

**3859 Tenth Ave. Corp. v United Natl. Specialty Ins.
Co.**

2013 NY Slip Op 31414(U)

June 27, 2013

Supreme Court, New York County

Docket Number: 112898/10

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C. Justice

PART 8

Index Number : 112898/2010
3859 TENTH AVENUE CORP.
VS.
UNITED NATIONAL SECURITY
SEQUENCE NUMBER : 003
PARTIAL SUMMARY JUDGMENT

INDEX NO. 112898/10
MOTION DATE _____
MOTION SEQ. NO. 003

The following papers, numbered 1 to 51, were read on this motion to/for Summary Judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 1-38
Answering Affidavits — Exhibits _____ No(s) 39-50
Replying Affidavits _____ No(s) 51

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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).

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

Dated: 6/27/13

Joan M. Kenney
JOAN M. KENNEY J.S.C.
J.S.C.

- 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

UNFILED JUDGMENT

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

-----X
3859 Tenth Ave. Corp. and Le Frank
Management Corp.,

Plaintiffs,

-against-

DECISION AND ORDER
Index Number: 112898/10
Motion Seq. No.: 003

United National Specialty Insurance
Co. and El Paraiso Corp.,

Defendants.

-----X

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss.

Papers	Numbered
Notice of Motion, Affirmations, Exhibits, and Memo of Law	1-38
Opposition Affirmation and Exhibits	39-50
Reply Memo of Law	51

In this declaratory judgment action, plaintiffs, 3859 Tenth Ave. Corp. (3859), and Le Frank Management Corp. (LFM), move for an Order, pursuant to CPLR 3212, granting them summary judgment against defendant United National Specialty Insurance Co.¹

Factual Background

This declaratory judgment action arises out of a wrongful death action currently pending in Supreme Court, New York County, entitled *Margaret R. Brick, et al. v 3859 Tenth Ave. Corp., et al.*, under Index #404121-2005 (the Brick action).

The Brick Action

It is alleged in the Brick action that a fire occurred on December 16, 2003 (the incident) at a building located at 3859 10th Ave., New York, NY (the premises), which was owned by 3859

¹This matter was dismissed as against defendant, El Paraiso Corp. by decision and Order dated May 12, 2011.

and managed by LFM. The fire resulted in the death of a NYFD firefighter, Thomas C. Brick, and caused substantial property damage to numerous tenants in the building and to businesses located in adjoining premises.

At the time of the incident, Barta Trading Corporation (Barta) was a tenant on the 2nd floor of the premises, and had operated a furniture warehouse. El Paraiso Corporation (El Paraiso), owned by Biancis Diaz (Diaz), was a tenant on the 1st floor of the premises, and had operated a delicatessen/meat market.

According to the Fire Incident Report prepared by the NYC Fire Marshall, the cause of the fire was “NFA [not fully ascertainable]– Probably careless discard of smoking materials” by a Barta employee on the 2nd floor.

On or about December 28, 2004, Margaret R. Brick, individually and as the Administratrix of the Estate of Brick, commenced a wrongful death action against 3859, LFM, Arbib & Rabba Realty Co., Barta, and the City of New York, in the Supreme Court of NY State, Queens County. In 2005, the action was removed and transferred to the Supreme Court of New York County.

On or about January 11, 2006, Barta filed a 3rd party action against El Paraiso and Diaz. In the 1st cause of action of the 3rd party complaint, Barta alleges that the cause and origin of the fire arose from heat generated by electricity powering a ceiling mounted heater located in the 1st floor deli. Barta further alleges that El Paraiso and Diaz were negligent in failing to properly install, maintain, repair, operate and/or control the ceiling mounted heater. The 2nd cause of action asserts a common law claim for contribution and indemnity against El Paraiso and Diaz.

On or about October 6, 2006, the Brick estate filed an Amended Complaint in the Brick

action, which added El Paraiso and Diaz as defendants. The amended complaint asserts three causes of action against El Paraiso and Diaz based upon their status as the tenants, owners, and/or occupants of the premises.

In the 1st cause of action, the amended complaint asserts that the 1st floor premises defendants were all negligent, careless, and reckless in causing the incident.

In the 2nd cause of action, the amended complaint alleges a right of action against the 1st floor premises defendants under General Municipal Law 205-a, for injuring and causing death to Brick as a firefighter due to their violation of various statutes, ordinances, rules, orders and requirements, including those contained in the Administrative Code of the City of New York.

The 3rd cause of action asserts claims based on pecuniary loss and damage against all defendants, including the 1st floor premises defendants, as a result of the wrongful death of brick.

In response to El Paraiso and Diaz's demand for a Bill of Particulars, the Brick estate alleges that El Paraiso was negligent, careless, and reckless in the operation, maintenance, repair, management, and leasing of the subject premises. In particular, the Brick estate alleges that El Paraiso created a dangerous condition which was permitted by 3859, by installing power heaters without proper circuit breakers.

In the Brick Estate's letter of September 16, 2008 to the defendants, the Brick estate reiterated that Owners' liability arises, in part, due to the improper maintenance and control of the deli on the 1st floor. (Moving papers, Exhibit I).

In its opposition to El Paraiso and Diaz's motion for summary judgment in the Brick action, the Brick estate argued that the motion should be denied due to issues of material fact as to whether the cause and origin on the fire emanated from the 1st floor deli. (Moving papers,

Exhibit J, pgs. 9, 19). The Court in the Brick action determined that there were issues of fact to be decided regarding fault in the incident, and therefore denied the summary judgment motions interposed by El Paraiso and Diaz. (Moving papers, Exhibit K).

The Lease Between 3859 and El Paraiso

On or about December 15, 1998, L. Milagros Meat & Grocery Corp. (Milagros) and 3859 entered into a lease agreement, whereby Milagros agreed to lease and occupy the 1st floor of the premises for a term commencing on February 22, 1999 and expiring on February 14, 2009 (the lease). On or about April 4, 2000, the lease was assigned and assumed by El Paraiso.

Paragraph 8 of the lease contains the following language, in pertinent part, with respect to El Paraiso's requirement to procure insurance and to indemnify 3859:

Tenant agrees, at Tenant's sole cost and expense, to maintain general public liability insurance in standard form in favor of [3859] and tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises, effective from the date the Tenant enters into possession and during the term of this lease. Such insurance shall be in the amount and with carriers acceptable to [3859]. Such policy or policies shall be delivered to [3859]...Tenant shall indemnify and save harmless [3859] against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which [3859] shall not be reimbursed by insurance, including reasonable attorney's fees, paid, suffered or incurred as a result of any breach by Tenant, Tenant's agent, contractors, employees, invitees, or licensees, of any covenant on condition of this lease, or the carelessness, negligence, or improper conduct of the Tenant, Tenant's agent, contractors employees, invitees, or licensees. Tenant's liability under this lease extends to the acts and omission of any subtenant, and any agent, contractor, employee, invitees or licensees of any subtenant. In case any action or proceeding is brought against [3859] by reason of any such claim, Tenant, upon written notice from [3859], will, at Tenant's expense, resist or defend such action or proceeding by counsel approved by [3859] in writing, such approval not to be unreasonably withheld.

Paragraph 75 of the lease also provides the following with respect to El Paraiso's requirement to indemnify 3859:

Tenant agrees to indemnify and save landlord harmless from and against any and all claims and demands for, or in connection with, any accident, injury or damage whatsoever occurring in or about the premises or any part thereof, or on the sidewalks adjoining same, caused to any person or property, arising directly or indirectly out of business conducted at the premises or arising from any act or omission of tenant or sub-tenant or their respective licensees, servants, agents, employees or contractors, and from and against any and all costs, expenses and liabilities incurred in connection with any such claim or proceeding brought thereon.

Paragraph 82 of the lease provides the following regarding the amount of insurance to be procured in 3859's favor:

Tenant agrees to carry liability insurance in the amount of \$1,000,000/\$1,500,000 for the benefit of the landlord same being for the purpose of protecting the landlord against any persons visiting the tenant's premises who may be injured in or about said premises...and naming the landlord herein as insured, which policies may cover tenant also as insured as his interest may appear.

