

Manfredo v Utica First Ins. Co.
2024 NY Slip Op 35519(U)
March 6, 2024
Supreme Court, Nassau County
Docket Number: Index No. 608921/2023
Judge: Lisa A. Cairo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. LISA A. CAIRO, J.S.C.

-----X

ANDREW MANFREDO, AS ASSIGNEE OF THE
RIGHTS OF MARVIN & MARIO CONSTRUCTION,
INC.,

Plaintiff(s),

-against-

UTICA FIRST INSURANCE COMPANY,

Defendant(s).

-----X

TRIAL/IAS PART 25

DECISION AND ORDER
ON MOTION

INDEX No. 608921/2023

Motion Seq. No. 1, 2

XXX

The following papers were read on this motion	DOCS NUMBERED
Notice of Motion, Affidavits, Affirmations, Exhibits, Memos.....	4-19
Cross-Motion and Opposition Papers.....	23-33
Opposition to Cross-Motion and Reply Papers.....	35-40, 41-45
Reply on Cross-Motion Papers.....	47-48

Upon the forgoing papers, Defendant UTICA FIRST INSURANCE COMPANY’s motion for an Order (1) pursuant to CPLR 3211(a)(1) and (7) and CPLR 3016(b) dismissing the complaint; or, in the alternative (2) treating the motion as one for summary judgment pursuant to 3211(c) since there is no issue of material fact to be decided and granting Defendant a declaratory judgment pursuant to CPLR § 3001, stating that it has no obligation to defend or indemnify any person or entity in connection with the accident involving Plaintiff that is currently at issue in the underlying action, *Andrew Manfredo v Marvin & Mario Construction Inc, Franklin Alvarado and Gloria Alvarado*, Nassau County Index No. 611176/2019, or to otherwise reimburse any person in connection with the accident or underlying litigation or any judgment resulting therefrom. Plaintiff Andrew Manfredo submits a cross-motion for an Order, pursuant to CPLR § 3212, granting Plaintiff partial summary judgment on the issue of Defendant’s liability. The motions consolidated for disposition and determined as set forth hereinafter.

BACKGROUND

In this declaratory judgment action, the parties seek a determination of the scope of coverage under a policy issued by Defendant. In relevant part, the policy, which was issued to Plaintiff's subrogor, Marvin & Mario Construction Co. ("M & M"), provided liability coverage for M & M but contained what Defendant terms the "Exclusion of Injury to Employees, Contractors, and Employees of Contractors," or the "XCNTR" exclusion, which exempts from coverage:

- (1) Bodily injury to any employee of any insured, to any contractor hired or retained by or for any insured or to any employee of such contractor, if such claim for bodily injury arises out of and in the course of his/her employment or retention of such contractor by or for any insured, for which any insured may become liable in any capacity;
- (2) Any obligation of any insured to indemnify or contribute with another because of damage arising out of the bodily injury.

The Underlying Accident and Litigation

On June 3, 2019, Plaintiff was employed by non-party Long Island House Lifting, Inc. ("LIHL"), which had been hired by M & M to perform certain work at a single-family home located at 261 Blackheath Road in Lido Beach, New York (the "Residence"). The Residence was the home of non-parties Franklin Alvarado and Gloria Alvarado. LIHL had directed Plaintiff to go to the Residence to retrieve some "C" clamps from the face of the premises so they could be brought to another job site. Plaintiff states that he arrived at the Residence, and while removing one of the "C" clamps that had been improperly secured to the face of the house, the stone that the clamp had been secured to fell, crushing his right hand between the stone and the "I" beam that the "C" clamp he was attempting to remove was attached to, causing him injury.

