

Tower Ins. Co. of N.Y. v Sanita Constr. Co., Inc.

2013 NY Slip Op 31678(U)

July 12, 2013

Supreme Court, New York County

Docket Number: 101064/2011

Judge: Milton A. Tingling

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: MON. MILTON A. TINGLES
Justice

PART 44

Tower
-v-

Santa

INDEX NO. 101069/11
MOTION DATE 7/26/13
MOTION SEQ. NO. 2

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 decided in accordance with
the annexed decision.

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

FILED

JUL 26 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/12/13

met, 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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MILTON A. TINGLING

PART 44

TOWER INSURANCE COMPANY OF NEW YORK,
PLAINTIFF,

INDEX NO. 101064/2011
MOTION DATE 11/26/12

-v-

SANITA CONSTRUCTION CO., INC. and CIAMPA ESTATES, LLC,
DEFENDANTS

FILED

JUL 26 2013

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that the motion for summary judgment is denied, the motion for default judgment is granted, and the cross motion for a stay is granted.

Plaintiff moves the court to grant a default motion, pursuant to CPLR 3215(a), and a summary judgment motion pursuant to CPLR 3212. Plaintiff seeks a judgment that it has no duty to defend or indemnify Defendants Sanita and Ciampa in the underlying action entitled Robinson Duran Urena v. Ciampa Estates, LLC and Sano Construction Corp., and Ciampa Estates, LLC v. Sanita Construction Co., Inc. Defendant Ciampa opposes the motions for default and summary judgments, and files a cross motion for a stay.

Plaintiff, Tower Insurance Company of New York ("Tower"), issued a commercial line policy to Defendant, Sanita Construction Co. ("Sanita"), Inc., effective March 15, 2005 to March 15, 2006. The policy's general liability coverage does not include bodily injury for which the insured is obligated to pay damages by reason of

assumption of liability in a contract or agreement, unless liability is assumed in an “insured contract”.

On or about February 1, 2006, Defendant Sanita Construction Co., Inc. hired Defendant Ciampa Estates, LLC (“Ciampa”) as a subcontractor to perform masonry work, which included the construction of building foundations. On February 10, 2006, Defendant Sanita and Defendant Ciampa entered into a contractual agreement where Defendant Sanita assumed insurance obligations for the contracted work, and also agreed to indemnify Defendant Ciampa for liability arising out of any loss suffered by an employee of Defendant Sanita.

On February 17, 2006, Robinson Duran-Urena, Defendant Sanita’s employee, suffered an on-the-job injury, and sought damages against Defendant Ciampa. Everest National Insurance Company (“Everest”), the primary insurer of Defendant Ciampa, settled the underlying action for \$1,250,000.

On August 11, 2006, Plaintiff received a letter from Everest, in which it tendered Defendant Ciampa’s defense and indemnification in the underlying action to Plaintiff. On August 17, 2006, Towers issued a letter to Everest denying tender; and notified Defendant Sanita that it would not be covered for its contractual liability to Defendant Ciampa based on the policy’s contractual liability limitation and the employer’s liability exclusion. Despite disclaiming coverage, Plaintiff agreed to

provide Defendant Sanita with a defense, but not indemnity, in the underlying action.

On or about August 28, 2007, Defendant Ciampa commenced a third party action against Defendant Sanita for contractual indemnification, common law indemnification and contributions.

To confirm denial of coverage, Plaintiff filed a Summons and Complaint on January 27, 2011. Defendant Ciampa served its answer to the complaint on March 7, 2012; however, Defendant Sanita failed to serve its answer to the complaint. According to the records of the New York State Divisions of Corporations, Defendant Sanita is no longer a registered corporation.

The movant on a summary judgment motion must establish his case as a matter of law. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985). A motion for summary judgment must be denied if a triable issue of fact exists. C.P.L.R. Section 3212; *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). The proponent of a summary judgment motion has the initial burden of coming forward with evidentiary proof in an admissible form demonstrating that it is entitled to summary judgment. *Zuckerman, supra*. In this case, Plaintiff alleges entitlement to summary judgment on the basis that the policy's contractual liability limitation and employer's liability exclusions bar coverage. Consequently, Defendant Sanita is

precluded from coverage because of its contractual agreement with Defendant Ciampa. The policy states:

“The policy does not cover “bodily injury... for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement,” unless the liability is assumed in a contract that is an insured contract. “

“The policy also excludes coverage for claims involving bodily injury to:

- (1) An employee of the insured arising out of and in the course of:
 - (a) Employment by the insured; or
 - (b) Performing duties related to the conduct of the insured’s business;
- (2) The spouse, child, parent, brother or sister of that employee as a consequence of Paragraph (1) above.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an “insured contract”.

An endorsement to the policy, entitled “Contractual liability Limitation” defines an “insured contract to mean: a contract for a lease of premises, a sidetrack agreement, any easement of license agreement, an obligation... to indemnify a municipality, or an elevator maintenance agreement.

In response to Defendant Ciampa’s opposition, Plaintiff contends that outright denial of coverage, based on the employer’s liability exclusion, is not a conflict prompting circumstance. Since the exclusion bars coverage of all claims asserted against Defendant Sanita by Defendant Ciampa in the underlying action, the independent counsel rule does not apply. Plaintiff relies on *Service Mutual Insurance*

v. Goldfarb, 53 N.Y.2d 392 (1981), citing that the right to independent counsel is triggered where the insurer is liable upon some of the grounds for recovery asserted and not upon others. Plaintiff also contends that failure to inform Defendant Sanita of its right to independent counsel does not preclude denying coverage based on *Sumo v. Evans*, 278 A.D.2d 169 (1st Dep't 2000). In *Sumo*, the plaintiff alleges that its insurer was liable for having failed to inform it of its rights to independent counsel, resulting in a defense compromised by inherent conflicts of interest. The court rejected the argument that the insurer's failure to inform the insured of that right triggered liability; and further underscored that an insurer has no affirmative duty to disclose the right to independent counsel.

