

**25-01 Newkirk Ave. LLC v Everest Natl. Ins. Co.**

2015 NY Slip Op 32567(U)

December 22, 2015

Supreme Court, Kings County

Docket Number: 501172/2013

Judge: Debra Silber

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

**FILED  
KINGS COUNTY CLERK  
2016 JAN 28 AM 8:45**

25-01 NEWKIRK AVENUE LLC.,

Plaintiff,

Index No.: 501172/2013

-against-

DECISION/ORDER

EVEREST NATIONAL INSURANCE COMPANY  
and BROWNSTONE AGENCY, INC.,

Motion Seq. #2  
Submitted: 10/29/15

Defendants.

HON. DEBRA SILBER, A.J.S.C.:

*Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant Brownstone Agency's Motion to Dismiss.*

Papers	Numbered
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>1-10</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>12-13</u>
Other: _____	_____

**Upon the foregoing cited papers, the Decision/Order on this application is as follows:**

Defendant Brownstone Agency moves to dismiss plaintiff's action for negligence and common law indemnification or to convert the motion to one for summary judgment. Plaintiff opposes the motion. For the reasons explained herein, the motion is denied.

This motion was initially made in a case captioned *25-01 Newkirk Avenue LLC v Brownstone Agency, Inc.*, (510916/14), but the two matters were subsequently consolidated, *sua sponte*, by order of this court on September 10, 2015. The 2013 action was brought against the first defendant, the 2014 action against the second

defendant, for the same causes of action.

The first action, then entitled *25-01 Newkirk Avenue LLC v Everest National Insurance Company*, sought a declaratory judgment that defendant is obligated to defend and indemnify plaintiff in connection with a personal injury action, *Michel v 25-01 Newkirk* (8871/12) brought on April 30, 2012 which involves the lead paint poisoning of a child who resided at the property from 2007 to 2010, during which time 25-01 Newkirk Avenue LLC was the property owner. It is noted that they sold the building on January 18, 2012, prior to the date the lead paint action was commenced.

In 2014, defendant Everest brought a motion to dismiss pursuant to 3211(a)(1) [documentary evidence] or 3211 ( c ) [to treat the motion as one for summary judgment], on the grounds it has no duty to defend or indemnify the plaintiff landlord.

Plaintiff 25-01 Newkirk contended Everest had no basis to exclude lead paint coverage from its insurance policy. However, both Everest and its claims adjusting service, defendant Brownstone (not yet a defendant), repeatedly had advised and warned plaintiff that it would add a lead paint exclusion to what was then a new insurance policy if plaintiff did not have lead paint testing performed at the premises and the peeling paint repaired.

In support of its prior motion, Everest submitted emails and correspondence which indicated the following:

1) On April 8, 2009, Brownstone issued an "indication" to 25-01 Newkirk's insurance broker advising it would underwrite the policy, subject to a lead paint exclusion, within 30 days of binding.

2) On April 24, 2009, plaintiff submitted a "Certification of Correction of Lead-Based Hazard Violation(s)." Attached to the certification is a letter from the firm "Lead

Investigation" showing only two dust wipe samples were taken. Also attached was a wipe sample report.

3) Defendant Everest then averred that this Certification was insufficient, as its guidelines required a minimum of five wipe samples for a building of this size<sup>1</sup>.

Defendant Everest then sent plaintiff a lead testing request form dated May 5, 2009 which advised that 10% of the apartments had to be tested to avoid the lead paint exclusion from coverage. A special program referral form dated May 6, 2009 stated defendant Everest would bind a policy subject to compliance with the lead testing. The building policy was initially issued on May 7, 2009.

4) A survey by Brownstone dated May 27, 2009 indicated peeling paint throughout the building.

5) Correspondence sent on May 30, 2009 by Everest to plaintiff indicated further testing was required. After 2501 Newkirk failed to conduct the testing and repairs, Everest issued a change endorsement advising plaintiff that a lead paint exclusion was added to the policy. Plaintiff was issued a refund of part of the premium reflecting same.

In opposition to the Everest motion, 25-01 Newkirk averred that it was Everest's obligation to perform the lead testing and that it had never scheduled and performed them. Plaintiff also averred that the documents relied upon by defendant were either emails or unsigned correspondence with no proof of transmission and were not affidavits from persons with knowledge. Plaintiff also argued that the documents did not unequivocally clarify who was responsible to perform the testing and whether defendant

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<sup>1</sup>The building has 55 residential units.

had even requested access to perform the testing.

On March 6, 2014, after oral argument, the court granted defendant's motion to dismiss and their motion for a declaration of non-coverage, finding that the property owner had been given ample notice of the insurer's intention to cancel the lead paint coverage if the landlord did not comply with the insurer's requirements and that the landlord had not complied.

On November 19, 2014, plaintiff commenced the second action, against Brownstone Agency. 25-01 Newkirk alleges in its complaint that Brownstone failed to conduct the requisite lead testing at the apartment building and that, because of their failure, Everest canceled the lead paint coverage and inserted a lead exclusion rider into its policy. The complaint is not entirely clear about what Brownstone's role was. Plaintiff avers that they went to the Stern Agency to purchase a policy and that the policy came from Everest, and they insinuate that Brownstone was some sort of middleman, without clearly setting forth Brownstone's role in the matter. They also say they authorized Brownstone to arrange and conduct the lead testing. The court notes that it appears that a company called Regional Reporting actually conducted the lead tests which were done, tests which Everest determined to be insufficient.

Defendant Brownstone Agency made this motion to dismiss on February 3, 2015. It is essentially the same motion as the one which was made by Everest, and relies on almost exactly the same documentation. Strikingly, Brownstone does not make an argument that there was no privity of contract between Brownstone and the plaintiff. The motion claims that the complaint should be dismissed as against it pursuant to 3211(a)(1) [documentary evidence] and/or CPLR § 3211 (c) [to treat the motion as one for summary judgment], on the grounds it has no duty to defend or

indemnify the plaintiff landlord.

On April 8, 2015, The Appellate Division 2<sup>nd</sup> Department reversed this court's prior ruling in favor of Everest saying "It is clear that judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as 'documentary evidence' in the proper case," "conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence," and "here, the evidence submitted by the defendant in support of the motion either did not constitute documentary evidence within the meaning of CPLR 3211(a)(1), or failed to utterly refute the plaintiff's allegations or conclusively establish a defense as a matter of law, particularly with regard to whether the plaintiff was obligated to perform lead testing at the premises and whether the lead exclusion was validly added to the policy." 25-01 *Newkirk Ave., LLC v Everest Natl. Ins. Co.*, 127 AD3d 850 [2<sup>nd</sup> Dept 2015].

As is to be expected, plaintiff's opposition to the instant motion relies almost entirely on the Appellate Division's decision.

The basis of the motion by defendant Brownstone in seeking dismissal being identical to the grounds argued by Everest, the court is constrained by the prior ruling of the Appellate Division and the motion to dismiss must be denied.

The court notes that plaintiff herein has brought a third-party action dated February 12, 2013 in the lead paint case (8871/12) against the insurance broker who they allege did not obtain the lead paint coverage at issue herein. That action should probable be severed from the personal injury action and consolidated with the instant action, which would require a motion.

This shall constitute the decision and order of the court.

Dated: December 22, 2015

ENTER:



Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber  
Justice Supreme Court

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