

<b>Wesco Ins. Co. v DB Ins. Co., Ltd.</b>
2020 NY Slip Op 31988(U)
June 23, 2020
Supreme Court, New York County
Docket Number: 155730/2018
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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INDEX NO. 155730/2018

WESCO INSURANCE COMPANY,
Plaintiff,

MOTION DATE N/A

MOTION SEQ. NO. 001

- v -

DB INSURANCE CO., LTD. (US BRANCH) F/K/A DONGBU
INSURANCE CO., LTD. (US BRANCH), WANKA
PERUVIAN CHICKEN CORP.

DECISION + ORDER ON
MOTION

Defendant.

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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, 48, 49, 50, 51, 52,
53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 75, 76, 77

were read on this motion to/for JUDGMENT - SUMMARY.

The motion for summary judgment by plaintiff against defendant DB Insurance Co. Ltd.
(US Branch) f/k/a Dongbu Insurance Co., LTD (US Branch) ("DB") is denied.

Background

This is an insurance dispute between plaintiff (which insured the landlord) and defendant
DB (which insured the tenant, a restaurant operated by defendant Wanka). After a purported trip
and fall at the restaurant, the landlord and the restaurant sought coverage through their insurance
policies. Plaintiff provided a general liability insurance policy to Mr. Ripley (the building owner
where the restaurant was located and who has since passed away). It claims that Ripley's estate
is entitled to additional insured status under a policy issued by DB to defendant Wanka.

Plaintiff contends that the DB policy contained an additional insured endorsement that insured Ripley Enterprises for liability. It insists that Ripley's coverage under the DB policy is primary to plaintiff's coverage and, therefore, DB must defend and indemnify the Ripley Estate in the underlying action and reimburse plaintiff for the amount plaintiff has spent defending Ripley.

In opposition, DB asserts that there are numerous issues of fact that should compel the Court to deny the motion. It claims that plaintiff failed to satisfy its burden of proof and the motion is premature as no depositions have been held. DB argues that on the date of the accident, the insurance policy did not identify an additional insured and that the additional insured endorsement was added only after the accident that formed the basis of the underlying action. DB maintains that the endorsement was not retroactive and plaintiff has offered no justification for reforming the DB policy. It also points out that the lease for the restaurant between Ripley Enterprises and Wanka (which defendants claim that Ripley drafted) required Wanka to name Ripley Enterprises as an additional insured, an entity that was not named in the underlying action. Defendants observe that in the personal injury action, the Supreme Court granted Wesco's motion for breach of contract against Wanka for failure to name any Ripley entity as additional insured pursuant to the lease.

In reply, plaintiff contends that Mr. Ripley's omission from the endorsement "must necessarily have resulted from an inadvertent mistake." Plaintiff argues that Ripley Enterprises was how the named insured is identified in the Wesco policy and was a business name for Mr. Ripley. It points out that there is no listing with any state entity for a corporation entitled Ripley Enterprises related to Mr. Ripley.

## Discussion

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. 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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]).

The Court denies the motion as there are issues of fact that require discovery. Plaintiff wants this Court to interpret the lease to find that “Ripley Enterprises” actually means Mr. Ripley and change DB’s insurance policy issued to Wanka to include Thomas A. Ripley, Kim L. Horan and Lynn C. Lehane as successor co-executors of the Estate of Thomas A. Ripley as additional insureds. The Court cannot do that without any discovery.

This is not a straightforward interpretation of an insurance policy. Rather, plaintiff is asking the Court to make assumptions about what a contract meant and reform it. Reformation “is not a mechanism to interject into the writings terms or provisions not agreed upon or suggested by one party but rejected by the other. Nor may it be used to relieve a party from a hard or oppressive bargain. The burden upon a party seeking reformation is a heavy one since it is presumed that a deliberately prepared and executed written instrument accurately reflects the true intention of the parties: The proponent of reformation must show in no uncertain terms not only that mistake or fraud exists, but exactly what was really agreed upon between the parties.” (*Greater New York Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 442-43,

827 NYS2d 147 [1st Dept 2007] [internal quotations and citations omitted]). “A claim for reformation of a written agreement must be grounded upon either mutual mistake or fraudulently induced unilateral mistake” (*id.* at 443).

Here, the lease required the tenant to “name the landlord as additional insured” (NYSCEF Doc. No. 21, Rider at 1). The landlord is listed as Ripley Enterprises (*id.* at 1). Although it may be that the inclusion of Ripley Enterprises rather than Mr. Ripley was some sort of mistake, that does not mean a contract can simply be ignored. At this stage of the litigation, the Court cannot find that Wanka knew that Ripley Enterprises was not actually a company and it was contracting with Mr. Ripley in his individual capacity. After all, DB argues that Mr. Ripley decided to use Ripley Enterprises on the lease and the Court cannot reform the DB insurance policy because Mr. Ripley purportedly decided to play fast and loose with the filing requirements of doing business under an assumed name.

A plain reading of the lease required Wanka to name Ripley Enterprises as an additional insured. Whether Wanka, in fact, complied with that requirement is not the issue on this motion. Instead, the parties must explore whether there was a mutual or unilateral mistake, who drafted the lease and the intent of the parties.

Moreover, the underlying action concerns an accident that happened at the restaurant on January 27, 2013 (NYSCEF Doc. No. 62) and DB’s policy endorsement identifying Ripley Enterprises as additional insured was effective April 18, 2013 (NYSCEF Doc. No. 54). It seems another Justice of the Supreme Court already found that on the date of the accident, no one was named as additional insured on the tenant’s policy, in violation of the lease. Therefore, there may be an additional issue of fact as to whether DB’s policy can be reformed if it purportedly did

not cover any Ripley entity at the time of the accident and if the endorsement can be applied retroactively.

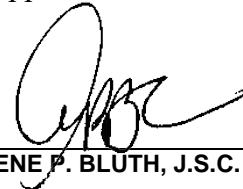
Accordingly, it is hereby

ORDERED that the motion for summary judgment by plaintiff is denied.

Conference: September 15, 2020 at 10 a.m. The parties are directed to consult the part's rules and the docket about whether the conference will take place virtually. They are encouraged to e-file a discovery stipulation signed by both parties for the Court's approval.

06/23/2020

DATE



ARLENE P. BLUTH, J.S.C.

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