

<b>Omni Build, Inc. v Dimver &amp; Assoc., Inc.</b>
2020 NY Slip Op 31631(U)
May 28, 2020
Supreme Court, Kings County
Docket Number: 507368/16
Judge: Wayne P. Saitta
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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 28<sup>th</sup> day of May, 2020.

P R E S E N T:

HON. WAYNE P. SAITTA,  
Justice.  
-----X  
OMNI BUILD, INC.,  
Plaintiff,

- against -

Index No. 507368/16

DIMVER & ASSOCIATES, INC. and RELIABLE  
GENERAL AGENCY, INC.,  
Defendants.  
-----X

The following e-filed papers read herein:

NYSEF Nos.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>112-113, 135<sup>1</sup></u>	<u>138-139, 172</u>
Opposing Affidavits (Affirmations) _____	<u>175-176</u>	<u>183</u>
Reply Affidavits (Affirmations) _____	<u>197</u>	<u>198</u>
Other Papers <u>Reliable's Statement of Material Facts</u>	<u>Unnumbered</u>	

Upon the foregoing papers, defendant Reliable General Agency, Inc. (Reliable) moves, in motion (mot.) sequence (seq.) seven, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Omni Build, Inc.'s (Omni) breach of contract and negligence claims against it. Reliable further moves for summary judgment dismissing

<sup>1</sup> While the court normally does not number memoranda, the plaintiff utilizes memoranda to oppose mot. seq. eight and in reply to mot. seq. seven. As a result, the court has numbered these as well as defendant Reliable's memorandum in support of mot. seq. seven .

defendant Dimver & Associates, Inc.'s (Dimver) cross claims against it. Dimver moves, in mot. seq. eight, pursuant to CPLR 3212, for summary judgment dismissing Omni's action against it.

### **The Parties**

Omni is a general contracting business based in Brooklyn, New York that is owned by its principal, Vyacheslav Fyabeshev (Slava). Reliable is an insurance broker based in Brooklyn that is owned by its principal, Russell Kapusta (Kapusta). Dimver is also an insurance broker based in Brooklyn that is owned by its principal, Dimitri Verkhovsky (Dimitri).

### **Background Facts and Procedural History**

On November 1, 2002, Dimver and Reliable entered into a written "Insurance Producer Agreement" whereby Reliable agreed to place insurance for Dimver's customers and the two parties would split the commissions on placed policies "at a percentage to be determined with each and every policy placed with [Reliable]." In a letter dated October 5, 2007, Slava notified Scottsdale Insurance Company (Scottsdale) that Reliable was taking over as Omni's broker of record and that Russell Bond and Company, Inc. (RBC) was taking over as Omni's wholesale insurance broker.<sup>2</sup> Thereafter, as Omni's retail broker of record, Reliable filled out an insurance application for a commercial general liability (CGL) policy with Scottsdale. Ultimately, a CGL

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<sup>2</sup> Russell Kapusta and RBC are unrelated notwithstanding the fact that they share the name Russell.

policy was placed with Scottsdale through RBC which covered Omni for the period of October 23, 2007 to October 23, 2008. Notably, the policy did not contain an exclusion for Labor Law §§ 240 (1) and 241 (6) claims brought against Omni by employees of subcontractors hired by Omni. Thus, the Scottsdale policy provided coverage for Labor Law claims brought against Omni by the employees of subcontractors. Although Reliable was listed as Omni's broker of record, Kapusta testified at his deposition that, in reality, Dimver was Omni's retail broker and that Reliable merely served as an interface between Dimver and RBC. In particular, Kapusta testified that Dimver did not have access to wholesale brokers who represented insurance carriers and that Dimitri approached him about having Reliable serve as Omni's broker of record so that a CGL policy covering Omni could be obtained. According to Kapusta, under this arrangement, Reliable had no direct contact with Omni and Reliable filled out the insurance application based upon information that was relayed to it by Dimver. Kapusta further testified that Reliable and Dimver split the insurance policy commissions paid by Omni on a 50/50 basis.

