

Bellet Constr. Co. Inc. v Colony Ins. Co.
2020 NY Slip Op 33372(U)
October 13, 2020
Supreme Court, New York County
Docket Number: 654347/2018
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

BELLET CONSTRUCTION CO. INC.,

Plaintiff,

- V -

COLONY INSURANCE COMPANY,
COLONY SPECIALTY INSURANCE COMPANY,
SCOTTSDALE INSURANCE COMPANY and TUDOR
INSURANCE CO.,

Defendants.

-----X

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for DISMISSAL.

In this declaratory judgment action, defendant Tudor Insurance Company (“Tudor”) seeks dismissal of the complaint against it, pursuant to CPLR 3211 (a) (1) and (7), asserting that it has no duty to defend and indemnify plaintiff Bellet Construction Company, Inc. (“Bellet”), in an underlying personal injury action because Bellet was not a named insured or an additional insured under the policy Tudor issued to its insured, non-party LSQ Contracting Corp. (“LSQ”). Tudor also seeks dismissal, pursuant to CPLR 3211 (a) (10), contending that Insurance Law § 3420 (d) bars the claims, and that Bellet failed to name LSQ, a necessary party to this action.

Background

On October 1, 2013, Bellet, a general contractor specializing in exterior building work, entered into a contract with 321 West 78th Street Corp. (“Owner”), the owner of a

building at 321 West 78th Street, New York, New York (the “Building”), to act as general contractor for a construction project involving, among other things, exterior work on the Building (complaint ¶¶ 11, 18, 20; NYSCEF Doc. No. 1). On that same date, Bellet entered into a subcontract with LSQ in which LSQ agreed to perform exterior and pointing work at the project (the “Bellet-LSQ Subcontract”) (*id.* ¶ 22). Under the Bellet-LSQ Subcontract, LSQ agreed to defend, indemnify, and hold Bellet harmless against any and all liability, including bodily injury arising out of LSQ’s work at the project (*id.* ¶ 23). LSQ also agreed to procure general liability insurance naming Bellet as an additional insured on a primary and non-contributory basis (*id.* ¶ 24).

Tudor issued a commercial general liability insurance policy to LSQ, under policy number NPP8061093, allegedly effective February 7, 2013 to February 7, 2014, with a limit of \$1 million per occurrence (*id.* ¶ 25). Bellet asserts that it is an additional insured under this Tudor insurance policy (*id.* ¶ 27).

On December 11, 2013, Owner hired Accurate Elevator Fire Door Corp. (“Accurate Elevator”) to perform work on the elevators at the project. Margarito Hernandez, an employee of Accurate Elevator, was injured when he allegedly was struck by falling debris at the project and died from his injuries three days later (*id.* ¶¶ 28-30).

On November 16, 2015, Jennifer Stone, as the administrator for Hernandez’s estate, commenced a personal injury action against Bellet, the Owner, LSQ, and others, entitled *Stone v 321 W. 78th Street Corp., et al.*, Index No. 161854/2015 (Sup Ct, NY County) (the “Underlying Action”). In that action, Bellet interposed cross-claims against LSQ asserting common law and contractual indemnification (*id.* ¶¶ 35-36).

On August 28, 2018, Bellet commenced this action, seeking declarations that the various insurance defendants – Tudor, as well as Bellet’s primary and excess general commercial liability insurers, defendants Colony Insurance Company and Colony Specialty Insurance Company (collectively, “Colony”), and Scottsdale Insurance Company (“Scottsdale”), respectively, each had obligations to defend and indemnify Bellet in connection with the Underlying Action. As against Tudor, Bellet asserted that it is entitled to a declaratory judgment (fourth and sixth causes of action) and that Tudor is liable for breach of contract (fifth cause of action) (*id.* ¶¶ 54-67). Attached to the complaint, Bellet submitted a certificate of insurance dated February 21, 2013, which indicated that LSQ was issued Tudor policy number NPP8061093 and that Bellet was listed on that policy as an additional insured (NYSCEF Doc. No. 2). Bellet also attached a copy of the Bellet-LSQ Subcontract (*id.*).

In moving to dismiss, Tudor asserts that, at the time of the accident, LSQ was the named insured on Tudor policy number NPP8138760, effective February 7, 2013 to February 7, 2014 (the “Tudor Policy”), and that this policy does not contain an additional insured endorsement; and Bellet was not a named insured, nor did it qualify as an insured under policy “Section II-Who Is An Insured” (*see* NYSCEF Doc. Nos. 11, 14). Tudor points to the “Declarations” page of the Tudor Policy, which identifies LSQ as the “Named Insured” (NYSCEF Doc. No. 14, Tudor Policy WW230 [08/11]), and states that the policy does not contain any forms or endorsements amending or expanding the “Named Insured” identified in the Declarations. It asserts that there are no “Additional Insured” endorsements, blanket or otherwise. Tudor contends that submission of a copy

of this policy is sufficient documentary evidence that conclusively disposes of Bellet's claims. It urges that, to the extent that Bellet intends to rely on the certificate of insurance, such certificate is not evidence of insurance. Tudor also argues that Insurance Law § 3420 (d) prohibits Bellet from bringing a direct action against Tudor until the injured party obtains a judgment against the tortfeasor in the Underlying Action. Finally, Tudor maintains that LSQ is a necessary party to this action, and the complaint must be dismissed since Bellet failed to include LSQ. It seeks sanctions against Bellet, asserting that these claims were frivolous.

Bellet, Colony, and Scottsdale join in opposing, and urge that Tudor failed to submit an affidavit attesting to the completeness of the policy it submitted, or any foundation for the documentary evidence. They contend that there is evidence of a second Tudor policy issued to LSQ and they need discovery on that issue.

Discussion

The motion to dismiss is granted to the extent that the claims against Tudor are dismissed. The motion is otherwise denied.

On a motion to dismiss, the allegations of the pleading are liberally construed, accepted as true and accorded the benefit of all favorable inferences (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *S & J Serv. Ctr., Inc. v Commerce Commercial Group, Inc.*, 178 AD3d 977 [2d Dept 2019]). Under CPLR 3211 (a) (1), a motion seeking dismissal based on documentary evidence, is "appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326

[2002]; *see Arnell Constr. Corp. v New York City Sch. Constr. Auth.*, -- AD3d--, 2020 NY Slip Op 04445 [2d Dept Aug. 12, 2020]).

In an insurance coverage dispute, “[t]he party claiming insurance coverage has the burden of proving entitlement. A party that is not named an insured or additional insured on the face of the policy is not entitled to coverage” (*see Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 339 [1st Dept 2003] [citations omitted]). Whether a party is a named or additional insured is determined by the parties’ intention as expressed in the language of the policy (*see 140 Broadway Prop. v Schindler El. Co.*, 73 AD3d 717, 718 [2d Dept 2010]). When a third party seeks the benefit of insurance coverage, the policy terms must clearly evince the intent to provide such coverage (*see Hargob Realty Assoc., Inc. v Fireman’s Fund Ins. Co.*, 73 AD3d 856, 857 [2d Dept 2010]; *Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, 388 [1st Dept 2006]).

Here, Tudor has submitted Tudor policy number NPP8138760 along with a letter by Rosemary D’Aco, Vice President of Underwriting and Marketing, certifying that this was the policy issued to LSQ covering the period February 7, 2103 to February 7, 2014. This policy clearly does not name Bellet as an insured, and there is no additional insured endorsement (*see* NYSCEF Doc. No. 14, Tudor Policy, Schedule of Endorsements). In addition, Bellet does not qualify as an insured under “Section II - Who Is An Insured.” Under that provision, you are an insured “[i]f you are designated in the Declarations” and it extends covered insureds to include various parties within your business organization depending on the form of your organization. For example, if the named insured is an individual, then the individual and his or her spouse are insureds with respect to the

business, or if the named insured is a limited liability company, then it and its members are insureds (*id.*, Tudor Policy Section II.1 at page 9 of 16). Bellet is not designated in the Declarations, and, therefore, does not qualify as an insured under this policy provision (*see Summer Bldrs. Corp. v Rutgers Cas. Ins. Co.*, 101 AD3d 417, 417-418 [1st Dept 2012] [where third parties, general contractor and property owner, were not named as additional insureds on the policy in the Schedule or in the Declarations, then they are not additional insureds under the policy])). This documentary evidence is sufficient and establishes Tudor's defense.

