**Old Republic Gen. Ins. Corp. v Harleysville Worcester Ins. Co.**

2018 NY Slip Op 31975(U)

July 23, 2018

Supreme Court, New York County

Docket Number: 651797/2017

Judge: Anthony Cannataro

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

OLD REPUBLIC GENERAL INSURANCE
CORP., Individually and as Subrogee of                    Index No. 651797/2017
LEGACY BUILDERS/DEVELOPERS CORP.
and ZUMA, LLC.,

                                        Plaintiff,

                                                          **DECISION & ORDER**

            against


HARLEYSVILLE WORCESTER INSURANCE
COMPANY and MARLIN MECHANICAL
CORP.

                                        Defendants.


**Anthony Cannataro, J.:**


In this action plaintiff Old Republic General Insurance Corp. (Old Republic) is seeking, among other things, a declaratory judgment that defendant Harleysville Worcester Insurance Company (Harleysville) is obligated to defend, indemnify and provide additional insured coverage to Legacy Builders/Developers Corp. (Legacy) and Zuma, LLC (Zuma) in an underlying personal injury action, *Boyar v The Sapir Group LLC et al.*, index No. 156809/2014. The complaint also seeks common law indemnification, contractual indemnification, breach of contract, and contribution from Harleysville's insured, defendant Marlin Mechanical Corp. (Marlin).


<u>Factual and Procedural History</u>

Zuma, the tenant of the building located at 260 Madison Avenue in Manhattan, hired Legacy to serve as general contractor on a project to renovate the premises and build a restaurant. Legacy subcontracted the HVAC work for the project to Marlin, which in turn subcontracted a portion of that work to Aleta Industries (Aleta). Aleta was the employer of Mr. Boyar, the plaintiff in the underlying action, who fell from

an unsecured ladder and sustained serious injuries.

Mr. Boyar filed a summons and complaint against Legacy, Zuma, and the building's owners. Legacy filed a third-party complaint against Marlin for common law and contractual indemnification, breach of contract for failure to provide insurance, and breach of contract for failure to ensure that Marlin's subcontractor, Aleta, provided insurance to Legacy. Subsequently, on April 4, 2017, Old Republic commenced the instant action against Harleysville and Marlin. Harleysville now moves for partial summary judgment seeking a declaratory judgment that its coverage is excess to the coverage afforded by Old Republic and as such it has no duty to defend in the underlying action.

## Legal Analysis

On a motion for summary judgment, the movant carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court must view the evidence in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn (*Benjamin v City of New York*, 55 Misc 3d 1217[A], 2017 NY Slip Op 50619[U] [Sup Ct, NY County 2017]). Summary judgment "is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Andre v Pomeroy*, 35 NY2d 361, 363 [1974]).

Where an insurance company seeks summary judgment dismissing a plaintiff's claim of coverage, the plaintiff's burden is "merely to raise a question of fact as to the coverage under the policy" (*Gilbane Bldg Co/TDX Constr. v St. Paul Fire & Mar. Ins. Co.*,

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143 AD3d 146 [1st Dept 2016]).  If the language in the insurance contract is ambiguous and susceptible to two reasonable interpretations, the resolution of the ambiguity is for the trier of fact (*State of New York v Home Indem. Co.*, 66 NY2d 669 [1985]; *Fagnani v American Home Assur. Co.*, 64 NY2d 967 [1985]).

In the instant case, pursuant to the terms of its agreement with Zuma, Legacy was required to obtain insurance in accordance with the following provision:

> Prior to commencement of any work, **Contractor and all subcontractors** shall secure the following types and amounts of insurance coverage which are to be continuously maintained throughout the term of the project:
>
> 1. Commercial General Liability Insurance written on standard Insurance Services Offices, policy forms on an Occurrence basis with the following minimum limits:…
>
> The General Liability policy shall NOT contain any exclusions or limitations relating to:
>
> a. Contractual Liability:
> b. Independent Contractors or Operations of Independent Contractors:
> c. Injury to employees of Independent Contractors or "Action over" claims by employees or Independent Contractors;
>
> The policy shall also contain a Per Project Aggregate limit and shall be endorsed to name Zuma NYC…and their officers, partners, members, employees and agents as Additional Insureds… **Contractors coverage shall be primary and non-contributory** with respect to additional insureds coverage.  Waiver of Subrogation to be provided in favor of Additional Insureds. (emphasis added)

In accordance with this provision, Legacy obtained insurance from Old

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Republic with Zuma named as an additional insured. Subsequently, Legacy subcontracted work to Marlin, and as a term of the subcontract agreement, Marlin was required to obtain insurance naming Legacy and Zuma as additional insureds. The subcontract agreement also contained a rider regarding insurance and indemnification which subordinates the subcontract agreement to the agreement between Legacy and Zuma. It provides:

> **This agreement (Rider) serves as Rider to AIA document A401 1997 or Purchase Order form for project noted above (A401) as executed by the parties hereto and is subordinate to prime contract as executed by Contractor and Owner (Prime Contract).** If and where A401 is not consistent with Rider or Prime Contract, A401 shall be superseded by same. Parties hereto are otherwise in agreement with and bound by A401 as executed.

> INSURANCE

> Subcontractor will issue certificate of liability, workers compensation and disability insurance equal to or exceeding statutory requirements or other as required by prime contract to which this agreement is subordinate....

> INDEMNIFICATION

> A. To the fullest extent permitted by law, Marlin Mechanical, Inc., shall indemnify and hold harmless Legacy Builders/Developers, Corp. et al. the Owner...from and against claims, damages, losses and expense, including but not limited to attorney's fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property.... Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which could otherwise exist as to a party or person described in this agreement....

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> In addition to this agreement, Marlin Mechanical, Inc. will
> also be required to comply with the insurance requirement,
> if any, of each specific job. (emphasis added)

In interpreting these contractual provisions, the parties dispute whether Marlin, in its insurance policy agreement with Harleysville, agreed to serve as primary insurer. Old Republic argues that the contract between Legacy and Marlin expressly incorporated the insurance requirements contained in the prime contract between Legacy and Zuma, including the provision that each subcontractor was required to obtain its own primary insurance (*see Zurich Am. Ins. Co. v Harleysville Ins. Co.*, 194 F Supp 3d 253 [SD NY 2016]). As such, Harleysville, as Marlin's insurer, should be held primarily liable for the damages which arose as a result of Marlin's subsequent subcontract with Aleta. Harleysville on the other hand argues that its policy agreement with Marlin states that in order to be considered the primary insurer, the underlying contract must include insurance requirement language that the coverage shall be "primary and noncontributory," and although that language exists in the prime contract, it is not present in the Legacy-Marlin subcontract, and therefore should not be considered binding upon Marlin (*see Poalacin v Mall Props, Inc.*, 155 AD3d 900 [2d Dept 2017]).

In the instant case, the underlying Zuma-Legacy contract requires every subcontractor to obtain primary insurance. This distinguishes the instant case from the *Poalicin* case relied upon by Harleysville, in which there was no such provision. Evaluating the contractual provisions in light of Harleysville's motion for partial summary judgment, they are at best ambiguous as to whether Harleysville's insurance policy with Marlin ought to be deemed primary or excess for any injuries suffered by Mr. Boyar in the underlying personal injury case. Accordingly, summary judgment on that issue cannot be awarded at this juncture. Consequently, the Court

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also cannot summarily decide at this juncture that Harleysville has no duty to defend the underlying defendants (*see Fitzpatrick v American Honda Motor Co., Inc.,* 78 NY2d 61 [1991]; *Sturges Mfg. Co. v Utica Mut. Ins. Co.,* 37 NY2d 69, 71 [1975]).

Accordingly, it is

ORDERED that the defendant's motion for partial summary judgment is denied in its entirety and counsel are directed to appear for a status conference in Room 490, 111 Centre Street on September 5, 2018 at 2:15PM.

Dated: 7/23/18

ENTER:

Anthony Cannataro, JSC

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