

New York Univ. v Arma Scrap Metal Co., Inc.

2011 NY Slip Op 32754(U)

October 7, 2011

Supreme Court, New York County

Docket Number: 603743/09

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Saliann Scarpulla PART 19

Justice

NEW YORK UNIVERSITY,

INDEX NO. 603743/09

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 002

ARMA SCRAP METAL CO., INC., ET AL.,

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to _____ were read on this motion to _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED

OCT 12 2011

Upon the foregoing papers, it is

NEW YORK
COUNTY CLERK'S OFFICE

ORDERED that the motion is determined in accordance with the accompanying decision/order,

This constitutes the Decision and Order of the Court.

Dated: October 7, 2011

Saliann Scarpulla
Saliann Scarpulla, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
NEW YORK UNIVERSITY,

Plaintiff,

- against-

Index No.:603743/09
Submission Date: 7/29/11

ARMA SCRAP METAL CO., INC., NORTHFIELD
INSURANCE COMPANY, NATIONAL
CONTINENTAL INSURANCE COMPANY,
NATIONAL UNION FIRE INSURANCE
COMPANY, PA, GLENN HAMER AND DENISE
HAMER

DECISION AND ORDER

Defendants.

----- X

For Plaintiff:
The Chartwell Law Offices, LLP
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New York, NY 10004

For Defendant National Continental Insurance Company.:
Morris, Duffy, Alonso & Faley
2 Rector Street, 22nd Floor
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FILED

Papers considered in review of this motion for summary judgment:

- Notice of Motion 1
- Aff in Opp 2
- Reply 3
- Affs in Further Opp 4, 5
- Aff in Further Support 6

OCT 12 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

HON. SALIANN SCARPULLA, J.:

In this declaratory judgment action, defendant National Continental Insurance Company ("National") moves for summary judgment dismissing the complaint and any cross claims insofar as asserted against it.

On December 11, 2008, Glenn Hamer ("Hamer"), allegedly sustained personal injuries while working for Arma Scrap Metal Co., Inc. ("Arma") dismantling a boiler at the Tishman Auditorium on plaintiff New York University's ("NYU") premises.

According to Hamer, he was standing on the third level of a catwalk, which was a walkway/stairway around the boiler that he was dismantling. Hamer explained that another employee, BJ, was working on a hydraulic lift at the same level as the catwalk on which Hamer was standing. The lift was attached to a cab underneath. BJ asked Hamer to take a shut off valve from him, and after Hamer reached over to take it, he fell from the catwalk and sustained injuries. Subsequently, Hamer commenced an action against NYU seeking to recover damages for the injuries he sustained, alleging Labor Law violations and a negligence claim, and his wife Denise Hamer sought to recover damages for her loss of services ("the underlying action").

Thereafter, NYU commenced the instant declaratory judgment action to determine the rights and obligations of the parties to defend NYU in the underlying action, based on a commercial auto insurance policy issued by Progressive Insurance Co. and underwritten by National, issued to Arma, which named NYU as an additional insured.

National now moves for summary judgment dismissing the complaint and any cross claims insofar as asserted against it, arguing that the subject insurance policy provided coverage only for incidents arising out of the insured's ownership, maintenance or use of an insured auto, and thus does not cover Hamer's accident. Specifically, the policy provides that National will only pay those damages sought by a third party and will defend only those lawsuits initiated by a third party against the insured, which arise of the insured's ownership, maintenance or use of the insured auto.

NYU argues that National failed to provide an affidavit of individual with personal knowledge, failed to lay a foundation for the admissibility of the subject policy and, in any event, the motion is premature in that discovery has not been completed.¹

NYU further maintains that (1) the policy raises material factual questions in that it says that it covers an “insured,” and not just an “insured auto;” (2) an issue of fact exists as to whether the hydraulic lift operated by BJ qualifies as an “auto” covered by the insurance policy and whether that lift caused or contributed to the happening of Hamer’s accident; and (3) National is obligated to defend NYU pursuant to the policy because the duty to insure is broad.

In reply, National first contends that any alleged Labor Law violations could in no way arise out of the ownership, maintenance or use of any insured auto. National next maintains that even if the policy covers an “insured,” clearly it only refers to an “insured” with respect to an insured auto or a person using an insured auto because there must be some causal relationship between the injury and the risk for which coverage is provided. Further, while the duty to insure is broad, the intent of this automobile insurance policy was not to protect any insured that sustained any bodily injury at any time.

National also submits an affidavit from senior claims specialist of Progressive Insurance Commercial Auto Group Lawrence D. Leeders (“Leeders”), who annexed the entire subject policy to his affidavit. According to Leeders, the subject policy did not

¹At the first oral argument on this motion on May 18, 2011, the Court granted leave to National to submit an admissible version of the subject insurance policy. National complied on June 21, 2011.

cover construction accidents, rather it covered only incidents arising out of ownership, maintenance or use of an insured auto.²

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Here, the policy at issue is a commercial auto insurance policy. Hamer has made no allegations that his accident or injuries were caused by anyone's use or operation of any auto. In addition, in his examination before trial testimony, Hamer clearly explains the circumstances surrounding the happening of his accident, and makes no mention of any auto that played a part in causing his accident. While Hamer explained that BJ was standing on a hydraulic lift when he handed the valve to Hamer, there is no evidence that any use or operation of that lift contributed in any way to Hamer's subsequent fall. Therefore, even if the hydraulic lift is covered under the subject policy, there is absolutely

² NYU argues that the Leeders affidavit is insufficient because it contains legal conclusions which are unsupported by any referenced substantive terms of the policy and Leeders is not qualified to determine if there were any other policies issued that might provide coverage to Arma and/or NYU.

no evidence of any causal relationship between the injury and the use of the lift or any other auto covered by the policy.

NYU's argument that National's motion must be denied because further discovery is necessary to determine whether any other autos were covered under the policy, whether the hydraulic lift did in fact contribute to Hamer's accident, or whether there are any other policies covering NYU or Arma is insufficient to defeat National's motion. A claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment.

Bachrach v. Farbenfabriken Bayer AG, 36 N.Y.2d 696 (1975); *Hariri v. Amper*, 51 A.D.3d 146 (1st Dept. 2008); *Batista v. Rivera*, 5 A.D.3d 308 (1st Dept. 2004).

In accordance with the foregoing, it is hereby

ORDERED that defendant National Continental Insurance Company's motion for summary judgment dismissing the complaint and any cross claims insofar as asserted against it is granted, the complaint and any cross claims insofar as asserted against it are dismissed, and the action is severed and shall continue as to the remaining defendants; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

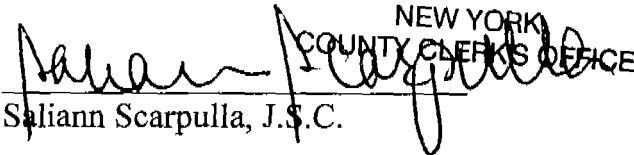
This constitutes the decision and order of the Court.

Dated: New York, NY
October 7, 2011

FILED

ENTER:

OCT 12 2011


NEW YORK
COUNTY CLERKS OFFICE
Saliann Scarpulla, J.S.C.