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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Saliann Scarpulla Justice

PART 19

Index Number : 109189/2010
ROBINSON, SEAN
VS.
LAMAR CENTRAL OUTDOOR
SEQUENCE NUMBER : 004
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

decided per the memorandum decision dated 9/13/12
which disposes of motion sequence(s) no. 004 +006

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

Dated: 9/13/12

Saliann Scarpulla, J.S.C.
SALIANN SCARPULLA

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: IAS PART 19

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SEAN ROBINSON,

Plaintiff,

DECISION AND ORDER

-against-

LAMAR CENTRAL OUTDOOR, INC. and LAMAR ADVERTISING OF PENN, LLC,

Index No.: 109189/2010

Defendants.

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LAMAR CENTRAL OUTDOOR, INC. and LAMAR ADVERTISING OF PENN, LLC,

Third-Party Plaintiffs,

Index No.: 591074/2010

-against-

METROPOLITAN SIGN & RIGGING CORP.,

Third-Party Defendant.

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METROPOLITAN SIGN & RIGGING CORP.,

Fourth-Party Plaintiff,

Index No.: 590305/2011

-against-

FIRST MERCURY INSURANCE COMPANY, YANKEE BROKERAGE, INC., and JEFFREY L. GOLDSTEIN,

Fourth-Party Defendants.

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For Plaintiff:
Law Offices of Spar & Bernstein, P.C.
225 Broadway, 5th Floor
New York, NY 10007

For Defendants:
Law Offices of Edward Garfinkel
12 Metrotech Center, 28th Floor
New York, NY 11201

For Third-Party Defendant:
Friedman, Levy, Goldfarb & Green, P.C.
250 West 57th Street, Suite 1619
New York, NY 10107

For Fourth-Party Defendant Yankee Brokerage, Inc.:
The Sullivan Law Group LLP
980 Avenue of the Americas, Suite 405
New York, NY 10018

For Fourth-Party Defendant First Mercury:
Shay & Maguire LLP
950 Franklin Avenue, Suite 101
Garden City, NY 11530

HON. SALIANN SCARPULLA, J.:

These actions arise out of an accident that occurred on December 10, 2009, when plaintiff Sean Robinson ("Robinson"), an employee of third-party defendant Metropolitan Sign & Rigging Corp. ("Metropolitan"), sustained injuries after he fell from an elevated structure while performing work on a billboard/structure owned by Lamar Central Outdoor, Inc. and Lamar Advertising of Penn, LLC ("Lamar defendants"). Motion sequence numbers 004 and 006 are hereby consolidated for disposition.

In motion sequence number 004, fourth-party defendant First Mercury Insurance Company ("First Mercury") moves, pursuant to CPLR 3212, for summary judgment dismissing the fourth-party complaint as against it. Metropolitan cross-moves for summary judgment dismissing the third-party complaint as against it. Fourth-party defendant Yankee Brokerage, Inc. ("Yankee") cross-moves for summary judgment dismissing the fourth-party complaint as against it.

In motion sequence number 006, Yankee moves, pursuant to CPLR 3025 (b), for an order granting Yankee leave to amend its answer to the fourth-party complaint to assert the affirmative defense of the statute of frauds, and to thereby dismiss

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Metropolitan's breach of contract and breach of implied contract causes of action as void under the statute of frauds.

On May 26, 2005, Metropolitan entered into an independent contractor agreement to provide certain construction work for Lamar Media Corp. ("non-party Lamar"). The agreement stated, among other things, that Metropolitan would procure workers' compensation insurance, and commercial liability insurance coverage, protecting Metropolitan and any other subcontractor from claims for damages for bodily injury. The agreement further provided that Metropolitan would name non-party Lamar as an additional insured. There was also a clause indicating that Metropolitan would indemnify non-party Lamar for "injuries to persons or damages to property arising from work performed by [Metropolitan] under this Agreement."

First Mercury, an insurance provider, issued an insurance policy to the insured, Metropolitan. This policy was in effect from October 1, 2007 to October 1, 2008, and was subsequently renewed from October 1, 2008 to October 1, 2010. The policy contained an endorsement entitled "Additional Insured," whereby non-party Lamar was added as an additional insured. This additional insured, according to the agreement, was an additional insured with respect to bodily injury caused, in whole or in part, by Metropolitan's employees or Metropolitan's subcontractors. However, the policy also contained a provision which exempted the insurance from applying to any employee of Metropolitan.

Metropolitan avers that it purchased the policy through Yankee, and specifically, Yankee's insurance agent, Jeffrey L. Goldstein ("Goldstein"). Metropolitan argues that, prior to 2007, Yankee procured insurance for Metropolitan that contained provisions to cover employees hurt in the course of their employment. However, according to Metropolitan, when Metropolitan changed policies in 2007, pursuant to Yankee's recommendation, Yankee unilaterally removed the provision to cover injured employees.

According to Metropolitan's president Tom Miller ("Miller"), in 2007, he contacted Yankee, through Goldstein, to determine whether Metropolitan could get more competitive rates on its insurance policies "while satisfying the requirements and needs of Metropolitan." Miller further alleges that one of Metropolitan's employees had recently been injured in 2007, and that the prior insurance policy had covered this employee. As a result, Miller claims that he emphasized to Goldstein that Metropolitan required a provision in the insurance policy which would also cover its employees and subcontractors who are injured while working on the jobs.

Miller states, "[a]t no time did I tell anyone from Yankee Brokerage that additional insured coverage of third parties or their employees should be removed from the insurance policy." He also claims that he was never notified that this coverage was removed, and was unaware of this fact until after Robinson's accident. Miller also advises that he paid all of the Metropolitan premium payments for the First Mercury insurance through Yankee.

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According to Goldstein, Yankee had been placing insurance coverage for Metropolitan since approximately 2005. He states that, in 2007, Miller informed him that the premiums were too high, and that Metropolitan needed to save money. In response, Goldstein states that he submitted multiple insurance applications to get the best quote. Goldstein writes that the only way that Metropolitan could reduce its premiums was to include an employee exclusion in the policy, which would exclude coverage for injuries suffered by Metropolitan's employees. Goldstein further provides,

> In addition to the difference in premiums however, I informed Miller that the CGL policy issued by First Mercury would not include coverage for bodily injury, property damage, or personal injury to any employee of Metropolitan. Specifically, I informed Miller than Metropolitan would be losing that specific coverage it previously had with ACE, which did in fact cover Metropolitan for a prior injury claim to one of its employees. Miller then directed me to secure the CGL coverage with First Mercury with the lower premium.

Goldstein also maintains that Yankee is not an agent of First Mercury, and does not have any type of agency contract or agreement with First Mercury. Prior to placing coverage for Metropolitan with First Mercury, Goldstein claims that he spoke to non-party Morstan General Agency.

First Mercury states that "[r]ecords reveal that the First Mercury policy was submitted by Excess and Surplus Lines Broker, Morstan General Agency, Inc., and not Yankee and/or Goldstein." For this reason, among others, First Mercury argues that there is no agency agreement between First Mercury and Yankee.

In any event, after Robinson's accident, by letter dated October 18, 2010, the insurer for the Lamar defendants submitted a claim to First Mercury for it to tender insurance for its insured, Metropolitan. By letter dated November 10, 2010, First Mercury notified Metropolitan that it was denying coverage for Robinson's accident. First Mercury advised that, despite the clause for an additional insured, because Robinson was an employee of Metropolitan, he was excluded from coverage, according to the employee exclusion portion of the policy. In response to receiving the third-party complaint, by letter dated February 4, 2011, First Mercury again responded to Metropolitan, advising Metropolitan that First Mercury was denying coverage for Robinson's accident.

Robinson commenced this action, filing a complaint against the Lamar defendants, asserting Labor Law and negligence claims. The Lamar defendants then commenced a third-party action against Metropolitan, seeking common-law indemnification, contractual indemnification and contribution. The Lamar defendants also asserted a claim for breach of contract for failure to procure insurance.

