Smith v Waste Mgt. of N.Y., LLC
2016 NY Slip Op 32285(U)
November 14, 2016
Supreme Court, Kings County
Docket Number: 508276/14
Judge: Larry D. Martin
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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 18th day of October, 2016.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

SHAWN SMITH,

Plaintiff,

-VS-

WASTE MANAGEMENT OF NEW YORK, LLC,

Defendant.

WASTE MANAGEMENT OF NEW YORK, LLC,

Third-Party Plaintiff,

-VS-

LU TRANSPORT, INC., MESA UNDERWRITERS SPECIALTY INSURANCE COMPANY, GEMINI TRANSPORTATION UNDERWRITERS, INSURANCE COMPANY OF THE STATE OF PA, CONTINENTAL INDEMNITY COMPANY, RBN & ASSOCIATES, INC., COTTINGHAM & BUTLER, INC., and APPLIED RISK SERVICES,

Third-Party Defendants.

Motion Sequences # 1, 2 & 3

INDEX No. 508276/14

The following papers numbered 1 to 18 read on this motion	Papers Numbered
Notice of Motion - Cross Motion and Affidavits (Affirmations) Annexed	1-2, 10-11, 15-16
Answering Affidavit (Affirmation)	4, 5, 6, 7, 8, 13, 14, 17, 18
Reply Affidavit (Affirmation)	
Memorandum of Law	3, 9, 12

Upon the foregoing papers, third-party defendant Cottingham & Butler Insurance Services, Inc., ("Cottingham") moves for an order: (1) pursuant to CPLR 603, severing the eighth through eighteenth

causes of action in the third-party complaint from the main action herein; and (2) pursuant to CPLR 3211(a)(7), dismissing the fifteenth, seventeenth and eighteenth causes of action of the third-party complaint as against Cottingham. Moreover, third-party defendant RBN & Associates, Inc. ("RBN"), moves for an order, pursuant to CPLR 3211(a)(7), granting dismissal of the fourteenth, seventeenth and eighteenth causes of action in the third-party complaint insofar as asserted against RBN. By separate motion papers, plaintiff Shawn Smith ("plaintiff") cross-moves for an order, pursuant to CPLR 603, granting severance of the entire third-party action from the main action herein.

BACKGROUND FACTS & PROCEDURAL HISTORY

Plaintiff commenced the main action to recover compensatory damages for personal injuries he allegedly sustained as a result of a slip and fall accident which occurred on February 17, 2014, at a transfer station owned and operated by defendant and third-party plaintiff, Waste Management of New York, LLC ("Waste Management"). The transfer station is located at 215 Varick Street, Brooklyn, New York ("subject premises"). Plaintiff alleges that his injuries were sustained while working as a truck driver for third-party defendant Lu Transport Inc. ("Lu Transport"). Thereafter, Waste Management commenced the third-party action asserting that it entered into a contract with Lu Transport, wherein Lu Transport agreed to: (1) obtain certain insurance coverage and to add Waste Management as an additional insured on each of the policies; and (2) indemnify Waste Management for damages arising from personal injuries sustained by anyone near the subject premises. Waste Management alleges that Lu Transport retained third-party defendants RBN, Cottingham, and Applied Risk Services ("Applied Risk") as insurance agents and/or brokers, to procure the appropriate insurance coverages on its behalf. Waste

Management further alleges that RBN then obtained insurance policies with third-party defendants Mesa Underwriters Speciality Insurance Company ("Mesa Underwriters"), Gemini Transportation Underwriters Insurance Company of the State of P.A., ("Gemini") and Insurance Company of the State of P.A., ("IC of PA"), while Applied Risk obtained a policy from third-party defendant Continental Indemnity Company ("Continental"). Waste Management avers that RBN, Cottingham and Applied Risk failed to place sufficient primary insurance coverage and failed to ensure that Waste Management was named as an additional insured under the policies they obtained from Mesa, Gemini, Continental and IC of PA., as required under the contract between Waste Management and Lu Transport.

DISCUSSION

I. Severance of the Eighth through Eighteenth Causes of Action of the Third-party Complaint

Based upon a review of the record submitted by the parties, the Court grants that branch of Cottingham's motion to sever the eighth through eighteenth causes of action in the third-party action from the main action[1]. Cottingham avers that the eighth through eighteenth causes of action involve questions of insurance coverage and, as such, should be severed from the main action as no common questions of law or fact exists between these claims (Cottingham Mem of Law in Supp, 1-2). Section 603 of the CPLR allows a court to "order a severance of claims" or a "separate trial of any claim" where doing so would further "convenience" or would "avoid prejudice" (CPLR ¶ 603). Moreover, according to CPLR 1010, "[t]he court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof . . . . In exercising its discretion, the court shall

[1] Third-party defendants Lu Transport, Gemini, Mesa Underwriters, Continental and Applied Risk join in on that branch of Cottingham's motion seeking severance.

consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party" (CPLR 1010).

It is well-settled that a primary action based on negligence and a third-party action based on insurance coverage do not involve common questions of law and fact,[2] and, as such, a joint trial of such actions would prejudice the third-party insurers (*see Kelly v Yannotti*, 4 NY2d 603, 607 [1958]; *Golfo v Loevner*, 7 AD3d 568, 568 [2d Dept 2004]). Here, in the eighth through thirteenth causes of action of the third-party action, Waste Management is seeking judgments declaring that it is an additional insured under Lu Transport's policies with Mesa, Gemini, Continental and IC of PA, and also that said third-party defendants are obligated to defend and indemnify it with respect to any recovery against it in the main action (Cottingham Affirmation in Supp, Exhibit C). Moreover, in the fourteenth through seventeenth causes of action, Waste Management is seeking contribution and/or indemnification from Cottingham, RBN and Applied Risk, as an intended third-party beneficiary under the contracts and/or relationships between Lu Transport and the other third-party defendants (*id.*).The eighteenth cause of action similarly deals with claims of contribution against the third-party insurers and insurance agents (*id.*). By reason of the fact that these claims relate to insurance coverage and have no relevance to the underlying liability action[3], the Court finds that severance of these claims from the main action is

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[2] According to CPLR 602(a), "[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all matters in issue . . . " (CPLR 602 [a]).

[3]The Court notes that even if the two actions involved common questions of law and fact, it is nonetheless "prejudicial to insurers to have the issue of insurance coverage tried before the jury that considers the underlying liability claims" (*see Christensen v Weeks*, 15 AD3d 330, 331 [2d Dept 2005]). As the Court of Appeals noted in *Kelly v Yannotti*, such prejudice lies in the fact that "the jury might be more disposed than otherwise, if it saw fit to render a verdict in favor of the plaintiffs (and especially if it chose to award a generous

appropriate in order to avoid prejudice to the insurers (see *Christensen v Weeks,* 15 AD3d 330, 331 [2d Dept 2005]). Accordingly, the Court grants that branch of Cottingham's motion to sever the eighth through eighteenth causes of action of the third-party complaint from the main action.

II. Dismissal of the Fifteenth, Seventeenth & Eighteenth Causes of Action of the Third-Party Complaint Against Cottingham

Cottingham additionally seeks dismissal of the fifteenth, seventeenth and eighteenth causes of action in the third-party complaint, insofar as asserted against it, for failure to state a cause of action under CPLR 3211(a)(7). As an initial matter, when considering a motion dismiss a cause of action pursuant to CPLR3211(a)(7), the Court is required to "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts, as alleged fit within any cognizable legal theory" (*F & M General Contracting v Oncel*, 132 AD3d 946, 947 [2d Dept 2015], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Cog-Net Bldg Corp. v Travelers Indem Co.*, 86 AD3d 585, 586 [2d Dept 2011]; *see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Rietschel v Maimonides Medical Ctr.*, 83 AD3d 810, 810 [2d Dept 2011]; *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]).

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verdict), to resolve the question of insurance coverage against the insurance company, or, if the jury saw fit to resolve the question of insurance coverage against the insurance company, knowing then that the insurance company (and not the defendant-respondent) would be ultimately liable, it might be more disposed than otherwise to render a verdict in favor of the plaintiffs" (*Kelly*, 4 NY2d at 607).

A. The Fifteenth Cause of Action

In the third-party complaint, the fifteenth cause of action alleges that Cottingham acted as an insurance agent and/or broker for Lu Transport in placing the Automobile Liability Insurance coverage that Lu Transport was responsible for under its contract with Waste Management (Third-party Complaint, ¶ 70). The complaint further alleges that Cottingham "failed to place sufficient primary coverage under the contract" and "failed to have [Waste Management] named as an additional insured as required under Automobile Liability policy" (*id.*). As a result, Waste Management alleges that it is entitled to indemnification or contribution from Cottingham in the underlying action (*id.*).

