

**Greater N.Y. Mut. Ins. Co. v Endurance Am.
Specialty Ins. Co.**

2020 NY Slip Op 30985(U)

April 3, 2020

Supreme Court, New York County

Docket Number: 154462/2015

Judge: Nancy M. Bannon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

-----X

GREATER NEW YORK MUTUAL INSURANCE CO. and
3920 REALTY ASSOCIATES, LLC,

Plaintiffs,

- v -

ENDURANCE AMERICAN SPECIALTY INSURANCE CO.,

Defendant.

-----X

Table with 2 columns: INDEX NO., MOTION DATE, MOTION SEQ. NO. and a large text box containing 'DECISION + ORDER ON MOTIONS'.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 88, 90, 92, 100, 102, 103, 104, 105

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 89, 91, 93, 94, 95, 96, 97, 98, 101, 106, 107, 108

were read on this motion to/for JUDGMENT - DECLARATORY

In this indemnification action, the plaintiffs seek a judgment declaring, inter alia, that the defendant Endurance American Specialty Insurance Company (Endurance) must reimburse plaintiff Greater New York Mutual Insurance Company (GNY) for monies GNY paid to defend 3920 Realty Associates LLC (3920 Realty) in a Bronx County Supreme Court action entitled Oscar Miranda v 3920 Realty Associates LLC, Index No. 306400/2012 (the Miranda action). Endurance moves for summary judgment dismissing the amended complaint (MOT SEQ 004). The plaintiffs move separately for summary judgment on the complaint (MOT SEQ 005). Both motions are opposed. The motions are denied.

On July 2, 2012, Oscar Miranda allegedly suffered personal injuries while performing restoration work for Applied Construction, Inc. (ACI) on the roof of the building located at 3920 Bronx Boulevard (the building). 3920 Realty is the owner the building. On or about July 25, 2012, Miranda commenced the Miranda Action, suing 3920 Realty for his injuries. 3920 Realty impleaded ACI as a third-party defendant. After receiving notice of the Miranda Action from 3920 Realty, GNY began to pay 3920 Realty's defense costs associated with the Miranda

Action in accordance with a general commercial liability insurance policy issued by GNY to 3920 Realty (the GNY policy). However, by its plain terms, the GNY policy was to be excess coverage over any primary insurance otherwise available to 3920 Realty “for all liabilities that 3920 Realty incurred arising out of the building or operations for which 3920 Realty has been added as an additional insured by attachment of an endorsement.”

On September 5, 2012, GNY tendered to Endurance (GNY’s September 5 tender) a demand that Endurance provide primary/noncontributory insurance coverage for the Miranda Action. GNY’s September 5 tender claimed that 3920 Realty was an additional insured under an endorsement to a May 1, 2012 insurance policy between Endurance and ACI covering liability for certain bodily (the Endurance policy). On September 27, 2012, Endurance replied to GNY’s September 5 Tender by letter addressed to GNY and purportedly copied to ACI, and NYC Guardian Brokerage (the September 27 notice). In this notice, Endurance disclaimed coverage of 3920 Realty for the Miranda action. It is undisputed that the September 27 notice was never sent directly to 3920 Realty. Among other things, in the September 27 notice Endurance disclaimed coverage for Miranda’s injuries based on an exclusion in the Endurance Policy, entitled “Exterior Work Limitation (Three Story Height Limitation)” that states as follows:

“It is hereby agreed that with respect to ... exterior contracting operations performed on the exterior side of structures or buildings, any work performed by the insured, or by any subcontractor on behalf of the insured, shall be at heights of no greater than 50 feet or three stories. Any claims for ‘bodily injury,’ ‘property damage’ or ‘personal and advertising injury’ involving exterior work performed at greater than 50 feet or three stores in height shall be excluded hereunder.

On May 6, 2015, GNY commenced this action against Endurance. On February 21, 2019, this court granted leave to amend the complaint to add 3920 Realty as a co-plaintiff. The amended complaint contains two causes of action. The first cause of action seeks a judgment declaring that Endurance has a duty to defend and indemnify 3920 Realty in connection with the Miranda action and reimburse the money GNY spent on the defense of the Miranda action. The second cause of action seeks an additional judgment declaring that Endurance is estopped from relying on any exclusions in the Endurance Policy to disclaim coverage for the Miranda action because Endurance violated Insurance Law § 3420(d) by not sending its disclaimer notice directly to 3920 Realty.

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra. This is because “[s]ummary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.” Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

Plaintiffs have failed to establish *prima facie* through the submission of evidence in admissible form that 3920 Realty was an additional insured under the Endurance Policy. The Endurance policy contains two endorsements that could potentially qualify 3920 Realty as an additional insured under the policy. One endorsement, which predates Miranda's injury, defines additional insureds as “[a]ny entity required by written contract... to be named as an insured ... but only with respect to liability arising out of... [ACI's] work for the additional insured, or acts or omissions of the additional insured...” A second endorsement, which is undated, expressly names 3920 Realty as an additional insured under the Miranda Policy. This endorsement requires Endurance to defend and indemnify 3920 Realty against “bodily injury...caused in whole or in part by (1) [ACI's] acts or omissions; or (2) the acts of omissions of those acting on [ACI's] behalf in the performance of [ACI's] ongoing operations for [3920 Realty] at the building.”

As to the first endorsement, the plaintiffs annex copies of (i) a May 25 contract between ACI and 3920 Realty appearing to obligate ACI to procure insurance on 3920 Realty's behalf for the restoration work and (ii) a May 29, 2012 certificate of insurance issued by NYC Guardian Insurance Brokerage naming 3920 Realty as an additional insured under the Endurance policy. However, these documents are not authenticated by a witness with personal knowledge. They are submitted only through the affirmation of plaintiffs' litigation counsel who does not have the personal knowledge necessary to authenticate these documents. See Fairlane Fin. Corp. v Greater Metro Agency, 109 AD3d 868 (2nd Dept. 2013). As, these documents are without

probative value or evidentiary significance for the purposes of this motion. See Zuckerman v City of New York, supra; Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012).

As to the second endorsement that expressly names 3920 Realty as an additional insured, the plaintiffs do not proffer an affidavit from a witness with personal knowledge stating the date this endorsement became effective. The pages preceding this endorsement in the Endurance Policy show that the endorsement appears not to have been made effective until July 24, 2012, which was 22 days after Miranda's injury. Contrary to the plaintiffs' contention in reply that Endurance never disputed that 3920 Realty was an additional insured under the Endurance policy, the complaint expressly alleges that Endurance disputed this by letter dated September 22, 2012. Neither party addresses Endurance's letter in these papers. Thus, there exists a triable issue of fact as to whether Endurance was an additional insured under the Endurance Policy on the date of the injury. See Vikram Const., Inc. v. Everest Nat. Ins. Co., 139 AD3d 720 (2nd Dept. 2016)

Absent conclusive proof that 3920 Realty was an additional insured under the Endurance policy on the date of Miranda's accident, there is not yet a basis for the judgment south in the second cause of action declaring that Endurance's failure to send 3920 Realty the September 27 notice estops it from relying upon the policy exclusions set forth therein. If 3920 Realty is an additional insured, Endurance had an absolute obligation under Insurance Law § 3420(d) to send all the September 27 notice to directly to 3920 Realty "or at least to its agent – perhaps their attorney—who owed a duty of loyalty in this matter" to 3920 Realty only." Sierra v 4401 Sunset Park, LLC, 24 AD3d 514, 514 (2014). An insurer is estopped from relying on any policy exclusions not disclaimed by notice directly to an additional insured. Id. However, to the extent that Endurance is denying coverage because 3920 Realty was not an additional insured does not require notice under Insurance Law § 3420(d). See Harco Construction LLC v First Mercury Ins. Co., 148 AD3d 870 (2nd Dept. 2017) *citing* Markevics v Liberty Mut. Ins. Co., 197 NY2d 646 (2001). Thus, MOT SEQ 005 is denied in its entirety.

As to MOT SEQ 004, Endurance fails to establish prima facie its right to summary judgment dismissing the complaint and declaring that it has no duty to indemnify the plaintiffs. Endurance argues that regardless of whether 3920 Realty was an additional insured under the Endurance Policy, Endurance discharged its notice obligations under Insurance Law § 3420(d) by sending the September 27 notice to GNY. Endurance argues that sending the disclaimer

notice to GNY was sufficient under Insurance Law 3420(d) because GNY (i) tendered the demand for coverage to Endurance on 3920 Realty's behalf and (ii) GNY accepted its own coverage obligations to 3920 Realty without reservation and paid 3920's claim in full up to the policy limit, and (iii) 3920 Realty's excess insurer assumed coverage thereafter and settled the Miranda Action in 2019 within the policy's limits. Thus, Endurance argues that GNY was the only real party in interest and 3920 Realty's agent for all purposes, including receiving disclaimer notices under Insurance Law § 3420(d). However, Endurance arguments are misplaced because they are the same arguments rejected in Sierra as grounds to avoid the notice obligations of Insurance Law § 3420(d). See Sierra v 4401 Sunset Park, LLC, supra.

In Sierra, the Court of Appeals held even when an insurer tenders a demand on behalf of its insured, like GNY did for 3920 Realty, the insurer does not become an agent for receiving disclaimer notices for its insured under Insurance Law § 3420(d) because an insurer owes no duty of loyalty to its insured. Id. The Court of Appeals held, among other things, that if the potential exists that the insured's claim could exceed a tendering insurer's policy limits, this alone creates sufficient adversity to require that disclaimer notices under be sent directly to an insured. Consistent with Sierra, when GNY sent the September 5 tender, it was unclear that the defense of the Miranda action would exceed GNY's \$1 million policy limit. Id. Thus, under Sierra, GNY owed no duty of loyalty to 3920 Realty and was not its agent for receiving disclaimer notices under Insurance § Law 3420(d). Id. That the Miranda Action did exhaust GNY's policy limits forcing 3920 Realty's excess insurer to defend the Miranda Action and indemnify its settlement in 2019 only reinforces that 3920 Realty was entitled to separate notice of disclaimers and that Endurance could not rely on notices sent to GNY, as agent for 3920 Realty.

The plaintiffs also correctly argue that there is a triable issue of fact as to whether the height exclusion in the Endurance Policy exempts Endurance from covering the Miranda action because it is reasonably susceptible of two meanings. The first sentence of the exclusion states that the ACI shall not perform "exterior contracting work performed on the exterior *side* of structures or buildings ...over 3 stories or 50 feet." (emphasis added). The term exterior side of building is not defined in the Endurance Policy and can be reasonably be interpreted as applying only to work performed on the sides of the building, such as where workers are suspended over three stories, and not the flat surfaces of the roof. Furthermore, given that this is one exclusion, read in context, the second sentence excluding bodily injuries for "exterior


work” could be read to refer to the prohibited work in the prior sentence of the policy. Since Miranda was injured on the flat surface of a roof that happened to have been over three stories but not necessarily on the “exterior side” of the building, it is for a jury or other factfinder to determine whether the exclusion applies to work on the flat surface of roof. See Heartland Brewery, Inc. v Nova Cas. Co., 149 AD3d 522 (1st Dept. 2017).

Accordingly, it is hereby,

ORDERED that the motion for summary judgment pursuant to CPLR 3212 by defendant Endurance American Specialty Insurance Company (MOT SEQ 004) is denied; and it is further,

ORDERED that the motion for summary judgment pursuant to CPLR 3212 by plaintiffs Greater Mutual Insurance Company and 3920 Realty Associates, LLC (MOT SEQ 005), is denied, and it is further,

ORDERED that the parties shall appear for a settlement conference on July 23, 2020, at 3:00 p.m. This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

4/3/2020
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
 GRANTED DENIED GRANTED IN PART OTHER