

Ruiz v 829 Realty, LLC

2020 NY Slip Op 35661(U)

January 27, 2020

Supreme Court, Bronx County

Docket Number: Index No. 22941/2018

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seq. # 2

JORGE VEGA RUIZ,

Index No.: 22941/2018

Plaintiff,

- against -

DECISION and ORDER

829 REALTY, LLC and ARSH GEN CONSTRUCTION
CORP.,

Defendants.

and Third-Party action.

	<u>PAPERS NUMBERED</u>
Third-Party Defendant Acceptance Indemnity Insurance Company's Notice of Motion, Memorandum of Law in Support, Affirmation in Support, Exhibits	1, 2, 3, 4
Third-Party Plaintiff's Affirmation in Opposition, Exhibits	5, 6
Third-Party Defendant Acceptance Indemnity Insurance Company's Reply Memorandum of Law, Reply Affirmation, Exhibits	7, 8, 9

Upon the enumerated papers, Third-Party Defendant Acceptance Indemnity Insurance Company's motion to dismiss the third-party complaint is granted, in accordance with the annexed decision and order.

Dated: 1/27/2020



Hon.

LUCINDO SUAREZ, J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

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JORGE VEGA RUIZ,

Plaintiff,

Index No.: 22941/2018

- against -

829 REALTY, LLC and ARSH GEN CONSTRUCTION
CORP.,

Defendants.

DECISION and ORDER

829 REALTY, LLC,

Third-Party Plaintiff,

- against -

ACCEPTANCE INDEMNITY INSURANCE
COMPANY and MOLOD, SPITZ & DESANTIS,

Third-Party Defendants.

PRESENT: Hon. Lucindo Suarez

The issue presented in Third-Party Defendant Acceptance Indemnity Insurance Company's ("Acceptance") motion is whether it established its burden for a dismissal of the third-party complaint pursuant to CPLR §3211(a)(1)(7). This court finds in the affirmative.

Under CPLR §3211(a)(1), a dismissal may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. *Seaman v. Schulte Roth & Zabel LLP*, 176 A.D.3d 538, 111 N.Y.S.3d 266 (1st Dep't 2019). Furthermore, it is well established that on a motion to dismiss pursuant to CPLR §3211(a)(7), the court must accept as true the plaintiff's factual allegations and afford the plaintiff all favorable inferences in ascertaining whether the pleadings support

relief on the basis of any reasonable view of the facts pled. *Aristy-Farer v. State of NY*, 29 N.Y.3d 501, 81 N.E.3d 360, 58 N.Y.S.3d 877 (2017).

The underlying complaint arises from personal injuries that Plaintiff purportedly sustained at Defendant/Third-Party Plaintiff 829 Realty, LLC's, ("829 Realty") property. Plaintiff alleges that at the time of loss he was working for a subcontractor, Sebastian H. Soriano Construction, to perform construction work at 829 Realty's property. Further, he alleges that while working thereat he was caused to fall off a scaffold rendering him injured. Upon receiving notice of the instant action, 829 Realty sought that Acceptance, its insurance company, indemnify and provide it a defense to the underlying action. Acceptance disclaimed 829 Realty's request for coverage. Subsequently thereafter, 829 Realty filed a third-party complaint against Acceptance seeking, *inter alia*, a declaratory judgment that Acceptance must indemnify and defend it in this action.

Here, Acceptance argues that the third-party complaint must be dismissed against it because the subject insurance policy under an endorsement entitled "injury to independent contractors exclusion" exempted insurance coverage for bodily injuries resulting from work being performed at 829 Realty's property of an independent contractor or its employees. In addition, it posits that 829 Realty's claim of breach of good faith and fair dealing must fail as a matter of law. It further argued that the good faith and fair dealing claim is duplicative of 829 Realty's breach of contract claim, that the third-party complaint lacks any allegations to substantiate a viable breach of good faith and fair dealing claim, and that in New York there is no independent cause of action for bad faith breach of an insurance contract arising from an insurer's failure to perform its obligations under the insurance policy.

Furthermore, Acceptance argued that 829 Realty's fraud claim must fail as said claim did

not contain the required specificity under CPLR §3016(b). Moreover, Acceptance contends that the third-party complaint should be dismissed because the subject insurance policy expressly provided that no entity has any right to bring Acceptance into any action to determine the liability of 829 Realty, and that it also expressly prohibits 829 Realty from filing suit against Acceptance unless there has been a final judgment or settlement. Lastly, Acceptance argues that in the event this court denies its application for a dismissal that this matter should be severed.

