Hudson Meridian Constr. Group, LLC v Utica Natl. Assur. Co.
2015 NY Slip Op 32198(U)
November 17, 2015
Supreme Court, New York County
Docket Number: 156318/13
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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HUDSON MERIDIAN CONSTRUCTION GROUP, LLC,

Plaintiff,

-against-

UTICA NATIONAL ASSURANCE COMPANY, UTICA MUTUAL INSURANCE COMPANY, SCOTTSDALE INSURANCE COMPANY, INTERSTATE FIRE & CASUALTY COMPANY, ILLINOIS UNION INSURANCE COMPANY, CRYSTAL WINDOW & DOOR SYSTEMS, LTD., CRYSTAL CURTAIN WALL SYSTEMS CORP., KINGDOM ASSOCIATES INC., RESTOR TECHNOLOGIES, INC., ROVINI CONSTRUCTION CORP., and BAY RESTORATION CORP.,

Defendants.

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Index No. 156318/13

Mot. seq. no. 002

DECISION AND ORDER

BARBARA JAFFE, J.:

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By notice of motion, defendant Scottsdale Insurance Company moves pursuant to CPLR 2221(d) for an order granting it leave to reargue its motion for summary judgment. Plaintiff opposes.

By decision and order dated April 27, 2015, as pertinent here, I granted in part and denied in part Scottsdale's motion seeking a declaratory judgment that it had no duty to defend or indemnify plaintiff in the underlying litigation based on its issuance of insurance policies to Kingdom Associates Inc. I granted Scottsdale a judgment declaring that it had no duty to defend

or indemnify plaintiff under Kingdom's 2007 policy, and denied it judgment as to Kingdom's 2005 and 2006 policies, based in part on plaintiff's submission of certificates of insurance naming it as an additional insured on those policies. I found as follows:

> While the 2005 and 2006 policies do not name plaintiff as an additional insured on their face, the 2005 and 2006 certificates of insurance, while not establishing coverage as a matter of law, raise an issue as to whether the policies contain additional insured endorsements listing plaintiff as an additional insured. And, given Kingdom's contractual agreement to procure insurance naming plaintiff as an additional insured, its having named plaintiff as an additional insured in the 2007 policy, albeit for a different location, and plaintiff's assertion that a full copy of the policies has not yet been produced, a summary disposition of this issue is premature.

(NYSCEF 112).

Scottsdale now asserts that I erroneously found that the certificates of insurance raised a triable issue as to coverage, that I based my ruling on inapplicable extrinsic factors, and that I overlooked that the policies were certified as true, complete, and correct documents. To the extent that plaintiff seeks its underwriting file, it argues that the file is irrelevant and privileged. (NYSCEF 119).

Plaintiff contends that leave to reargue is not warranted as Scottsdale did not show that I overlooked or misapprehended the relevant law, and denies that Scottsdale's underwriting file is privileged or irrelevant. (NYSCEF 121).

In reply, Scottsdale again relies on the complete certified copy of the applicable insurance policies and the absence of any indication that plaintiff is covered therein as an additional insured. It also observes that plaintiff has received all of the relevant documents from Scottsdale as well as from North Island Facilities, Ltd, the insurance broker and Kingdom's insurance agent

in connection with Scottsdale's policies. It submits a copy of its underwriting file for *in camera* review, and argues that it contains no documents reflecting that plaintiff is or should have been added an additional insured. (NYSCEF 153).

While Scottsdale correctly asserts that under settled New York law, a certificate of insurance, by itself, is insufficient to establish that additional insured coverage exists, the issue here is whether plaintiff had raised a triable issue as to its additional insured status by submitting certificates of insurance listing it as an additional insured on Kingdom's policies. In *Herrnsdorf v Bernard Janowitz Constr. Corp.*, the insurer moved for summary judgment, submitted the policy at issue, and argued that the defendant was not covered under its policy. In opposition, the defendant submitted a certificate of insurance listing the defendant as an additional insured under the policy. Although the Court found that an exclusion precluding liability under a certain scenario applied, thus relieving the insurer from liability, it also held that "although the certificate of insurance submitted by [defendant] raised a triable issue of fact as to whether [defendant] was an additional insured under the policy," the factual issue was irrelevant due to the exclusion precluding liability. (96 AD3d 1011 [2d Dept 2012]).

Similarly, in *Horn Maintenance Corp. v Aetna Cas. & Sur. Co.*, the Appellate Division, First Department, held that the insurers were not entitled to summary judgment, because "[o]n summary judgment, a certificate [of insurance] may be sufficient to raise an issue of fact, especially where additional factors exist favoring coverage . . ." (225 AD2d 443 [1st Dept 1996]).

As I cited both *Herrnsdorf* and *Horn* in my original decision, Scottsdale has failed to establish that I overlooked or misapprehended the law in finding that a certificate of insurance

may raise a triable issue as to a party's additional insured status on summary judgment, even where the insurer has submitted a copy of its insurance policy. (*See DiMaggio v Chase Manhattan* Bank, 266 AD2d 89 [1st Dept 1999] [certificate of insurance showing additional insured coverage sufficient to raise factual issue on summary judgment]; *Morrison-Knudsen Co., Inc. v Continental Cas. Co.*, 181 AD2d 500 [1st Dept 1992] [certificate of insurance naming party as additional insured constituted evidence of insurer's agreement to insure party]; *Bucon, Inc. v Pennsylvania Mfg. Assn. Ins. Co.*, 151 AD2d 207 [3rd Dept 1989] [same]; *see also Sevenson Envtl. Servs., Inc. v Sirius Am. Ins. Co.*, 74 AD3d 1751 [4th Dept 2010] [while plaintiffs submitted certificate of insurance naming them as additional insureds, insurer raised triable issue by affidavit from third-party administrator stating that underwriting file contained no request or notice to name plaintiffs as additional insureds; however, insurer not entitled to declaratory judgment as fact that administrator located no documentation in underwriting file insufficient by itself to establish that insurer or its agents possessed no documents naming plaintiffs as additional insureds]).

While Scottsdale also contends that I erred in considering additional or extrinsic factors in determining whether a triable issue was raised, the Court in *Horn* held that a certificate of insurance may raise a triable issue especially where additional factors exist, and ultimately ruled there that the certificate, by itself, did not prove coverage. (225 AD2d at 444). A similar result was reached in *New York City Health & Hosps. Corp. v Constr. Force Servs., Inc.*, where the Court held that while the testimony of the defendant's insurance broker that it issued a certificate of insurance listing the plaintiff as an additional insured may not have been sufficient, standing alone, to defeat summary judgment, "considering the totality of the circumstances," including the

broker's testimony, earlier certificates of insurance listing the plaintiff as an additional insured, and proposed agreements that included therein insurance as a line item, triable issues were raised as to the existence of additional insured coverage. (123 AD3d 493 [1st Dept 2014]).

Scottsdale's argument concerning plaintiff's receipt of documents in discovery and its submission on reply of its underwriting file constitute new arguments and evidence submitted improperly here on its motion seeking leave to reargue (*Kent v 534 E. 11th St.*, 80 AD3d 106 [1st Dept 2010] [movant may not advance new arguments not previously presented]; *Mazinov v Rella*, 79 AD3d 979 [2d Dept 2010] [same]; *Ahmed v Pannone*, 116 AD3d 802 [2d Dept 2014], *lv denied* 25 NY3d 964 [2015] [motion for leave to reargue shall not include matters of fact not offered on prior motion]), and made for the first time on reply (*Ambac Assur. Corp. v DLJ Mortg. Cap., Inc.*, 92 AD3d 451 [1st Dept 2012] [reply papers do not permit movant to introduce new arguments]). And even if treated as a motion for leave to renew, Scottsdale provides no reasonable justification for its failure to submit the evidence in support of its original motion. (*Granite State Ins. Co. v Transatlantic Reinsurance Co.*, __ NYS3d __, 2015 WL 5972101 [1st Dept 2015]).

Accordingly, it is hereby

ORDERED, that defendant Scottsdale Insurance Company's motion for leave to reargue is denied.

ENTER:

Barbara Jaffe, JSC

DATED: November 17, 2015
New York, New York

BARBARA JAFFE
J.S.C.