

**Greater N.Y. Mut. Ins. Co. v Dongbu Ins. Co., Ltd.,
(U.S. Branch)**

2018 NY Slip Op 30599(U)

April 5, 2018

Supreme Court, New York County

Docket Number: 151673/2017

Judge: Kelly A. O'Neill Levy

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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GREATER NEW YORK MUTUAL INSURANCE COMPANY

Plaintiff,

- v -

DONGBU INSURANCE COMPANY, LTD., (U.S. BRANCH),

Defendant.

INDEX NO. 151673/2017

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION AND ORDER

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HON. KELLY O'NEILL LEVY:

The following e-filed documents, listed by NYSCEF document number 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29

were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is

In this insurance coverage action, plaintiff Greater New York Mutual Insurance Company (“Greater New York”), seeks a declaration that defendant Dongbu Insurance Company, Ltd., (US Branch) (“Dongbu”) is obligated to defend and indemnify Melohn Foundation in the underlying personal injury action, *Kolmer v. Boston Properties, Inc., et al.*, Index No. 153202/2013, also pending before this court. In the underlying action, Dongbu is defending Stage Star Deli Corp. (“Stage Star”) and Greater New York is defending Melohn (sued as “Melohn Properties Inc.”).

Now Dongbu makes a pre-answer motion to dismiss the complaint, pursuant to CPLR 3211(a)(7), and seeks a judgment that Melohn Foundation is not an additional insured on the insurance policy Dongbu issued to Stage Star (hereinafter, “the Dongbu Policy”). Greater New York opposes.

The plaintiff in the underlying personal injury action, Lloyd Kolmer, alleged in the initial complaint that on February 3, 2013, he sustained injuries when he slipped and fell on the sidewalk outside of 125 West 55th Street in Manhattan, which houses Milos Restaurant. Following the plaintiff's deposition, plaintiff served a supplemental summons and amended verified complaint dated September 24, 2014 adding defendants Melohn Properties Inc. and Stage Star Deli Corp. and including allegations that plaintiff's fall occurred on the sidewalk in front of and/or adjacent to 125 West 55th Street and/or 105 West 55th Street.

At the time of the incident, Melohn Foundation was the owner of the premises located at 105 West 55th Street and Stage Star was the longtime lessee of the ground floor. Under the terms of the lease, the tenant (Stage Star) and owner (Melohn) agreed that Stage Star would provide Melohn with "comprehensive policy of liability insurance with contractual [sic] liability endorsement protecting the Demised Premises or any appurtenance thereto." [Lease at ¶ 54(B).]

Stage Star was covered as the named insured by a Businessowners' policy (policy number NBP 1222743) issued by Dongbu on July 12, 2012 ("Dongbu Policy"). Pursuant to the Dongbu Policy, the lessor of 105 W. 55th Street, #1, was listed as an additional insured. It is undisputed that at the time of the incident, Melohn was the lessor of the property and the Certificate of Liability Insurance issued by Morse Insurance Agency, Inc. identifies "Stage Star Deli Corp" as the insured and "The Melohn Properties Inc." as additional insured. However, the policy identifies a "Jessie Gupta" as the lessor.

Defendant argues in its motion to dismiss that Melohn Foundation does not qualify as an additional insured under the policy and even if it did, it would be limited to the designated premises occupied by the named insured, that is, the area outside 105 West 55th Street. Plaintiff opposes and argues that the policy provides for an additional insured to the "Lessor" of the

property which is clearly the Melohn Foundation, despite the mention of “Jessie Gupta.” Further, plaintiff contends that there remains an open question in the underlying action concerning where plaintiff fell precluding dismissal based on liability only extending to accidents relating to the premises designated in the policy.

Discussion

CPLR § 3211(a)(7) permits the court to dismiss a complaint that fails to state a cause of action. The complaint must be liberally construed and the plaintiff given the benefit of every favorable inference. *See Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion. *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002). If the court “determine[s] that the plaintiff [is] entitled to relief on any reasonable view of the facts stated, [its] inquiry is complete” and the complaint must be declared legally sufficient. *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 318 (1995). While factual allegations in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to the presumption of truth. *Summit Solomon & Feldesman v. Lacher*, 212 A.D.2d 487, 487 (1st Dep’t 1995).

While it is true that the action against Stage Star and Melohn may be dismissed at a later point should it be found that plaintiff did not fall outside 105 West 55th Street, dismissal of the coverage action on 3211(a)(7) grounds is inappropriate here where the complaint is legally sufficient. *See Great Atlantic Ins. Co. v. Weinstein*, 125 AD2d 214, 215 (1st Dep’t 1986). *See also Southwest Mar. & Gen. Ins. Co. v. Preferred Contrs. Ins. Co.*, 143 AD3d 577, 577 (1st Dep’t 2016)(denying a CPLR 3211(a)(1) and (7) motion to dismiss where the “additional insured endorsements at issue do not reference plaintiffs, plaintiffs are identified on the certificates of

insurance, which is relevant to whether plaintiffs' exclusion from the endorsements was perhaps an inadvertent error (citation omitted).")

Accordingly, it is ORDERED that defendant Dongbu Insurance Co. Ltd.'s motion to dismiss the complaint is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after entry of this order; and it is further

ORDERED that counsel are to appear for a status conference in Part 19 (60 Centre Street, Room 218) on May 16, 2018, at 9:30 AM.

This constitutes the decision and order of the court.

4/5/2018
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: