

Strathmore Ins. Co. v Massachusetts Bay Ins. Co.

2020 NY Slip Op 33807(U)

November 13, 2020

Supreme Court, New York County

Docket Number: 653272/2019

Judge: Laurence L. Love

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. LAURENCE L. LOVE PART IAS MOTION 63M

Justice

-----X

STRATHMORE INSURANCE COMPANY

Plaintiff,

- v -

MASSACHUSETTS BAY INSURANCE COMPANY,

Defendants.

-----X

INDEX NO. 653272/2019

MOTION DATE 10/26/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

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

Upon the foregoing documents, it is

The following read on plaintiff's summary judgment motion, CPLR 3212, that defendant has a duty to defend 150 East 77th Street Corp. in a personal injury lawsuit filed on behalf of Mildred Vazquez, *Mildred Vazquez v. 150 East 77th Street Corp. et al.*, Ind. No. 11816/2015.

Defendant cross-moves for summary judgment, CPLR 3212, that defendant is not obligated to defend, nor indemnify nonparties, 150 East 77th Street Corp., and Maxwell Kates in the action of *Mildred Vazquez*. Defendant also seeks a declaration that they are not obligated to reimburse plaintiff for any past defense or future indemnity costs incurred by plaintiff in their defense of the *Mildred Vazquez* action.

Strathmore Insurance Company ("Strathmore") commenced this action by filing a summons and complaint on June 4, 2019. Massachusetts Bay Insurance Company ("Mass Bay") joined issue by an interposed answer on February 4, 2020.

Mass Bay asserts in their thirteenth affirmative defense that, “150 East 77th Street Corp., does not qualify as an additional insured under the Massachusetts Bay Insurance Company policy, since the facts alleged by underlying plaintiff, Mildred Vazquez, do not include any alleged facts which indicate that the accident occurred on premises owned, leased or operated by Laurence (sic) Friedland or Melvin Friedland.”

Mass Bay also asserts in their second affirmative defense that, “[p]ursuant to CPLR Article 10, this action cannot be properly brought without a necessary party, including, but not limited to, plaintiff’s named insured and all of the named insured’s insurance carriers.”

The building at 1093 Lexington Avenue is owned by 150 East 77th Street Corp., leased to Lawrence Friedland and Melvin Friedland, and subleased to Lutas Beauty, Inc. Massachusetts Bay Company’s named insured is tenant, Laurence Friedland. Strathmore Insurance Company issued a commercial general liability policy naming owner, 150 East 77th Street Corp.

The *Mildred Vazquez* action has defendants of “150 East 77th Street Corp., Maxwell Kates, Inc., Duane Reade Inc., Lutas Beauty Inc. d/b/a Bleu Sur Bleu, Larstrand Corp., 1091 Lexington, LLC, Lawrence Friedland and Eric Friedland as Executor under the last will and testament of Melvin Friedland, deceased.”

Mildred Vazquez’s third amended verified complaint states in paragraphs seventy-seven to seventy-nine, “That on February 17, 2015, Plaintiff, MILDRED VAZQUEZ was lawfully on the public sidewalk in front of 1091 Lexington Avenue abutting 1093 Lexington Avenue, in the County, City and State of New York. That on February 17, 2015, while Plaintiff, MILDRED VAZQUEZ was lawfully at the aforesaid location, she was caused to sustain serious and permanent injuries. That the above mentioned occurrence, and the results thereof, were caused by the joint, several and concurrent negligence of the Defendants and/or said Defendants’ agents,

servants, employees and/or licensees in the ownership, operation, management, supervision, maintenance and control of the aforesaid premises” (NYSCEF Doc. No. 43).

Mildred Vazquez’s Verified Bill of Particulars states in paragraph two, “[t]he accident herein occurred on the public sidewalk in front of 1091 Lexington Avenue and 1093 Lexington Avenue, in the County, City and State of New York.” Paragraph five continues in relevant part, “[t]he acts or omissions claimed herein ... in carelessly and improperly clearing ice and/or snow from the location of this accident prior thereto causing a more dangerous condition that would ordinarily have existed” (NYSCEF Doc. No. 42).