Plaintiff then commenced an action in this Court *Andrew Manfredo v Marvin & Mario Construction Inc, Franklin Alvarado and Gloria Alvarado* (Nassau County Index No. 611176/2019). During the course of that action, the parties stipulated to a "hi-lo" arbitration with a range of not less than \$500,000 and not greater than \$2,000,000. Following the arbitration, an award was rendered which granted Plaintiff \$1,300,000 to compensate him for his injuries, including past pain and suffering, future pain and suffering, anticipated future surgeries, past wage loss and future loss of earnings. The award was confirmed by Order of this Court (Marber, J.) entered May 4, 2023 and reduced to a judgment entered May 16, 2023.

Prior to the arbitration, M & M had submitted Plaintiff's claim, and the underlying litigation, to Defendant, seeking coverage pursuant to the policy issued by it to M & M. By letter dated January 6, 2020, Defendant disclaimed coverage, citing to the XCNTR exclusion. Plaintiff then commenced this action by Summons and Complaint dated June 5, 2023, seeking a declaration that Defendant is required to indemnify M & M (and by extension, Plaintiff) pursuant to the policy.

The Instant Motions

Defendant responded to the complaint by filing the instant pre-answer motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7), arguing that the documentary evidence, i.e., the policy containing the XCNTR exclusion, provides a complete defense to its obligation to indemnify Plaintiff for his damages. Defendant argues in the alternative that this Court may, and should, based on the documentary evidence, convert the motion to dismiss to one for summary judgment pursuant to CPLR §3211(c), and grant it summary judgment dismissing the complaint and a declaration that it has no obligation to indemnify Plaintiff under the policy.

In opposition, Plaintiff argues that he was not on the site to perform any task in furtherance of the work specified in the contract between LIHL and M & M. He was simply retrieving equipment that was left on the site and did not actually work on the project in any way. Plaintiff asserts that the work, as stated in the contract between LIHL and M & M, was a “House Lift,” involving “(1) the disconnection of the house from its existing foundation; (2) excavation as needed to install steel; (3) lifting the house to required height as per drawings and (4) lowering the house and removal of steel and cribbing after new foundation is installed.”

Plaintiff’s argument is unavailing. Here, the plain language of the policy exclusion is clear. “Claims for bodily injury...if such claim arises out of or in the course of [a contractors’ employee] . . . for bodily injury aris[ing] out of and in the course of his/her employment or retention of such contractor employment.” The Plaintiff’s injuries occurred within the course of the contractor’s retention. Moreover, as rightfully noted by Defendant, this type of exclusion in its policy has already been interpreted by the Court of this state and upheld as proper (*see, e.g., Campoverde v Fabian Bldrs., LLC*, 83 AD3d 986 [2d Dept 2011]).

Given that Plaintiff’s complaint seeks a declaratory judgment of the parties’ rights and obligations pursuant to the insurance agreement, this Court is empowered to treat Defendant’s motion to dismiss the cause of action...as one seeking a declaration in Defendant’s favor.” (*Neuman v City of New York*, 186 AD3d 1523 [2d Dept 2020]). Accordingly, this court concludes that the policy exclusion applies and that Defendant is under no obligation to indemnify Plaintiff pursuant to the policy.

For the foregoing reasons, it is

ORDERED that Defendant’s motion to dismiss pursuant to CPLR §3211(a)(7) is **GRANTED**; and it is further

ORDERED, ADJUDGED and DECLARED that Defendant has no obligation to indemnify Plaintiff under the policy; and it is further

ORDERED that Plaintiff's cross-motion for partial summary judgment on the issue of Defendant's liability is **DENIED**; and it is further

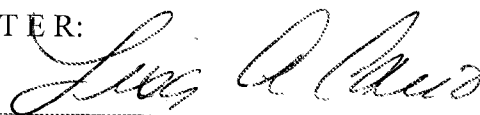
ORDERED that all requests for relief not expressly addressed herein are **DENIED**.

This constitutes the decision and order of the Court.

The foregoing constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, NY
March 6, 2024

ENTER:



HON. LISA A. CAIRO, J. S. C.

ENTERED

Mar 08 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE