

**Erin Constr. & Dev. Co., Inc. v Gulf
Ins. Co.**

2008 NY Slip Op 32046(U)

July 18, 2008

Supreme Court, New York County

Docket Number: 0103440/2005

Judge: Jane S. Solomon

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JANE S. SOLOMON

PRESENT

PART 55

Justice

Index Number : 103440/2005

ERIN CONSTRUCTION

VS.

GULF INSURANCE

SEQUENCE NUMBER : # 002

DISMISS COMPLAINT

INDEX NO. 103440-05

MOTION DATE 3/13/08

MOTION SEQ. NO. #002

MOTION CAL. NO. _____

read on this motion to/for _____

PAPERS NUMBERED

1-4

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided, together with motion 03, in accordance with the enclosed memorandum decision under declaration and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 7/18/08

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate

DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55

-----x

ERIN CONSTRUCTION & DEVELOPMENT, CO., INC., Index No. 103440/05

Plaintiff,

DECISION, ORDER,
DECLARATION AND
JUDGMENT

-against-

GULF INSURANCE COMPANY and GULF UNDERWRITERS
INSURANCE CO.,

Defendants.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1415).

SOLOMON, JANE J.:

Plaintiff Erin Construction & Development Co, Inc.

(Erin) moves for summary judgment in this declaratory judgment action seeking insurance coverage to defend and indemnify Erin from a personal injury claim. Defendant Select Insurance Company, sued erroneously as Gulf Insurance Co. and Gulf Underwriters Insurance Co. (together referred to as Gulf Insurance) opposes the motion, and by separate motion, seeks a declaration that Erin is not entitled to coverage and dismissing the complaint.

Erin's business was construction and building renovation work. On several occasions, it engaged Rockledge Scaffolding, Corp. (Rockledge) as a scaffolding sub-contractor. According to Erin's president, John Murnane, it was the custom and practice of Erin and Rockledge that, when Rockledge accepted a subcontract from Erin, Rockledge would add Erin as an

additional insured on its liability policy. In connection with this agreement, Rockledge would cause a certificate of insurance to be issued, showing Erin and the property owner/client as additional insureds.

When Erin was hired to work at 3810 Broadway in Manhattan, it engaged Rockledge to install scaffolding outside the building under a written agreement. While it makes no reference to Rockledge's obligation to add Erin as an additional insured, Rockledge did cause Erin to receive a certificate indicating that Erin was an additional insured. The certificate contains a disclaimer that it was provided for information purposes only, conferred no rights on its holder, and it did not amend, alter or extend coverage under the policy.

Rockledge's insurer was Gulf Insurance. The Rockledge policy includes a Commercial General Liability coverage form and an additional insured endorsement. The additional insured endorsement extends coverage to "any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy . . ." (Additional Insured Endorsement, annexed to Affidavit of Eugene Otto in Opposition to Plaintiff's Motion at Ex. A2, hereafter referred to as the "AI Endorsement").

By a summons and complaint dated January 23, 2004, a

person named Ronnie Cohen alleged that he was injured on January 26, 2003 when he fell beneath the Rockledge scaffold on a sidewalk adjacent to 3810 Broadway. He sued the City of New York and Rockledge, alleging negligence, in part due to inadequate lighting under the scaffold (N.Y. County Index No. 600251/04). In April 2004, the summons and complaint was supplemented to add Erin as a defendant.

Erin commenced this action for a declaratory judgment that it is covered as an additional insured under the Rockledge policy, and that Gulf Insurance is obligated to defend and indemnify it in the Cohen action. The parties now move for dispositive relief.

Gulf Insurance contends that there is no written agreement between Erin and Rockledge requiring that Erin be an additional insured, so there is no coverage for Erin under the AI Endorsement. Erin argues that the AI Endorsement is ambiguous as to whether an agreement to add a person for whom the named insured was performing work must be in writing. According to Erin, the passage in the AI Endorsement which states that "when you and such person or organization have agreed in writing in a contract or agreement that such person . . . be added as an additional insured" is reasonably read to be applicable to situations where the parties have either a written a contract, or where there is no writing but only an "agreement". Erin further

contends that the certificate of insurance provided by Rockledge states that Erin is an additional insured under the subject policy, and that representation should be enforceable.

New York courts have held repeatedly that a certificate of insurance which includes a disclaimer that it is for information only and does not amend, extend or alter coverage provided by the policy, does not create coverage where the unambiguous language of the policy provides none (see, American Motorist Ins. Co. v Superior Accoustics, Inc., 277 AD2d 97 [1st Dept 2000]; and International Couriers Corp. v North River Ins. Co., 44 AD3d 568 [1st Dept 2007])). Therefore, Erin may not rely upon the certificate of insurance, and must show that it expressly is covered as an additional insured, or that the language of the AI Endorsement is ambiguous such that summary judgment may not be granted to Gulf Insurance.

When construing an insurance policy, the general rule is that "in case of ambiguity that construction of the policy will be adopted which is most favorable to the insured" (Mutual Life Ins. Co. Of NY v Hurni Packing Co., 263 US 167 [1923]), and ambiguities are construed against the drafter (Guardian Life Ins. Co. v Schaefer, 70 NY2d 888, 890 [1987]). However, before the rules governing construction of ambiguous contracts are triggered, the court first must find ambiguity (Breed v Ins. Co. Of N. America, 46 NY2d 351 [1978]).

Here, there is no ambiguity. The person or organization seeking coverage as an additional insured must show that it "agreed in writing" with Rockledge that it be added as an additional insured. Erin contends that the phrase "in a contract or agreement" in the endorsement creates an ambiguity as to whether the agreement to add Erin as an additional insured also must be in writing. However, that phrase does not alter the plain meaning of the AI Endorsement that there must be a writing, whether a contract, work order, invoice or other document setting forth the insurance obligation. An unwritten understanding arising from custom and practice clearly does not create additional insured coverage under the AI Endorsement. Accordingly, it hereby is

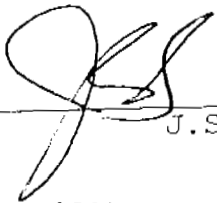
ORDERED that the motion for summary judgment by plaintiff (motion sequence 02) is denied, and the motion for summary judgment by defendants (motion sequence 03) is granted; and it further is

DECLARED and ADJUDGED that plaintiff Erin Construction & Development Co., Inc. is not an additional insured under the subject insurance policy issued by Select Insurance Company (Policy number GS2806106); and it further is

ORDERED that the complaint is dismissed, and the Clerk of the Court is directed to enter judgment accordingly, with costs and disbursements to defendants as taxed.

Dated: July 18, 2008

ENTER:



J.S.C

JANE S. SOLOMON

UNFILED JUDGMENT

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