Bellet's response that the certificate of insurance from LSQ's insurance broker specifies a different policy number, NPP8061093, and states that Bellet is an additional insured, is insufficient. The certificate of insurance clearly states that it was "issued as a matter of information only and confers no rights upon the certificate holder, . . . [and that] this certificate does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies" (NYSCEF Doc. No. 2, certificate of insurance). This certificate is insufficient to establish that Bellet was an additional insured under the relevant Tudor policy, especially where, as here, Tudor Policy NPP8138760 itself fails to provide coverage (*see Lexington Ins. Co. v Kiska Dev. Group LLC*, 182 AD3d 462, 463 [1st Dept 2020]; *Illinois Natl. Ins. Co. v American Alternative Ins. Corp.*, 58 AD3d 537, 538 [1st Dept 2009]; *Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d at 389; *Insurance Corp. of N.Y. v U.S. Underwriters Ins. Co.*, 11 AD3d 235, 236 [1st Dept 2004]; *Moleon v Kreisler Borg Florman General Constr. Co.*, 304 AD2d at 339; *see also Brunner v*

United House of Prayer For All People of Church on Rock of Apostolic Faith, 292 AD2d 319, 322 [1st Dept 2002]).

Bellet's contention that there may be another policy (policy number NPP8061093) covering LSQ to which Bellet is an additional insured is unavailing. Tudor submits proof in the form of the Declarations page from that policy, showing that it was the prior policy issued to LSQ for the period February 7, 2012 to February 7, 2013, and was not in effect at the time of the accident which resulted in the Underlying Action for which Bellet seeks defense and indemnity (NYSCEF Doc. No. 29). This is sufficient to conclusively establish Tudor's defense to coverage as a matter of law.

Tudor's reliance on Insurance Law § 3420 (d) and related case law (*see Lang v Hanover Ins. Co.*, 3 NY3d 350, 355 [2004]) to support its argument that Bellet cannot bring this action is misplaced. That statute addresses the right of an injured party to bring a direct action against a tortfeasor's insurer to recover money damages, a situation not implicated in this declaratory judgment action. In fact, in *Lang v Hanover Ins. Co.*, 3 NY3d at 353) the Court of Appeals held that "[t]here is no dispute that parties to an insurance contract--the issuer, a named insured or a person claiming to be an insured under the policy--may bring a declaratory judgment action against each other when an actual controversy develops concerning the extent of coverage, the duty to defend, or other issues arising from the insurance contract" (*id.*; *see also BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708 [2007]). In any event, inasmuch as this court has already determined that Tudor is not obligated to provide any coverage to Bellet under the policy as an additional insured, this argument is academic. Similarly, Tudor's assertion that LSQ

is a necessary party, is not supported by any case law and is, in fact, incorrect because an additional insured may seek a declaration regarding defense and indemnity without joining the named insured (*e.g.*, *TK Marketing, Ltd. v National Ben. Life Ins. Co.*, 160 AD2d 665 [1st Dept 1990]). Moreover, as noted directly above, Tudor's contention is academic, given this court's determination that Tudor is not obligated to provide any coverage to Bellet.

Tudor's request for sanctions, pursuant to NYCRR 130-1.1, is denied. While the claims against Tudor are insufficient, Bellet had a good faith basis for arguing that there may be coverage under the other policy number referred to in the certificate of insurance.

Therefore, the fourth and fifth causes of action and the portion of the sixth cause of action against defendant Tudor are dismissed, and Tudor is entitled to a declaration that it is not obligated to defend or indemnify Bellet in the Underlying Action as an additional insured under Tudor policy number NPP8138760.

Accordingly, it is

ORDERED that the motion to dismiss by defendant Tudor Insurance Company is granted and the complaint is dismissed as against it (the fourth, fifth, and sixth causes of action), with costs and disbursements to defendant Tudor Insurance Company upon an appropriate bill of costs as taxed by the Clerk; and it is further

ORDERED and ADJUDGED that defendant Tudor Insurance Company has no obligation to defend or indemnify plaintiff Bellet Construction Co., Inc., in the action entitled *Stone v 321 W. 78th Street Corp., et al.* (Index No. 161854/2015 [Sup Ct, NY County]); and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remaining claims are severed and continued.

This will constitute the decision and order of the court.

ENTER:



<u>10/13/2020</u>		<u>LOUIS L. NOCK, J.S.C.</u>	
DATE			
CHECK ONE:	☐	CASE DISPOSED	☒ NON-FINAL DISPOSITION
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APPLICATION:	☐	SETTLE ORDER	☐ SUBMIT ORDER
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