

Griffin v Davinci Dev., LLC

2006 NY Slip Op 30793(U)

September 27, 2006

Supreme Court, Suffolk County

Docket Number: 001427/2005

Judge: Jr., John J.J. Jones

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This opinion is uncorrected and not selected for official publication.

PUBLISH

AMENDED
SHORT FORM ORDER

INDEX NO.: 001427/2005
SUBMIT DATE: 3/15/2006
MTN. SEQ.#: 002;003;004;005

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 002- 2/15/2006
003-3/29/2006 004;005-3/31/2006
MOTION NO.: 002-MOT D 003-MOT D
004-XMOT D 005-XMOT D

-----X

BRIAN GRIFFIN,

Plaintiff,

-against-

DAVINCI DEVELOPMENT, LLC and ARTIE
CIPOLETTI,

Defendants.

-----X

DAVINCI DEVELOPMENT, LLC and ARTIE
CIPOLETTI,

Third-Party Plaintiffs,

-against-

ACTION SIDING, INC., RMS INSURANCE
BROKERAGE, LLC and R&W BROKERAGE, INC.,

Third-Party Defendants.

-----X

[2]
Upon the following papers numbered 1 to 79 read on these two motions to dismiss the third-party complaint, and two cross-motions to sever the third-party action; Notice of Motion/Order to Show Cause and supporting papers 1-7; 8-23 ; Notice of Cross Motion and supporting papers 24-32; 33-35 ; Answering Affidavits and supporting papers 36-47; 48-56 ; 63-74; 75-77 ; Replying Affidavits and supporting papers 57-58; 59-60; 61-62; 78-79 ; Other _____; it is

ORDERED that the Order of this Court dated June 29, 2006 is hereby recalled and vacated in its entirety; and it is further

ORDERED that this motion by third-party defendant, RMS Insurance Brokerage, LLC (RMS), for an order dismissing the third-party complaint and the separate motion by RMS for an order dismissing the amended third-party complaint and all cross-claims against it are granted only to the extent that the claims asserted by the defendant/third-party plaintiffs, DaVinci Development, LLC (DaVinci) and Artie Cipoletti, against RMS in the tenth, eleventh, twelfth and thirteenth causes of action in the amended third-party complaint are dismissed; and it is further

ORDERED that the cross-claims asserted by third-party defendant Action Siding Inc. (Action) against RMS are converted to and deemed to be causes of action in a third-party complaint (*see Cusick v Lutheran Med. Cent.*, 105 AD2d 681, 481 NYS2d 122 [2d Dept 1984]); and it is further

ORDERED that the motion by third-party defendant, R & W Brokerage, Inc. (R & W), deemed herein to be a cross-motion, and the cross-motion by RMS for an order severing the third-party claims from the main action are granted only to the extent that the claims and cross-claims arising out of the alleged failure of the third-party defendants to provide insurance coverage are hereby severed from the main personal injury action commenced by plaintiff, Brian Griffin, and the remaining causes of action designated "First", "Third" and "Fourth" in the Amended Third Party Complaint shall survive in this action, and in all other respects the applications are denied.

Plaintiff, Brian Griffin, commenced this action against defendants DaVinci and Cipoletti to recover damages for personal injuries allegedly sustained on May 7, 2004 while he was employed by Action on premises allegedly owned by DaVinci. Defendants commenced a third-party action against Action, RMS and R & W seeking indemnification and contribution for damages incurred in the Griffin action claiming, in part, that the third-party defendants breached contractual obligations and negligently failed to secure effective insurance coverage on defendants' behalf. Specifically, it is alleged in the amended third-party complaint that DaVinci entered into an agreement with Action under which Action agreed to perform certain work at the premises owned by DaVinci, to provide liability coverage for the benefit of DaVinci, and to obtain a policy naming DaVinci as an additional insured, but that it failed to obtain the

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necessary insurance. It is also claimed that R & W procured a commercial liability policy from United National Insurance Company for DaVinci and represented that DaVinci was covered for liability arising out of its construction operations, but such coverage was not obtained. In addition, it is alleged that Action arranged with RMS to obtain insurance, and on or about March 16, 2004, RMS issued an certificate of liability insurance identifying Utica First as the insurer for the period from February 18, 2004 through February 18, 2005, and naming DaVinci as a certificate holder. Another certificate was issued which identified Allstate Insurance Company and Utica First as the insurers, and named DaVinci Construction of Nassau, Inc. (but not DaVinci Development, LLC) as a certificate holder and as an additional insured. It is claimed that RMS knew, or should have known, that DaVinci expected to be named as an additional insured on Action's commercial liability policy.

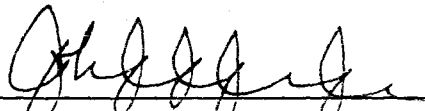
Following plaintiff's accident, both United National Insurance Company, DaVinci's commercial liability insurer, and Utica First, Action's commercial liability insurer, disclaimed coverage on multiple grounds, including that there was no coverage for liability for injury to employees of the insured or independent contractors retained by the insured.

It is generally recognized that, even where common facts exist, it is prejudicial to insurers "to have the issue of insurance coverage tried before the jury that considers the underlying liability claims" (*Christensen v Weeks*, 15 AD3d 330, 790 NYS2d 153 [2d Dept 2005], quoting *Schorr Bros. Dev. Corp. v Continental Ins. Co.*, 174 AD2d 722, 573 NYS2d 874). A trial of the personal injury claims of plaintiff Griffin together with the third-party insurance coverage claims and cross-claims would be inappropriate, especially since it could result in substantial prejudice to the third-party defendants and because the main action and such claims in the third-party action do not involve common questions of law or fact (*see Golfo v Loevner*, 7 AD3d 568, 777 NYS2d 159 [2d Dept 2004]). Thus, the claims in the second, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth causes of action asserted in the third-party complaint, as well as the first, second, third, fourth and fifth cross-claims asserted by third-party defendant Action must be severed from the main personal injury action.

It is undisputed that RMS served as a broker for Action, not DaVinci. Accordingly, it owed no duty to DaVinci and is not in privity with DaVinci (*see St. George v W. J. Barney Corp.*, 270 AD2d 171, 706 NYS2d 24 [1st Dept 2000]). Thus, defendant/third-party plaintiffs can not seek damages from RMS for its alleged failure to procure the insurance allegedly requested by Action (*see American Ref-Fuel Co. v Resource Recycling, Inc.*, 248 AD2d 420, 671 NYS2d 93 [2d Dept 1998]). Action is entitled, however, to seek indemnification upon its claims against RMS for negligence, breach of fiduciary duty, breach of warranty and breach of contract, upon allegations that "Action retained and relied upon RMS to provide liability insurance coverage . . . that would cover DaVinci in the event of any bodily injury suffered by an employee of Action while working at the premises defined in the third-party complaint as the "DaVinci Premises." Accordingly, dismissal of the third-party claims against RMS by DaVinci is appropriate, while the

cross-claims asserted by Action against RMS will survive.

DATED: 27 Sept. 06



HON. JOHN J.J. JONES, JR.
J.S.C.

CHECK ONE: FINAL DISPOSITION

NON-FINAL DISPOSITION

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