Metropolitan commenced a fourth-party action against First Mercury, Yankee and Goldstein, seeking a declaratory judgment stating that First Mercury is required to tender insurance coverage for Robinson's accident. Metropolitan also included six causes of action as against Yankee and Goldstein. Yankee and Goldstein moved to dismiss the complaint and to sever the action. Pursuant to an order dated September 7, 2011, the

complaint was dismissed as against Goldstein individually, the action was severed solely for trial, and the remaining claims against Yankee were for breach of fiduciary duty, breach of contract, breach of implied contract and negligence.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

The Third-Party Action

In the third-party action, the Lamar defendants are seeking indemnification from Metropolitan, and also claim that Metropolitan breached its contract by failing to add the Lamar defendants as additional insureds. Under New York Workers' Compensation Law § 11, the Lamar defendants would be entitled to pursue third-party claims only if they had a contract with Metropolitan entitling them to indemnification, or the employee suffered a grave injury. There is no contract whereby Metropolitan agreed to indemnify the Lamar defendants or add them as additional insureds. The independent contractor agreement sets forth that Metropolitan is to indemnify non-party Lamar for any injuries to persons arising from work performed by Metropolitan. The Lamar defendants were not named as

other entities which would also require indemnification. The agreement also indicates that Metropolitan is required to name non-party Lamar as an additional insured. The Lamar defendants were not listed as other parties who should also be listed as additional insureds, nor did they sign the agreement.

Fundamental contract law provides that "a contract is to be construed so as to give effect to each and every part," and that the "court should not rewrite the terms of an agreement under the guise of interpretation [internal quotation marks and citations omitted]." *FCI Group, Inc. v. City of New York,* 54 A.D.3d 171, 176-177 (1st Dept. 2008). Accordingly, the Lamar defendants cannot sustain a claim for contractual indemnification or for breach of contract for failure to name them as additional insureds because there was no contract between Metropolitan and the Lamar defendants.

Nonetheless, the Lamar defendants claim that they are entitled to the benefit of the indemnification provision in the agreement between non-party Lamar and Metropolitan, because the Lamar defendants are wholly owned subsidiaries of non-party Lamar. The Lamar defendants cite to *Clute v. Ellis Hospital* (184 A.D.2d 942, 945 [3rd Dept. 1992]), in which the Court held that "[the parent corporation] is also entitled to indemnity ... because NYNEX Technical is a wholly owned subsidiary of [the parent corporation] and acted on behalf of [the parent corporation] when signing this contract."

However, as set forth by Yankee, the issue in the present case is not whether non-party Lamar, the parent corporation, can benefit from the acts of the Lamar defendants,

but whether the Lamar defendants, as wholly owned subsidiaries, can benefit from a contract solely entered into by their parent corporation, non-party Lamar. The Appellate Division, First Department, has held that subsidiaries are not bound to a contract where the parent corporation is the sole signatory and the "contract contained no provision which would bind the subsidiaries." *Daley v. Related Cos.*, 198 A.D.2d 118, 119 (1st Dept. 1993); *see also Carte Blanche (Singapore) Pte., Ltd. v. Diners Club International, Inc.*, 2 F.3d 24, 26 (2d Cir. 1993) ("The parties agree that New York law guides our decision. Generally speaking, a parent corporation and its subsidiary are regarded as legally distinct entities and a contract under the corporate name of one is not treated as that of both"). As such, the Lamar defendants, not being named parties on the contract, cannot benefit from this contract entered into by their parent corporation.

The Lamar defendants further allege that it was the intention of both non-party Lamar and Metropolitan that the Lamar defendants be entitled to the benefit of the indemnification provision. They claim that certain depositions are outstanding which would make Metropolitan's cross-motion premature. However, with respect to contract interpretation, the Court of Appeals has held that,

> "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing."

W.W.W. Associates v. Giancontieri, 77 N.Y.2d 157, 162 (1990).

Because the contract in question is clear and not ambiguous, "[e]xtrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face [internal quotation marks and citations omitted]." *R/S Associates v. New York Job Development Authority*, 98 N.Y.2d 29, 33 (2002). Accordingly, extra deposition testimony is not required at this time. The contract should be enforced according to its terms, which does not include any benefit to the Lamar defendants.

As contractual indemnification is not available to the Lamar defendants, the only way that the Lamar defendants can obtain common-law indemnification or contribution from Metropolitan is if Robinson suffered a grave injury. The Court of Appeals provides the following, with respect to New York Workers' Compensation Law § 11:

> Workers' Compensation Law § 11 prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a "grave injury," or the claim is "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered."

Rodrigues v. N & S Bldg. Contrs., Inc., 5 N.Y.3d 427, 429-430 (2005). There is no indication in the record that Robinson suffered a grave injury. Accordingly, the Lamar defendants cannot sustain claims for common-law indemnification and contribution.

No issues of fact remain with respect to the third-party claims. As such, Metropolitan is granted summary judgment on its cross motion dismissing the third-party action as against it.

The Fourth-Party Action

First Mercury moves for summary judgment dismissing the fourth-party action as against it. Yankee cross moves for summary judgment dismissing the fourth-party action as against it. In the third-party complaint, the Lamar defendants were seeking to be compensated by Metropolitan, in the event that Robinson recovered damages from the Lamar defendants in the original action. The Lamar defendants were also looking to be indemnified pursuant to the contract between non-party Lamar and Metropolitan. They also sought to receive coverage under Metropolitan's insurance policy.

As a result of this court's decision to grant Metropolitan summary judgment dismissing the third-party action as against it, the Lamar defendants have no viable claims against Metropolitan. As such, Metropolitan no longer has any sustainable claims in the fourth-party action. For instance, Metropolitan's contentions that it needs the First Mercury policy paid, and that Yankee failed to procure insurance pursuant to Metropolitan's needs, among other allegations, are moot.

As such, where, as here, all claims against a defendant, in this case Metropolitan, are dismissed, "third-party actions and all cross claims are dismissed as a necessary

consequence of dismissing the complaint in its entirety." *Turchioe v. AT & T Communications*, 256 A.D.2d 245, 246 (1st Dept 1998).

Accordingly, First Mercury is granted summary judgment dismissing the fourth-party action as against it. Likewise, Yankee is granted summary judgment dismissing the fourth-party action as against it.

Yankee's Motion to Amend

Yankee seeks to amend its answer to include the affirmative defense of statute of frauds, and to use this defense to obtain an order dismissing Metropolitan's causes of action as against Yankee grounded in breach of contract. As a result of this decision, the fourth-party complaint is dismissed as against all parties. Consequently, Yankee's motion to amend its answer is denied as moot.

In accordance with the foregoing, it is hereby.

ORDERED that First Mercury Insurance Company's motion (motion sequence number 004) for summary judgment dismissing the fourth-party complaint as against it is granted, and the fourth-party complaint is dismissed as against it; and it is further

ORDERED that Metropolitan Sign & Rigging Corp.'s cross motion for summary judgment dismissing the third-party complaint as against it is granted, and the third-party complaint is dismissed as against it; and it is further

ORDERED that Yankee Brokerage, Inc.'s cross motion for summary judgment dismissing the fourth-party complaint as against it is granted, and the fourth-party complaint is dismissed as against it; and it is further

ORDERED that Yankee Brokerage, Inc.'s motion (motion sequence number 006) for an order granting Yankee Brokerage, Inc. leave to file and serve its amended answer to the fourth-party complaint to assert the affirmative defense of the statute of frauds, and thereby dismissing Metropolitan Sign & Rigging's breach of contract and breach of implied contract causes of action as void under the statute of frauds, is denied; and it is further

ORDERED that the remaining claims shall be severed and shall continue and the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
September 13, 2012

FILED
SEP 27 2012
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

J.S.C.

SALIANN SCARPULLA