The United National Policy

United National (United) issued a commercial insurance policy to El Paraiso for policy period February 10, 2003 to February 10, 2004, with limits of \$500,000 per occurrence and \$1,000,000 in the aggregate (United policy). The United policy's coverage form provided, in pertinent part:

We will pay those sums that the insured becomes legally obligated to pay as damages because of the "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages even if the allegations of the "suit" are groundless, false, or fraudulent.

In the Supplementary Payments section the United policy states that it is the primary insurance policy, "unless...other insurance is also primary. Then [they] will share with all that other insurance described in subsection 'c' below." Subsection 'c' states, in pertinent part:

If all of the other insurance permits contribution by equal shares, we will follow

this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

The United policy also contains a section about those who are “additional insureds.” That section provides that 3859 is to be insured.

Zurich’s Defense of 3859

Zurich American Insurance Company (Zurich) issued a commercial insurance policy to Barta for the time period between January 15, 2003 and January 15, 2004. In June of 2007, Zurich agreed to accept 3859’s tender request for defense coverage in the Brick action as additional insureds under a commercial insurance policy issued to Barta. Zurich’s assumption of the defense in June of 2007 included the reimbursement of past defense costs paid by 3859’s direct insurers in their defense of the Brick action, as well as costs going forward. Currently, Zurich has incurred approximately \$486,376.60 in legal fees and expenses in defense of 3859 in the Brick action.

The Zurich policy provides coverage for any “bodily injury”... occurring during the policy period and pays defense costs in addition to the indemnity limits. The Zurich policy also contains the same additional insured form as the United policy and specifically names 3859 as additional insureds.

The Zurich policy contains the following “other insurance” provision, which is virtually identical to the terms in the United policy: “If other valid and collectible insurance is available to the insured for a loss we cover,...our obligations are limited as follows:”

- a. This insurance is primary...If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

c. Method of Sharing– if all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

Plaintiffs' Requests to United

On or about April 11, 2007, by way of letter, 3859's defense counsel (Wilson Elser) tendered the Brick Action to United seeking contractual indemnification and additional insured coverage under the United policy. (Moving Papers, Exhibit Q). Wilson Elser requested that United provide defense and indemnity coverage for 3859 in the Brick action. With no response to the letter, Wilson Elser sent another letter on June 7, 2007 reiterating its prior request. On June 29, 2007, United responded by denying 3859's request for additional insured coverage because there was allegedly "no evidence of fault on the part of El Paraiso" or that the fire originated from its premises.

On July 2, 2007 Wilson Elser responded by stating that United did not address 3859's demand for coverage under the United policy. It stated, "even assuming that El Paraiso is ultimately found not to be liable...the fact of the matter is that El Paraiso has been named as a direct defendant in [the Brick action] and alleged to have caused the plaintiff's damages as a result of El Paraiso's use and occupancy of the subject premises." On September 30, 2008, Wilson Elser again requested coverage from United.

United's claims adjuster made a note that they were aware of the letter requests by Wilson Elser for their coverage of 3859 in the Brick action.

Procedural History of the Declaratory Judgment Action

On or about September 30, 2010, plaintiffs filed the declaratory action now before this

Court on behalf of themselves and at Zurich's request pursuant to the provisions of the policy with Zurich.

Arguments

Plaintiffs contend that they are entitled to a defense under the United policy because: (1) they are named defendants in the Brick action, thus springing United's broad duty to defend; (2) plaintiffs have met their burden to qualify as additional insureds under the United policy; (3) United's policy must provide concurrent coverage with Zurich's policy in accordance with its supplementary payments duty under the policy; and (4) Zurich is entitled to reimbursement by United for past defense costs, plus statutory prejudgment interest.

Defendants argue that plaintiffs' motion must be denied because: (1) the coverage for 3859 as an additional insured under the United policy is not triggered by the initial or amended complaint from the Brick action; and (2) plaintiffs in the Brick action asserts that the fire was due to the gross negligence of Barta and 3859.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of

any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.”

The rule governing summary judgment is well established: “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.”

(*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

“A liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered.” (*Fitzpatrick v American Honda Motor Co., Inc.*, 78 NY2d 61 [1991]). “Insurer's duty to defend arises whenever the allegations of the complaint, for which the insured may stand liable, fall within the risk covered by the policy, or, in other words, where there is a reasonable possibility of recovery under the policy.” (*City of NY v Certain Underwriters at Lloyd's of London, England*, 15 AD3d 228 [1st Dept. 2005]).

The “standard for determining whether additional named insured under...insurance policy was entitled to defense was same standard that was used to determine if named insured was entitled to defense.” (*BP Air Conditioning Corp. v One Beacon Ins. Group*, 8 NY3d 708 [2007]; *Sport Rock Intern., Inc. v American Cas. Co. of Reading, PA*, 65 AD3d 12 [1st Dept. 2009]).

“[T]he well-understood meaning of the term [additional insured] is an entity enjoying the same protection as the named insured.” (*BP Air Conditioning*, 65 AD3d 12 [1st Dept. 2009]).

The documentary evidence of the multiple insurance policies, together with the amended pleadings of the Brick action demonstrates that there are no factual issues to be determined at

trial respecting the issue of whether or not plaintiffs are entitled to a defense under the United policy. On October 6, 2006, when the Brick estate filed their amended complaint, adding El Paraiso and Diaz as defendants, it triggered United's duty to defend 3859 as the additional insureds of the United policy, based on the lease between 3859 and El Paraiso.

As per the numerous letters sent by Wilson Elser to United alerting them of the Brick action and their responsibility to defend in said action, and by the comments of United's own claims adjuster, it is clear that United was aware of their insured's and additional insureds' possible liability in the Brick action.

The fact that United's insureds and additional insureds may be liable in the Brick action is enough to require United's defense, and/or contribution of the defense based on the above mentioned lease, and its respective coverage policies. Specifically, since Zurich has already assumed the defense of 3859 based on their additional insured status through Zurich's policy with Barta, under United's Supplementary Payments section of their lease with El Paraiso (and 3859 through additional insured status), United is liable to contribute to the defense of El Paraiso and 3859 "by equal shares..., contribut[ing] equal amounts" until the policy limit is reached, and to reimburse for past defense costs in an equally contributory manner.

Further, plaintiffs' application to stay the action with respect to United's duty to provide indemnity coverage pending the outcome of the Brick action, is granted, without opposition. Accordingly, it is hereby

ORDERED, that the motion of plaintiff for seeking a declaration that defendant provide a defense to, and provide coverage for, the defendants 3859 Tenth Ave. Corp. and Le Frank Management Corp. in the action of Margaret R. Brick, as Administratrix of the Estate of Thomas

C .Brick, deceased, and Margaret R. Brick, individually vs. 3859 Tenth Ave. Corp., Arbib & Rabba Realty Co., Le Frank Management Corp., Barta Trading Corp., the City of NY, El Paraiso Corp. and Bianca Diaz, Index No. 404121/2005, New York County, is granted; and it is further

ADJUDGED and DECLARED that defendant, United National Specialty Insurance Co., is obliged to provide a defense to, and provide coverage for, the plaintiffs 3859 Tenth Ave. Corp. and Le Frank Management Corp. in the Brick action pending in New York County; and it is further

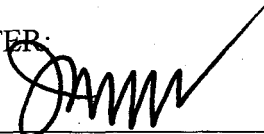
ORDERED, that United National Specialty Insurance Co. provide additional insurance coverage with non-party Zurich, and share in defense costs; and it is further

ORDERED, that United National Specialty Insurance Co. reimburse Zurich in equal shares for all past defense costs, with statutory prejudgment interest; and it is further

ORDERED, that the remainder of this action seeking indemnification, is stayed, until a final determination is made on the Brick action.

Dated: 6/27/13

ENTER:



Joan M. Kenney, J.S.C.

UNFILED JUDGMENT

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