239 E. 115th St. v Original JNS Pizza
2017 NY Slip Op 30593(U)
March 28, 2017
Supreme Court, New York County
Docket Number: 157222/16
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. Justice

PART 35

239 East 115th Street

-v-

Original JNS Pizza et al.

INDEX NO. 157222/16

MOTION DATE 1/27/17

MOTION SEQ. NO. 001

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

Defendant LIG Insurance ("defendant") moves to dismiss the complaint pursuant to CPLR 3211(a) for failure to state a cause of action and upon documentary evidence, or in the alternative, for a declaration pursuant to CPLR 3212 that it has no duty to defend or indemnify plaintiffs 239 East 115th Street Housing Development Fund Corporation and Hope Community, Inc. in a personal injury action commenced by William Lawrence (the "Underlying Action").

In this action, plaintiffs allege that they entered into a lease with Z&S Deli Pizza Corp ("Z&S"), which required Z&S to maintain general liability insurance for the benefit of plaintiffs. Plaintiffs allege that defendant issued a policy (the "Policy") to Z&S, that coverage obligations have been triggered under such policy, and that therefore, plaintiffs are entitled to defense and indemnification for the claims in the underlying action.

In support of dismissal, defendant argues that plaintiffs are not named insureds under the subject insurance policy it issued to Z&S and that said policy does not contain an additional insured endorsement naming them as additional insureds. Therefore, defendant has no obligation to defend or indemnify plaintiffs in the underlying action.

In opposition, plaintiff argues that its lease with Z&S required Z&S to procure insurance in their favor, and Z&S agreed to indemnify and hold plaintiffs harmless form all claims and liability for losses occurring at the demised premises (the "Lease"). Therefore, plaintiffs are indemnitees of Z&S. Pursuant to the Policy, page 32(f)(2), defendant agreed to indemnify an indemnitee of the insured, Z&S. Also, pursuant to the certificate of insurance, plaintiffs are listed as certificate holders. Based on the certificate of insurance, lease, and Policy, sufficient issue of fact exist as to whether defendant is required to defend plaintiffs.

Dated: _____ _____, J.S.C.

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

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

In reply, defendant argues that purported indemnitees of the named insured are not entitled to coverage under the section of the policy cited by plaintiffs (the "Supplementary Payments provision"). In any event, plaintiffs cannot satisfy the conditions precedent to coverage under that provision. And, the certificate of insurance is not evidence of coverage.

Discussion

In determining a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, 960 N.Y.S.2d 404 [1st Dept 2013]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v. Hack*, 97 A.D.3d 437, 948 N.Y.S.2d 583 [1st Dept 2012]; *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81, 692 N.Y.S.2d 304 [1st Dept 1999], *affd* 94 N.Y.2d 659, 709 N.Y.S.2d 861, 731 N.E.2d 577 [2000]; *Kliebert v. McKoan*, 228 A.D.2d 232, 643 N.Y.S.2d 114 [1st Dept], *lv denied* 89 N.Y.2d 802, 653 N.Y.S.2d 279, 675 N.E.2d 1232 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 [1977]; *see also Leon v. Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]; *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150, 730 N.Y.S.2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v. NYNEX Corp.*, 188 A.D.2d 257, 259, 590 N.Y.S.2d 460 [1st Dept], *lv denied* 81 N.Y.2d 709, 599 N.Y.S.2d 804, 616 N.E.2d 159 [1993]).

Pursuant to CPLR 3211 (a)(1), a motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *Mill Financial, LLC v. Gillett*, 122 A.D.3d 98, 992 N.Y.S.2d 20 [1st Dept 2014]; *Mill Financial, LLC v. Gillett, supra, citing Art and Fashion Group Corp. v. Cyclops Production, Inc.*, 120 A.D.3d 436, 992 N.Y.S.2d 7 [1st Dept 2014]). To be considered "documentary," evidence must be unambiguous and of undisputed authenticity (*Fontanetta v Doe*, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010] *citing* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21–22; *Raske v Next Management, LLC*, 40 Misc 3d 1240(A), Slip Copy, 2013 WL 5033149 (Table) [Supreme Court, New York 2013]; *Philips South Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 867 NYS2d 386 [1st Dept 2008]). To constitute documentary evidence, the papers must be "essentially undeniable" and support the motion on its own (*Amsterdam Hospitality Group, LLC v. Marshall-Alan Associates, Inc.*, 120 A.D.3d 431, 992 N.Y.S.2d 2 [1st Dept 2014] *citing* Siegel, Practice Commentaries, supra, at 2)).

Finally, where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The proponent of a motion for summary judgment

must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.,* 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84 [2014]).

Once such showing made, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212 [b]; *Farias v Simon*, 122 AD3d 466 [1st Dept 2014]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose" (*Kosovsky v. Park South Tenants Corp.,* 45 Misc.3d 1216(A), 2014 WL 5859387 [Sup Ct New York Cty 2014] *citing Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

Here, plaintiffs allege in the complaint that Z&S was obligated under its lease to maintain general insurance liability insurance policy covering the leased premises and "to benefit the plaintiffs," and to name plaintiffs as additional insureds and Certificate Holders (¶4). Z&S was insured by defendant "under general liability policy number . . ." and plaintiffs were the certificate holder for the policy (¶¶5, 17).

It is well settled that a certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists (*Tribeca Broadway Associates, LLC v. Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 774 NYS2d 11 [1st Dept 2004]; *see also, Kermanshah Oriental Rugs, Inc. v. Gollender*, 47 A.D.3d 438, 850 N.Y.S.2d 47 [1st Dept 2008]). There is no allegation that plaintiffs are named as insureds or additional insureds under the Policy. Thus, the mere allegations of Z&S's obligation to procure insurance and that defendant issued insurance to Z&S is insufficient to assert an obligation by the defendant to defend and indemnify plaintiffs.

In any event, plaintiffs failed to overcome defendant's documentary evidence, *i.e.*, the Complaint and Policy, showing their entitlement to dismissal of the complaint.

In interpreting an insurance policy, "words and phrases are to be understood in their plain, ordinary, and popularly understood sense, rather than in a forced or technical sense" (*Hartford Ins. Co. of the Midwest v Halt*, 223 AD2d 204, 212, 646 NYS2d 589, 594 [4th Dept 1996]). The policy must be construed "in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (*Raymond Corp. v National Union Fire Ins. Co.*, 5 NY2d 157, 162, 800 NYS2d 89, quoting *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221-222, 746 NYS2d 622 [2002]; *see also United Stated Fid. & Guar. Co. v Annumiata*, 67 NY2d 229, 232, 501 NYS2d 790 [1986]) "Unambiguous provisions of a policy are given their plain and ordinary meaning" (*Lavanant v General Ace. Ins. Co.*, 79 NY2d 623, 629, 584 NYS2d 744 [1992]; *Seaport Park Condominium v Greater New York Mutual Ins.* Co., 39 AD3d 51, 828 NYS2d 381 [1st Dept 2007]).

Section II of the Policy, "Liability" defines "Who Is An Insured" as, inter alia, an organization other than a partnership, or limited liability company "designated in the Declarations as" such. (C, page 40 of 49). Under the "Common Policy Declarations" page (and

pages thereafter), "Z & S Deli Corp" is listed as the "Named Insured." And, there is no additional insured endorsement to the Policy. Therefore, the Policy demonstrates that plaintiffs not insureds or additional insureds thereunder.

Contrary to plaintiff's contention, the Supplementary Payments provision of the Policy, which obligates the defendant to defend an indemnitee of the named insured when certain specified conditions are met, is insufficient to raise an issue of fact as to coverage. It has been held that the "supplementary payments provision [does] not demonstrate an intent by the defendant insurer to afford the plaintiff coverage solely on the basis that it is an indemnitee of the named insured, in the absence of the plaintiff's addition as 'an insured' under . . . the subject policy pursuant to the additional insured endorsement (*Hargob Realty Associates, Inc. v. Fireman's Fund Ins. Co.*, 73 A.D.3d 856, 901 N.Y.S.2d 657 [2d Dept 2010] *citing Stainless, Inc. v. Employers Fire Ins. Co.*, 69 A.D.2d at 33, 418 N.Y.S.2d 76 [1st Dept 1979]).

Given that the Policy herein does not name plaintiffs as an insured or additional insured under the Policy, the Supplementary Payments provision is insufficient to afford plaintiffs coverage (*see also*, *Mulvey Construction, Inc. v. BITCO General Life Insurance Corp.*, 2015 WL 6394521 (the supplementary payments coverage is provided as a benefit for the insured, not a stranger to the insurance contract. Significantly, it does not make a third party indemnitee an insured under the policy")).

Therefore, defendant is entitled to dismissal of the complaint as asserted against it.

Conclusion

Based on the foregoing, it is hereby

ORDERED that Defendant LIG Insurance's motion to dismiss the complaint pursuant to CPLR 3211(a) for failure to state a cause of action and upon documentary evidence, or in the alternative, for a declaration pursuant to CPLR 3212 that it has no duty to defend or indemnify plaintiffs 239 East 115th Street Housing Development Fund Corporation and Hope Community, Inc. in a personal injury action commenced by William Lawrence is granted; and it is further

ORDERED and DECLARED that Defendant LIG Insurance has no duty to defend or indemnify plaintiffs 239 East 115th Street Housing Development Fund Corporation and Hope Community, Inc. in a personal injury action commenced by William Lawrence; and it is further

ORDERED that the action as asserted against Defendant LIG Insurance is hereby severed and dismissed; and it is further

ORDERED that Defendant LIG Insurance shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the remaining parties shall appear for a Preliminary Conference on May 30, 2017, 2:15 p.m.; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated 3/28/17 **ENTER:** _____ **J.S.C.**

HON. CAROL R. EDMEAD
J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**