Central Hudson Gas & Elec. Corp. v Cincinnati Ins. Co.
2020 NY Slip Op 35036(U)
December 2, 2020
Supreme Court, Orange County
Docket Number: Index No. EF003567-2019
Judge: Robert A. Onofry

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

----------X

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Plaintiff,

- against –

CINCINNATI INSURANCE COMPANY and RAYMOND VAZQUEZ,

Defendants.

----------X

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF003567-2019

DECISION, ORDER and JUDGMENT

Motion Date: September 30, 2020

The following papers numbered 1 to 15 were read and considered on (1) a motion by the Plaintiff, pursuant to CPLR §3212, for summary judgment and a declaratory judgment that the Defendant Cincinnati Insurance Company must defend and indemnify the Plaintiff in an underlying personal injury action, and reimburse it for costs and fees incurred in the action, plus the costs and disbursements of this action, and (2) a cross motion by the Defendant Cincinnati Insurance Company, pursuant to CPLR § 3212, to dismiss the action insofar as asserted against it.

Notice of Motion- Kurtz Affirmation- Palmer Affidavit- Exhibits A-P	1-4
Notice of Cross Motion- Lattuca Affirmation- Exhibits A-F- Memorandum of Law	5-8
Affirmation in Support of Motion- Lissauer- Exhibits A&B	9-10
Reply- Kurz Affirmation	11
Reply- Lissauer Affirmation - Exhibit A	12-13
Opposition to Cross Motion- Lissauer Affirmation- Exhibit A	14-15

Upon the foregoing papers, it is hereby,

ORDERED, ADJUDGED and DECREED, that the motion is granted, and the cross motion is denied.

Introduction

The action at bar is one of several arising from an accident that allegedly occurred during a construction project which resulted in personal injuries to the Defendant Raymond Vasquez. This action concerns insurance coverage. Certain basic background facts do not appear to be in dispute and may be summarized as follows.

Non-party (to this action) J. Mullen & Sons, Inc. (hereinafter "J. Mullen") is in the business of construction. At all relevant times, it was insured by the Defendant Cincinnati Insurance Co. (hereinafter "Cincinnati").

On the date of the underlying accident at issue, May 13, 2016, J. Mullen was performing construction work in Kingston, New York for the Plaintiff Central Hudson Gas & Electric Company (hereinafter "Central Hudson").

Vazquez was working at the site as a flagger. In the underlying personal injury action, Vazquez alleges that he was seriously injured when an excavator rolled backwards and crushed his foot and ankle, ultimately resulting in amputation. He seeks damages against J. Mullen and Central Hudson for negligence and Labor Law violations.

In a related declaratory action brought by J. Mullen, the Court declared that Cincinnati had a duty to defend and indemnify J. Mullen in the underlying personal injury. Cincinnati had denied coverage on the ground that Vazquez was an employee (a "leased worker") for J. Mullen at the time of accident, which is a policy exclusion.

In the action at bar, Central Hudson seeks coverage from Cincinnati as an "additional insured" under the policy issued to J. Mullen. Central Hudson argues that it is entitled to such coverage pursuant to a general provision in the policy which provides coverage to any party that

J. Mullen is contractually obligated to name as an additional insured. Here, Central Hudson asserts, it entered into a general contract (hereinafter "master agreement") with J. Mullen which required J. Mullen to name it as an additional insured.

Initially, Cincinnati had denied coverage to Central Hudson on the same ground *supra*, to wit: that Vazquez was a non-covered "leased worker" at the time of accident.

However, Cincinnati subsequently denied coverage on the ground that there was no contract between J. Mullen and Central Hudson as to the work at issue which required J. Mullen to name Central Hudson as an additional insured. Rather, Cincinnati asserts, although the master agreement did require J. Mullen to name Central Hudson as an additional insured, the master agreement contemplated further, separate contracts ("Scope of Work" agreements) specifying the actual work to be performed, and no such contract was entered into for the project at issue.

Central Hudson commenced this action seeking a declaration that Cincinnati must defend and indemnify it in the underlying personal injury action.

Central Hudson now moves for summary judgment.

Cincinnati cross moves seeking dismissal of the complaint.

The motion is granted, and the cross motion is denied.

Factual/Procedural Background

On October 14, 2015, J. Mullen entered into a contract (the master agreement) with Central Hudson (Motion, Exhibit I). The term was for approximately five years.

In relevant part, Article 2 of the contract, entitled, "General Description of Project," provides as follows:

2.1. Nature of Contract. This Contract is a contract for a specified Scope of Work, as

described herein.

2.2. Description of Work. Under the terms of this Contract, the Contractor shall, either directly or through approved Subcontractors, perform the following services or work: PERFORM GAS MAIN AND SERVICE INSTALLATION, LIVE PIPELINE WELDING, TAPPING AND BAGGING OF PIPELINES UNDER PRESSURE, PURGING, RESTORING GAS SERVICE, AND BUILDING METER SETS THROUGHOUT THE CENTRAL HUDSON TERRITORY and such other work as identified in section 2.5 hereof and/or in the Scope of Work entered into by Owner and the Contractor (all such work and services constituting the "Work,") as defined in and governed by the General Conditions of Contract).

2.3. Location of Work. The Work shall be performed throughout Central Hudson territory, and/or such other location or locations as identified by Owner.

* * *

2.5. Term Contracts. If this Contract is described as a term contract in section 2.1 hereof, Owner and Contractor acknowledge and agree that Owner may, from time to time, order the performance of Work under this Contract either by delivering any such order orally or by means of one or more "Work and Billing Authorizations" or similar document signed by the Owner's authorized representative; any such Work shall be subject to the terms and conditions of this Contract unless specifically stated to the contrary on the Work and Billing Authorization or such other document.

J. Mullen agreed to perform all work specified in the "Scope of Work or elsewhere in the Contract." (section 3.1).

Central Hudson agreed to pay J. Mullen "the Contract Price as specified in the [Scope of Work, Rate Sheet or pricing terms of Contractor's proposal].

According to the general "terms and conditions" of the contract, J. Mullen was obligated, *inter alia*, to maintain various insurance, including Commercial General Liability insurance (Section 12.1), and to name Central Hudson as an additional insured in such policies (section 12.2.[c]).

In support of its motion for summary judgment, Central Hudson submits an affirmation

from counsel, Eric Kurtz.

Kurtz summarizes certain disclosure in the case as follows.

At an examination before trial, Edwin Cooper, the general manager of J. Mullen, testified that the work at issue, which was being performed on May 13, 2016, was pursuant to the master agreement between J. Mullen and Central Hudson for the replacement of natural gas facilities, including service lines in the City of Kingston. The work began in April of 2016. The master agreement allowed J. Mullen to "be able to bid and perform work" for various projects designed by Central Hudson. The work being performed on the date of the underlying accident was part of the original estimate that had been submitted to Central Hudson pursuant to the terms of the master agreement.

At an examination before trial, Thomas Palmer, the Superintendent of Gas Transmission and Distribution at Central Hudson, testified that his responsibilities included ensuring that the work carried out by Central Hudson's contractors was performed pursuant to Central Hudson's specifications. Here, the work being performed by Vazquez at the time of his injury involved the replacement of gas mains and services in the city of Kingston, and were part of the master agreement between Central Hudson and J. Mullen, entered into in October of 2015. There was no separate contract for the work. J. Mullen had several other contracts with Central Hudson. However, they did not apply to the work being performed at the situs of the accident.

At an examination before trial, Richard Bridges, a home office supervisor with Cincinnati, testified that he became involved in the case because of the potential for coverage for Central Hudson and the significance of the injuries to Vazquez.

Cincinnati first learned about Vasquez's injury in February of 2017. On February 9, 2017,

Cincinnati requested a copy of the contract J. Mullen had entered into for the project on which Vasquez was working when he was injured.

