

Visto Realty Corp. v Castlepoint Ins. Co.

2012 NY Slip Op 33140(U)

December 26, 2012

Supreme Court, New York County

Docket Number: 107476/10

Judge: Shlomo S. Hagler

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: ~~EMILY DANE GOODMAN~~ **SHLOMO HAGLER** J.S.C.
Justice

PART 17

Index Number : 107476/2010
VISTO REALTY CORP.
vs.
CASTLE POINT INSURANCE
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

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

The following papers, numbered 1 to 5, were read on this motion ^{+ cross motion} ~~to~~

| | |
|--|---------------------|
| Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). <u>1</u> |
| Answering Affidavits — Exhibits <u>+ Notice of Cross-Motion</u> _____ | No(s). <u>2</u> |
| Replying Affidavits _____ | No(s). <u>3,4,5</u> |

Upon the foregoing papers, it is ordered that this motion ^{+ cross motion} is decided in accordance with the attached Order.

FILED
JAN 07 2013
COUNTY CLERKS OFFICE
NEW YORK

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

Dated: 12/26/12

SHLOMO HAGLER
J.S.C. J.S.C.
~~EMILY DANE GOODMAN~~

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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X
VISTO REALTY CORP.,

Plaintiff,

-against-

CASTLEPOINT INSURANCE COMPANY,
1801 LAUNDRY CORP. d/b/a STATION LAUNDROMAT,
and CARLOS TORRES,

Defendants.
-----X

SHLOMO S. HAGLER, J.S.C.:

Procedural History

Index No.: 107476/10

Motion Sequence No.: 003

FILED

JAN 07 2013

COUNTY CLERKS OFFICE
NEW YORK

Plaintiff Visto Realty Corp. ("Visto" or "plaintiff") moves, pursuant to CPLR § 3212, for: (1) an order granting summary judgment in favor of plaintiff as against defendant 1801 Laundry Corp. d/b/a Station Laundromat ("Laundromat"); (2) a declaration that Laundromat is required to defend and indemnify plaintiff in the underlying personal injury action filed in August, 2009 and entitled *Carlos Torres v Visto Realty Corp.*, Supreme Court, Bronx County, Index No. 306975/09 ("Personal Injury Action"); and (3) an order granting summary judgment in favor of plaintiff as against defendant CastlePoint Insurance Company ("CastlePoint") and a declaration that plaintiff is an insured on CastlePoint's policy and, as such, that CastlePoint is required to defend and indemnify plaintiff in the underlying Personal Injury Action.

CastlePoint opposes the motion and cross-moves, pursuant to CPLR § 3212, for summary judgment declaring that it has no obligation to defend or indemnify plaintiff in the underlying Personal Injury Action.

Oral argument was held on these motions on June 11, 2012. At that time, this Court granted Laundromat's motion to dismiss¹ the claims asserted against Laundromat in this action. As a consequence, the only issues currently before this Court are the insurance claims between Visto and CastlePoint. Both the motion and cross-motion are consolidated herein for disposition.

Background

In the underlying Personal Injury Action, Carlos Torres ("Torres") alleged that he tripped and fell outside of the premises located at 1801 Edison Avenue, Bronx, New York ("subject premises") owned by plaintiff and leased by Laundromat. (See, Summons and Complaint, Exhibit "B" to the cross-motion). Torres claims that the cause of his trip and fall was a sidewalk flag that was raised up because of vegetation growing out of the sidewalk. (See, Verified Bill of Particulars, Exhibit "A" to the cross-motion).

Visto asserts that it is an additional insured under the terms of the general commercial liability insurance policy issued by CastlePoint to Laundromat that was in effect at the time of Torres' accident and that CastlePoint failed to disclaim coverage. This Court notes that Visto failed to attach a copy of the insurance policy to the motion.

In support of its cross-motion, and in opposition to Visto's motion, CastlePoint states that, pursuant to the terms of its Commercial Lines Policy with Laundromat for a period December 22, 2008 to December 22, 2009 ("Policy"), the only individuals or entities that qualify as an insured are Laundromat, its officers, directors and employees; the Policy does not list any other insureds. (See, Policy, Exhibit "1" to the cross-motion). In addition, the Policy covers Laundromat for bodily injury

1. That motion, sequence number 004, was made separately to the motions now before this Court for consideration.

[* 4]

for which it is “obligated to pay damages by reason of the assumption of liability in a contract or agreement,” but only if the contract or agreement falls within the policy’s definition of an “insured contract,” which is defined as “a contract for the lease of premises.” *Id.* Further, the Policy’s supplemental payments provision states that CastlePoint will defend, but not indemnify, Laundromat’s indemnitees as follows:

“If we defend an insured against a ‘suit’ and an indemnitee of the insured is also named as a party to the ‘suit’, we will defend that indemnitee if all of the following conditions are met:

- a. The ‘suit’ against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an ‘insured contract’;
- b. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same ‘insurance contract’;
- c. The allegations in the ‘suit’ and the information we know about the ‘occurrence’ are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee.”

Id.

According to the provisions of the lease dated June 1, 2006, entered into between Visto and Laundromat, Laundromat will “indemnify and save harmless [plaintiff] for and against any and all liability ... arising from injury ... to person ... of any nature.” (See, Lease, Exhibit “3” to the cross-motion). CastlePoint states that this Lease does not obligate Laundromat to defend Visto.

By letter dated February 9, 2010, Visto’s counsel first notified CastlePoint about the accident which occurred on February 3, 2009, seeking coverage for Visto as an alleged additional insured under Laundromat’s policy. CastlePoint received this letter six months after Torres commenced the

Personal Injury Action and more than a year after the accident occurred. (See, Exhibit "B" to the cross-motion).

CastlePoint avers that the February 9, 2010 letter contained a certificate of insurance, dated October 16, 2009 (more than seven months after the occurrence), that recited that Visto was "named as an additional insured ... for the specified job site" on the CastlePoint policy with Laundromat. (See, Exhibit "4" to the cross-motion). This certificate is signed by Patrick J. Cavallo ("Cavallo"), a person with whom CastlePoint states that it does not have any contractual or other relationship. Further, CastlePoint maintains that it never received any request from Cavallo seeking to add Visto to the Policy. Based on the foregoing, CastlePoint determined that it did not issue coverage to Visto and, therefore, declined to defend or indemnify it.

It is CastlePoint's position that Visto is not an insured or additional insured under its Policy with Laundromat and, consequently, has no rights under that Policy. CastlePoint contends that the certificate of insurance is not insurance, may not be used to alter the terms of an insurance policy, and that in any event the certificate presented by Visto was dated seven months after the occurrence.

In addition, CastlePoint argues that while it may be required to indemnify Laundromat if Laundromat is found liable in the underlying Personal Injury Action, it has no obligation to indemnify plaintiff, Laundromat's indemnitee, nor does it have any duty to defend plaintiff since the Lease entered into between plaintiff and Laundromat does not obligate Laundromat to defend plaintiff.

Lastly, CastlePoint contends that, since Visto is not covered under the Policy, it has no duty to disclaim coverage as soon as reasonably possible.

[* 6]

In opposition to CastlePoint's cross-motion, and in support of its own motion, Visto asserts that it is an additional insured under the Policy and Lease provisions noted above, and that CastlePoint's failure to disclaim coverage until the commencement of the present lawsuit is untimely, mandating that CastlePoint both defend and indemnify Visto in the underlying Personal Injury action.

Discussion

"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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

The branch of Visto's motion seeking summary judgment in its favor as against CastlePoint is denied, and CastlePoint's cross-motion for summary judgment seeking to dismiss the complaint as asserted against it is granted.

CastlePoint met its initial burden by demonstrating that Visto was not named as an insured or an additional insured under its Policy with Laundromat. The burden then shifted to Visto, as the party claiming insurance coverage, to provide evidence in admissible form to raise a triable issue of fact as to whether it is entitled to such coverage. *Sirius Am. Ins. Co. v Burlington Ins. Co.*, 81 AD3d 562 (1st Dept 2011).

Visto relies on two documents to establish its right to coverage under the Policy: the Lease and the certificate of insurance.

The Lease only requires Laundromat to indemnify Visto, not to defend plaintiff, for any liability arising from a claim of bodily injury, among other things, and does not mandate that Laundromat name Visto as an additional insured under its Policy with CastlePoint. According to the Policy's provisions, quoted above, CastlePoint is only obligated to pay damages that its insured, Laundromat, is obligated to pay under the terms of its Lease. Since, at this juncture, no liability has been established, Laundromat is not obligated to pay any damages to Torres and, hence, CastlePoint is under no present indemnification obligation.

With respect to the certificate of insurance, "since the certificate of insurance was issued as a matter of information only and tendered after the loss, it is [not] proof of insurance" *Rodless Props., L.P. v Westchester Fire Ins. Co.*, 40 AD3d 253, 254-255 (1st Dept 2007); *See Home Depot U.S.A., Inc. v National Fire & Mar. Ins. Co.*, 55 AD3d 671 (2nd Dept 2008).

Consequently, neither of these documents supports Visto's contention that it is an additional insured under CastlePoint's Policy with Laundromat.

Finally, CastlePoint did not have to disclaim coverage in a timely fashion when no such coverage exists. "Insofar as the claim fell outside of the policy's coverage, the carrier was not required to disclaim as to coverage that did not exist." *Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200-201 (1st Dept 2004); *See York Restoration Corp. v Solty's Constr., Inc.*, 79 AD3d 861, 863 (2nd Dept 2010).

Conclusion

Based on the foregoing, it is hereby

ORDERED, the branch of plaintiff's motion seeking summary judgment as against defendant 1801 Laundry Corp. d/b/a Station Laundromat is denied as moot; and it is further

ORDERED, the branch of plaintiff's motion seeking summary judgment as against CastlePoint Insurance Company is denied; and it is further

ORDERED, that CastlePoint Insurance Company's cross-motion for summary judgment dismissing the complaint as asserted against it is granted and the complaint is severed and dismissed as against said defendant; and it is further

ORDERED, ADJUDGED, AND DECLARED, that defendant CastlePoint Insurance Company is not obligated to provide a defense to and provide coverage or indemnification at this juncture to plaintiff Visto Realty Corp. in the underlying personal injury action, *Carlos Torres v Visto Realty Corp.*, Index No. 306975/09, pending in Supreme Court, Bronx County; and it further


ORDERED, the remainder of the action as asserted against Carlos Torres shall continue; and it is further

ORDERED, that the remaining parties shall appear for a conference in Part 17, Room 581 at 111 Centre Street, New York, New York on January 28, 2013 at 11:00 AM.

Dated: December 26, 2012
New York, New York

FILED
JAN 07 2013
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:


Hon. Shlomo S. Hagler, J.S.C.