

Central Park Studios, Inc. v Slosberg

2012 NY Slip Op 32094(U)

June 5, 2012

Supreme Court, New York County

Docket Number: 110490/2008

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 12

Index Number : 110490/2008
CENTRAL PARK STUDIOS
vs.
SLOSBERG, MICHAEL
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits _____ | No(s). _____
Answering Affidavits -- Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.**

FILED

AUG 08 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/5/2012

SAZ, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X
CENTRAL PARK STUDIOS, INC. and GERARD
J. PICASO, INC.,

Plaintiffs,

Index No.: 110490/08
Mot. Seq. Nos. 002, 003, 004

-against-

DECISION

MICHAEL SLOSBERG, JANET COHN SLOSBERG,
PACIFIC INDEMNITY COMPANY, DSA BUILDERS,
INC., DELOS INSURANCE COMPANY formerly
known as SIRIUS AMERICA INSURANCE
COMPANY, HAGEDORN & COMPANY and STEVE
DWYER,

Defendants.

FILED

AUG 08 2012

NEW YORK
COUNTY CLERK'S OFFICE

-----X
APPEARANCES:

Plaintiffs

Margaret G. Klein & Associates
By: Michael J. White, Esq.
200 Madison Ave.
New York NY 10016
(212) 683-9700

Defendant Delos Insurance Co.

Garbarini & Scher, P.C.
By: Barry Rothman, Esq.
432 Park Ave. So.
New York NY 10016
(212) 689-1113

Defendant DSA Builders, Inc.

Havkins Rosenfeld Ritzert & Varriale, LLP
By: Linda Fridegotto, Esq.
1065 Ave. of the Americas
New York NY 10018
(212) 488-1598

Defendant Hagedorn & Company

Keidel, Weldon & Cunningham, LLP
By: Jeffrey A. Lesser, Esq.
925 Westchester Ave., ste. 400
White Plains NY 10604
(914) 948-700

Defendant Pacific Indemnity Co.

Goodman & Jacobs, LLP
By: Howard M. Wagner, Esq.
Judith F. Goodman, Esq.
75 Broad St., 30th fl.
New York NY 10004
(212) 385-1191

Defendant Steve Dwyer

Pollack Pollack Isaacs & DeCicco
By: Brian Isaacs, Esq.
225 Broadway, ste. 307
New York NY 10007
(212) 233-8100

Defendants Michael Slosberg and Janet Cohn Slosberg

Camacho Mauro Mulholland, LLP
By: Kathleen M. Mulholland, Esq.
350 Fifth Ave., ste. 4702
New York NY 10118
(212) 947-4999

Papers review on these motions for summary and/or declaratory judgment:

<u>Papers</u>	<u>Numbered</u>
<u>Mot. Seq. 002</u>	
Plaintiffs' Notice of Motion for Summary Judgment agst. Pacific Indemnity, Exs. A - U	1
Defendants Michael Slosberg and Janet Cohn Slosberg's Aff. in Opposition	2
Defendant Delos Insurance Co.'s Aff.	3
Defendant Pacific Indemnity's Memorandum of Law in Opposition	4

Defendant Delos Insurance Co.'s Aff. in Response to Pacific Indemnity Memorandum	5
Plaintiffs' Reply Aff., Exs. A - K	6
Transcript of Oral Argument	7
<u>Mot. Seq. 003</u>	
Plaintiffs' Notice of Motion for Summary Judgment agst. Delos Ins., Exs. A - P	1
Defendant Delos Insurance Co.'s Aff. in Opposition	2
Defendant DSA Builders, Inc.'s Aff. in Partial Opposition,	3
Defendant Hagedorn & Company's Aff. in Support	4
Defendant Pacific Indemnity Company's Aff. in Partial Support	5
Plaintiffs' Reply Aff. and Exs. A - F	6
Transcript of Oral Argument	7
<u>Mot. Seq. 004</u>	
Defendant Pacific Indemnity's Notice of Motion for Summary Judgment, Aff. in Support, Exs. A - L, Memorandum of Law in Support	1 - 3
Plaintiffs' Aff. in Opposition, Exs. A - L	4
Defendant Delos Insurance Co.'s Aff. in Opposition	5
Defendant Steve Dwyer's Aff. in Opposition	6
Defendant Pacific Indemnity's Partial Opp. to Dwyer Aff.	7
Defendant Delos Insurance Co.'s Aff. in Opp. To Dwyer Aff.	8
Defendant Pacific Indemnity's Reply Memorandum of Law	9
Transcript of Oral Argument	10

PAUL G. FEINMAN, J.:

In a declaratory judgment action, plaintiffs Central Park Studios, Inc. (CPS) and Gerard Picaso, Inc. (Picaso) move, pursuant to CPLR 3212, for summary judgment against defendant Pacific Indemnity Company (Pacific), declaring that Pacific is obligated to defend and indemnify them in an underlying action (motion seq. no. 002). CPS and Picaso, defendants in the underlying action, which is captioned *Steve Dwyer v Central Park Studios, Inc.*, Index No. 115086/06 (Sup Ct, NY County), move separately for summary judgment against Delos Insurance Company (Delos), formerly known as Sirius America Insurance Company (Sirius), declaring that Delos is obligated to defend and indemnify them in the underlying lawsuit (motion seq. no. 003). Finally, Pacific moves for summary judgment dismissing this declaratory judgment action as against it (motion seq. no. 004).

Background

The underlying action arose from an incident, on October 7, 2005, in which Steve Dwyer (Dwyer), a carpenter, fell from a ladder while working at a cooperative building located at 15 West 67th Street in Manhattan. At the time, Dwyer was working for defendant DSA Builders (DSA), CPS was the cooperative board, and Picaso was the building's managing agent.

Defendants Michael Slosberg and Janet Cohn Slosberg (the Slosbergs) owned the individual unit where Dwyer was injured, and had hired DSA for a renovation project that would, among other things, convert two units into one.

On October 12, 2006, Dwyer filed a complaint against CPS, Picaso, and the Slosbergs, alleging that defendants were liable to him under Labor Law §§ 240 (1) and 241 (6), as well as Labor Law § 200 and common-law negligence. By a decision and order dated December 6, 2010 (December 2010 Order), another justice of this court dismissed all of Dwyer's claims against the Slosbergs and Picaso, and denied Dwyer's motion for partial summary judgment as to liability on his Labor Law §§ 240 (1) and 241 (6) claims. The December 2010 Order denied CPS's motion for summary judgment with respect to Dwyer's Labor Law §§ 240 (1) and 241 (6) claims as against CPS, but granted CPS summary judgment dismissing Dwyer's Labor Law § 200 and common-law negligence claims. The justice in the underlying action also denied a motion for summary judgment by intervenor American Home Assurance Company, DSA's insurer, to dismiss the Slosbergs' common-law indemnification claims against DSA. Finally, the December 2010 Order granted Picaso and CPS summary judgment on their claims for contractual indemnification against the Slosbergs, but found that there remained an issue of fact as to their contractual indemnification against DSA.

On August 1, 2008, CPS and Picaso filed a summons and complaint in this declaratory judgment action. In addition to a declaration that Pacific is obligated to defend and indemnify them, CPS and Picaso seek a declaration that Pacific's policy, with a limit of \$5,000,000, is primary. Pacific contends that CPS and Picaso are not covered under its policy. Likewise, CPS and Picaso seek from Delos, in addition to the declaration of an obligation to defend and indemnify, a declaration that its policy with a limit of \$1,000,000 is primary, and that its policy with a limit of \$3,000,000 is excess. Delos concedes that CPS and Picaso are insured under its policies, but disagrees with CPS and Picaso as to their relative primacy and the method of sharing.¹

Discussion

"Summary judgment must be granted if the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'regardless of the sufficiency of the opposing papers'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Pacific Indemnity Company

CPS and Picaso contend that they are additional insureds under the "masterpiece" policy

¹ Dwyer submits an affirmation seeking dismissal of plaintiffs' claims as against him, but, as he has failed to file and serve a notice of motion or cross motion seeking affirmative relief, and/or to pay the appropriate motion fee, and the court declines to address his informal application. Similarly, in the absence of a motion or cross motion, the court declines to address DSA's suggestion that it is entitled to dismissal. CPLR 2211.

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Pacific issued to the Slosbergs. However, since CPS and Picaso are not named as additional insureds under Pacific's policy, the burden of proof is on them to raise an issue of fact as to whether they are entitled to coverage under Pacific's policy (*see Sirius Am. Ins. Co. v Burlington Ins. Co.*, 81 AD3d 562, 563 [1st Dept 2011]). They fail to do so.

Pacific's policy states that a "covered person" is, among other things, "any other person or organization with respect to liability because of acts or omissions of you [the Slosbergs] or a family member" (Pacific Policy, policy no. 10479154-03, at T-1). CPS and Picaso argue that they are covered persons under the policy, as the Slosbergs' act of contracting with DSA to do renovation work caused any liability they may have in the underlying case.

In pursuing this argument, CPS and Picaso rely on a line of cases that interprets "arising out of" language appearing in contractual indemnification provisions. These cases hold that, in this context, where a negligent act is not specifically required by the policy language, courts should not read a negligence requirement into the indemnification provision (*see e.g. Santos v BRE/Swiss, LLC*, 9 AD3d 303 [1st Dept 2004]). All that is required for indemnification to be triggered, where the provision relates to a construction contract, is a showing that "a particular act or omission in the performance of [the] work was causally related to the accident" (*Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 273 [1st Dept 2007] [internal quotation marks and citation omitted]).

Pacific, conversely, contends that the covered person language in its policy requires a showing that the Slosbergs committed a negligent act or omission, which, the record makes clear, they have not. This argument relies on a misreading of *Crespo v City of New York* (303 AD2d 166 [1st Dept 2003]). *Crespo* involved additional insured language similar to that found in the

subject Pacific policy (*id.* at 167), and the Court held that the party seeking contractual indemnification was not entitled to indemnification:

Inasmuch as it has not yet been determined whether plaintiff's harm was caused by negligence by [the party against whom indemnification was sought], and it remains possible that the trier of fact will find that plaintiff's harm was caused by negligence by [the party seeking indemnification], it cannot now be determined whether [the claim for indemnification] falls within the subject additional insured endorsement

(*id.*).

Pacific contends that this language stands for the proposition that a negligence requirement should be read into additional insured language like the subject one, where additional insured status is extended to parties whose liability is created by "because of acts or omissions" of the insured party. In *Crespo*, however, the underlying claim sounded in negligence, thus, causation was intertwined with negligence, and when the Court discussed the triggering act, it referred to negligence (*id.* at 166-167). *Crespo* did not create the broad rule that Pacific urges. Here, all negligence claims have been dismissed in the underlying case. Moreover, the additional insured language in Pacific's policy plainly does not require a negligent act or omission.

However, Pacific's policy does require, in order to create an additional insured relationship with an unnamed third party, such as CPS and Picaso, that an act or omission of the Slosbergs had a direct causal relationship to the third party's liability. While not requiring negligence, the policy's "because of" language requires a stronger causal link than the "arising out of" standard that CPS and Picaso urge the court to import (*see e.g. Long Is. Light. Co. v Hartford Acc. & Indem. Co.*, 76 Misc 2d 832, 836 [Sup Ct, Nassau County 1973] ["there is a

more circumscribed meaning to 'because of' than merely being a sequential link in the chain of events").

Here, the Slosbergs' act of contracting to have renovation work done, and agreeing to "assume all responsibility for the Alterations" (Alteration Agreement, ¶ 2), has too attenuated a connection to the underlying accident, and to CPS's potential liability to the underlying plaintiff. CPS and Picaso also argue that their liability was caused by the Slosbergs' failure to carry out their obligations under paragraph three of the alteration agreement, which provides that:

All work referred to herein shall be done in a good workmanlike manner and shall comply with all rules and regulations. [The Slosbergs] shall obtain or cause [their] plumber, electrician or other contractor to obtain any permit or license which shall be necessary in connection with such work.

If the Slosbergs had commissioned work done without proper permits and licenses, then they may have committed an omission that gives rise to an additional insured relationship under the Pacific policy. However, there is no allegation that the Slosbergs commissioned the work done without proper permits and licenses. What CPS and Picaso actually allege, that the Slosbergs failed in a general sense to ensure that the work was done in a "good workmanlike manner," is too vague and insubstantial to establish a strong "because of" causal link between the Slosbergs' conduct and CPS's potential liability.

In the underlying action, it has already been found that Picaso has no liability. To the extent that CPS is ultimately found liable to Dwyer under Labor Law §§ 240 (1) or 241 (6), it will not be vicariously liable for any conduct by the Slosbergs because the Slosbergs have not committed any act or omission that would implicate liability under either of those Labor Law provisions. As CPS and Picaso are not liable in the underlying action because of any conduct by

the Slosbergs, CPS and Picaso are not entitled to additional insured status under Pacific's policy.

While Pacific acknowledges that its policy covers the contractual indemnification that the Slosbergs owe to CPS and Picaso, this is an obligation Pacific owes to the Slosbergs, rather than to CPS and Picaso (*see Boyle v City of New York*, 237 AD2d 230, 231 [1st Dept 1997] [noting that additional insured status is distinct from contractual indemnity]). Moreover, the Pacific policy "does not provide automatic additional insured coverage for parties indemnified under an 'insured contract'" (*Yoda, LLC v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 88 AD3d 506, 508 [1st Dept 2011], citing *Kassts v Ohio Cas. Ins. Co.*, 12 NY3d 595 [2009] [involving a tenant's insurance policy that provided automatic additional insured coverage to landlord through the lease agreement]). Thus, the fact that the Slosbergs owe contractual indemnification to CPS and Picaso does not confer additional insured status under the Pacific policy.

As CPS and Picaso are not additional insureds under the Pacific policy, Pacific's motion for summary judgment dismissing all claims against it in this declaratory action is granted, while CPS and Picaso's motion for summary judgment against Pacific is denied.

Delos Insurance Company

Delos concedes that CPS and Picaso are additional insureds under the policy its predecessor, defendant Sirius America Insurance Company (Sirius), issued to the contractor, DSA, and that CPS and Picaso are also additional insureds under the excess policy its predecessor issued to DSA. Thus, the branch of CPS and Picaso's motion that seeks a declaration that Delos is obligated to defend and indemnify them in the underlying action is granted.

CPS and Picaso additionally seek a declaration determining the order of priority, and the

method of sharing of the various insurance policies under which they are covered. Specifically, CPS and Picaso contend that the policy Sirius issued under policy number IRS104733, with a limit of \$1,000,000, is primary, and that the policy Sirius issued under policy number EXS201095, with a limit of \$3,000,000, is excess, along with a policy issued by nonparty Insurance Company of Greater New York (GNY) under policy number 6131M09472, with a limit of \$1,000,000. As to the method of sharing as between the GNY policy and the excess Sirius policy, CPS and Picaso contend that the two policies should contribute by share, such that the GNY policy would pay at a ratio of 1 to 4 and the Sirius policy would pay at a ratio of 3 to 4.

“In order to determine the priority of coverage among different policies, a court must review and consider all of the relevant policies at issue” (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 716 [2007]). Here, the issues of priority of coverage and method of sharing cannot yet be determined, as GNY is not a party to this action (*see id.*; *McLean v 405 Webster Ave. Assoc.*, 28 Misc 3d 1219[A], *23, 2010 NY Slip Op 51396[U] [Sup Ct, Kings County 2010]).

Conclusion

Settle order and judgment:

(1) Denying the motion of plaintiffs Central Park Studios, Inc. and Gerard J. Picaso, Inc. for summary judgment on their first cause of action seeking a declaration that defendant Pacific Indemnity Company is obliged to provide a defense to, and provide coverage for, said plaintiffs in the action of *Steve Dwyer v Central Park Studios, Inc.*, Index No. 115086/06 (Sup Ct, NY County) (mot. seq. 002); and

(2) Granting the branch of plaintiffs Central Park Studios, Inc. and Gerard J. Picaso,

Inc.'s summary judgment motion seeking a declaration that defendant Delos Insurance Company is obliged to provide a defense to, and provide coverage for, said plaintiffs in the action of *Steve Dwyer v Central Park Studios, Inc.*, Index No. 115086/06 (Sup Ct, NY County)(mot. seq. 003), with costs and disbursements to said defendant;

(3) Declaring that defendant Delos Insurance Company is obliged to provide a defense to, and provide coverage for, Central Park Studios, Inc. and Gerard J. Picaso, Inc. in the said action pending in Supreme Court, New York County;

(4) Denying without prejudice the branch of plaintiffs Central Park Studios, Inc. and Gerard J. Picaso, Inc.'s summary judgment motion seeking determinations as to priority of coverage and method of sharing between the insurance policies covering them; and

(5) Granting the motion of defendant Pacific Indemnity Company for summary judgment dismissing this declaratory judgment action as against it (mot. seq. 004), with costs and disbursements to said defendant.

This is the decision of the court.

Dated: June 5, 2012



J.S.C.

FILED

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