Lastly, Plaintiff asserts that Defendant Sanita alone must demonstrate prejudice; therefore, Defendant Ciampa's allegations are insufficient on their face. Plaintiff cites *Schnieder v. Canal Ins. Co.*, 210 F.3d 355 (2d Cir. 2000), where the court rejects the argument that a third party can demonstrate prejudice on behalf of the insured; and *Inc. Village of Freeport v. Sanders*, 121 A.D.2d 430 (2d Dep't 1986), where the court ruled that the doctrine of equitable estoppel is not a defense available to defendants third party plaintiffs since no representations were ever made to them by the plaintiffs.

Once the movant has established a prima facie case that it is entitled to summary judgment, the burden shifts to the party opposing the motion to tender sufficient evidence in admissible form to defeat the motion. *Zuckerman v. City of New York*, 49

N.Y.2d 557 (1980). Defendant Sanita has failed to respond to the complaint issued by Plaintiff, and to the motion for summary judgment, and consequently does not oppose the summary judgment motion. Defendant Ciampa opposes summary judgment on the basis of equitable estoppel. Defendant Ciampa claims that because Plaintiff denied coverage to Defendant Sanita, placing it in conflict as to its insured, Defendant Sanita was entitled to independent counsel to represent and protect its interest. Defendant Ciampa also asserts that Plaintiff's assigned counsel controlled and mishandled Defendant Sanita's defense.

Defendant Ciampa relies on *Public Service Mut. Ins. Co. v Goldfarb*, 53 N.Y.2d 392 (1981), citing that where defense counsel's loyalty is divided between his duty to the insured and his duty to the insurer, the insured is entitled to independent counsel to protect his interest. Defendant Ciampa further relies on *Servidone Construction Corp. v. Security Ins. Co. of Hartford*, 106 Misc.2d 118, 430 N.Y.S.2d 991, where the insurer disclaimed any obligation to the insured to provide coverage for the contractual indemnification, citing to an exclusion contained in its policy. The court found that because the insurer disclaimed coverage based on the contractual indemnification exclusion, there was an irreconcilable conflict between the insurer and the insured. (See also *69th Street and 2nd Avenue Garage Association, L.P. v Ticor Title Guarantee Company*, 207 A.D.2 225, 622 N.Y.S.2d 13 (1st Dep't 1995), where the court states that a conflict is created whether the insurer and the insured have divergent interests in how to go about defeating those claims).

Plaintiff's motion for summary judgment is denied. To be granted summary judgment, the Plaintiff must show that, as a matter of law, judgment is in favor of the Plaintiff. Once a prima facie case is established, the burden shifts to the opposing party to raise a triable issue of fact or law to defeat the motion. Here, Defendant Ciampa establishes a triable issue of fact as to whether a conflict of interest was present between Plaintiff and Defendant Sanita, such that Defendant Sanita was entitled to independent counsel.

The Plaintiff's motion for default judgment against Defendant Sanita is granted.

When a defendant has failed to appear, plead, or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the Plaintiff may see a default judgment against the Defendant. C.P.L.R. Section 3215(a). In this case, Plaintiff alleges entitlement to default judgment on the basis that Defendant Sanita failed to appear in response to its complaint filed on January 27, 2010. Defendant Sanita has not provided any evidence refuting Plaintiff's assertion. Consequently, the default motion against Defendant Sanita is granted.

Defendant Ciampa's cross motion for a stay is granted.

Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.

C.P.L.R. 2201. In this case, Defendant Ciampa alleges entitlement to a stay of the proceedings on the basis that discovery is necessary and relevant to support its position that Plaintiff is equitably estopped from denying coverage to Defendant Sanita due to its control of Defendant Sanita's defense. Defendant Ciampa further contends that Plaintiff's motion is premature because Defendant Ciampa has already been awarded contractual indemnification against Defendant Sanita, and is therefore an injured claimant, per Ins. Law Section 3420(a)(2).

Defendant Ciampa cites *Buzzell v. Mills*, 32 A.D.2d 897, 897, 301 N.Y.S.2d 645, 646-646 (1st Dept. 1969), which holds that a subsequent action may be stayed pending the trial of a prior action between the same parties where there are overlapping issues and the determination of the prior action may dispose of or limit issues that are involved in the subsequent action.

In response to Defendant Ciampa's cross motion for a stay, Plaintiff contends that Defendant Ciampa has not shown that further discovery would yield evidence supporting an estoppel. Plaintiff further asserts it is not a party to the underlying action, and that the single issue in the underlying action solely involves the determination of damages, which Defendant Sanita must pay for its contractual liability to Defendant Ciampa.

To date, the hearing to determine damages of the underlying issue, which Plaintiff has provided the defense, is still pending. Furthermore, given the overlapping issues

between the underlying action and this present case, it is clear that a decision on the matter transcends computation of damages. Accordingly, the cross motion for a stay is granted until the underlying action is resolved.

Based on the evidence provided by the parties, the motion for summary judgment is denied. Defendant Ciampa's opposition raises triable issues of fact in dispute concerning entitlement to independent counsel. Plaintiff's motion for default judgment is granted because Defendant Sanita failed to respond to the complaint. Lastly, Defendant Ciampa's cross motion for a stay is granted. Defendant Ciampa has provided sufficient evidence to show overlapping issues in the underlying case.

Date: July 12, 2013



J.S.C. **Judge Milton A. Tingling**

FILED
JUL 26 2013
COUNTY CLERK'S OFFICE
NEW YORK