According to the general rule, "the duty of an insurance broker runs to its customer and not to any additional insureds since there is no privity of contract" between the broker and the insured party *(Binyan Shell Chessed, Inc. v. Goldberger Ins. Brokerage, Inc.*, 18 AD3d 590, 593, [2d Dept 2005]; citing *St. George v Barney Corp.*, 270 AD2d 171, 172 [1st Dept 2000]). Since no privity lies between an insured and an insurance broker, an insured party can only bring a claim against an insurance broker in two instances: (1) where there are special circumstances at play, such as fraud or collusion (*see Binyan*, 18 AD3d at 592), or (2) where there is evidence that the insured party is an intended third-party beneficiary of a contract between the insurance broker and its client *(see Griffin v DaVinci Development, LLC*, 44 AD3d 1001, 1002-1003, [2d Dept 2007]). In order to establish that a party is an intended third-party beneficiary of a contract, such party must prove: "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for its benefit and (3) that the benefit to it is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate it if the benefit is lost" (*Town of Huntington v Long Island Power Authority*, 130

AD3d 1013, 1014 [2d Dept 2015]).

It is undisputed that there is no direct contractual relationship between Waste Management and Cottingham. Notwithstanding, Waste Management contends that it was the intended third-party beneficiary of the agreement between Cottingham and Lu Transport. Annexed to Cottingham's motion papers is a copy of the "Transportation Service Agreement" between Waste Management and Lu Transport (Cottingham Affirmation, Exhibit B, 9). Pursuant to section 15 of this agreement, Lu Transport (described therein as "Carrier") was required to obtain the following insurance coverages: (1) workers compensation insurance; (2) employers' liability insurance; (3) commercial general liability insurance; and (4) automobile liability insurance (*id.*). The agreement further required Lu Transport to add Waste Management (described therein as "Company") as "additional insureds on a Primary basis to all required liability policies required of [Lu Transport] and its subcontractors, and all required insurance policies" (*id.*). In light of this agreement, and assuming the facts alleged in the fifteenth cause of action are true, the insurance coverage that Cottingham procured on behalf of Lu Transport, was intended to satisfy Lu Transport's obligations under its contract with Waste Management. Since Cottingham failed to demonstrate that "this material fact alleged by [Waste Management] was not a fact at all, and failed, moreover, to demonstrate that no significant dispute exists regarding the allegation," the Court finds that the alleged facts give rise to a cognizable cause of action (*Cog-Net,* 86 AD3d at 586; *Nunez v Mohamed*, 104 AD3d 921, 922 [2d Dept 2013]). Accordingly, Cottingham's motions to dismiss the fifteenth cause of action of the third-party complaint is denied.

B. *The Seventeenth Cause of Action*

With respect to the seventeenth cause of action, Waste Management requests that the Court

compel Cottingham, among others, to defend it in the main action and "to fully indemnify [Waste Management] up to the policy limits and under the appropriate policy for any award that plaintiff were to obtain against [Waste Management] in this matter" (Third-Party Complaint, ¶ 77). However, Cottingham contends that any liability on its part would require that Waste Management establish the existence of privity between the two parties, which it failed to do in the complaint (*see* Cottingham Mem of Law in Supp, 13). Cottingham further argues that the cause of action is "legally deficient because it seeks the equitable relief of a declaratory judgment," when Waste Management's only remedy, if one exists, "is a remedy at law through an action for damages against Cottingham" (*id.*).

The Court notes that "[w]here a cause of action is sufficient to invoke the court's power to render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy, a motion to dismiss that cause of action should be denied" (*Tilcon New York, Inc., v Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2d Dept 2011]). In relation to disputes involving insurance coverage, the Court further notes that "[a] party who is not privy to an insurance contract but would nevertheless benefit from the insurance policy may bring a declaratory judgment action to determine whether the insurer owes a defense and/or coverage under the policy *(Tepedino v Zurich-American Ins. Group*, 220 AD2d 579 [2d Dept 1995]). Moreover, an insurance broker who is negligent in failing to procure the necessary insurance "stands in the shoes of the insurer and is liable to provide for the insured's defense in the underlying action and to indemnify the insured for any judgment which would have been covered by the policy" (*Brian Fay Const. Inc., v Morstan General Agency, Inc.*, 90 AD3d 796 [2d Dept 2011]).

