

**City of New York v National Fire Ins. Co. of Hartford
& Gandhi Eng'g, Inc.**

2012 NY Slip Op 32359(U)

September 7, 2012

Supreme Court, New York County

Docket Number: 114478/2011

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: _____
Justice

PART 10

Index Number : 114478/2011
CITY OF NEW YORK
vs.
NATIONAL FIRE INSURANCE
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

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

PC *Not* FILED 2012 in Part 10

SEP 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

SEP 07 2012

Dated: _____

_____, J.S.C.
HON. JUDITH J. GISCHT

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
The City of New York,

Plaintiff (s),

-against-

National Fire Insurance Company of
Hartford and Gandhi Engineering, Inc.,

Defendant (s).
-----X

DECISION/ORDER

Index No.: 114478-2011

Seq. No.: 001

PRESENT:

Hon. Judith J. Gische
J.S.C.

FILED

Recitation, as required by CPLR § 2219 [a] of the papers considered in the view of this
(these) motion(s):

**NEW YORK
COUNTY CLERK'S OFFICE**

Papers

National Fire n/m (§3211) w/LS affirm (sep back), exhs	1, 2
City opp w/DJ affirm, exhs	3
City x/m w/DJ affirm, exhs	4
National Fire reply/further support w/LS affirm, exhs	5
City reply/further support w/DJ affirm, exhs	6

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action by The City of New York ("City") for a declaratory judgment that it is entitled to defense and indemnification in an underlying personal injury action (Jatkowski v. The City of New York, et al, Supreme Ct., N.Y. Co. Index No.: 111495/08) ("personal injury action"). The personal injury action is also assigned to this court. The City has commenced a third party action (T.P. Index No. 590583/10) against Gandhi Engineering, Inc. ("Gandhi") ("2010 third party action"). Gandhi, a named defendant in this action, is the insured of defendant National Fire Insurance Company of Hartford ("National Fire"). National Fire has appeared on its own behalf. Counsel for National

[* 3]

Fire has not appeared on behalf of Gandhi nor has Gandhi taken any position on the relief sought. National Fire now moves for the pre-answer dismissal of this action against its insured on the basis that this action seeks the same relief as the third party complaint in the personal injury action, it has documentary evidence disproving the City's claims, and failure to state a cause of action (CPLR 3211 [a][4], [1] and [7]).

After this motion was brought, National Fire served a Notice to Admit dated June 11, 2012. The City has cross moved to strike Request No. 1 of the Notice to Admit. That motion is opposed.

Arguments

Jatkowski claims to have been injured when he fell off a ladder while working on a construction project at 2 Lafayette Street, New York, New York ("premises"). The premises are a City owned building and Jatkowski has commenced a negligence action against the City, alleging violations of Labor Law §§ 200, 240 [1] and 241 [6]. Pursuant to a contract dated December 6, 2005, Gandhi was hired by the City to perform "project management services" at premises ("Gandhi's contract"). The City has commenced a third party action against Gandhi for contribution, indemnification (common law and contract) and breach of contract (failure to procure insurance).

In this action, the City seeks a declaration that it is entitled to defense and indemnification in the personal injury action on the basis that it qualifies as an additional insured under Gandhi's policy with National Fire (1st cause of action). The second cause of action is against Gandhi for breach of contract (failure to procure insurance).

Although National Fire is not a named defendant in the 2010 third party action, National Fire nonetheless argues that this action seeks relief identical to the 2010 third

party action and should be dismissed for that reason.

National Fire also argues that the claims the City has asserted against it in this action for a declaratory judgment have no merit, based upon the terms of Gandhi's contract with the City and the insurance policy Gandhi obtained. National Fire claims that Gandhi is only obligated to obtain insurance for claims against it "arising out of activities performed by or on behalf of" its insured. Gandhi was hired to perform consulting services and conduct "the necessary and usual construction inspection services" at the premises. Thus, National Fire argues that under Gandhi's contract, Gandhi was not required to name the City as an additional insured on its professional liability policy and, if the claims against the City arise from Gandhi's construction management services, the City is not an additional named insured under the policy endorsement excluding "Construction Management – Errors and Omissions & Construction and Demolition Work."