Finally, Bridges noted, the general conditions portion of the master agreement set forth indemnification and additional insured requirements. However, he testified, it was his understanding that, "for the provisions of the master agreement to be triggered for Mr. Vazquez's accident, there has to be a separate contract for the specific job site that states that the work is being done under the terms and provisions of the master agreement." J. Mullen never produced such a separate contract or written agreement.

In support of the grant of summary judgment, Kurtz argues that the testimony of Palmer and Cooper demonstrates that the master agreement governed all work that J. Mullen performed on behalf of Central Hudson during the time frame covered by the agreement. Indeed, he asserts, that the location of Vazquez's accident was included within the master agreement is further verified by the attached affidavit of Thomas Palmer, and the submission by J. Mullen seeking payment for the work performed in the area of the accident.

Kurtz argues that the terms of the master agreement are sufficiently clear to demonstrate that J. Mullen agreed to perform work for Central Hudson when the latter deemed it necessary. In fact, he notes, the plain language of the contract makes clear that work would be directed "from time to time" and that the overall term of the contract was to run for a period of five years.

As such, he argues, there is no ambiguity and the plain language of the master agreement demonstrates that the parties intended for it to govern their respective projects for the duration of the specified period.

Kurtz notes that both parties to the master agreement (J. Mullen and Central Hudson)

agree that the general conditions, including the additional insured status therein, applied to the work being performed at the situs of the accident involving Vazquez.

In any event, Kurtz argues, Cincinnati failed to issue a timely disclaimer of coverage and, therefore, is estopped from denying coverage, to wit: Cincinnati has known about the potential additional insured claim since at least June of 2017, and was aware of the lawsuit against Central Hudson since March 12, 2019, and still has not served a denial of coverage.

In sum, he asserts, the Court should declare that Cincinnati must provide coverage to Central Hudson in the underlying action and must reimburse Central Hudson for all legal costs incurred to date in defending the same.

In further support of the motion, Central Hudson submits an affidavit from Thomas Palmer (*supra*).

Palmer asserts that he is familiar with the contractual requirements that are imposed on contractors hired by Central Hudson to perform work on its pipelines. Each must sign a "Master Agreement" with certain required terms and conditions. Such agreements are generally for a specific time period (here, five years) and for a specific type of work (here, gas main and service installation, live pipeline welding, tapping and bagging of pipelines under pressure, purging, restoring gas service, and building meter sets throughout the Central Hudson territory). The Master Agreement sets forth the time for performance of the work, the services to be provided, site housekeeping and waste disposal, responsibilities for both the contractor and Central Hudson, issues concerning environmental matters, compliance with Occupational Safety and Health Laws, invoicing and payments, warranties, intellectual property, termination and, relevant to this case, indemnification and insurance coverage.

Here, he asserts, all of the work being performed by J. Mullen for Central Hudson, including the work at issue, was being performed pursuant to the Master Agreement, and was subject to its terms and conditions.

Cincinnati cross moves to dismiss the complaint.

In support of its cross motion, Cincinnati submits an affirmation from counsel, Christopher Lattuca.

Lattuca argues that Central Hudson is not entitled to coverage under the policy issued to J. Mullen because Central Hudson it is not specifically named as such in the policy, and because there is otherwise no enforceable contract which required J. Mullen to name Central Hudson as an additional insured for the work at issue. Contrary to the contentions of Central Hudson, he asserts, the master agreement is not such a contract.

First, he contends, the master agreement expressly anticipates that the parties will enter into contracts for "specified scope of Work." Section 1.2 of the contract, entitled "Attachments Incorporated By Reference," states that a "Scope of Work Schedule" is incorporated by reference in the master agreement (Exhibit F, at § 1.2). However, he notes, the parties never drafted nor attached a "Scope of Work Schedule" to the contract.

