

85 Kenmare Realty Corp. v Mills

2013 NY Slip Op 32469(U)

October 11, 2013

Supreme Court, New York County

Docket Number: 100290/2012

Judge: Doris Ling-Cohan

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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: Jon. Doris Ling-Cohan
Justice

PART 36

Index Number : 100290/2012
85 KENMARE REALTY CORP.
vs.
I AM MALIA MILLS LLC
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

The following papers, numbered 1 to _____, were read on this motion to/for Summary judgment
 Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 1, 2
 Answering Affidavits — Exhibits _____ No(s) 5
 Replying Affidavits Notice of Cross-motion etc (+ memo) _____ No(s) 6
 _____ No(s) 3, 4

Upon the foregoing papers, it is ordered that this motion ~~is~~ & cross-motion for

Summary judgment are 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: Oct. 11, 2013

_____, J.S.C.

JUDGE DORIS LING-COHAN

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: PART 36

-----X

85 KENMARE REALTY CORP. and
NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH,

Plaintiffs,

Index No. 100290/12

-against-

I AM MALIA MILLS and
TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA,

Motion Seq. No.: 001

Defendants.

-----X

Doris Ling-Cohan, J.:

In this dispute over insurance coverage, plaintiffs 85 Kenmare Realty Corp. (85 Kenmare) and National Union Fire Insurance Company of Pittsburgh, Pa. (National) move, pursuant to CPLR 3212, for summary judgment, and, pursuant to CPLR 3001, for a declaration that defendant Charter Oak Fire Insurance Company, sued herein as Travelers Property Casualty Company of America (Travelers/Charter Oak), is obligated to provide a defense to 85 Kenmare in an underlying personal injury action. Travelers/Charter Oak cross-moves for summary judgment dismissing the complaint.

85 Kenmare is the owner of a building located at 197 and 199 Mulberry Street in Manhattan. 85 Kenmare leased the ground floor of 199 Mulberry Street to defendant I Am Malia Mills, LLC (I Am

Malia), where I Am Malia operated a shop (premises). The lease required I Am Malia to add 85 Kenmare to a general liability policy as an additional insured.

I Am Malia obtained a liability policy with Travelers/Charter Oak (policy). Aff. in Support of Motion, Policy, Ex. E. The policy contained an endorsement entitled "Blanket Additional Insured-Mangers or Lessors of Premises," which reads as follows:

Who is an insured (Section II) is amended to include as an insured any person or organization (referred to below as "additional insured") with whom you have agreed in a written contract, executed prior to loss, to name as an additional insured, but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you

On April 23, 2010, an incident occurred in which Kathryn Ann Perkins (Perkins) tripped and fell on the sidewalk at or near the outside of the premises, and sustained personal injuries. Perkins, along with her husband, Frank Perkins, instituted a lawsuit in this court against, among others, 85 Kenmare, I Am Malia, and Sheryl Lee, Inc., doing business as BAG (BAG), the shop located next door to the premises, at 197 Mulberry Street. See *Perkins v 85 Kenmare Realty Corp.*, Index No. 102502/11 (underlying action). The bill of particulars in the underlying action alleges that Perkins fell "at or about a raised walkway abutting premises known as 197-199 Mulberry Street" (Aff. in Support of Motion, Ex. B), implicating both stores.

Travelers/Charter Oak is defending I Am Malia in the underlying action.

85 Kenmare tendered a demand on Travelers/Charter Oak to defend it in the underlying action, as an additional insured under the policy. Travelers/Charter Oak disclaimed, on the ground that the accident did not arise out of the "ownership, maintenance or use" of the premises, since, in so far as the accident may be found to have occurred in front of I Am Malia, and not BAG, the accident took place on the sidewalk outside I Am Malia, which is not part of the leased space, i.e., inside the building.

"Where the terms of an insurance policy are clear and unambiguous, interpretation of those terms is a matter of law for the court." *Town of Harrison v National Union Fire Insurance Company of Pittsburgh, Pa.*, 89 NY2d 308, 316 (1996). "An insurer is entitled to have its contract of insurance enforced in accordance with its provisions and without a construction contrary to its express terms." *Bretton v Mutual of Omaha Insurance Co.*, 110 AD2d 46, 49 (1st Dept), *affd* 66 NY2d 1020 (1985).

