

**Wesco Ins. Co. v Fulmont Mut. Ins. Co.**

2022 NY Slip Op 31863(U)

June 14, 2022

Supreme Court, New York County

Docket Number: Index No. 154111/2021

Judge: Suzanne Adams

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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. SUZANNE ADAMS PART 39TR

Justice

-----X

WESCO INSURANCE COMPANY, BEYOND 501 WEST
SPE, LLC,

Plaintiff,

- v -

FULMONT MUTUAL INSURANCE COMPANY,
BIENVENIDO SANTANA,

Defendant.

-----X

INDEX NO. 154111/2021

MOTION DATE 09/08/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19,
20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47,
48, 49

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that plaintiff's motion is granted. Plaintiff
Beyond 501 West SPE, LLC ("Beyond") is the owner of a building located at 501 West 173rd
Street, New York, New York 10032 (the "Building"). The Building's earlier owners were non-
parties SC2284LLC and EFE Realty LLC, who had leased the corner store in the Building (the
"Leased Premises") to non-party Justo Zapete, as tenant, pursuant to a lease agreement dated
December 15, 2010 (the "Lease"). The Lease required the tenant to obtain commercial general
liability insurance naming the Building's owner as an additional insured. Thereafter, by deed dated
April 19, 2012, SC2284 LLC and EFE Realty LLC conveyed the building to non-party 501 West
173 LLC ("501 West"). In an amendment to the Lease dated August 31, 2015 (the "Lease
Amendment"), 501 West as the successor in interest to the owner identified in the Lease, and
defendant Bienvenido Santana d/b/a JD's Fix Flat ("Santana"), identified as the "present occupant"

of the Leased Premises, agreed that Santana would formally be considered the new tenant under the Lease and that the Lease would be extended an additional five years.

Defendant Fulmont Mutual Insurance Company (“Fulmont”) issued to Santana an insurance policy bearing number S415057508901, effective May 31, 2017, to May 31, 2018 (the “Fulmont Policy”). The Fulmont Policy listed 501 West as an additional insured, as Santana so requested in its initial application for the policy, dated May 11, 2012. By Deed dated January 7, 2016, 501 West conveyed the Building to Beyond. Subsequently, plaintiff Wesco Insurance Company (“Wesco”) issued to Beyond an insurance policy numbered WPP1442108 02, effective April 1, 2018 to April 1, 2019 (the “Wesco Policy”).

In or about November 2018, non-party Alicia Maldonado filed an action against Beyond in Supreme Court, Bronx County, for injuries she allegedly sustained on April 11, 2018, due to Beyond’s alleged negligent failure to properly maintain and repair the sidewalk abutting the Building (the “Underlying Action”). Maldonado’s discovery responses in the Underlying Action suggesting the location in question may be the sidewalk abutting the Leased Premises’ bay door. Beyond impleaded Santana and other Building tenants in April 2019. Wesco tendered its defense of Beyond in the Underlying Action to Santana and received no response. Its tender to Fulmont was denied. Wesco and Beyond then commenced this action in April 2021, the gravamen of which is reformation of the Fulmont Policy to include Beyond as an additional insured, and compelling Fulmont’s defense and indemnification of Beyond in the Underlying Action. Wesco and Beyond now move for summary judgment pursuant to CPLR 3212 against Fulmont and default judgment pursuant to CPLR 3215 against Santana: (1) reforming the Fulmont Policy to identify Beyond as the additional insured on the policy’s Additional Insured (Premises leased to the Named Insured) endorsement; (2) declaring that Fulmont has a duty to defend Beyond in the Underlying Action;

(3) declaring that Fulmont has a duty to indemnify Beyond in the Underlying Action under the Fulmont Policy; (4) declaring that Beyond's coverage under the Fulmont Policy is primary to its coverage under the Wesco Policy with respect to the Underlying Action; (5) declaring that Fulmont must reimburse Wesco for all reasonable costs Wesco has incurred defending and, if necessary, indemnifying, Beyond in the Underlying Action; and (6) setting this matter down for a hearing on the amount Wesco is entitled to recover on its claim against Fulmont for defense and indemnification costs. Fulmont opposes the motion. Santana has not appeared in this action.

It is well-settled that "the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986) (citing *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985)). The party opposing a motion for summary judgment is entitled to all reasonable inferences most favorable to it, and summary judgment will only be granted if there are no genuine, triable issues of fact. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 521-22 (1<sup>st</sup> Dep't 1989).

Plaintiffs herein have established entitlement to summary judgment on the relief requested. First, the Fulmont Policy should be reformed to include Beyond as an additional insured, as it is the Building's owner and lessor of the Leased Premises. It is clear that the Lease contemplated such coverage. *Matter of Galaxy Ins. Co.*, 257 A.D.2d 351, 352 (1<sup>st</sup> Dep't 1999).

Second, the additional insured language of the Fulmont Policy indicates that Beyond is entitled to a defense and indemnification in connection with the Underlying Action. The injury in the Underlying Action is alleged to have occurred on the public sidewalk abutting the Leased Premises; New York courts have held that insurance policy language referring to "ownership, maintenance or use" of a premises includes the abutting sidewalk. *Wesco Ins. Co. v. Travelers*

*Prop. Cas. Co. of Am.*, 188 A.D.3d 476, 477 (1<sup>st</sup> Dep't 2020). Further, Fulmont may not rely on the Fulmont Policy's vicarious liability exclusion to disclaim coverage of Beyond. Fulmont failed to give Beyond written notice that it was disclaiming coverage under this exclusion, either in its November 7, 2019, letter or in response to Wesco's counsel's further communication dated April 13, 2021. Reasonable and timely notice is required pursuant to Insurance Law § 3402(d)(2). *West 16<sup>th</sup> S. Tenants Corp. v. Public Serv. Mut. Ins. Co.*, 290 A.D.2d 278, 279 (1<sup>st</sup> Dep't 2002); *see also*, *Matter of Nationwide Mut. Ins. Co. v. Steiner*, 199 A.D.2d 507, 508 (2<sup>nd</sup> Dep't 1993).

Finally, plaintiffs have established that they are entitled to a default judgment against Santana, who was properly served with the pleadings in this action, failed to answer, and failed to oppose the instant motion. Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment as to Fulmont is granted; and it is further

ORDERED that plaintiffs' motion for default judgment as to Santana is granted, on default; and it further

ORDERED, ADJUDGED and DECREED that the Fulmont Policy issued by Fulmont to Santana bearing policy number S415057508901 should identify Beyond as the additional insured on the policy's Additional Insured (Premises leased to the Named Insured) endorsement; and it is further

ORDERED, ADJUDGED and DECREED that Fulmont has a duty to defend and indemnify Beyond in the Underlying Action, *Alicia Maldonado v. Beyond 501 West SPE, LLC, et al.*, Index No.: 33800/2018E, Supreme Court, Bronx County, as an additional insured under the Fulmont Policy; and it is further

ORDERED, ADJUDGED and DECREED that Beyond's coverage under the Fulmont Policy is primary to its coverage under the Wesco Policy with respect to the Underlying Action; and it is further

ORDERED ADJUDGED and DECREED that Fulmont must reimburse Wesco for all reasonable costs Wesco has incurred defending and, if necessary, indemnifying, Beyond in the Underlying Action; and it is further

ORDERED that the amount that Wesco is entitled to recover on its claim against Fulmont for defense and indemnification costs is referred for determination to a Special Referee, and that within 60 days from the date of this order plaintiffs shall cause a copy of this order with notice of entry, including proof of service thereof, to be filed with the Special Referee clerk (Room 119M, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) to arrange a date for a reference to determine pursuant to CPLR § 4317(b); and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Wesco and against defendant Fulmont in accordance with the report of the Special Referee without any further application.

This constitutes the decision and order of the court.

6/14/2022

DATE

SUZANNE ADAMS, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>		<input type="checkbox"/>	
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APPLICATION:

CHECK IF APPROPRIATE: