

**Kookmin Best Ins. Co., LTD v Cambridge Mut. Fire
Ins. Co.**

2020 NY Slip Op 30148(U)

January 9, 2020

Supreme Court, Kings County

Docket Number: 522354/17

Judge: Dawn M. Jimenez-Salta

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At an IAS Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of January, 2020.

P R E S E N T:

HON. DAWN M. JIMENEZ-SALTA

Justice.

-----X

KOOKMIN BEST INSURANCE COMPANY, LTD
(US branch) f/k/a LEADING INSURANCE GROUP
INSURANCE COMPANY, LTD,

Plaintiff(s),

- against -

Index No. 522354/17
Mot. Seq. #2

CAMBRIDGE MUTUAL FIRE INSURANCE
COMPANY,

Defendant.

-----X

The following papers numbered 1 through 4 read herein:

Papers Numbered:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____

1-3
4

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Upon the foregoing papers in this insurance coverage dispute, plaintiff Kookmin Best Insurance Company, Ltd., f/k/a Leading Insurance Group Insurance Company, Ltd. (KBIC) moves (in motion sequence [MS] 2) for an order, pursuant to CPLR 3212, granting it summary judgment: (1) declaring that defendant, Cambridge Mutual Fire Insurance Company (Cambridge), is obligated to provide L&C 6417 18th Ave. Inc. (L&C) with a defense and indemnity in the underlying personal injury action commenced by Marylou Levenhar (Levenhar Action) on a primary basis, and (2) declaring that Cambridge must

reimburse KBIC for all costs, fees and disbursements that it paid on L&C's behalf in the Levenhar Action.

Background

Levenhar's Accident

This insurance coverage dispute arises out of a December 8, 2013 accident in which Marylou Levenhar (Levenhar) was allegedly injured when she tripped and fell on the metal cellar door on the sidewalk abutting the premises at 6417 18th Avenue in Brooklyn (Premises).

The Compustar Lease

L&C owns the Premises. Prior to Levenhar's accident, L&C purportedly leased the Premises to L&L 18th Ave. Computer Inc. d/b/a Compustar (Compustar), pursuant to a March 1, 2010 lease (Compustar Lease). Paragraph 8 of the Compustar Lease provides, in relevant part, that:

“Tenant agrees, at Tenant's sole cost and expense, to maintain commercial general liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises, effective from the date Tenant enters into possession of the demised premises and during the term of this lease. Such insurance shall be in an amount and with carriers acceptable to Owner. Such policy or policies shall be delivered to Owner. . . .”

The Cambridge Policy

Cambridge issued a businessowners insurance policy to Compustar, effective from October 23, 2013 through October 23, 2014 (Cambridge Policy). The Cambridge Policy

contains an endorsement (Form BP0402) entitled "ADDITIONAL INSURED - MANAGERS OR LESSORS OF PREMISES," which provides, in relevant part:

"A. The following is added to Paragraph C. WHO IS AN INSURED in the Businessowner Liability Coverage Form:

- 4. The person or organization shown in the Schedule is also an insured, but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule."

A Declaration in the Cambridge Policy identifies L&C as the additional insured under the foregoing endorsement.

The KBIC Policy

KBIC issued a commercial liability policy to L&C, effective from September 10, 2013 through September 10, 2014 (KBIC Policy). Section IV, paragraph 4 of the KBIC Policy, entitled "Other Insurance," provides, in relevant part:

"4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph **b.** below applies. . . .

b. Excess Insurance

(1) This insurance is excess over:

* * *

- (b) Any other primary insurance available to you covering liability for damages arising out of the premises . . . for which you have been added as an additional insured by attachment of an endorsement.
- (2) When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any ‘suit’ if any other insurer has a duty to defend the insured against that ‘suit.’ If no other insurer defends, we will undertake to do so, but we will be entitled to the insured’s rights against all those other insurers.”

*The Levenhar Action*¹

On October 20, 2014, Levenhar and her husband commenced the Levenhar Action against L&C, Compustar and others, alleging that L&C owned, operated, maintained, managed and controlled the Premises and the sidewalk which contained metal cellar doors (*id.* at ¶¶ 16-30). The Levenhar Action complaint asserts a cause of action against L&C, Compustar and the other defendants for negligence:

“[o]n or about the 8th day of December 2013, the plaintiff, **MARYLOU LEVENHAR**, was lawfully and properly traversing upon the aforesaid premises, when she was caused to trip and/or slip and fall, and otherwise be precipitated to the ground, thereby causing [her] to sustain severe and serious personal injuries, due to the negligence of the defendants, in the ownership, operation, maintenance, management, and control of the above said premises” (*id.* at ¶ 61).

Levenhar’s husband, Julius Levenhar, asserted a derivative claim against L&C, Compustar and the other defendants for loss of consortium (*id.* at ¶¶ 69-70).

¹ See *Levenhar, et ano. v The City of New York, et al.*, Kings County index No. 14913/14.

This Declaratory Judgment Action

By a January 29, 2016 letter, KBIC, on behalf of L&C, tendered L&C's defense and indemnification in the Levenhar Action to Cambridge. Cambridge denied coverage to L&C.

On November 16, 2017, KBIC commenced this declaratory judgment action against Cambridge by filing a summons and an unverified complaint seeking a declaration that Cambridge has a duty to provide L&C with a defense and indemnification in the Levenhar Action (complaint at ¶ 1). The complaint asserts two causes of action for: (1) a judgment declaring that Cambridge is required to defend and indemnify L&C in the underlying action, and (2) a judgment declaring that Cambridge must reimburse KBIC for the costs, fees and disbursements that it paid on L&C's behalf in the Levenhar Action.

On January 17, 2018, Cambridge answered the complaint, denied the material allegations therein and asserted several affirmative defenses.

KBIC's Instant Summary Judgment Motion

KBIC now moves for summary judgment granting the relief sought in the complaint based on the terms of the Compustar Lease, the Cambridge Policy and the KBIC Policy. KBIC submits a copy of the Compustar Lease that it obtained from Cambridge during document discovery, and argues that it "explicitly required Compustar to procure general liability insurance on L&C's behalf." KBIC argues that Cambridge has a duty to defend and indemnify L&C in the Levenhar Action based on the additional insured endorsement in the Cambridge Policy, which extends coverage to L&C "with respect to liability arising out of

ownership, maintenance or use of that part of the premises leased to [Compustar] . . .” KBIC asserts that Levenhar’s accident on the sidewalk abutting the Premises arises out of the “ownership, maintenance or use” of the Premises, as a matter of law. KBIC also argues that Cambridge’s coverage obligation to L&C is primary to KBIC’s coverage obligation based on the “other insurance” clause in the KBIC Policy.

Cambridge, in opposition, argues that KBIC “failed to submit sufficient evidence in admissible form demonstrating an absence of any material issue of fact to establish a *prima facie* showing of entitlement to judgment as a matter of law” because it relies on unauthenticated and inadmissible copies of the Compustar Lease and the Cambridge Policy. Cambridge notes that KBIC’s summary judgment motion is supported by an attorney affirmation and an affidavit from KBIC’s Claims Litigation Supervisor, Frank Rodriguez, which only authenticated the KBIC Policy.

Alternatively, if the Compustar Lease is admissible, Cambridge argues that the Compustar Lease only requires Compustar to procure insurance on behalf of L&C regarding “claims for bodily injury . . . **occurring in or upon the demised premises**” and the Compustar Lease defines the “demised premises” as the “Ground Floor Store and Basement” of the Premises. Cambridge argues that the metal cellar doors on the sidewalk adjacent to the Premises are not included in the Compustar Lease’s definition of the “demised premises.”

Cambridge further contends that the Compustar Lease is ambiguous because paragraph 4 only requires Compustar to make “nonstructural” repairs to the sidewalk, while

paragraph 30 obligates Compustar to make “all repairs and replacements” to the sidewalk. Cambridge notes that neither of those paragraphs of the Compustar Lease “expressly address the duty to make structural repairs to the metal cellar doors . . .” Cambridge also argues that the “Other Insurance” clauses in the Cambridge and the KBIC Policies “cancel each other out” and, thus, KBIC and Cambridge “must apportion the costs of defending and indemnifying” L&C.

KBIC, in reply, seemingly argues that it was not required to submit an affidavit authenticating the Cambridge Policy or the Compustar Lease in support of its summary judgment motion because “Cambridge has not asserted that the Cambridge Policy submitted by KBIC is inaccurate[,]” and the Cambridge Policy and the Compustar Lease annexed to KBIC’s moving papers were produced by Cambridge during the course of discovery.

On the merits, KBIC argues that “New York courts have repeatedly held, for purposes of interpreting identical additional insured endorsements, that an accident occurring on the abutting sidewalk arises out of the ‘ownership, maintenance or use’ of the leased premises as a matter of law[,]” “regardless of the tenant’s obligations to repair the sidewalk under the lease agreement.” Regarding the priority of coverage, KBIC argues that when Compustar agreed in the Compustar Lease to procure general liability insurance for L&C as an additional insured, it agreed that coverage would be primary, as a matter of law.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]). “To establish prima facie entitlement to judgment as a matter of law, a movant for summary judgment must come forward with evidentiary proof, *in admissible form*, demonstrating the absence of any triable issues of fact” (*Gonzalez v Abreu*, 162 AD3d 748, 748 [2018] [emphasis added]; *see also Deutsche Bank Nat. Tr. Co. v Brewton*, 142 AD3d 683, 685 [2016] [same]. “The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Gonzalez*, 162 AD3d at 748).

Here, KBIC seeks summary judgment based on the terms of unauthenticated documentary evidence. While KBIC claims that the Compustar Lease and the Cambridge Policy were exchanged through discovery, this is not a substitute for a proper foundation,² and this absence precludes the court from considering such evidence (*Tougher Industries, Inc. v Dormitory Authority of State*, 130 AD3d 1393, 1396 [2015] [“(t)he mere fact that the email was originally produced by defendant during discovery does not, as plaintiff contends,

² There are mechanisms by which KBIC can authenticate such documents that were produced by Cambridge during discovery, such as a notice to admit or through depositions.

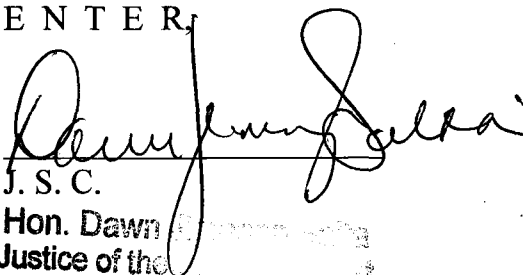
alter that requirement," namely, that a foundation for admissibility be laid]). Accordingly,

it is

ORDERED that KBIC's summary judgment motion (in MS 2) is denied.

This constitutes the decision and order of the court.

ENTER,



J. S. C.
 Hon. Dawn
 Justice of the

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