In *ZKZ Associates v CNA Insurance Co.* (89 NY2d 990 [1997]), the Court of Appeals, in reviewing a trip and fall accident which occurred on the sidewalk in front to a garage, which was leased to a tenant having insurance adding the owner as an additional

insured, found that the sidewalk was part of the insured premises "by implication" because that part of the sidewalk was "necessarily used for access in and out of the garage" *Id.* at 991. Consequently, the claim was found to have arisen out of the "ownership, maintenance (or) use" of the premises, and so, was covered by the policy. *Id.*

ZKZ Associates has since been cited to provide coverage for an additional insured owner, where a trip and fall accident occurred on the sidewalk in front of leased premises "necessarily used for access in and out" of the premises. *Stein v 1349 Housing Corp.*, 31 Misc 3d 1224(A), *11, 2011 NY Slip Op 50813(U) (Sup Ct, NY County 2011). In *Stein*, the policy expressly stated that "ownership, maintenance or use" of premises, included "operations necessary or incidental to those premises." *Id.*¹ However, this language merely mirrors the finding in *ZKZ Associates*, that a sidewalk used for access to and from a premises is "necessarily used" for that purpose. See also *Dewars Management Co., Inc. v Great Northern Insurance Co.*, 2001 NY Slip Op 40254(U), * 3 (App Term, 1st Dept 2001) (sidewalk in front of leased premises "necessarily used for access" to the premises, and "any liability based on a sidewalk defect necessarily arose out of the 'use' of the demised premises and comes within the

¹The court in *Stein* also noted that the lessee had a sidewalk license to put out tables and chairs, but this part of the sidewalk was not implicated in the accident.

additional insureds' coverage" [quoting *ZKZ Associates* 89 NY2d at 991]).

In accordance with the foregoing case law, as to the subject accident, if it is proven to have occurred on I Am Malia's sidewalk, then the accident occurred on the insured's premises; since the sidewalk is necessarily used for access to and from I Am Malia's shop. Therefore, Travelers/Charter Oak is obligated to defend 85 Kenmare in the underlying action. Travelers/Charter Oak is also obligated to reimburse National for its costs in defending 85 Kenmare in the underlying action.

Accordingly, it is

ORDERED that the motion by plaintiffs 85 Kenmare Realty Corp. and National Union Fire Insurance Company of Pittsburgh, Pa. for summary judgment is granted; and it is further

ORDERED that the cross-motion by defendant Charter Oak Fire Insurance Company, sued herein as Travelers Property Casualty Company of America, is denied; and is further

ORDERED and ADJUDGED that defendant Charter Oak Fire Insurance Company, sued herein as Travelers Property Casualty Company of America, is obligated to provide a defense to 85 Kenmare Realty Corp. in the action entitled *Perkins v 85 Kenmare Realty Corp.*, Index No. 102502/11, pending in this court; and it is further

ORDERED and ADJUDGED that defendant Charter Oak Fire

Insurance Company, sued herein as Travelers Property Casualty Company of America, is obligated to reimburse plaintiff National Union Fire Insurance Company of Pittsburgh, Pa., for attorneys' fees, expenses and disbursements expended in the defense of the action *Perkins v 85 Kenmare Realty Corp.*, Index No. 102502/11; and it is further

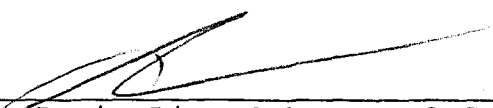
ORDERED that with respect to the issue of legal fees/costs, within 30 days of entry of this decision/order/judgment, plaintiff National Union Fire Insurance Company of Pittsburgh, Pa. are directed to submit an accounting of the fees/costs incurred, to defendant Charter Oak Fire Insurance Company, sued herein as Travelers Property Casualty Company of America, and such defendant is directed to review the accounting, and should defendant agree with such fees/costs, satisfy such defense fees/costs incurred by plaintiff National Union Fire Insurance Company of Pittsburgh, Pa. , within 30 days from receipt of the accounting, or provide specific reasons for its disagreement within such time (such objections shall be specifically directed to each item billed, with detailed reasons for the objection); and it is further

ORDERED that, after following the above procedure with respect to attorneys' fees, and conferring in person or by telephone, should the parties be unable to resolve the issue of

the amount of attorneys' fees owed to plaintiff National Union Fire Insurance Company of Pittsburgh, Pa. for the defense of the action *Perkins v 85 Kenmare Realty Corp.*, Index No. 102502/11, such issue is respectfully referred to a Special Referee to hear and determine, in accordance with CPLR §4317(b); and it is further

ORDERED that counsel for the party seeking the reference, or, absent such party, counsel for the plaintiff shall, within 90 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,² upon the Special Referee Clerk in the Motion Support Office, Rm. 119 at 60 Centre Street, who is directed to place the matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

Dated: October 11, 2013


Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\85 Kenmare rly. linell hunter.wpd

UNFILED JUDGMENT

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² Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.