Section 6.3 of Gandhi's contract sets forth the minimum scope of insurance Gandhi was required to procure and maintain. Among those requirements are Comprehensive General Liability and Broad Form Comprehensive General Liability Insurance (Gandhi Contract § 6.3.1[a]) and Professional Liability Insurance (Gandhi Contract § 6.3.1 [c]).

Discussion

Regardless of which subsection of CPLR § 3211[a] a motion to dismiss is brought under, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Goshen v. Mutual Life Ins. Co. of N.Y.*, 98

N.Y.2d 314, 326 [2002]; Leon v. Martinez, 84 N.Y.2d 83, 87 [1994]; Plaza PH2001 LLC v. Plaza Residential Owner LP, 98 A.D.3d 89 [1st Dept. 2012]). Since the sufficiency of the pleadings are being attacked, the plaintiff may provide sworn affidavits to remedy any defects in the complaint and preserve a possibly inartful pleading that may contain a potentially meritorious claim, (Cron v. Hargro Fabrics, Inc., 91 N.Y.2d 362 [1998]). The facts submitted in those submissions in opposition to defendant's motion are also accepted as true (511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 [2002]).

National Fire has not met its burden of showing that there is a prior action pending for the same relief sought by the City in this case. Although the causes of action in this action and the 3rd party action arise from Jatkowski's accident in a City owned building, there is no identity of parties in the two actions, the relief is not the same and there is good reason to maintain the separate existence of these actions (Kent Development Co., Inc. v. Liccione, 37 NY2d 899 [1975]; Morgulas v. J. Yudell Realty, Inc., 161 A.D.2d 211 [1st Dept 1990]). Whereas the third party action is based upon Gandhi's contract and the City seeks defense and indemnification by Gandhi, here the City seeks a declaration in its favor against Gandhi's insurance company which has denied its notice of claim as an additional insured (see Letter denying claim dated 8/19/10).

Apparently acknowledging that the breach of contract claim in this action and in the 2010 third party action are indistinguishable, if not identical, the City has voluntarily agreed to withdraw that claim and all other claims against Gandhi in the action at bar. Since there is no opposition to the City withdrawing its claims against Gandhi, that branch of National Fire's motion to dismiss the claims against Gandhi is now academic and,

therefore, denied as moot.

Where a defense is founded on documentary evidence, the documents relied on must establish a defense to the claims asserted, as a matter of law (See Leon v Martinez, 84 NY2d 83 at 87) and conclusively dispose of the challenged pleading (Erich Fuchs Enterprises v. American Civil Liberties Union Foundation, Inc., 95 A.D.3d 558, 588 [1st Dept 2012] citing Forftis Fin. Servs., LLC v Fimat Futures USA, Inc., 290 AD2d 383, 383 [1st Dept 2002]). National Fire relies on Gandhi's contract with the City and its insurance policy. These documents do not resolve all factual issues in the case, as a matter of law, nor do they conclusively dispose of the plaintiff's claims (Erich Fuchs Enterprises v. American Civil Liberties Union Foundation, Inc., supra). "Documentary evidence," for purposes of a motion to dismiss, includes judicial records, documents reflecting out of court transactions, such as mortgages, deeds, leases and contracts, the contents of which are undeniable Forftis Fin. Servs., LLC v Fimat Futures USA, Inc., supra at 84-85. The insurance policy and contract are, however, not being offered as proof of what they state. National Fire is arguing facts which, they claim when applied to the contracts, mandate the dismissal of this action. There is, therefore, a significant dispute about what services Gandhi was performing at the job site. Consequently, National Fire has not proved this action should be dismissed based upon documentary evidence.