Here, given that Waste Management's indemnity and contribution claims stem from its claim that

it is an intended third-party beneficiary, the Court finds that the allegations in the seventeenth cause of action are sufficient to invoke the Court's power to render a declaratory judgment. As such, Cottingham's motion to dismiss the seventeenth cause of action is denied. In addition, contrary to Cottingham's contention, given that the issue here involves Cottingham's obligation to defend and indemnify Waste Management, a request for declaratory relief is appropriate in this matter (*see generally Brian Fay Const. Inc.*, 90 AD3d at 798-799).

C. The Eighteenth Cause of Action

Next, the eighteenth cause of action seeks a declaratory judgment against Cottingham, among others, "for the amount of any judgment or verdict which may be recovered in this action against [Waste Management]"; alternatively, Waste Management seeks to recover a portion of the judgment from Cottingham to the extent that it is responsible, "in accordance with the principles of common law indemnity and contribution, and in accordance with the contents of the contract referred to herein" (Third-Party Complaint, ¶ 79). The cause of action also requests a judgment declaring that Cottingham, among others, "had a duty to [Waste Management] to secure additional insured status for [Waste Management]" and, because Cottingham allegedly breached this duty, it must "defend and indemnify [Waste Management] to the full extent of those policies" (*id.*). In support of its motion to dismiss this cause of action, Cottingham again argues that the cause of action fails to allege any contractual privity or special relationship between Cottingham and Waste Management, such that would give rise to a duty of care to Waste Management in the underlying action (Cottingham Mem of Law in Supp, 16). Cottingham further avers that a claim for contribution is not appropriate here because "[n]owhere in the [t]hird-[p]arty complaint is there any allegation that Cottingham shared in responsibility for any injury

to the [p]laintiff in the [f]irst-[p]arty [a]ction" (*id.*).

In this regard, the Court notes the general rule that the existence of a contractual obligation between two parties is sufficient to impose a duty in favor of an intended third-party beneficiary (*see Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002]). In light of the foregoing, and for the reasons previously mentioned, the Court finds that the facts asserted in the third-party complaint sufficiently allege that Cottingham, in its role as insurance broker for Lu Transport, breached a duty of care owed to Waste Management, rendering the allegations in the eighteenth cause of action adequate to state a claim upon which relief can be granted. Furthermore, the Court notes that a claim for contribution is proper in this matter because, rather than merely being "compelled to pay for the wrong of another," Waste Management is also alleging that Cottingham is liable "for its own failure to exercise reasonable care" under the circumstances (*Salonia v Samsol Homes, Inc.*, 119 AD 2d 394 [2d Dept 1986]; citing *D'Ambrosio v City of New York*, 55 NY2d 454 [1982]). Accordingly, that branch of Cottingham's motion to dismiss the eighteenth cause of action is denied.

III. Dismissal of the Fourteenth, Seventeenth & Eighteenth Causes of Action of the Third-Party Complaint Against RBN

RBN seeks dismissal of the fourteenth, seventeenth and eighteenth causes of action in the third-party complaint, insofar as asserted against it, for failure to state a cause of action under CPLR 3211(a)(7). In the third-party complaint, the fourteenth cause of action alleges that RBN acted as an insurance agent and/or broker for Lu Transport in placing the General Liability and Excess/Umbrella coverages that Lu Transport was responsible for under its contract with Waste Management (Third-party

Complaint, ¶ 67). The complaint further alleges that RBN "failed to place sufficient primary coverage under the contract" and "failed to have [Waste Management] named as an additional insured as required under the General Liability and Excess/Umbrella policies" (*id.*). As a result, Waste Management alleges that it is entitled to have RBN defend and fully indemnify it in the underlying action (*id.*).

In the seventeenth cause of action, Waste Management requests that the Court also compel RBN to defend it in the main action and to "fully indemnify [Waste Management] up to the policy limits and under the appropriate policy for any award that plaintiff were to obtain against [Waste Management] in this matter" (Third-Party Complaint, ¶ 77). Moreover, the eighteenth cause of action also seeks a declaratory judgment against RBN for an amount commensurate with RBN's responsibility to Waste Management in the main action, as well as a judgment declaring that RBN breached its duty to Waste Management by failing to secure additional insured status for Waste Management (Third-Party Complaint, ¶ 79).