CPLR § 3212 (b) states that, “the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (*Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968]).

In ruling on a motion for summary judgment, the Court must ascertain whether any genuine issues of material fact exist in the proofs laid bare by the parties’ submissions of affidavits based on personal knowledge and documentary evidence, rather than in their conclusory or speculative averments (*Behar v. Ordover*, 92 A.D.2d 557, 558 [2nd Dept. 1983]).

An “agreement of lease” states the owner as “150 East 77th Street Corp., c/o William B. May & Co., Inc., 555 Madison Ave., NY, NY,” and tenant as “Lawrence Friedland and Melvin Friedland, Esq., 22 East 77nd Street, New York, New York 10021.” The lease continues with, “[o]wner hereby leases to Tenant and Tenant hereby hires from Owner the premises known as basement storage space Nos. 3 & 4 as set forth on the diagram” (NYSCEF Doc. No. 2).

A February 28, 1992 lease agreement was made for Apartment 1-A, between 150 East 77th Street, lessor, and Lawrence and Melvin Friedland, lessee. Paragraph two of the lease states, “[t]he lessor shall at its expense keep in good repair all of the building including all of the apartments, the sidewalks and courts surrounding the same.”

The 1992 lease contains obligations for the Friedlands in paragraph eighteen, “Repairs by the Lessee.” This does not include any obligation of the Friedlands to maintain the sidewalks.

In the *Mildred Vazquez* action, an Elliot Rebollo appeared for an Examination before trial. Mr. Rebollo testified that he worked for 150 East 77th Street and was the property manager. Mr. Rebollo testified that he and his men performed the snow removal and that none of the commercial tenants along Lexington Avenue performed snow removal.

The lease agreement between 150 East 77th Street Corp. and the Friedlands required the latter to procure an insurance policy naming 150 East 77th Street Corp. as “co-assured.” The Friedlands obtained an insurance policy from Mass Bay and states in relevant part, “any person or organization with whom [the Friedlands] agreed ... to provide insurance, is an insured, but only with respect to ... [p]remises [the Friedlands] own, rent, lease, or occupy.”

The central question of whether 150 East 77th Street is entitled to coverage under the Mass Bay policy is whether the Lexington Avenue sidewalk, the site of Mildred Vazquez’s injury, is included in the premises demised to the Friedlands.

The Supreme Court has held that the owner of a premises was not entitled to additional insurance coverage where the lease “did not provide that the sidewalk crossing in front of the premises was included in the leased premises nor did the [tenants] have a duty to repair or maintain the sidewalk or keep it free from defects” (see *Leading Ins. Grp. Ins. Co., LTD v. Argonaut Great Cent. Ins. Co.*, 47 Misc. 3d 1214(A)[Sup. Ct. Westchester 2015])

The Mass Bay policy only accounts for coverage to an additional insured where Mildred Vazquez’s alleged accident arises from the “premises the Friedlands own, rent, lease or occupy.” The lease agreement for the store front spaces along Lexington Avenue did not include the sidewalks as part of the demised premises, and the lease obligated owner 150 East 77th Street to maintain same, there lies no insurance coverage for 150 East 77th Street under the Mass Bay policy.

Under New York Law, it is well settled that “[a] Court may and ordinarily must refuse to render a declaratory judgment in the absence of necessary parties (see *J-T Assocs. v. Hudson River-Black River Regulating Dist.*, 175 A.D.2d 438, 440 [3d Dept. 1991]). Herein, Strathmore has failed to join 150 East 77th Street, and Maxwell Kates, Inc., the non-parties plaintiff is seeking coverage for in this action. To determine the priority of coverage among different policies, a ‘court must review and consider all of the relevant policies at issue’ (see *Paramount Ins. Co. v. Fed. Ins. Co.*, 174 A.D.3d 476, 477 [1st Dept. 2019]).

ORDERED that plaintiff’s motion for summary judgment is denied; and it is further

ORDERED that defendant’s motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

11/13/2020

DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE