

**Emil Mosbacher Real Estate LLC v Travelers
Indemnity Company**

2003 NY Slip Op 30156(U)

April 7, 2003

Supreme Court, New York County

Docket Number: 0605495/2001

Judge: Sherry Klein Heitler

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 30**

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EMIL MOSBACHER REAL ESTATE LLC and
DIAMOND STATE INSURANCE COMPANY,

Plaintiffs,

Index No. 605495/01

DECISION AND ORDER

- v -

TRAVELERS INDEMNITY COMPANY,

Defendant.

SCANNED
APR 11 2003

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SHERRY KLEIN HEITLER, J.:

Plaintiffs Emil Mosbacher Real Estate LLC (Mosbacher Real Estate) and Diamond State Insurance Company move for an order granting a reformation of the insurance policy (the Policy) issued by defendant Travelers Indemnity Company (Travelers) to Dollar City, Inc. to include Mosbacher Real Estate as an additional insured; and a judgment declaring that Travelers must defend and indemnify Mosbacher Real Estate in an action titled Maria Abreu v Emil Mosbacher Real Estate LLC. et. al. (the Other Action), pending in the Supreme Court of the State of New York, County of Bronx, under Index No. 15765/01. Travelers cross-moves for an order, pursuant to CPLR 3212, dismissing the complaint; or in the alternative, pursuant to CPLR 3211(a)(7), dismissing the third-party complaint for failure to state a cause of action against Travelers.

There is currently a ten-year written lease in effect regarding premises 142-144 East 1700th Street, Bronx, New York (the Leased Premises), which names Dollar City, Inc. (Dollar City), as tenant, and "Robert Mosbacher, as Trustee of the Emil Mosbacher 1978 Trust" (the Trust), as lessor, which was entered into on May 2, 1996 (the Lease). The Trust subsequently transferred the property to Mosbacher Real Estate in January 1998. Under the terms of the Lease, Dollar City was required to procure general public liability naming the "owner as an additional party" insured under the policy

(Lease, ¶44[D]). Dollar City obtained a Commercial Liability Property policy of insurance, through the agency of Seide, Jonas, & Cohen, an agent of Travelers, effective September 9, 2000. At the time the Policy was issued, and in subsequent renewals, the additional insured endorsement listed "Robert Mosbacher/John Gordon" as additional insureds (see Mosbacher Real Estate's Exhibit A, Endorsement titled "Additional Insured - Managers or Lessors of Premises), and not Mosbacher Real Estate, the owner of the Leased Premises.

The Other Action, commenced in April 2001, names Dollar City and Mosbacher Real Estate as defendants, and asserts negligence claims against them for personal injuries sustained by Maria Abreu when a portion of a ceiling within the Leased Premises fell and struck her. Mosbacher Real Estate's request that Travelers defend and indemnify it in the Other Action was denied by Travelers, based on Travelers' position that Mosbacher Real Estate was not listed as an additional insured under the Policy. Mosbacher Real Estate has been defended in the Other Action by plaintiff Diamond State Insurance Company (Diamond) under a separate policy.

Mosbacher Real Estate instituted this action seeking, inter alia, a declaration that Travelers must defend and indemnify it in the Other Action.

Now Mosbacher Real Estate moves for reformation of the Policy, and requests that its declaratory relief be granted. It argues that reformation of the Policy should be permitted herein, since the failure to include it in the Policy could only have been an innocent mistake, and the proposed change would not alter the nature of the **risk** assumed by Travelers thereunder. It notes that the title of the subject endorsement "Additional Insured - Managers or Lessors of Premises", and the language therein, manifests the parties' intent with respect to the nature of the risk covered thereunder, i.e., the lessor's liability in connection with Dollar City's maintenance or use of the

Leased Premises (Mosbacher Real Estate's Exhibit A, Endorsement titled "Additional Insured - Managers or Lessors of Premises). It maintains that the failure to reform the Policy would render the subject endorsement a nullity, since the names listed thereon were never the lessors during the effective dates of the Policy.

In opposition to the motion and in support of its cross motion, Travelers initially argues that Mosbacher Real Estate does not have any standing to bring this declaratory judgment action. Additionally, it maintains that, since plaintiff cannot prove that the writing in question was executed under mutual mistake or unilateral mistake coupled with fraud, Mosbacher Real Estate's request for reformation of the Policy should be denied. Travelers further contends that "Robert Mosbacher/John Gordon" were the only additional insureds that it agreed to insure under the Policy.

Contrary to Travelers' argument, Mosbacher Real Estate has standing to bring this action. A plaintiff need not be privy to an insurance contract to commence a declaratory judgment action to determine the rights and obligations of the respective parties, so long as the plaintiff stands to benefit from the Policy (Mortillaro v Public Serv. Mut. Ins. Co., 285 AD2d 586 [2d Dept 2001]). Mosbacher Real Estate is a defendant in the Other Action, and clearly stands to benefit from the Policy issued by Travelers to Dollar City if the reformation, and declaratory relief it seeks, is granted.

As noted by Travelers, a party is entitled to reformation where the writing in question was executed under mutual mistake or unilateral mistake coupled with fraud (Lavitt-Bemer Tanning Corp. v American Home Assur. Co., 129 AD2d 199 [3d Dept], lv denied 70 NY2d 609 [1987]). Where it is established that an innocent mistake occurred with respect to a named insured, the error may be deemed mutual for purposes of reformation, even though the insurer is unaware of the error (Anand v GA Ins. Co. of N.Y., 228 AD2d 397 [2d Dept 1996]; Cheperuk v Liberty Mut. Fire Ins.

Co., 263 AD2d 748 [3d Dept 1991). "The name of the insured in [an insurance] policy is not always important if the intent to cover the risk is clear" (Anand v GA Ins. Co. of N.Y., 228 AD2d at 399 [interior quotes and citation omitted]).

Travelers submits an affidavit by Yvonne Anderson, one of its underwriters, who acknowledges that the Policy was issued by its agent, Seide, Jonas & Cohen, Inc., which had binding authority. She claims, however, without any personal knowledge of the circumstances surrounding the issuance of the Policy, that it was intended that the only additional insureds on the Policy would be "Robert Masbacher/John Gordan".

Here, a review of the terms of the Policy discloses that the risks assumed by Travelers included coverage to managers or lessors of the Leased Premises as additional insured for liability arising out of [Dollar City's] ownership, maintenance or used within the Leased Premises (see Mosbacher Real Estate's Exhibit A, the Policy, Endorsement titled "Additional Insured - Managers or Lessors of Premises). It is clear that the Dollar City and Travelers intended to cover this risk, and the identity of the lessor/owner of the Lease Premises was comparatively unimportant (see Anand v GA Ins. Co. of N.Y., 228 AD2d at 399; see also New York Cas. Ins. Co. v Shaker Pine, Inc., 262 AD2d 735 [3d Dept 1991). Additionally, Travelers does not claim that it would have discontinued coverage of the Policy, or not accepted the risk had it been informed of the change of the lessor/owner (see Court Tobacco Stores, Inc. v Great Eastern Ins. Co., 43 AD2d 561 [2d Dept 1973]; see also Cheperuk v Liberty Mut. Fire Ins. Co., 263 AD2d at 749).

Since it is evident that coverage was intended for the managers and lessors of the Leased Premises, and that the identity of the lessor/owner herein was relatively unimportant, the plaintiff is entitled to equitable reformation of the Policy to correct the inadvertent misidentification of the

additional insured (Cheperuk v Liberty Mut. Fire Ins. Co., 263 AD2d at 749-750).

Accordingly, that branch of plaintiffs' motion for an order granting reformation of the Policy to include Mosbacher Real Estate as the additional insured is granted. In view of the foregoing, that branch of plaintiffs' motion for a judgment declaring that Travelers must defend and indemnify Mosbacher Real Estate in the Other Action is granted. Under the Policy, Travelers is contractually obligated to provide primary coverage to Dollar City, and under the additional insured endorsement it is required to extend that coverage to Mosbacher Real Estate (Tishman Constr. Corp. of N.Y. v American Mfrs. Mut. Ins. Co., 299 AD2d 169 [1st Dept 2002]). There is no dispute that the injuries alleged by plaintiff in the Other Action are within the risks undertaken by Travelers under the Policy (see Charter Oak Fire Ins. Co. v Trustees of Columbia Univ. in the City of New York, 198 AD2d 134 [1st Dept 1993]).

Plaintiffs application for a judgment declaring that Travelers' duty to defend and indemnify Mosbacher Real Estate is primary to that of Diamond State is also granted. This court notes that Travelers does not address this branch of plaintiffs' application. As previously discussed, under the Policy, Travelers is required to provide primary coverage to Mosbacher Real Estate, as an additional insured. The insurance policy issued by Diamond State to Mosbacher Real Estate was in excess to the Policy, in that it provides that its coverage is excess where there was "any other primary insurance available to you covering liability for damages arising out of the premises or operation for which you have been added as **an** additional insured by attachment of an endorsement" (Mosbacher Real Estate's Exhibit E, Endorsement titled "Amendment of Other Insurance Condition", ¶ 4[b][2]; see Tishman Constr. Corp. of N.Y. v American Mfrs. Mut. Ins. Co., 299 AD2d at 171).

To recapitulate, plaintiffs' motion is granted in its entirety. In view of the foregoing, Travelers' cross motion for summary judgment in its favor, or alternatively, dismissal of the complaint, pursuant to CPLR 3211(a)(7) is denied.

Accordingly, it is

ORDERED that the branch of plaintiffs' motion for a reformation of the Policy is granted; and the Policy is reformed to include Emil Mosbacher Real Estate LLC as an additional insured; and it is further

ORDERED that the branch of plaintiffs' motion for declaratory relief is granted; and it is


ADJUDGED **AND** DECLARED that Travelers Indemnity Company is obligated to defend and indemnify Emil Mosbacher Real Estate LLC in Maria Abreu v Emil Mosbacher Real Estate LLC. et. al., pending in the Supreme Court of the State of New York, County of Bronx, under Index No. 15765/01; and it is further

ADJUDGED **AND** DECLARED that Travelers Indemnify Company's duty to defend and indemnify Emil Mosbacher Real Estate LLC is primary to that of Diamond State Insurance Company; and it is further

ORDERED that the cross motion by Travelers Indemnity Company is denied.

Dated: APRIL 7, 2003

ENTER:


SHERRY KLEIN HEITLER
J. S. C.