

**Eliou & Scopelitis Steel Fabrication, Inc. v
Scottsdale Ins. Co.**

2013 NY Slip Op 32177(U)

September 11, 2013

Sup Ct, New York County

Docket Number: 103456/10

Judge: Paul Wooten

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ELIOU & SCOPELITIS STEEL FABRICATION, INC.,

INDEX NO. 103456/10

Plaintiff,

- against-

MOTION SEQ. NO. 002

SCOTTSDALE INSURANCE COMPANY,

Defendant.

The following papers were read on this motion by defendant for summary judgment pursuant to CPLR 3212.

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

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

Motion sequence numbers 002, 003 and 004 are hereby consolidated for disposition.

In this action concerning liability insurance coverage for a personal injury, defendant Scottsdale Insurance Company (Scottsdale) moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint (Mot. Seq. 002). Plaintiff Eliou & Scopelitis Steel Fabrication, Inc. (E&S) moves for summary judgment, pursuant to CPLR 3212, in its favor on the complaint (Mot. Seq. 003). Prospective intervenor Ebenezer Construction Inc. (Ebenezer) moves, pursuant to CPLR 1013, for leave to intervene in the instant action (Mot. Seq. 004).

BACKGROUND

On September 29, 2005, Wilfredo Lorenzo (Lorenzo), an Ebenezer employee, was allegedly injured at a construction site at 343 Fourth Avenue, Kings County, the Park Slope Towers project (the PST Project). Alisa Construction Co., Inc. (Alisa), was the general contractor on the PST Project. Ebenezer was under contract with Alisa to erect steel at the

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).

site, and E&S was under contract to provide Ebenezer with the steel products. Lorenzo was allegedly injured while the steel products were being delivered.

On December 6, 2005, Lorenzo commenced a personal injury action, *Lorenzo v 343 LLC*, Index No. 24436/2005, in Bronx County Supreme Court (the Lorenzo Action), against the landlord, Alisa and E&S. Subsequently, Lorenzo amended his complaint twice, adding three other defendants who allegedly manufactured, supplied and/or distributed defective equipment to E&S for the PST Project. Third-party actions were later commenced, however, they do not bear on the matter at hand.

At the time of the incident, Ebenezer had liability insurance coverage from Scottsdale under policy number CLS 1063812 (the Policy). E&S purportedly was an additional insured under the Policy, but Scottsdale disclaimed coverage for E&S in the Lorenzo Action. E&S commenced the instant action on March 16, 2010, asserting causes of action for a declaratory judgment on the Policy's coverage, and for Scottsdale to indemnify and defend E&S in the Lorenzo Action.

DISCUSSION

Exhibit G attached to motion sequence 002 is a copy of "General Indemnification of Eliou & Scopelitis Steel Fabrication on All Jobs & At All Locations" (the Indemnification Agreement). This one-page document, dated December 16, 2004, originating with E&S, is signed by Rafael Martinez (Martinez), identified as Ebenezer's treasurer. Among other things, it requires Ebenezer to carry general liability insurance "whenever working on an Eliou & Scopelitis Steels (sic) Fabrication job site . . . [and] name Eliou & Scopelitis Steel Fabrication and the developer and/or owner of the subject job site as additional insured for the duration of the job."

On September 16, 2005, E&S issued a quote to provide steel to Ebenezer for \$140,000 for the PST Project (Mot. Seq. 002, exhibit E). On September 20, 2005, E&S issued another

quote to provide more steel to Ebenezer for \$75,000 (*id.*, exhibit F). Once countersigned by Martinez for Ebenezer, each quote became a purchase order for the quoted materials.

On October 27, 2005, E&S's general liability insurer Illinois Union Insurance Co. (ILU) made a formal demand for Scottsdale to assume the defense and indemnification of E&S in the Lorenzo Action, based on the Indemnification Agreement (Mot. Seq. 002, exhibit H). Although a certificate of insurance for E&S was said to be attached to ILU's letter, but not provided here, Scottsdale concedes that it was produced (Weisberg affirmation, Mot. Seq. 002, ¶ 15). Scottsdale disclaimed coverage of E&S on April 20, 2007, denying that it was an additional insured on the PST Project. In the Policy's "Blanket Additional Insured Endorsement," "additional insured" is defined as any person or organization:

"whom you are required to add as an additional insured on this policy under a written contract, agreement or permit . . . That person or organization is an additional insured only with respect to liability arising out of . . . your ongoing operations performed for that additional insured as specified in the written contract, agreement or permit."

Scottsdale based its refusal, in this instance, on the absence of a contract between Ebenezer and E&S "whereby Ebenezer is under an obligation to defend, indemnify or hold harmless Eliou" (Mot. Seq. 002, exhibit L). Without such a contract, Scottsdale contends that there is "no contractual indemnification coverage to Eliou. Further, there is no additional insured endorsement naming Eliou as an additional insured or providing additional insured status to Eliou" (*id.*). A similar exchange occurred when E&S's counsel again tendered the defense and indemnification of E&S in the Lorenzo Action on May 22, 2009 (*id.*, exhibit M), and Scottsdale rejected the tender on June 18, 2009 (*id.*, exhibit N).

Scottsdale's position does not deny the existence of an enforceable agreement, the Indemnification Agreement, between the parties. Rather, it maintains that the Indemnification Agreement did not apply to the PST Project, where Lorenzo was allegedly injured. Scottsdale

relies upon the Policy's language in light of the testimony of Andrew Scopelitis (Scopelitis), one of E&S's two principals, Martinez, and the language of the Indemnification Agreement.

Scopelitis was deposed in the Lorenzo Action on September 26, 2011 (Mot. Seq. 002, exhibit I [Scopelitis Tr.]). He said that E&S fabricated steel beams for Ebenezer for the PST Project (*id.* at 11). Delivery to the job site was included as well (*id.* at 12). Scopelitis negotiated the contract with Martinez, whom he believes is Ebenezer's owner, for the PST Project (*id.* at 14). Scopelitis only dealt directly with Ebenezer in regard to the PST Project, not the landlord or the general contractor (*id.* at 52). In this instance, Ebenezer was not a contractor of E&S, although it had been on other projects (*id.* at 65). "Generally, I hire Ebenezer to erect the steel that I fabricated. I'm the primary contractor and he's the subcontractor. In this case, it was reversed" (*id.*). Scopelitis stated that E&S was not a subcontractor for Alisa; "we were subcontractors of Ebenezer" (*id.* at 72). When asked whether the Indemnification Agreement "was going to apply to this Park Slope Towers Project," Scopelitis replied, "I do not know that" (*id.* at 67).

Martinez was deposed on June 19, 2012 in the Lorenzo Action (Mot. Seq. 002, exhibit J [Martinez Tr.]). He testified that he and his wife were the officers of Ebenezer, which no longer exists (*id.* at 17-18). He recalled that Ebenezer was a subcontractor on the PST Project, under contract to Alisa (*id.* at 26, 34). E&S supplied Ebenezer the steel (*id.* at 32). When shown the Indemnification Agreement, Martinez said that it was not applicable to the PST Project, "[b]ecause this document, it's when I work for Eliou Steel . . . [but] then I was working for myself" (*id.* at 81). At the PST Project, "Eliou was working for me" (*id.* at 82).

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as

a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (see *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Scottsdale's Summary Judgment Motion – Mot. Seq. 002

Scottsdale argues that Martinez placed the PST Project outside the scope of the Indemnification Agreement because of the reversal of the usual roles for Ebenezer and E&S. Scopelitis also recognized this role reversal in his testimony, although he drew no conclusion about the applicability of the Indemnification Agreement.

Scottsdale claims that E&S cannot be recognized as an additional insured on the Policy issued to Ebenezer in the absence of a written contract, agreement or permit that required E&S to be added as an additional insured. Only the Indemnification Agreement requires the "nam[ing of] Eliou & Scopelitis Steel Fabrication and the developer and/or owner of the subject

job site as additional insured for the duration of the job.” However, the PST Project was not a job addressed by the Indemnification Agreement, as read by Scottsdale, because it was not an E&S job site; it was an Ebenezer job site. Alisa engaged Ebenezer to erect steel which Ebenezer purchased from E&S, to be delivered to Ebenezer at the PST Project. Lorenzo, an Ebenezer employee, was allegedly injured while offloading steel from an E&S truck (Scopelitis Tr. at 18). Only one E&S employee was present on the job site (*id.*).

The two September 2005 purchase orders are the only contracts linking Ebenezer and E&S on the PST Project, and they identify E&S as the provider of product to Ebenezer. Specifically, the September 16, 2005 purchase states, “All steel delivered to site.” Insurance is not mentioned in either purchase order. While the Indemnification Agreement obliged Ebenezer to name E&S as an additional insured on a general liability insurance policy secured whenever Ebenezer worked on an E&S job site, the terms and conditions of the September 2005 purchase orders established E&S as the provider of steel products to Ebenezer at the PST Project. Scottsdale, therefore, concludes that the Policy does not extend to E&S as an additional insured because no contract requiring such was in effect for the PST Project.

The Policy extends coverage to an additional insured “only with respect to liability arising out of . . . [Ebenezer’s] ongoing operations performed for that additional insured as specified in the written contract, agreement or permit.” “[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms” (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Lorenzo’s alleged injuries were not rooted in Ebenezer’s contracted work for E&S. To the contrary, Ebenezer was performing work under its contract with Alisa when E&S delivered steel to Ebenezer. The testimony of Scopelitis and Martinez lead to no other conclusion. Scottsdale, therefore, has no obligation to indemnify and defend E&S in the Lorenzo Action under the Policy, and its motion for summary judgment dismissing the complaint shall be granted.

E&S's Summary Judgment Motion – Mot. Seq. 003

E&S moves for summary judgment in its favor on the complaint. This would yield a declaratory judgment that Scottsdale must defend and indemnify E&S in the Lorenzo Action. As discussed above, however, the Policy's definition of an additional insured did not reach to E&S at the PST Project. It is true that "the well-understood meaning of the term [additional insured] is an entity enjoying the same protection as the named insured" (*Pecker Iron Works of N.Y. v Traveler's Ins. Co.*, 99 NY2d 391, 393 [2003] [internal quotation marks and citations omitted]). However, because of the particular nature of the business transacted between Ebenezer and E&S at the PST Project, E&S was not an additional insured under the Policy's terms, and, therefore, was not entitled to the same protection as Ebenezer. Accordingly, E&S's motion is denied.

Ebenezer's Motion For Leave to Intervene – Mot. Seq. 004

Ebenezer moves, pursuant to CPLR 1013, to intervene in the instant action, and to oppose E&S's summary judgment motion. The Court found above that the plain language of the Indemnification Agreement and the Policy, applied to the facts as outlined by uncontroverted testimony of Scopelitis and Martinez, require dismissal of the complaint. The need for Ebenezer's participation in the motion practice is, therefore, moot. As such, Ebenezer's motion is denied.

CONCLUSION

Accordingly, it is

ORDERED that defendant Scottsdale Insurance Company's motion for summary judgment, pursuant to CPLR 3212, dismissing the complaint (Mot. Seq. 002), is granted, and the complaint is dismissed in its entirety, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff Eliou & Scopelitis Steel Fabrication, Inc.'s motion seeking a

declaration that defendant Scottsdale Insurance Company is obliged to defend and indemnify it in the personal injury action of *Lorenzo v 343 LLC*, Supreme Court index number 24436/2005, Bronx County (Mot. Seq. 003), is denied; and it is further

ADJUDGED and DECLARED that Scottsdale Insurance Company is not obliged to defend and indemnify the plaintiff Eliou & Scopelitis Steel Fabrication, Inc. in the said action pending in Bronx County; and it is further,

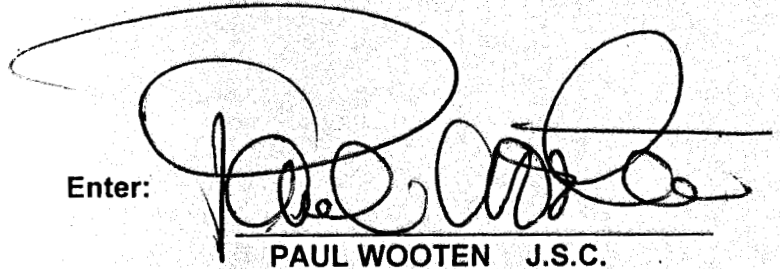
ORDERED that Ebenezer Construction Inc.'s motion, pursuant to CPLR 1013, for leave to intervene in the instant action (Mot. Seq. 004), is denied as moot; and it is further

ORDERED that counsel for Scottsdale Insurance Company is directed to serve a copy of this Order upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: *Sept. 11, 2013*

Enter:


PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: : DO NOT POST REFERENCE

UNFILED JUDGMENT
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