The motion to dismiss for failure to state a cause of action (CPLR 3211[a][7]) relies on similar arguments to those raised in connection with National Fire's motion to dismiss on documentary evidence. The motion must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (511 West 232nd Owners Corp. v. Jennifer Realty Co., supra at 152

citing Guggenheimer v. Ginsburg, supra at 275). The only distinguishing argument is that the complaint does not contain certain key words or allegations to the effect that the City is an additional insured because the underlying personal injury action "arose or arises out of" Gandhi's operations/work for the City.

Examining the City's complaint¹, it states at paragraph 14 that "Gandhi agreed to perform certain work at 2 Lafayette Street, 11th floor, New York, New York, the project site. The terms and conditions of the Gandhi contract required Gandhi to procure commercial general liability insurance adding The City of New York as an Additional Insured . . ." Paragraph 16 states that "The City of New York qualifies as an Additional Insured on the said policy issued by National Fire to Gandhi." Paragraph 17 adds that Jatkowski commenced the personal injury action against the City and paragraph 19 states that the National Fire policy issued to Gandhi "is applicable to each and every aspect of the claims made in the Jatkowski Action concerning the allegation of personal injuries on September 4, 2007. Paragraph 20 summarizes the relief sought by the City, which is for National Fire to assume its defense and indemnification. Accepting the facts alleged in the pleading as true, according the plaintiff the benefit of every possible inference, the facts, as alleged, state a justiciable dispute against Gandhi's insurer. No particular words are required in a complaint where the plaintiff is alleging rights as an additional insured. Therefore, National Fire's motion for the dismissal of this action for failure to state a claim must be denied as well.

¹The complaint is stapled upside down and National Fire's reply is printed double sided. Both submissions were accepted, despite the considerable inconvenience to the court.

The cross motion by the City involves the Notice to Admit that National Fire served after it moved to dismiss. CPLR 3123 provides that any time after service of the answer or after the expiration of twenty (20) days after service of the summons, whichever is sooner, a party may serve upon any other party a Notice to Admit. The Notice to Admit is a written request for admission by the latter party of the genuineness of any papers or documents or the correctness or fairness of things such as photographs. It is used to request admissions of fact where there could be no substantial dispute at trial (Kimme v. Paul Weiss et al., 214 AD2d 453 [1st Dept 1995]). A Notice to Admit is not a discovery device nor should it be used to seek admissions that "go to the heart of the matter," or that are contrary to the party's previous pleadings (Morreale v. Serrano, 67 A.D.3d 655 [2nd Dept 2009]). Here National Fire seeks an admission that the contract it provides as an exhibit to the Notice is "complete." Not only is there a disagreement about the completeness of the contract, the contract and its terms are central to the parties' dispute in this action. Given the City's opposition to the motion to dismiss, service of the Notice was ill-timed and could hardly have been expected to elicit an admission by the City resolving any disputed issue in National Fire's favor. Since the admission both goes to the heart of the parties' dispute and is contrary to the City's pleading and contentions, it is improperly. Therefore, the City's motion for a protective order striking Request No. 1 in the June 11, 2012 Notice to Admit is granted and Request No. 1 is stricken.

Conclusion

Defendant has not met its burden in proving that the complaint must be dismissed pre-answer under any of the subsections of CPLR 3211 it relies upon. Therefore, defendant's motion to dismiss the complaint is denied. Defendant shall answer in the

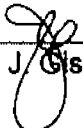
manner provided under CPLR 3211 [e]. The claims against Gandhi are hereby severed and dismissed at the request of National Fire. The dismissal is without prejudice to any claims by and against Gandhi in the 2010 third party action.

The City's motion for a protective order is granted to the extent that Request No. 1 is stricken.

Anticipating that issue will be joined, this case is hereby scheduled for a Preliminary Conference on **November 1, 2012** in Part 10, 60 Centre Street, Room 232 at 9:30 a.m. Any relief requested but not specifically addressed is hereby denied.

Dated: New York, New York
September 7, 2012

So Ordered:



Hon. Judith J. Glische, JSC.

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