

Josma v Interboro Ins. Co.

2011 NY Slip Op 32578(U)

September 27, 2011

Supreme Court, Nassau County

Docket Number: 3575/11

Judge: Anthony L. Parga

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**SHORT FORM ORDER
SUPREME COURT-NEW YORK STATE-NASSAU COUNTY**

PRESENT:

HON. ANTHONY L. PARGA
JUSTICE

-----X PART 8
MARIE G. JOSMA,

Plaintiff,

INDEX NO. 3575/11

-against-

MOTION DATE: 08/05/11
SEQUENCE NO. 001

INTERBORO INSURANCE CO., NUBIA, INC.,
KINGSTON INSURANCE CO., and FIRST CHOICE
COVERAGES,

Defendants.

-----X

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|--------------------------------------|----------|
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Upon the foregoing papers, the motion by defendant Kingston Insurance Co. for an order dismissing the plaintiff's complaint and all cross-claims as against said defendant is granted to the extent directed below.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action in which the plaintiff seeks insurance coverage under plaintiff's first-party homeowner's policy issued by defendant Interboro Insurance Co. (hereinafter "Interboro"), for property damage allegedly caused to plaintiff's home and personal property; damages from defendant Nubia, Inc. (hereinafter "Nubia") due to Nubia's alleged breach of contract and defective construction at plaintiff's premises; and insurance coverage directly under the third party general liability policy issued by moving defendant Kingstone Insurance Company s/h/a Kingston Insurance Company (hereinafter "Kingstone") to Nubia (herinafter referred to as the "Kingstone policy").

Plaintiff alleges that she entered into a contract on or about June 9, 2010 with Nubia to

perform work, labor, and services, and to furnish materials, in connection with the addition of a second story onto plaintiff's premises located in Uniondale, New York. Nubia allegedly began work shortly thereafter, which included removal of the house's roof and the placing of a tarp over the open portions of the roof at the end of each work day. On or about July 13, 2010, a wind and rainstorm allegedly caused portions of the tarp to be removed from plaintiff's roof and exposed the openings in the roof to the elements. Plaintiff alleges that because Nubia failed to properly secure the tarp over the open portions of the house's roof, rain from the storm entered the plaintiff's house and caused damage to the interior of the house, as well as to personal property.

Nubia was insured by a Commercial General Liability insurance policy through Kingstone at the time of this incident. The policy contained an endorsement which amended the definition of "insured" in the General Liability Coverage, but limited such coverage to "vicarious liability" of the additional insured. The policy amended the definition of "insured" to include "any person(s) or organizations(s) for whom you are performing operations under contract and for whom you are contractually obligated to furnish additional coverage," but limited same by stating that "this endorsement covers only liability arising out of your work involving ongoing operations performed for the additional insured(s) and is limited to vicarious liability arising from the hazards covered by this policy."

Nubia notified Kingstone that it was seeking coverage under the Kingstone policy for plaintiff's claim against Nubia for the damage to plaintiff's home and property and Kingstone disclaimed coverage based upon the exclusion in the Kingstone policy for "property damage or products/completed operations liability arising out of your work which involves the removal and/or replacement of roof materials," among other items. In addition, plaintiff sought coverage through her homeowner's policy with Interboro, but Interboro denied coverage because the premises were not plaintiff's primary residence and were not occupied by the homeowner, contrary to the information contained in plaintiff's insurance application to Interboro, which was allegedly prepared and submitted by defendant First Choice Coverages.

With respect to moving defendant Kingstone, plaintiff's complaint seeks a declaration that Kingstone is required to indemnify Nubia for plaintiff's claims against Nubia for the alleged property damage to plaintiff's home and personal property, as well as a declaration that plaintiff is entitled to additional insured coverage under the Kingstone policy for the alleged property damage to plaintiff's home and personal property. Kingstone moves for dismissal arguing, *inter alia*, that this is an improper direct action against Kingstone by a party who lacks standing to assert a direct action against Kingstone, and that the documentary evidence forecloses the plaintiff's claims against Kingstone as a matter of law. Kingstone also argues that Interboro

lacks standing for its cross-claim against Kingstone.

Insurance Law §3420 grants an injured plaintiff the right to sue a tortfeasor's insurance company to satisfy a judgment obtained against the tortfeasor. A judgment is a statutory condition precedent to a direct suit against the tortfeasor's insurer. (*Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 820 N.E.2d 855 (2004)). Insurance Law §3420(b)(1) grants an injured party a right to sue the tortfeasor's insurance, but the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for thirty days. (*Id.*) Compliance with these requirements is a condition precedent to a direct action against the insurance company. (*Id.*) The statutory right created in Insurance Law §3420 arises only after a plaintiff has obtained a judgment in the underlying action. (*Id.*) The plaintiff herein has not obtained a judgment against Kingstone's insured, Nubia, and may not maintain a direct action against Kingstone seeking damages for her property damage or seeking a declaration that Kingstone is required to cover the plaintiff's claim against Nubia. (*Id.* (holding that a declaratory judgment action challenging the tortfeasor's insurer's disclaimer of coverage was properly dismissed where it was brought by the injured plaintiff while his underlying action against the tortfeasor was pending)).

In addition, contrary to plaintiff's contentions, plaintiff is not an intended third party beneficiary herein, as she is not a named insured, nor is she referred to or described in the Kingstone policy as an intended beneficiary. In order for a third party to enforce a policy of insurance, it must be demonstrated that the parties intended to insure the interest of a third party who seeks to recover on the policy. (*Stainless, Inc. v. Employers Fires Insurance Co.*, 69 A.D.2d 27, 418 N.Y.S.2d 76 (1st Dept. 1979)). Unless it is established that there is an intention to benefit the third party, the third party will be held to be a mere incidental beneficiary, with no enforceable rights under the contract. (*Id.*) An incidental beneficiary is a third party whom, although he or she may not be the promisee or the one to whom performance is to be rendered, may nevertheless derive a benefit from the performance of the contract. (*Cole v. Metropolitan Life Ins. Co.*, 273 A.D.2d 832, 708 N.Y.S.2d 789 (4th Dept. 2000)). The terms contained in the contract must clearly evince an intention to benefit the third person who seeks the protection of the contractual provisions. (*Stainless, Inc. v. Employers Fires Insurance Co.*, 69 A.D.2d 27, 418 N.Y.S.2d 76 (1st Dept. 1979)). A third party seeking to enforce the insurance policy must be able to show from the four corners of the contract that the parties to the insurance policy clearly and specifically intended to insure the specific interest of that third party. (*Alicea v. City of N.Y.*, 145 A.D.2d 315, 534 N.Y.S.2d 983 (1st Dept. 1988); *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 485 N.E.2d 208 (1985)). Further, when circumstances apart from

the policy language are considered to determine the parties' intent to benefit a third party, such intent will be found only where it is established that no one other than the alleged beneficiary could recover under the contract. (*Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 485 N.E.2d 208 (1985)). There is no such evidence herein, and there is no evidence that plaintiff is any more than an incidental beneficiary of the policy at issue. The Court notes that the portion of the policy which the plaintiff relies upon to demonstrate that plaintiff was an intended beneficiary of the policy, "Coverage O" at page 000009 of the Kingstone policy, applies to fire damage which was not the source of the alleged damage in the instant action. The portion of the policy is entitled "Coverage O - Fire Legal Coverage - Real Property."

Additionally, while plaintiff may have a claim as an Additional Insured under the policy, as plaintiff concedes, any additional insured coverage under the Kingstone policy is limited to plaintiff's vicarious liability in suits against plaintiff for damage to a third party's property arising out of Nubia's work for plaintiff. The Construction Agreement between the plaintiff and Nubia states that "the contractor represents that workmen's compensation and public liability insurance are carried by it and its subcontractors and are applicable to work performed under this contract." The contract further states that Nubia agrees to "maintain worker's compensation insurance and liability insurance coverage for Contractor and Owner." As such, Nubia was contractually obligated under the terms of the Construction Agreement to provide additional insured coverage to plaintiff. Under the terms of the Kingstone policy, however, such additional insured coverage was limited to "liability arising out of [Nubia's] work involving ongoing operations performed for the additional insured" and "is limited to vicarious liability arising from the hazards covered by this policy." As such, the plaintiff does have standing to bring the within action against Kingstone, only with respect to a request for a declaration regarding coverage for plaintiff's vicarious liability in suits against plaintiff for damage to a third party's property arising out of Nubia's work for plaintiff. As such, plaintiff is not barred from seeking a declaration regarding coverage for the *Salguero v. Josma* action (bearing Nassau County District Court index number 45758/10), commenced against plaintiff for property damage to her renter, Salguero's personal property arising out of Nubia's work at the plaintiff's premises.

Regardless of plaintiff's standing as an Additional Insured, all of plaintiff's claims are barred by the policy exclusion for roofing operations. The Kingstone policy states that "Insurance provided by Coverage L and Coverage N does not apply to bodily injury and/or property damage or products/completed operations arising out of [Nubia's] work which involves the removal and/or replacement of roof materials." Plaintiff alleges in her complaint that "in order to add a second story to the Premises, the Defendant Nubia removed a portion of the roof

of the house” and that “before leaving each at the end of each day, the Defendant Nubia placed a tarp over the opening in the roof.” Plaintiff further alleges that on July 13, 2010, there were wind gusts and rain that “blew a portion of the tarp” and created an opening in the roof, allowing rain to enter, causing “substantial damage to the interior structure of the house and the plaintiff’s personal property.” Further, the plaintiff in the Salguero action also alleges that the roof was removed, plaintiff failed to take adequate precautions, and rain fell through the top of the building that had been left open and exposed, causing damage to her property. As such, it is evident that the damage claimed herein arose out of Nubia’s “removal and/or replacement of roof materials,” and it is therefore excluded from coverage. As the terms of exclusion are unambiguous, the exclusion herein is a bar to coverage. (*See, Grove Hill Associates v. Colonial Indemnity Ins. Co.*, 24 A.D.3d 607, 806 N.Y.S.2d 691 (2d Dept. 2005)(exclusion in roofer’s policy for “liability arising out of your work which involves the removal and/or replacement of roof materials” barred coverage for fire damage to building due to propane torches used in course of replacing roof); *Covenant Ins. Co. v. Jonathan Construction Corp.*, 237 A.D.2d 243 (2d Dept. 1997)(damage which occurred when the defendant peeled away the waterproof covering of the plaintiff’s roof to install roof trusses was considered a “roofing operation” within meaning of insurance policy exclusion which barred liability for certain types of property damage arising out of the insured’s “roofing operations”); *Kay Bee Builders, Inc. v. Merchant’s Mutual Ins. Co.*, 10 A.D.3d 631, 781 N.Y.S.2d 692 (2d Dept. 2004)(policy exclusions are to be read seriatim and, if any one exclusion applies, there is no coverage since no one exclusion can be regarded as inconsistent with another)).

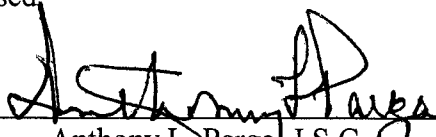
As the activities which are alleged to have caused plaintiff’s damages and the damages to plaintiff’s renter, Salguero, arose from defendant Nubia’s removal of a portion of the roof, the exclusion in the policy applies to bar coverage. Where documentary evidence definitively contradicts the plaintiff’s factual allegations and conclusively disposes of plaintiff’s claims, dismissal is warranted. (*See, Berrardino v. Ochlan*, 2 A.D.3d 556, 770 N.Y.S.2d 75 (2d Dept. 2003); CPLR §3211(a)(1)).

Lastly, defendant Interboro does not have standing to assert its cross-claim, and its contentions regarding the timeliness of the disclaimer are without merit. The within claim for property damage does not fall within the ambit of Insurance Law 3240(d). Therefore, absent proof that there was prejudice to the insured by the alleged delay in disclaiming liability based on an exclusion in the insurance policy, Kingstone is not estopped from making such a disclaimer, even if such delay was unreasonable. (*See, Scappatura v. Allstate Ins. Co.*, 6 A.D.3d 692, 775 N.Y.S.2d 162 (2d Dept. 2004); *Topliffe v. U.S. Art Co., Inc.*, 40 A.D.3d 967, 838 N.Y.S.2d 571

(2d Dept. 2007); N.Y. Ins. Law 3420(d)).

Accordingly, plaintiff's complaint against defendant Kingstone, together with all cross-claims asserted against defendant Kingstone, are dismissed.

Dated: September 27, 2011



Anthony L. Parga J.S.C.

Cc: Rivkin Radler LLP
 Attn: Alan C. Eagle, Esq.
 926 RXR Plaza, West Tower
 Uniondale, NY 11556-0926

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Austin Graff, Esq.
 The Scher Law Firm
 One Old Country Road, Suite 385
 Carle Place, NY 11514

Kevin T. Conklin, Esq.
 Mead Hecht Cinklin & Gallagher, LLP
 109 Spencer Place
 Mamaroneck, NY 10543

Nubia, Inc.
 250 Fulton Avenue
 Hempstead, NY 11550

First Choice Coverage
 1 Long Beach Road
 Hempstead, NY 11550