

Scottsdale Ins. Co. v Casino Dev. Group, Inc.

2022 NY Slip Op 31220(U)

April 11, 2022

Supreme Court, New York County

Docket Number: Index No. 656275/2018

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA JAMES

PART 59

Justice

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SCOTTSDALE INSURANCE COMPANY,

Plaintiff,

- v -

CASINO DEVELOPMENT GROUP, INC., TOLL FIRST AVENUE, LLC, TOLL GC, LLC, TOLL BROTHERS, INC., STARWOOD CAPITAL GROUP, TOLL BROTHERS INC. AND STARWOOD CAPITAL GROUP, JV, BROOKLYN PIER 1 RESIDENTIAL OWNER, L.P., BROOKLYN PIER 1 HOTEL OWNER, L.P., BROOKLYN BRIDGE PARK CORPORATION, BROOKLYN BRIDGE PARK DEVELOPMENT CORPORATION, HUDSON MERIDIAN CONSTRUCTION GROUP, LLC, S.N.A. CONCRETE PUMPING CORP., EMPIRE TRANSIT MIX, INC., MARCOS DASILVA, ELAINE SOARES, ERROLL FAIRWEATHER, ALDAIR DIAS, JOSE FERREIRA, and DENISE RICHBERG,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 170, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 202, 203, 204, 205

were read on this motion to/for JUDGMENT - SUMMARY.

ORDER

Upon the foregoing documents, which are consolidated for disposition, it is

ORDERED that to the extent that it seeks a summary judgment on its second cause of action for a declaration that the Commercial Excess Liability Policy Number NXS0001044 shall be RESCINDED, the

such motion of plaintiff (motion sequence number 004) is DENIED; and it is further

ORDERED that the motion of plaintiff is otherwise DENIED, without prejudice to move again, should plaintiff's second cause of action seeking a declaratory judgment rescinding Commercial Excess Liability Policy Number NXS0001044 be denied; and it is further

ORDERED that the motion of defendants for partial summary judgment seeking a declaration that plaintiff Scottsdale Insurance Company is required to provide insurance coverage and indemnity to such defendants pursuant to Commercial Excess Liability Policy Number NXS0001044 for the underlying personal injury action entitled DaSilva v Toll First Avenue, LLC, pending in Supreme Court, New York County (Index No. 452797/2015) (motion sequence number 003 and "cross motion" on motion sequence number 004) is denied, with leave to move again, should plaintiff's second cause of action seeking a declaratory judgment rescinding Commercial Excess Liability Policy Number NXS0001044 be denied; and it is further

ORDERED that counsel are directed to transmit to SFC-Clerk-Part59@nycourts.gov and to SFC-Part59@nycourts.gov and to post on NYSCEF a proposed preliminary conference order or competing proposed preliminary conference order(s) no less than two days

before May 10, 2022, on which date counsel shall appear via Microsoft Teams, unless such appearance be waived by the court.

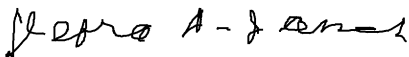
DECISION

Here, plaintiff not only established that Commercial Excess Liability Number NXS0001044 itself excluded "residential projects", as defined thereunder, and that the guidelines and classification of defendant Casino Development Group, Inc.'s business would indeed alter the coverage provided, but also offered the affidavits of its Senior Director of Brokerage Casualty Department (NYSCEF Document Number 148) and its Excess & Surplus Specialty Consultant (NYSCEF Document Number 142), who each stated that plaintiff does not write policies for such residential projects (owner occupied apartments) construction work. Their contentions were also supported by plaintiff's underwriting policies. See Kiss Construction NY, Inc. v Rutgers Casualty Insurance Company, 61 AD3d 412, 414 (1st Dept 2009).

However, the unsigned copy of the application proffered by plaintiff, wherein defendant Casino Development Group, Inc. allegedly states, in pertinent part, "Commercial Construction 99 (%)" and "Residential Construction 1 (%)", is inadmissible as secondary evidence under the best evidence rule, as plaintiff has failed to offer any explanation, let alone a sufficient explanation, for the absence or unavailability of a copy of the unproduced signed application. See Amica Mut. Ins. Co. v

Kingston Oil Supply, 134 AD3d 750, 752-753 (2d Dept 2015) and New York Jurisprudence 2nd Evidence and Witnesses § 251, "Admissibility of secondary evidence, generally". Therefore, plaintiff has not prima facie established that defendant Casino Development Group, Inc. made a misrepresentation of a material fact on its application for insurance. Nor does defendant Casino Development Group, Inc. offer any affidavit of any person with knowledge of the veracity of the application, but merely points out the deficiency in plaintiff's proof. See Demilia v Demico Brothers, Inc., 294 AD2d 264 (1st Dept 2002). Therefore, the question of whether such defendant made a misrepresentation of material fact therein remains an issue of fact that must be resolved by a fact finder at trial.

The court cannot reach the question of which party is entitled to a coverage declaration, unless and until the issue of whether Commercial Excess Liability Policy Number NXS0001044 must be rescinded *ab initio* is resolved in defendant Casino Development Group, Inc.'s favor. See Kiss, *supra*.


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<u>4/11/2022</u> DATE			<u>DEBRA JAMES, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE