

<b>American Intl. Specialty v Kagor Realty Co., LLC</b>
2012 NY Slip Op 33089(U)
December 24, 2012
Supreme Court, New York County
Docket Number: 102154/11
Judge: Richard F. Braun
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 102154/2011  
AMERICAN INT'L SPECIALTY

VS

KAGOR REALTY CO. LLC, et al

Sequence Number : 001

SUMMARY JUDGMENT

PART 23

INDEX NO. \_\_\_\_\_

MOTION DATE 12/6/12

MOTION SEQ. NO. \_\_\_\_\_

**FILED**

JAN 03 2013

NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 5, were filed on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

No(s). 1

Answering Affidavits — Exhibits \_\_\_\_\_

No(s). 2, 3, 4

Replying Affidavits \_\_\_\_\_

No(s). 5

Upon the foregoing papers, it is ordered that this motion is denied, with a \$25 motion costs awarded to Plaintiff against Cross — movant. RE 715

It is further ORDERED that plaintiff is awarded summary judgment on all causes of the complaint including the cross motion declaring that plaintiff has no duty to defend or pay any loss on behalf of its insured in the subject underlying action, and the balance of the cross motion is denied, with a total of \$100 motion costs awarded to plaintiff on the motion, and \$100 on the cross motion, including the \$25 above, and it is further ORDERED that the clerk shall enter judgment accordingly, and the third party action is dismissed with prejudice. This constitutes the decision and order of this Court. See separate Opinion.

\* Complaint and counterclaim,

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

Dated: New York, New York, December 14, 2012

ENTER

\_\_\_\_\_, J.S.C.

- |   |  |   |
|---|--|---|
| 1. CHECK ONE: .....                       | <input type="checkbox"/> CASE DISPOSED           | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| 2. CHECK AS APPROPRIATE: ..... MOTION IS: | <input type="checkbox"/> GRANTED                 | <input type="checkbox"/> DENIED                           |
| 3. CHECK IF APPROPRIATE: .....            | <input checked="" type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER                     |
|   | <input type="checkbox"/> DO NOT POST             | <input type="checkbox"/> FIDUCIARY APPOINTMENT            |
|   |  | <input type="checkbox"/> REFERENCE                        |

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 23**

----- X  
AMERICAN INTERNATIONAL SPECIALTY  
LINES INSURANCE COMPANY,

Plaintiff,

Index No. 102154/11

**OPINION**

v.

KAGOR REALTY CO. LLC, DAVID  
RODRIGUEZ, an infant by his mother  
and natural guardian MILAGROS  
RODRIGUEZ, and MILAGROS RODRIGUEZ  
individually, LESLIE KAUFMAN, DEENA  
WEINTRAUB, STEPHEN WEINTRAUB, JOE  
LIVORSI, STAR INSURANCE CORPORATION  
and the SUPERINTENDENT OF INSURANCE  
of the STATE OF NEW YORK an liquidator  
of U.S. CAPITAL INSURANCE COMPANY

Defendants.

**FILED**

JAN 03 2013

NEW YORK  
COUNTY CLERK'S OFFICE

----- X  
**RICHARD F. BRAUN, J.:**

This is a declaratory judgment action for a declaration that plaintiff American International Specialty Lines Insurance Company (AISLIC) is not obligated to provide a defense or pay for any loss on behalf of defendants Kagor Realty Co. LLC (Kagor), Leslie Kaufman, Deena Weintraub, Stephen Weintraub, and Joe Livorsi (the five Kagor defendants) in connection with the claims in the underlying action, *Rodriguez v Kagor Realty Co.* (Sup Ct, Bronx County, index No. 16840/05) (the *Rodriguez* action), and that neither defendants Star Insurance Corporation (Star) nor U.S. Capital Insurance Company is entitled to indemnification or contribution from plaintiff AISLIC for any sums paid in the *Rodriguez* action. Plaintiff moves for summary judgment declaring that plaintiff AISLIC has no duty to defend or pay for any loss on behalf of its insureds, the five Kagor defendants in the

*Rodriguez* action. Defendant Star cross-moves for summary judgment declaring that plaintiff AISLIC has a duty to defend and pay for any loss on behalf of its insureds, the five Kagor defendants, and that plaintiff AISLIC is not permitted to withdraw from the defense of the five Kagor defendants in the *Rodriguez* action; or, alternatively, defendant Star requests a finding of material issues of fact precluding summary judgment to plaintiff AISLIC, and/or the denial of plaintiff AISLIC's summary judgment for failure to make a prima facie showing of entitlement to summary judgment. By order, dated July 15, 2012, that last mentioned branch of defendant Star's cross motion was denied as unnecessary (*Sullivan v 40 West 53<sup>rd</sup> Partnership*, NYLJ, Oct. 16, 2000, at 27, col 2 [Sup Ct, NY County]), with \$25 motion costs awarded to plaintiff AISLIC against defendant Star.

The allegation in the *Rodriguez* action was that defendant David Rodriguez, an infant, was injured as a result of ingesting lead from November 1992 to March 2001. Defendant Kagor was the owner of the subject premises from February 1996 to March 2001. Defendant Star insured defendant Kagor for the period from March 9, 1995 to March 9, 1996. Defendant U.S. Capital Insurance Company insured defendant Kagor from March 9, 1996 to June 9, 1996. Plaintiff AISLIC issued a policy for the period from December 2003 to December 2008 (AISLIC policy). The AISLIC policy provides a retroactive date and states "the Pollution Conditions must commence on or after the date shown below." The retroactive date specified is June 9, 1996. In her deposition, defendant Milagros Rodriguez, the mother of defendant David Rodriguez, testified that David Rodriguez was eating paint chips from November 1993 through November 1994 or November 1995. The first time Milagros Rodriguez complained about the peeling paint condition to the superintendent of the subject building was some time between August 1993 and November 1993.

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927 [1<sup>st</sup> Dept 2010]). To defeat summary judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Orphan v Pilnik*, 15 NY3d 907, 908 [2010]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. (DE) v McKinney*, 27 AD3d 224, 226 [1<sup>st</sup> Dept 2006]).

Plaintiff AISLIC has demonstrated that it is entitled to judgment, and defendants have not shown that there is any material issue of fact that needs to be tried in this action. Plaintiff AISLIC has demonstrated that it does not have to provide coverage for the *Rodriguez* action because the pollution conditions commenced before June 9, 1996. The five Kagor defendants and defendant Star do not raise issues of fact that the terms of plaintiff AISLIC's policy are ambiguous, and thus the terms of plaintiff AISLIC's policy are to be interpreted according to their plain meaning (*see Lavanant v General Acc. Ins. Co. of Am.*, 79 NY2d 623, 629 [1992]). The five Kagor defendants and defendant Star cannot create coverage by arguing that plaintiff AISLIC's disclaimer notice was improper (*cf. Fair Price Med. Supply Corp. v Travelers Indem. Co.*, 10 NY3d 556, 563-564 [2008] [same for a no-fault insurance policy]).

Plaintiff AISLIC initially failed to include any pleadings in this action in support of the motion, in violation of CPLR 3212 (b) (*see Weinstein v Gindi*, 92 AD3d 526, 527 [1<sup>st</sup> Dept 2012]). This deficiency was cured by defendant Star and plaintiff subsequently submitting the pleadings. This court permitted the correction of the procedural error, pursuant to CPLR 2001.

The five Kagor defendants argue that B. Daly Painting Inc. (Daly), who was a defendant in the *Rodriguez* action, should have been joined in this action as a necessary party, pursuant to CPLR

1001 (a). Daly attempted to abate the lead paint condition in the subject premises. The five Kagor defendants do not show that Daly's presence in this action is necessary to provide complete relief, or that Daly's rights will be inquitably affected by a determination in this action (*see Joanne S. v Carey*, 115 AD2d 4, 7 [1<sup>st</sup> Dept 1986]).

The five Kagor defendants further argue that plaintiff AISLIC's motion was premature because of the need for further discovery (CPLR 3212 [f]). The five Kagor defendants' contention is conclusory and failed to provide a proper basis to defeat the motion (*see Kent v 534 E. 11th St.*, 80 AD3d 106, 114 [1<sup>st</sup> Dept 2010]). In any event, no facts discovered in either the *Rodriguez* action, or this action, could result in creating coverage under the AISLIC policy.

Therefore, by this court's December 14, 2012 decision and order, on default of defendants Milagros Rodriguez and David Rodriguez, and on the merits, plaintiff AISLIC's motion for summary judgment was granted declaring in favor of plaintiff AISLIC on all causes of action of the complaint, including that plaintiff AISLIC has no duty to defend or pay for any loss on behalf of its insureds, the five Kagor defendants in the *Rodriguez* action, and the balance of the cross motion was denied. Pursuant to CPLR 8106 and 8202, plaintiff AISLIC was awarded motion costs in the total sum of \$100 on the motion, and a total of \$100 on the cross motion, which includes the \$25 previously awarded.

Dated: New York, New York  
December 24, 2012

**FILED**

JAN 23 2013

NEW YORK

CO. 1001

*Richard F. Braun*  
RICHARD F. BRAUN, J.S.C.