In opposition, 829 Realty contends that this court should deny Acceptance's motion due to its failure to factually buttress its argument via an affidavit from a person with knowledge. Moreover, 829 Realty attempts to assail the veracity of Plaintiff's allegations as to the facts surrounding his injuries particularly challenging the notion that he was injured on a "job site", thereby, calling into question the applicability of the subject insurance policy's endorsement entitled "injury to independent contractors exclusion." It also argues that the subject endorsement was not applicable as it required that Plaintiff work on behalf of the insured.

829 Realty also sought to distinguish the facts in this case from the facts in the cases cited by Acceptance's motion. 829 Realty also attacked Acceptance's legal argument with respect to its claim of bad faith. 829 Realty contends that if New York does not recognize an independent cause of action for bad faith breach of an insurance contract that New York State is in violation of the 14th Amendment to the United States Constitution. It also posited that on a motion to dismiss the third-party action that this court is constrained to only examine the third-party complaint and not the underlying complaint. Lastly, 829 argues that Acceptance request for a severance should be denied considering that discovery just commenced in this matter.

In reply, Acceptance argued that Plaintiff's injury did occur on a job site, that the subject insurance policy's endorsement entitled "injury to independent contractors exclusion" applies

regardless of 829 Realty's relationship to the property, that said exclusion applies irrespective of who Plaintiff's employer was at the time of loss, that its motion to dismiss was properly supported by documentary evidence (i.e., a copy of the insurance policy), and that this court is not constrained to just examining the third-party complaint in determining Acceptance's duty to indemnify and defend.

From the outset, this court rejects 829 Realty's argument that it is constrained to only examining the third-party complaint and not the underlying complaint. Courts frequently, when determining issues regarding the applicability of insurance coverage raised in a third-party complaint, analyze both the allegations contained in third-party complaint and the underlying complaint to conclusively decide whether an insurance company had a duty to indemnify and defend. *See Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 A.D.3d 386, 825 N.Y.S.2d 46 (1st Dep't 2006); *see also Intl. Couriers Corp. v. N. Riv. Ins. Co.*, 44 A.D.3d 568, 844 N.Y.S.2d 253 (1st Dep't 2007).

Moreover, this court finds that Acceptance satisfied its burden of establishing that the endorsement of the subject insurance policy entitled "injury to independent contractors exclusion" applies in this particular case, and that it is not subject to other reasonable interpretation. *See Dean v. Tower Ins. Co. of NY*, 84 A.D.3d 499, 922 N.Y.S.2d 371 (1st Dep't 2011). 829 Realty's attempt to create an ambiguity as to the term "job site" is of no avail.

Gleaning from Plaintiff's verified complaint and bill of particulars it establishes that on the day of loss he was present at 829 Realty's property and performing construction work thereat. Thus, adhering to the tenets of contract interpretation by reading this exclusion policy in its entirety and ascribing to its plain and ordinary meaning, the area that Plaintiff was working at on the day of loss, is undoubtedly, a "job site" that is excluded from coverage. *See Lend Lease*

(US) Constr. LMB Inc. v. Zurich Am. Ins. Co., 136 A.D.3d 52, 22 N.Y.S.3d 24 (1st Dep't 2015).

In addition, this court finds that 829 Realty's contention that Plaintiff had to be under its employ in order for the exclusion to apply is meritless as a plain reading of the exclusion policy provided that regardless of whether Plaintiff was 829 Realty's employee or the employee of an independent contractor the exclusion provision still applies.

Furthermore, this court finds that New York does not recognize an independent cause of action for bad faith breach of an insurance contract arising from an insurer's failure to perform its obligations under same. See *Head v. Emblem Health*, 156 A.D.3d 424, 64 N.Y.S.3d 518 (1st Dep't 2017). Additionally, in support of 829 Realty's fraud causes of action, the third-party complaint fails to allege sufficient facts to establish a fraud claim under CPLR §3016(b). *Id.* Therefore, 829 Realty's third-party claims for breach of good faith and fair dealing, and fraud must be dismissed.


Accordingly, it is

ORDERED, that Acceptance's motion to dismiss the third-party complaint is granted; and it is further

ORDERED, that the Clerk of Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: January 27, 2020



Lucindo Suarez, J.S.C.

LUCINDO SUAREZ, J.S.C.