In support of its motion to dismiss the three causes of action herein, RBN argues, in similar fashion to Cottingham, that the third-party complaint failed to allege that there is privity between RBN and Waste Management, and, as such, RBN cannot be held liable to Waste Management (RBN Memo of Law in Supp, 5-6). In addition, RBN argues that a contribution claim against it is improper because plaintiff failed to make any allegations of wrongdoing against RBN in the main action, and plaintiff is not seeking any damages or relief against RBN based on insurance coverage issues (RBN Mem of Law in Supp, 6).

For the reasons stated above, the Court finds that the facts alleged in the fourteenth, seventeenth and eighteenth causes of action, as against RBN, are sufficient to state a claim upon which relief can be

granted. Accordingly, RBN's motion to dismiss the fourteenth, seventeenth and eighteenth causes of action is denied.

IV. Plaintiff's Cross-Motion to Sever the Third-Party Complaint from the Main Action

Plaintiff, in his cross motion, requests that the Court sever the entire third-party complaint from the underlying personal injury action, on the grounds that there are no common questions of fact between the claims in the respective actions. Plaintiff further contends that he will suffer undue prejudice if the two actions are tried together because the insurance issues involved in the third-party complaint, as well as the issues of indemnification, are separate and distinct from the issues regarding how the accident occurred and of defendant's alleged negligence (Plaintiff Affirmation in Supp, ¶ 13). In opposition to the instant cross-motion, Waste Management avers that severance is not appropriate in this matter because there are "complex and interwoven common questions of law and fact," and its claims against the third-party defendants "are largely predicated upon the facts and legal determinations in the underlying personal injury claim" (Waste Management Aff in Opp to Cross-Motion, ¶ ¶ 5-6). As the Court has determined that the eighth through eighteenth causes of action of the third-party complaint will be severed from the underlying action, the Court will limit its analysis to whether first through seventh causes of action ought to be severed as well.

The first through seventh causes of action in the third-party complaint are all asserted against Lu Transport, plaintiff's employer. The first and second causes of action assert that Waste Management is entitled to contribution and indemnification in the full amount of any judgment rendered against Waste Management in the main action. The third cause of action is for the alternative remedy of statutory apportionment. The fourth through seventh causes of action are all breach of contract claims, and are

based upon the contract between Waste Management and Lu Transport, in which Lu Transport agreed, inter alia, to transport waste materials from the subject transfer station where the alleged accident occurred.

The Court notes that while it is within the court's discretion to grant a motion to sever, severance will be deemed improper "where the claims against the defendants involve common factual and legal issues, and the interests of judicial economy and consistency of verdicts will be served by having a single trial" (*New York Schools Ins. Reciprocal v Milburn Sales Co., Inc.*, 138 AD3d 940, 941 [2d Dept 2016]; quoting *New York Cent. Mut. Ins. Co. v McGee*, 87 AD3d 622, 624 [2d Dept 2011]). Here, since Lu Transport is the owner of the subject premises and, pursuant to its contract with Waste Management, agreed to indemnify it should an employee become injured on the premises (*see* Cottingham Affirmation, Exhibit B), Lu Transport's liability in the third-party action is dependent on whether, and to what extent, Waste Management is found liable in the first-party action. Accordingly, based upon a review of the record submitted by the parties, and the relevant law, the Court grants plaintiff's cross-motion to the extent of severing the eighth through eighteenth causes of action of the third-party complaint. That branch of plaintiff's motion seeking to sever the first through seventh causes of action in the third-party complaint from the main action is denied (*see Curreri v Heritage Property Investment Trust, Inc.*, 48 AD 3d 505, 507 [2d Dept 2008]; *see generally Zili v City of New York*, 105 AD3d 949 [2d Dept 2013]).

CONCLUSION

Accordingly, that branch of Cottingham's motion to sever the eighth through eighteenth causes of action in the third-party complaint is granted, and these causes of action are hereby severed from the

main action. Those branches of Cottingham's motion to dismiss the fifteenth, seventeenth and eighteenth causes of action in the third-party complaint, insofar as asserted against it, is denied. RBN's motion to dismiss the fourteenth, seventeenth and eighteenth causes of action in the third-party complaint, insofar as asserted against it, is likewise denied. Plaintiff's cross-motion to sever the entire third-party complaint from the main action is granted to the extent of severing the eighth through eighteenth causes of action of the third-party complaint from the main action. Upon payment of any requisite fee, the Kings County Clerk is directed to assign a new index number to the severed causes of action (eighth through eighteenth) of the third-party complaint.

The foregoing constitutes the decision and order of the Court.

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ENTER,

HON. LARRY D. MARTIN
J.S.C.

For Clerks use only

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