Further, he argues, the master agreement does not by its terms purport to cover all work performed by J. Mullen. Rather, he asserts, although section 2.5 of the master agreement, entitled "Term Contracts," does provide for such an open ended work relationship for "term contracts," the section is only applicable when the contract is designated a term contract in section 2.1. Here, he notes, section 2.1 of the master agreement does not define the contract as a "term" contract, but rather as "a contract for a specified scope of Work."

Further, he notes, the master agreement does not set forth any pricing terms.

Lattuca notes that Central Hudson attempts to avoid dismissal by offering extrinsic evidence, including testimony and documents, which purport to demonstrate that the work at issue was being performed within the scope of the master agreement. However, he argues, this evidence is precluded from consideration by the contract's merger clause (General Conditions of Contract, § 1.5).

Finally, he asserts, Cincinnati is not estopped from denying coverage due to any delay in issuing a disclaimer of coverage. Rather, he argues, such estoppel is only applicable when the basis of the disclaimer is a policy exclusion; not, as here, when it concerns a lack of inclusion.

In reply, Central Hudson submits an affirmation from counsel, Eric Kurtz.

Kurtz asserts that Cincinnati's cross motion was not timely made.

In any event, he argues, Cincinnati's opposition and cross-motion rest upon a misinterpretation of the contract between Central Hudson and J. Mullen, together with a disregard for the intent of J. Mullen and Central Hudson in entering into the contract, as evidenced by the testimony of their own witness (*supra*). In particular, he asserts, the master agreement does not limit the scope of the work to only that set forth in a "scope of work." Rather, the definition of work is more expansive.

Further, he argues, the merger clause in the master agreement does not preclude the testimony or other evidence from Central Hudson and J. Mullen that the master agreement provided J. Mullen the right to bid on individual projects.

Indeed, he asserts, Cincinnati is a stranger to the contract, and lacks standing to challenge the interpretation or enforcement of the same. That is, (1) it is not a party to the contract; (2) it is

not a third-party beneficiary under the contract; and (3) it suffers no direct harm as a result of the contract. In fact, he notes, section 3.10 of the general conditions expressly provides that there are no third-party beneficiaries to the contract.

Discussion/Legal Analysis

The arguments concerning a timely disclaimer of coverage raise a threshold issue that will be addressed first.

In relevant part, Insurance Law § 3420(d)(2) requires that an insurer disclaim coverage for bodily injury arising out of an accident "as soon as is reasonably possible ."

If the insurer fails to provide such a timely disclaimer, the insurer may be estopped from denying coverage, even if the demand for coverage was not timely. *Zappone v. Home Ins. Co.*, 55 N.Y.2d 131 (1982); *Hargob Realty Associates, Inc. v. Fireman's Fund Ins. Co.*, 73 A.D.3d 856 [2nd Dept. 2010]; *City of New York v. St. Paul Fire and Marine Ins. Co.*, 21 A.D.3d 978 [2nd Dept. 2005].

However, on the issue of estoppel, the case law draws a distinction between a disclaimer based on a policy exclusion, and one based on a lack of inclusion. A timely disclaimer of coverage is not required for the latter. This is because the failure to disclaim coverage that does not exist (as opposed to coverage that would exist but for a policy exclusion) cannot create coverage. *Zappone v. Home Ins. Co.*, 55 N.Y.2d 131 (1982); *Hargob Realty Associates, Inc. v. Fireman's Fund Ins. Co.*, 73 A.D.3d 856 [2nd Dept. 2010]; *City of New York v. St. Paul Fire and Marine Ins. Co.*, 21 A.D.3d 978 [2nd Dept. 2005].

Here, Central Hudson is not a named additional insured under the policy issued to J. Mullen.

Further, the basis for denying coverage is not a policy exclusion (unlike, for example, the disclaimer as to J. Mullen, *supra*).

Rather, the Cincinnati policy would provide coverage for Central Hudson as an additional insured only if J. Mullen had a contractual obligation to provide such coverage for the work at issue. Thus, the "disclaimer" at issue concerns a lack of inclusion, not a policy exclusion. *Hargob Realty Associates, Inc. v. Fireman's Fund Ins. Co.*, 73 A.D.3d 856 [2nd Dept. 2010]. Consequently, Cincinnati need not have issued a timely disclaimer, and is not estopped from denying coverage based on a failure to do so.

