Fireman's Fund Ins. v Travelers Cas. Ins.
2017 NY Slip Op 31364(U)
June 27, 2017
Supreme Court, New York County
Docket Number: 151110/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. PART 35
Justice

Index Number : 151110/2016
FIREMAN'S FUND INSURANCE
vs.
TRAVELERS CASUALTY INSURANCE
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. _____
MOTION DATE 6/15/17
MOTION SEQ. NO. _____

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

In this action for, *inter alia*, breach of insurance procurement agreement, defendant Daffodil General Contracting Inc. ("Daffodil Contracting") moves to dismiss all claims asserted against it based on the doctrine of law of the case.

Factual Background

According to the Complaint, Sky Management Corp. ("Sky") hired Daffodil Contracting to perform certain construction work at a premises owned by Robrose Place, L.L.C. ("Robrose") located at 220 Sullivan Street, New York, New York (the "premises") (see May 29, 2012 letter agreement, the "Daffodil Contract").

Daffodil Contracting also executed an agreement with Robrose, agreeing to procure comprehensive general liability insurance naming the Owner (Robrose) and the Managing Agent (Sky) as additional insureds, and to defend and indemnify Robrose and Sky for the work at the premises (see Indemnification Agreement dated May 17, 2013, the "Indemnification Agreement"). Daffodil Contracting procured general liability coverage from Travelers Casualty Insurance Company of America ("Travelers"), which contained an additional insured endorsement for the benefit of Robrose and Sky (the "Travelers' Policy").

Thereafter, on June 15, 2013, nominal defendant Tsering Wangyal ("Wangyal") was allegedly injured at the premises and sued Robrose, Sky, and Daffodil for negligence and

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

Dated: _____ _____, **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**

violations of Multiple Dwelling Law § 78 (the "Underlying Complaint").[1]

At the time of Wangyal's alleged accident, Robrose and Sky were covered by a certain commercial general liability insurance policy issued by plaintiff, Fireman's Fund Insurance Company ("Fireman's Fund").

Consequently, Fireman's Fund, Robrose and Sky commenced this action for (1) reimbursement from Travelers and Daffodil Contracting for defense costs (second cause of action); and (2) damages against Daffodil Contracting for breach of contract in failing to obtain and provide insurance as required (third cause of action).[2]

By order dated May 15, 2017, this Court declared that Travelers "has no duty to defend, indemnify, or otherwise cover plaintiffs, Robrose Place, L.L.C. and Sky Management Corp. in the underlying personal injury action . . . ." The Court held that a prospective insured does not qualify as additional insureds under the Travelers' Policy as to its own independent acts or omissions. The additional insured endorsement provides coverage to additional insureds where the alleged liability of the prospective additional insured is vicarious. Since the Underlying Complaint asserted claims against Robrose and Sky for their own independent acts and omissions, and no vicarious liability claims against them existed, they did not qualify as additional insureds (Decision, pp. 12-17).

Daffodil Contracting now argues that since it has been determined that Robrose and Sky are being sued in the underlying action for their own acts of negligence, their defense and indemnification claims must be dismissed. The law of case, *i.e.*, the Court's finding that Travelers cannot be required to defend and indemnify Robrose and Sky for their own negligence must also apply to Daffodil Contracting.

In opposition, Robrose and Sky argue that Daffodil Contracting failed to specify the section under which it seeks dismissal. Further, the Court's May 15, 2017 Order has no bearing on plaintiffs' claims for reimbursement from Daffodil Contracting for defense costs and for breach of contract against Daffodil Contracting.[3]

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[1] Wangyal withdrew his claims alleging violations of Labor Law 241 and 200 with prejudice (See So-Ordered Stipulation, September 29, 2016).

[2] Plaintiffs asserted a first cause of action for a declaration that Travelers is obligated to defend and indemnify additional insureds Robrose and Sky. However, Travelers was dismissed from this action pursuant to this Court's order dated May 15, 2017, and the first cause of action was severed and dismissed.

[3] In reply, Daffodil Contracting argues that its motion indicates that it is based on the May 15, 2017 Order. Further, the Court found that the underlying claims against Robrose and Sky Management are for their own negligence, and such law of the case establishes that Daffodil Contracting is not contractually obligated to defend or indemnify Robrose and Sky for their own negligence. Therefore, the claims against Daffodil Contracting must be dismissed. However, as plaintiffs point out, such reply papers were untimely filed. The motion was made returnable on June 15, 2017 and the reply was e-filed June 15, 2017, in violation of CPLR 2214(b) which requires that reply papers be filed one day prior to the return date. Thus, the Court does not consider such reply.

Discussion

As a threshold issue, and contrary to plaintiffs' contention, the Court of Appeals has held that "the law of the case doctrine is found in no New York statute" (*People v. Evans*, 94 N.Y.2d 499, 727 N.E.2d 1232706 N.Y.S.2d 678 [2000]).[4] Thus, Daffodil Contracting failure to cite to any section of the CPLR is not fatal to its motion.

The law of the case doctrine, a creature of judicial craftsmanship, addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation prior to final judgment of the case (*People v Evans*, 94 NY2d 499 [2000]; *BDCM Fund Adviser, L.L.C. v. Zenni*, 106 A.D.3d 596, 966 N.Y.S.2d 40 [1st Dept 2013]). The doctrine of the law of the case applies only to legal determinations that were necessarily resolved on the merits in the prior decision (*Grullon v. City of New York*, 297 A.D.2d 261, 747 N.Y.S.2d 426 [1st Dept 2002] *citing Baldasano v. Bank of New York*, 199 A.D.2d 184, 605 N.Y.S.2d 293 [1st Dept 1993]; *Thompson v. Cooper*, 24 A.D.3d 203, 806 N.Y.S.2d 32 [1st Dept 2005] ("the doctrine of law of the case applies only to legal determinations resolved on the merits")).

The fact that the Travelers' policy Daffodil Contracting obtained did not provide additional insured coverage for Robrose and Sky does not necessarily constitute a satisfaction (or breach) of Daffodil Contracting's contractual obligation to obtain insurance as required under the Indemnification Agreement. A separate analysis of the terms of the Insurance Procurement clause in the Indemnification Agreement is required. Since the issue of Daffodil Contracting's breach of contract was not addressed or necessarily decided in the prior motion, the law of the case doctrine does not apply (*Mulder v. Donaldson, Lufkin & Jenrette*, 224 A.D.2d 125, 648 N.Y.S.2d 535 [1st Dept 1996] (finding that where "issue was not actually resolved on the merits in the prior decision, the law of the case doctrine does not apply")).

As such, the motion to dismiss all claims asserted against it based on the doctrine of law of the case is unwarranted.

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[4] The Court of Appeals in *People v. Evans* continues:

> "The law of the case doctrine is part of a larger family of kindred concepts, which includes res judicata (claim preclusion) and collateral estoppel (issue preclusion). . . . Res judicata and collateral estoppel are rules of limitation recognized in the CPLR. Indeed, in a civil proceeding a party is entitled, by statute, to a dismissal based on issue preclusion or claim preclusion (see, CPLR 3211[a] [5]), both of which are also designated as affirmative defenses (see, CPLR 3018[b]) . . . law of the case rests on a foundation that further distinguishes it from issue and claim preclusion. Whereas the latter concepts are rigid rules of limitation, law of the case is a judicially crafted policy that "expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power." (94 NY2d at 502-503).

Conclusion

Therefore, based on the foregoing, it is hereby

ORDERED that the motion by defendant Daffodil General Contracting Inc. to dismiss all claims asserted against it based on the doctrine of law of the case is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on August 28, 2017, 2:15 p.m.; and it is further

ORDERED that said defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 6/27/17 **ENTER:** HON. CAROL R. EDMEAD J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE