Deluxe Home Bldrs. Corp. v Harleysville Worchester Ins. Co.
2018 NY Slip Op 31651(U)
July 6, 2018
Supreme Court, New York County
Docket Number: 656083/2016
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy M. Bannon — *Justice* **PART 42**

DELUXE HOME BUILDERS CORP. and UNITED TALMUDICAL ACADEMY OF BORO PARK, INC.

- v -

HARLEYSVILLE WORCHESTER INSURANCE COMPANY

INDEX NO. 656083/2016

MOTION DATE 01/17/18

MOTION SEQ. NO. 001

The following papers were read on the defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7):

Notice of Motion/Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law	No(s). 1
Answering Affirmation(s) — Affidavit(s) — Exhibits	No(s). 2
Replying Affirmation — Affidavit(s) — Exhibits	No(s). 3

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

In this action, *inter alia*, for a judgment declaring that the defendant is obligated to defend and indemnify the plaintiff under an insurance policy issued by the defendant insurer to non-party Blizzard Cooling, Inc. (Blizzard), the defendant moves, pre-answer, to dismiss the complaint on the grounds of failure to state a cause of action (CPLR 3211[a][7]) and a defense based on documentary evidence (CPLR 3211[a][1]), or, in the alternative, for summary judgment pursuant to CPLR 3211(c), and for attorney's fees and costs. The plaintiffs oppose the motion. The motion is granted in part.

As alleged in the complaint, the plaintiff United Talmudical Academy of Boro Park, Inc. (UTA) hired plaintiff Deluxe Home Builders Corp. (Deluxe) as its general contractor for a project at premises owned by UTA. The plaintiffs allege that, prior to July 20, 2015, Deluxe entered into a proposal and agreement (the Agreement), and later a subcontract agreement (the Subcontract) with Blizzard, wherein Blizzard agreed to perform certain work at the project. The Agreement, marked 2014 but without a specific date, provides that Blizzard shall name "the Owner and/or Contractor" as additional insured under Blizzard's liability insurance policies. The Subcontract, dated February 9, 2015, similarly provides that Blizzard shall procure insurance that "shall include . . . additional insured coverage for the benefit of the Contractor, Owner and anyone else the Owner is required to name (as set forth in the schedule below), and shall specifically include coverage for completed operations." Neither the Agreement nor the Subcontract identified UTA or defines who the "Owner" is. On or about December 16, 2015, an employee of Blizzard and his parents commenced an action, asserting claims against the plaintiffs and others for negligence and violations of the Labor Law alleged to have caused him to suffer personal injuries at the project on July 20, 2015. By letter dated May 3, 2016, the plaintiffs

alleged to have caused him to suffer personal injuries at the project on July 20, 2015. By letter dated May 3, 2016, the plaintiffs tendered their request for defense and indemnification in the underlying personal injury action to the defendant and Blizzard, citing the Agreement's insurance requirement. By letter dated May 25, 2016, the defendant disclaimed the plaintiffs' request for coverage because the allegations in the underlying action did not trigger coverage under the policy it had issued to Blizzard, insofar as the "alleged loss took place while this job/project was [in] progress."

The plaintiffs claim that they are entitled to defense and indemnification in the underlying action as additional insureds pursuant to the commercial package policy that the defendant issued to Blizzard (the Harleysville Policy). The Harleysville Policy was issued for the period June 19, 2015 to June 19, 2016, with a per occurrence limit of $1 million. The Harleysville Policy lists Blizzard as the named insured, and does not include any additional scheduled named insureds. However, it includes coverage form CG 0001 and contains one additional insured endorsement, the CG 7263, entitled "Additional Insured - Owners, Lessees or Contractors - Completed Operations - Automatic Status When Required In Construction Agreement With You." The endorsement modifies who is insured under the Harleysville Policy to include, as an insured, "any person or organization for whom you are performing operations only as specified under a written contract . . . that requires such person or organization to be added as an additional insured on your policy." The endorsement further provides:

> Such person or organization is an additional insured only with respect to liability caused, in whole or in part, by the acts or omissions of the "Named Insured", or those acting on behalf of the "Named Insured", in the performance of the "Named Insured's" work for the additional insured and included in the "products-completed operations hazard" which was performed for that insured only as specified under the "written contract."

The "products-completed operations hazard" is defined as "all 'bodily injury' and 'property damage' occurring away from premises you own or rent and arising out of 'your product' or your work'" except for, among other things, "[w]ork that has not yet been completed or abandoned." Work is deemed completed pursuant to the Harleysville Policy at the earliest of the following times: (a) when all work called for in the insured's contract has been completed; (b) when all work to be done at the job site has been completed if the insured's contract calls for work at more than one job site; and (c) when that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Generally "'where a cause of action is sufficient to invoke the court's power to render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy, a motion to dismiss that cause of action should be denied.'" DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC, 102 AD3d 725, 728 (2nd Dept. 2013), quoting Matter of Tilcon, Inc. v Town of Poughkeepsie, 87 AD3d 1148, 1150 (2nd Dept. 2011); see Minovici v Belkin BV, 109 AD3d 520

(2nd Dept. 2013). It is well established in declaratory judgment actions that "'on a motion to dismiss the complaint for failure to state a cause of action, the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him [or her].'" Fillman v Axel, 63 AD2d 876, 876 (1st Dept. 1979), quoting Law Research Serv. v Honeywell, Inc., 31 AD2d 900, 901 (1st Dept. 1969). "This does not mean, however, that the courts may not reach the merits of a declaratory judgment on a motion to dismiss. . . . 'If no issue of fact is raised by the pleadings, or if the facts are conceded, a proper case is presented for judgment on the merits on defendant's motion to dismiss the complaint.'" Fillman v Axel, supra, at 876, quoting Law Research Serv. v Honeywell, Inc., supra at 901; see Hoffman v City of Syracuse, 2 NY2d 484 (1957); Plaza Drive Group of CNY, LLC v Town of Sennett, 115 AD3d 1165 (4th Dept. 2014). Matter of Tilcon, Inc., supra. Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action "should be taken as a motion for a declaration in the defendant's favor and treated accordingly." Siegel, NY Prac § 440 (5th ed); see Lanza v Wagner, 11 NY2d 317 (1962); Minovici v Belkin BV, supra; Fillman v Axel, supra; Law Research Serv., Inc. v Honeywell, Inc., supra. Thus, where the court, upon deeming the material allegations of the complaint to be true, is nonetheless able to determine, as a matter of law, that the defendant is entitled to a declaration in its favor, the court may enter a judgment making the appropriate declaration. See Pilgrim v Pantorilla, 144 AD2d 882 (2nd Dept. 2016); Minovici v Belkin BV, supra.

Applying these standards, the defendant has met its burden on its motion, which is deemed a motion for a declaration in its favor. The endorsement modifying the Harleysville Policy unambiguously limits the scope of coverage for additional insureds to coverage for liability which arises out of the named insured's *completed* operations. The plaintiff in the underlying personal injury action asserts that he was injured while working as Blizzard's employee. Specifically, his complaint states that he was injured while ascending a ladder at the subject premises during construction. The plaintiffs make no claim that Blizzard's operations were completed when the incident occurred. Therefore, the defendant is entitled to a declaratory judgment in its favor. However, the court does not find the plaintiffs' initiation of this lawsuit to have been frivolous, and thus declines to grant the defendant's request for attorneys' fees and costs pursuant to 22 NYCRR 130-1.1.

Accordingly, it is

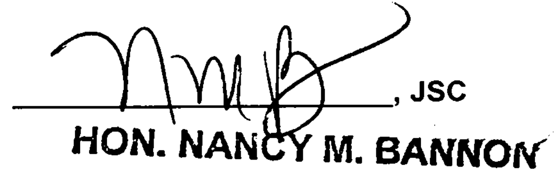
ORDERED that the defendant's motion to dismiss the complaint is deemed to be a motion for a declaration in its favor, and the motion is thereupon granted to that extent, and the motion is otherwise denied, and it is further,

ADJUDGED and DECLARED that Harleysville Worcester Insurance Company, incorrectly sued herein as Harleysville Worchester Insurance Company, is not obligated to defend or indemnify Deluxe Home Builders Corp. and United Talmudical Academy of Boro Park, Inc. in connection with the action

captioned Saquinaula v Blizzard Cooling, Inc., pending in the Supreme Court, Bronx County, under Index No. 25675/15.

This constitutes the Decision, Order and Judgment of the court.

Dated: July 6, 2018



________________________, JSC
HON. NANCY M. BANNON

1. Check one: .... ■ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. Check as appropriate: MOTION IS: ☐ **GRANTED** ☐ **DENIED** ■ **GRANTED IN PART** ☐ **OTHER**