

Centeno v Long Is. Hous. Partnership, Inc.
2020 NY Slip Op 35157(U)
October 22, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 621261/2018
Judge: George Nolan
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Short Form Order

Index No. 621261/2018

SUPREME COURT – STATE OF NEW YORK
PART 55 - SUFFOLK COUNTY

P R E S E N T:

Hon. George Nolan
Justice Supreme Court

RUBEN CENTENO,
Plaintiff,

-against-
MOT. Seq. No. #001 - MD
MOT. Seq. No. #002 - MG
MOT. Seq. No. #003 - MD
Orig. Return Date: 02/27/2020
Mot. Submit Date: 08/13/2020

LONG ISLAND HOUSING PARTNERSHIP, INC. and JJR
ASSOCIATES, INC.,
Defendants.

PLAINTIFF'S ATTORNEY
CESAR L. VALDEBENITO, ESQ.
250 Fulton Avenue, Suite 515
Hempstead, NY 11553

JJR ASSOCIATES, INC.,
Third-Party Plaintiff,

-against-

DEFENDANTS' ATTORNEY
HANNUM FERETIC PRENDERGAST
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Inc.
65 Broadway, Suite 202
New York, NY 10006

BIG BANG CONSTRUCTION, LLC, ARCH SPECIALTY
INSURANCE COMPANY and ATLANTIC CASUALTY
INSURANCE COMPANY,
Third-Party Defendants.

**DEFENDANT AND THIRD-PARTY
PLAINTIFF'S ATTORNEY**
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THIRD-PARTY DEFENDANTS' ATTORNEY
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Woodbury, NY 11797

KELLY & CURTIS
Attorneys for Arch Specialty Insurance Company
32 Broadway, Suite 301
New York, NY 10004

KEIDEL WELDON & CUNNINGHAM, LLP
Attorneys for Atlantic Casualty Insurance Company
925 Westchester Avenue
White Plains, NY 10604

Upon the e-filed documents numbered 34 through 51; 55 through 67; 70 through 77 and 79 through 119, it is

ORDERED that the motion to dismiss by third-party defendant Arch Specialty Insurance Company, ("Arch") is denied (motion sequence no. 001); and it is further

Centeno v Long Island Housing Partnership

Index No. 621261/2018

Page 2

ORDERED that motion for summary judgment (motion sequence no. 002) by third-party defendant Atlantic Casualty Insurance Company (“Atlantic”), is granted; and it is further

ORDERED that cross-motion for partial summary judgment (motion sequence no. 003) by defendant/third-party plaintiff JJR Associates, Inc. (“JJR”) against third-party defendant Arch Specialty Insurance Company is denied.

This is an action commenced on October 30, 2018 for personal injuries allegedly sustained by plaintiff Ruben Centeno (“Centeno”) while working on a construction project at premises located at 142 Cypress Drive, Mastic Beach, New York. Centeno, a employee of third-party defendant Big Bang Construction, LLC (“Big Bang”) sued the property owner Long Island Housing Partnership, Inc. (“LIHP”) and JJR Associates (“JJR”) the general contractor. JJR was insured by Arch. Big Bang was a subcontractor to JJR and was insured by Atlantic. On December 6, 2019, JJR commenced a third-party action against Big Bang, Arch and Atlantic seeking a declaratory judgment that Arch is obligated to defend and indemnify it under a general liability policy (“Arch Policy”) issued to JJR and which was in effect May 8, 2017 to May 8, 2018. Both Arch and Atlantic have denied coverage.

Arch moves pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) for an order dismissing the claims asserted against it in the third-party complaint as well as cross-claims asserted against Arch by Atlantic. Atlantic moves pursuant to CPLR 3212 for an order granting it summary judgment dismissing all claims asserted against it. JJR cross-moves pursuant to CPLR 3212 for an order granting it partial summary judgment against Arch determining that Arch has a duty to defend the claims alleged by plaintiff Centeno against JJR.

JJR was the prime contractor on the construction of a home located at 142 Cypress Drive, Mastic Beach, New York where it is alleged that Centeno’s accident occurred. The property was owned by LIHP. Prior to the accident, JJR entered into a subcontract with Big Bang for work on premises at 134 Cypress Drive Mastic Beach. This is the only contract provided to the court and it pertains to work “associated with LIHP affordable homes program proposed residential dwelling located at 134 Cypress Dr., Mastic Beach, NY.” The contract provides that Big Bang was to indemnify JJR and name JJR as an additional insured¹ in its general liability policy and maintain the following insurance:

The Subcontractor, at its own expense shall procure, carry, and maintain on all its operations **Workers’ Compensation** and employer’s **Liability insurance** covering all of its employees. **Subcontractor is required to name JJR Associates Inc., LIHP, Inc. And Affiliates as additional insured on subcontractor’s General liability Policy.** [Emphasis supplied].

¹The contract also agrees to hold harmless “Nassau/Suffolk Partnership Housing Development Fund Company Inc., & (NSPHDFC) and affiliates...”

