue, would still fall within the exclusion (*id.*).

Further, Plaintiff's argument that movant is barred from disclaiming by the doctrines of waiver and estoppel is without merit. Since the operative portions of the policy demonstrate it does not contemplate coverage for the claimed losses at its inceptions, timey disclaimer is not mandated (*see eg Zappone v. Home Ins. Co.*, 55 NY2d 131 [1982]).

Accordingly, the motions by Defendants 168 Franklin, Issac & Stern and Britt Realty are denied. As to Defendant State National's motion to dismiss Plaintiff's complaint, although movant is correct that coverage does not exist under the disputed policy for Plaintiff's losses, instead of dismissing the first, second and third causes of action, the Court must declare the rights and obligations of the parties (*see eg Lanza v Wagner*, 11 NY2d 317, 334 [1962]). It is therefore

ADJUDGED and DECLARED that State National Insurance Company is not required to indemnify or pay any claims by Plaintiff under the commercial general liability policy no. PUG1300772 arising out of property damage allegedly incurred by Plaintiff to a premises located at 168-184 Franklin Avenue, Brooklyn, New York.

The remaining Defendants shall, to the extent they have not already done so, serve answers within the time accorded in CPLR 3211[f] and the parties are directed to appear for a preliminary conference on **April 14, 2020 at 9:30 a.m.**, at 111 Center Street, IAS Part 14, courtroom in Courtroom 1127(B).

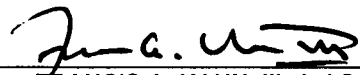
2/5/2020  
DATE

CHECK ONE:  CASE DISPOSED  DENIED  X

APPLICATION:  GRANTED  DENIED  X

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

  
 FRANCIS A. KAHN III, A.J.S.C.  
**HON. FRANCIS A. KAHN III**  
**J.S.C.**