

Hilgreen v Pollard Excavating Inc.
2021 NY Slip Op 33597(U)
September 15, 2021
Supreme Court, Albany County
Docket Number: Index No. 900007-18
Judge: Christina L. Ryba
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY
MATTHEW HILGREEN,

Plaintiff,

DECISION/ORDER

-against-

Index No. 900007-18
RJI No. 01-18-128542

POLLARD EXCAVATING INC., JOHN J.
POLLARD III, and CLINDA POLLARD,
individually and d/b/a THE HOMEFRONT
CAFÉ, POLLARD DISPOSALS INC.,
Defendants.

JOHN J. POLLARD III, and CLINDA POLLARD,
individually and d/b/a THE HOMEFRONT
CAFÉ,

Third-Party Plaintiffs,

-against-

CENTRAL MUTUAL INSURANCE COMPANY,
NATIONAL INTERSTATE INSURANCE
COMPANY, ROGER SADDLEMIRE, and
AVID INSURANCE AGENCY INC.,
Third-Party Defendants.

APPEARANCES

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For Defendants and Third-party Plaintiffs
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For Third-Party Defendants Roger Saddlemire
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For Third-Party Defendant Central Mutual
Insurance Company
9 Thurlow Terrace
Albany, NY 12203-10056

Goldberg Segalla LLP
For Third Party Defendant National Interstate
Insurance Company
655 Main Street
Buffalo, NY 14203-1425

RYBA, J,

The present dispute arises out of personal injuries allegedly sustained by plaintiff on real property owned by defendants John J. Pollard III and Clinda Pollard (hereinafter the Pollards), and the subsequent disclaimers of coverage by third-party defendants Central Mutual Insurance Company (hereinafter Central Mutual) and National Interstate Insurance Company (hereinafter National Interstate) under two separate liability insurance policies. The disclaimers of coverage were both premised upon the ground that the defendants Pollard Excavating Inc. and Pollard Disposal Inc., both businesses owned and operated by the Pollards, were listed as the named insureds on the respective policies rather than the Pollards individually. The extensive motion practice in this matter includes successive motions by the Pollards to serve amended third-party complaints, as well as motions by third-party defendants to dismiss those amended third-party complaints pursuant to CPLR 3211 (a) (7) for failure to state a cause of action. Presently before the Court is a motion by Central Mutual to dismiss the Pollard's third amended third-party complaint for failure to state a cause of action, and a cross motion by the Pollards for leave to serve a fourth amended third-party complaint in the event that Central Mutual's motion is granted. The motion and cross motion are opposed.

First addressing Central Mutual's motion to dismiss the third amended third-party complaint, the Pollards allege therein that when Central Mutual issued the liability insurance policy that designated Pollard Excavating as the named insured for the property where plaintiff's injury occurred, it knew that the subject property was owned by the Pollards individually rather than by Pollard Excavating. The Pollards further allege that they specifically requested coverage in their individual capacities under the policy issued to Pollard Excavating, that Central Mutual mistakenly failed to name them as insureds or additional insureds under the policy, that they relied to their detriment upon the specific assurances given by Central Mutual that such coverage was properly provided, and that both the Pollards and Central Mutual mistakenly believed that the policy provided coverage to the Pollards in their individual

capacities. Additionally, the Pollards allege that during the relevant policy period Central Mutual became aware that the Pollards should have been named as the insureds on the insurance policy, that Central Mutual had an internal policy whereby an error or mistake in listing the proper named insured would be corrected and the proper named insured notified of the error, and that despite this knowledge and internal policy, Central Mutual deliberately concealed the error and continued to collect premiums from the Pollards. These allegations form the basis of six causes of action against Central Mutual sounding in 1) reformation of contract based upon mutual mistake, 2) reformation of contract based upon unilateral mistake and fraud, 3) a declaratory judgment finding that the subject policy provides coverage to the Pollards in their individual capacities thus requiring Central Mutual to defend and indemnify them in this action, 4) breach of good faith and fair dealing, 5) promissory estoppel, and 6) equitable estoppel.

In support of the motion to dismiss the third amended third-party complaint, Central Mutual argues that none of the pleaded causes of action are viable because the allegations and proof do not establish that the Pollards requested individual coverage under the policy or that Central Mutual ever agreed or promised to provide such coverage. However, on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the Court must accept the facts alleged in the complaint as true and give the plaintiff the benefit of all favorable inferences to determine whether the facts support any cognizable legal theory (see, Nelson v Capital Cardiology Assoc., PC, 97 AD3d 1072, 1073 [2012]; Schmidt & Schmidt, Inc. v Town of Charlton, 68 AD3d 1314, 1315 [2009]). Even where the moving party offers evidentiary proof on a motion to dismiss pursuant to CPLR 3211 (a) (7), the applicable standard is whether the proponent of the pleading has stated a cause of action, not whether there is sufficient evidence to support the cause of action (see, Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]; Bua v Purcell & Ingraio, P.C., 99 AD3d 843, 845 [2012], lv denied 20 NY3d 857 [2013]; Jannetti v Whelan, 97 AD3d 797 [2012]). Although the arguments advanced by Central Mutual in support of its motion are guised as a challenge to the facial sufficiency of the causes of actions asserted in the third

amended third-party complaint, they are in essence a challenge to the underlying merits of the Pollards' claims and their ability ultimately to prove them at trial. Whether sufficient evidence exists to support the Pollards' claims is a matter more appropriately raised in the context of a motion for summary judgment. Central Mutual has thus failed to establish that it is entitled to dismissal of the complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7). In view of this finding, the Pollards' cross motion for leave to serve an fourth amended third-party complaint is moot and is denied on that ground.

For the foregoing reasons, it is hereby

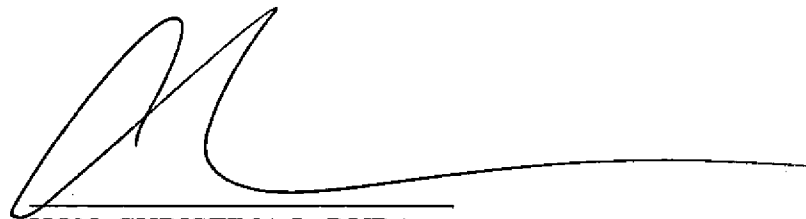
ORDERED that the motion to dismiss the third amended third-party complaint is denied, and it is further

ORDERED that the cross motion for leave to serve a fourth amended third-party complaint is denied as moot, and it is further

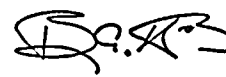
ORDERED that Third-Party Defendant Central Mutual Insurance Company is directed to serve an answer to the third amended third-party complaint within 20 days form the date of this decision.

This shall constitute the Decision and Order of the Court, the original of which is being transmitted to the Albany County Clerk for electronic filing and entry. Upon such entry, defendants' counsel shall promptly serve notice of entry on all other parties (see, Uniform Rules for Trial Courts [22 NYCRR] § 202.5-b [h] [1], [2]).

Dated: September 15, 2021



HON. CHRISTINA L. RYBA
Supreme Court Justice



09/15/2021