Centeno v Long Island Housing Partnership

Index No. 621261/2018

Page 3

Big Bang added JJR as an additional insured to its general liability policy pursuant to the contract provision, but Atlantic disclaimed the coverage indicated above because the Big Bang general liability policy contained an exclusion which eliminated coverage for claims for bodily injury sustained by employees:

Exclusion of Injury to Employees, Contractors and Employees of Contractors

Exclusion e. Employer's Liability of Section 1 - Coverage A - Bodily injury and property damage liability is replaced by the following:

This insurance does not apply to:

- i.) **"Bodily injury" to any employee** or any insured arising out of or in the course of;
 - a. Employment by any insured; or
 - b. Performing duties related to the conduct of any insured's business;
- (ii) **"Bodily injury" to any "contractor"** for which any insured may become liable in any capacity.

[Emphasis supplied].

Accordingly, Atlantic as Big Bang's insurer, declined JJR's request for coverage. Since JJR was not covered under Big Bang's policy, Arch in turn declined coverage under its policy with JJR. Arch's denial allegedly was in accordance with the following provision of the general liability policy it issued to JJR:

New York Limitation Endorsement - Work Done On Your Behalf By
Uninsured Or Underinsured Subcontractors

This insurance does not apply to any claim, "suit" demand or loss that alleges "bodily injury" including injury to any "worker", "property damage" or "personal and advertising injury" that in any way, in whole or in part, arises out of, relates to or results from operations or work performed on your behalf by a "subcontractor", **unless such "subcontractor" :**

- 1. Has in force at the time of such injury or damage a Commercial General Liability insurance policy that:

Centeno v Long Island Housing Partnership

Index No. 621261/2018

Page 4

- a. names you and any other Named Insured as an additional insured;
- b. provides an each-occurrence limit of liability equal to or greater than \$1,000,000; and
- c. provides coverage for you for such claim, "suit", demand or loss....

[Emphasis supplied].

Accordingly, Arch claims it is not obligated to defend and indemnify JJR because its subcontractor Big Bang's policy did not provide additional insured coverage for this type of claim or suit. Arch moved to dismiss the third party action for failure to state a claim and on the documentary evidence pursuant to CPLR 3211(a)(1) and (7). JJR opposed the motion to dismiss and moved for partial summary judgment declaring that Arch is required to provide it defense and indemnification.

Atlantic's Motion for Summary Judgment

Atlantic's motion is predicated on an exclusion which states that Atlantic does not provide liability coverage to "any employee or insured arising out of or in the course of employment by any insured." In the instant case, it is not disputed that Centeno is employed by Big Bang² and was in the course of his employment at the time he was injured. Accordingly, based on the exclusion recited above, Atlantic's summary judgment motion is granted and the third-party complaint and cross claims against it are dismissed.

Arch's Motion to Dismiss

In determining a motion to dismiss a complaint predicated on documentary evidence pursuant to CPLR 3211(a)(1), the motion may be granted "only if the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law" (*Integrated Constr. Servs., Inc. v Scottsdale Ins. Co.*, 82 AD3d 1160, 1162-1163 [2d Dept 2011]). Here, Arch's purported policy exclusions are predicated on a contract between JJR and Big Bang for a construction project located at 134 Cypress Drive, Mastic Beach. The plaintiff's accident occurred at 142 Cypress Drive, Mastic Beach, a discrepancy not explained by the documentary evidence provided on this motion. The court is unable to determine based on the documents and discovery provided to date as to whether or not there was an agreement between JJR and Big Bang for a construction project at 142 Cypress, where plaintiff's accident occurred.

²This is true regardless of where the accident took place.

Centeno v Long Island Housing Partnership

Index No. 621261/2018

Page 5

On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the Court must afford the pleading a liberal construction, accept as true all facts as alleged in the pleading, accord the pleader the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*V. Groppa Pools, Inc. v. Massello*, 106 AD3d 722, 964 NYS2d 563 [2d Dept 2013]). “When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action” (*Sokol v. Leader*, 74 AD2d 1180, 904 NYS2d 153 [2d Dept 2010]).

Accordingly, Arch’s motion to dismiss is denied.

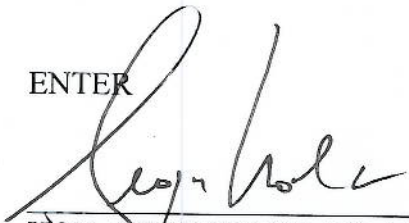
JJR’s Motion for partial Summary Judgment

Concomitantly, based upon the foregoing factual discrepancies, JJR’s motion for summary judgment is also denied.

The parties are reminded that this matter is scheduled for a compliance conference before the undersigned on January 5, 2021.

The foregoing constitutes the decision and Order of the Court.

ENTER


HON. GEORGE NOLAN, J.S.C.

Date: October 22, 2020
Riverhead, New York

☐ FINAL DISPOSITION☒ NON-FINAL DISPOSITION