On the merits, the Court notes as follows.

There appears to be no dispute, and the Court otherwise finds, that the master agreement constituted a written contract which obligated J. Mullen to name Central Hudson as an "additional insured" on any policy of insurance covering work performed pursuant to the contract. Thus, if the work at issue was being performed pursuant to the master agreement, Cincinnati must provide coverage to Central Hudson in the underlying personal injury action.

Here, the work at issue was being performed pursuant to the master agreement.

As noted by the parties, the master agreement clearly contemplated that a "Scope of Work" document would be appended as schedule 2 to the contract (section 1.4). It was not.

However, the master agreement, by its plain terms, does not limit the "work" to be performed under the agreement to only that work set forth in the Scope of Work document *supra*. Rather, the master agreement provides as follows:

> 2.2. Description of Work. Under the terms of this Contract, the Contractor shall, either directly or through approved Subcontractors, perform the following services or work: PERFORM GAS MAIN AND SERVICE INSTALLATION, LIVE PIPELINE

> WELDING, TAPPING AND BAGGING OF PIPELINES UNDER PRESSURE, PURGING, RESTORING GAS SERVICE, AND BUILDING METER SETS THROUGHOUT THE CENTRAL HUDSON TERRITORY and such other work as identified in section 2.5 hereof and/or in the Scope of Work entered into by Owner and the Contractor (all such work and services constituting the "Work,") as defined in and governed by the General Conditions of Contract).

Thus, the master agreement expressly identifies three potential sources of "work," to wit: work described in section 2.2 itself; work identified in section 2.5, and work identified in the Scope of Work. These sources are described in the conjunctive; not the disjunctive.

Further, the location of the work is also expansive, to wit: "throughout Central Hudson territory, and/or such other location or locations as identified by Owner."

Here, by the plain terms of the master agreement, the work being performed was within the description of work in section 2.2, and was being performed within the geographical limits of the master agreement. Indeed, this was clearly the understanding of the parties to the contract (J. Mullen and Central Hudson).

By contrast, the Court finds nothing in the master agreement, or in the law, which supports Cincinnati's position that the work at issue did not and could not constitute "work" within the meaning of the master agreement unless J. Mullen and Central Hudson entered into a separate written contract (or Scope of Work agreement) expressly concerning the work at issue, and which expressly referenced the master agreement.

Thus, Central Hudson's motion is granted.

In light of the forgoing, Cincinnati's cross motion is denied. Thus, the Court need not, and does not, determine whether the cross motion was timely.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, ADJUDGED and DECREED, that the motion is granted and the cross motion is denied; and it is further,

ORDERED, ADJUDGED and DECREED, that in conformity with the foregoing, the Defendant Cincinnati Insurance Company is obligated to defend and indemnify (if warranted) the Plaintiff in an underlying personal injury action entitled *Vazquez v J. Mullen & Sons, Inc.*, pending in Orange County, Supreme Court, under Index No. EF004431-2017, and to reimburse the Plaintiff for all costs and fees, etc. incurred in that action to date.

The foregoing constitutes the decision and order of the court.

Dated: December 2 , 2020
Goshen, New York

ENTER

HON. ROBERT A. ONOFRY, J.S.C.

TO: COOK, NETTER, CLOONAN, KURTZ & MURPHY, P.C.
ATTORNEYS FOR PLAINTIFF
Office & P.O. Address
85 MAIN STREET, P.O. BOX 3939
KINGSTON, NEW YORK 12402

VAHEY GETZ LLP
Attorneys for Defendant Cincinnati Insurance Company
Office & P.O. Address
144 Exchange Blvd., Suite 400
Rochester, New York 14614

FINKELSTEIN & PARTNERS
Attorneys for Defendant Raymond Vazquez
Office & P.O. Address
1279 Route 300
Newburgh, New York 12551