On October 14, 2008, Scottsdale notified Omni that it was canceling the CGL policy based upon "Exposures not as Represented on Application." Thereafter, a replacement CGL policy issued by Northfield Insurance Company (Northfield) was obtained in the same manner as the Scottsdale policy had been obtained. In particular, acting as Omni's broker of record, Reliable filled out an insurance application based

information provided by Dimver, and Reliable and Dimver split the commissions paid on the Northfield policy. However, Atlantic Risk Specialists (Atlantic) replaced RBC as the listed wholesale broker on the Northfield policy. The Northfield policy provided coverage for the period running from October 15, 2008 to October 15, 2009. Unlike the Scottsdale policy, the Northfield policy contained an exclusion for Labor Law claims brought by the employees of subcontractors hired by Omni. In this regard, Kapusta testified that, although he attempted to find a replacement CGL policy that provided such coverage, at that point in time, market conditions made it “impossible” to obtain subcontractor coverage.

On April 27, 2009, Jerzy Snop sustained various injuries while working on a construction project located at 290 13<sup>th</sup> Street in Brooklyn (the premises) when he was stuck by cinder blocks being delivered to the job site. At the time of the accident, Snop was employed by a sub-subcontractor, Stone Age Equipment (Stone Age). Prior to the accident, the owner of the premises, Eugene Khavinson, hired Omni to serve as the general contractor on the construction project. Thereafter, Omni hired Zom Equipment (Zom) to perform masonry work on the project. Zom, in turn, hired Snop’s employer, Stone Age. In or about March 2010, Snop commenced an action against Zom, Omni, Khavinson, and the managing agent of the premises, 290 13<sup>th</sup> Street LLC (the LLC) under Kings County Index No. 6637/10. Among other things, the complaint alleged that his plaintiff’s injuries were caused by violations of Labor Law §§ 240 (1), 241 (6), and 200

(the underlying personal injury action). Subsequently, the defendants asserted third-party claims against Stone Age seeking indemnification.

After being served with the complaint, Omni notified Northfield of the claim. In a letter dated April 29, 2010, Northfield agreed to defend Omni in the underlying personal injury action. However, Northfield reserved its right to decline coverage inasmuch as Snop's claim arose from an injury to the employee of a subcontractor, and such claims were excluded under the Northfield policy. Discovery in the underlying personal injury action was completed on or about March 29, 2013. Northfield then commenced a declaratory judgment action in the United States District Court for the Eastern District of New York (the federal action) seeking an order declaring that its policy did not provide coverage to Omni with respect to Snop's claims in the underlying personal injury action. Thereafter, on October 18, 2013, Omni commenced a third-party action to the federal court action against Reliable and Atlantic alleging breach of contract, negligence, and breach of fiduciary duty causes of action. The gravamen of Omni's claims against Reliable and Atlantic was that Omni instructed them to obtain a policy covering Omni for injuries sustained by the employees of subcontractors, but the Northfield policy that they procured failed to contain such coverage. On March 8, 2014, Omni filed an amended third party complaint in which it asserted claims against Reliable and Dimver, but not Atlantic. On February 3, 2015, a judgment was entered in the federal court action declaring that Northfield had no obligation to defend or indemnify Omni in the

underlying personal injury action. On April 6, 2016, a memorandum and order was entered in the federal court action dismissing Omni's third-party action against Reliable and Dimver based upon lack of federal jurisdiction. The dismissal was without prejudice to commencing a new action in state court.

On September 8, 2014, while the federal action was pending, the parties in the underlying personal injury action entered into a settlement agreement whereby Zom agreed to pay Snop \$1 million and Omni, Khavinson, and the LLC agreed to pay Snop \$750,000. Of the \$750,000, \$200 was to be paid by Khavinson and the LLC and the remaining \$749,800 was to be paid by Omni. However, inasmuch as Omni lacked the funds to pay the amount owed under the settlement agreement, the LLC loaned the payoff amount to Omni in exchange for a promissory note.

On May 5, 2016, following the dismissal of its third-party action in the federal action, Omni commenced the instant action against Dimver and Reliable. Among other things, the complaint alleged that Omni retained the defendants as its brokers to procure a CGL policy on its behalf, that Omni informed the defendants that any such policy must include coverage for claims asserted by the employees of subcontractors, and that the Northfield policy procured by Dimver and Reliable failed to contain such coverage. Based upon these allegations, the complaint asserted three causes of actions against the defendants sounding in negligence, breach of contract, and breach of fiduciary duty.

Subsequently, Dimver asserted cross claims against Reliable seeking contribution. The instant motions are now before the court.

### **Reliable's Motion for Summary Judgment**

Reliable moves for summary judgment dismissing Omni's negligence and breach of contract claims against it. Reliable further moves for summary judgment dismissing Dimver's contribution cross claims against it. In support of its motion to dismiss Omni's claims, Reliable maintains that the evidence in this case, including the deposition testimony of numerous witnesses, as well as documentary evidence, conclusively establishes that Reliable was never Omni's insurance broker. Instead, Reliable maintains that the evidence establishes that Dimver was Omni's actual broker and that Reliable's sole function was to interface with insurance carriers on Dimver's behalf inasmuch as Dimver was not qualified to do so on its own. In particular, Reliable contends that the deposition testimony of Slava, Dimitri, and Kapusta demonstrate that there were no direct communication between Omni and Reliable. Instead, all communications between these two parties went through Dimver. Thus, Reliable maintains that any claims it has for the failure to procure a CGL policy which covered subcontractor's employees lie solely against Dimver. Reliable further contends that the only reason that it has been brought into this action is that it was listed as the broker of record for Omni. However, according to Reliable, this does not automatically generate a contract between Reliable and Omni or otherwise create a tort duty between the two.



In support of that branch of its motion which seeks summary judgment dismissing Dimver's cross claims against it, Reliable argues that a party may not seek contribution for economic loss resulting exclusively from breach of contract. In addition, inasmuch as Dimver has admitted that Reliable merely procured the insurance that was requested by Dimver on behalf of Omni, Dimver cannot demonstrate that Reliable did anything wrong.

In opposition to Reliable's motion, Omni notes that Reliable entered into an agreement with Dimver whereby Reliable accepted the role of Omni's insurance broker in exchange for an equal split of the commissions earned from obtaining Omni an insurance policy in partnership with Dimver. Omni further notes that Kapusta admitted that he signed all of the certificates of insurance for Omni. Under the circumstances, Omni maintains that there is an issue of fact as to whether or not Reliable acted as its broker in procuring the Northfield policy. Omni further contends that there are issues of fact as to whether Reliable breached its contractual duty to Omni or was otherwise negligent in failing to procure a policy that contained coverage for subcontractor's employees and/or in failing to promptly notify Omni that it was unable to procure a policy with such coverage. In particular, Omni points to Slava's deposition testimony, wherein he stated that nobody informed him that there was not subcontractor coverage under the Northfield policy, that he believed that there was such coverage, and that he did not find out that there was no such coverage until after Snop's accident, when Northfield

sent Omni a letter advising it that the policy did not provide coverage for injuries sustained by subcontractors' workers.

In reply to Omni's opposition papers, Reliable maintains that Omni's claims against it must fail inasmuch as Omni has failed to point to any evidence that it specifically directed Reliable to obtain the subject coverage. In this regard, Reliable reiterates its contention that all of the evidence in this case indicates that there was no direct communications between Omni and Reliable.

### Discussion

It is well-settled that an insurance broker who is retained to procure adequate insurance coverage for an insured may be held liable under a theory of either negligence or breach of contract if the policy obtained does not cover a loss for which the broker contracted to provide insurance, and the insurance carrier refuses to cover the loss (*Houston Cas. Co. v Cavan Corp. of NY*, 161 AD3d 427, 428 [2018]; *Bruckmann, Rosser, Sherrill & Co. v Marsh USA Inc.*, 65 AD3d 865, 866 [2009]). Further, if the coverage requested by the insured cannot be obtained, the broker has a duty to promptly notify its client (*Hoffend & Sons, Inc. v Rose & Kliernan, Inc.*, 7 NY3d 152, 157 [2006]). Moreover, a wholesale insurance broker, which lacks privity with an insured, may still be held liable when it fails to fully inform the insurance company of all the information in its possession regarding the coverage requested by the insured (*Prime Alliance Group Ltd v Affiliated FM Ins. Co.*, 159 AD3d 845, 847 [2018], *lv dismissed* 32 NY3d 950 [2018],

citing *Chandler v H.E. Yerkes & Assoc., Inc.*, 784 F Supp 119, 123-124 [SD NY 1992]). However, “to set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy (*American Bldg. Supply Corp., v Petrocelli Group, Inc.*, 19 NY3d 730, 735 [2012], citing *Hoffend & Sons, Inc.* 7 NY3d at 155).

Here, Reliable has failed to establish, as a matter of law, that its contacts with Omni were insufficient to establish privity between the two, and thereby exempt Reliable from liability for the failure to procure coverage for injuries sustained by subcontractors’ employees. In particular, although Reliable maintains that it was merely the wholesale broker for the Northfield policy, the documentation before the court indicates that RBC was the wholesale broker for the Scottsdale policy and that Atlantic was the wholesale broker for the Northfield policy. Further, although almost all communications between Omni and Reliable went through Dimver, it does not follow that there was no connection between the parties. In particular, prior to the procurement of the Scottsdale policy, Omni directly named Reliable as its broker of record. Further, Omni made requests for certificates of insurance directly to Reliable, and Reliable signed all such certificate. In addition, Reliable directly received a portion of the commissions that Omni paid on the Scottsdale and Northfield policies. As a final matter, there is no merit to the argument raised in Reliable’s reply papers that Omni’s claims must be dismissed inasmuch as it never directly requested that Reliable procure a policy which covered subcontractor

injuries. In particular, the Northfield policy replaced the Scottsdale policy, which provided such coverage. Moreover, Kapusta testified that he attempted to obtain a policy which provided such coverage after the Scottsdale policy was cancelled, but that it was impossible to find subcontractor coverage at that time. Thus, Reliable was clearly aware that Omni wanted a policy that provided coverage for injuries sustained by subcontractors employees. However, Reliable failed to procure a policy which provided such coverage and allegedly failed to notify Omni that such coverage was not available. Accordingly, that branch of Reliable's motion which seeks summary judgment dismissing Omni's breach of contract and negligence causes of action against it is denied.

Turning to that branch of Reliable's motion which seeks summary judgment dismissing Dimver's cross claims for contribution and indemnification, any liability that Dimver faces in this action will be premised upon its own fault inasmuch it was an agent that had direct contact with Omni. Thus, Dimver cannot seek indemnification from Reliable (*Bleecker St. Health & Beauty Aids, Inc., v Granite State Ins. Co.*, 38 AD3d 231, 233 [2007]). Moreover, Dimver's contribution claim against Reliable fails inasmuch as it may not seek recovery for economic loss resulting exclusively from breach of contract (*Abetta Boiler & Welding Serv., Inc., v American Intl. Specialty Lines Ins. Co.*, 76 AD3d 412, 414 [2010]). Accordingly, that branch of Reliable's motion which seeks summary judgment dismissing Dimver's cross claims against it is granted.

### **Dimver's Motion for Summary Judgment**

Dimver moves for summary judgment dismissing plaintiff's action against it. In so moving, Dimver argues that it did not breach its duty to provide the insurance coverage requested by Omni. In support of this argument, Dimver maintains that numerous factors confirm that Omni accepted the Northfield policy, and was fully aware that it did not contain coverage for claims arising out of injuries sustained by subcontractors' employees such as Snop. In particular, Dimver notes that Dimitri testified that he informed Slava about the difference in coverage between the Scottsdale and Northfield policies. In addition, Dimver points out that the premiums on the Northfield policy were 50% less than the premiums on the Scottsdale policy. Further, Dimver notes that Slava was experienced in the construction business and was familiar with the insurance requirements in this field. In this regard, Dimver points out that Slava testified that he read the Scottsdale policy and made sure that it contained subcontractor coverage inasmuch as this was an important consideration for him. Thus, Dimver maintains that Slava must have read the Northfield policy and determined that it did not contain such coverage, particularly in light of the fact that the premiums on this policy were substantially less than the premiums on the Scottsdale policy. In further support of its argument that Omni was aware of and accepted the coverage in the Northfield policy, Dimver notes that even after Snop's accident, Omni kept the same coverage with Northfield for the period running from 2009 to 2010, 2010 to 2011, 2011 to 2012, and

2012 to 2013. Dimver also points out that, for the 2011/2012 renewal period, Reliable was able to obtain a quote from Endurance Insurance which covered subcontractors' claims, but Omni declined this policy since its premiums were substantially higher than the premiums on the Northfield policy.

In further support of its motion for summary judgment, Dimver argues that, even if there are issues of fact regarding whether Omni was advised of the lack of subcontractor coverage in the Northfield policy, Omni cannot show that the failure to procure such coverage was the actual and proximate cause of Omni's damages. In particular, Dimver maintains that such coverage was not available to Omni during the 2008/2009 policy period during which the underlying accident occurred. In support of this contention, Dimver notes that Kapusta testified that he attempted to obtain such coverage, but that it was impossible to obtain at that time. Dimver also submits an expert affidavit by Joanne Bentivegna, a Certified Insurance Counselor, Certified Risk Manager, and Construction Risk settlement Specialist. According to Ms. Bentivegna, given Omni's loss history and small size, no underwriter could find Omni a viable insurer willing to issue a policy covering claims by subcontractors.

Dimver also argues that Omni's complaint against it must be dismissed based upon Omni's voluntary payment of the settlement amount in the underlying personal injury action. In particular, Dimver maintains that the voluntary payment doctrine bars Omni from any recovery against it inasmuch as Omni voluntarily paid almost the entire

settlement amount notwithstanding the fact that the court denied Khavinson and the LLC's motion for contribution and indemnification against Omni.

In opposition to Dimver's motion, Omni maintains that there are clear issues of fact regarding whether or not Dimver informed it that the Northfield policy contained coverage for subcontractors' claims. In this regard, Omni notes that Slava testified that nobody informed him about the lack of coverage, and he did not learn about this until after the accident when Northfield informed him that the accident was not covered. In addition, Omni points out that Dimitri admitted during his deposition that Dimver never notified Omni in writing regarding the lack of coverage in the Northfield policy. Omni also contends that it cannot be charged with presumptive knowledge of the terms and limits of the Northfield policy inasmuch as it properly relied upon Dimver's representations regarding the policy's coverage. In particular, Omni maintains that, inasmuch as Dimver provided the correct coverage with the previous Scottsdale policy, Omni reasonably believed that this coverage was also provided by the Northfield replacement policy. In further opposition to Dimver's motion, Omni avers that Dimver has failed to establish that subcontractor coverage could not be obtained for the relevant policy period. In any event, Omni argues that, even if such coverage could not be obtained, Dimver had a duty to notify it of this fact, which Dimver failed to do. As a final matter, Omni contends that the voluntary payment doctrine is no defense to an insured's claim against his or her broker for failure to procure proper insurance coverage.

In support of this argument, Omni points to case law holding that the settlement of an underlying personal injury claim does not preclude a subsequent action for malpractice.

### Discussion

Here, there are issues of fact regarding whether or not Dimver was negligent or otherwise breached its contractual duty in failing to procure an insurance policy that provided coverage for injuries sustained by subcontractors' employees. In particular, although Dimitri testified that Slava was fully aware that the Northfield policy did not contain such coverage and accepted the policy, Slava testified that he requested such coverage and was unaware that the policy did not cover subcontractors until he was notified by Northfield after the accident. While the facts that the Northfield policy's premiums were substantially less than the premiums on the Scottsdale policy, and that Omni continued to maintain the Northfield policy, with its limited coverage, for several years after the accident clearly raise issues regarding Slava's credibility, it is improper for the court to weigh credibility when ruling on a summary judgment motion (*Pryor v Mandelup, LLP, v Sabbeth*, 82 AD3d 731, 732 [2011]). Further, the fact that Slava failed to read the terms of the Northfield policy merely raises issues of his comparative negligence (*American Bldg. Supply Corp., v Petrocelli Group, Inc.*, 19 NY3d 730, 736-737 [2012]).

Turning to Dimver's argument that Omni's claims must be dismissed against it inasmuch as the subcontractor coverage could not have been obtained when the



Northfield policy was procured, it is well settled that an insurance broker's has a duty to procure the requested coverage, or to promptly notify the client if it is determined that the coverage cannot be procured (*Hoffend & Sons*, 7 NY3d at 157; *Cosmos, Queens Ltd, v Mattias Saechang Im Agency* 74 AD3d 682, 683 [2010]). Here, assuming for the sake of argument, that Dimver has established that the subcontractor coverage could not have been procured for Omni at the time the Northfield policy was issued, Slava testified that Dimver never notified Omni that the coverage could not be procured. Thus, there is an issue of fact regarding whether Dimver breached its duty to Omni regardless of whether or not the coverage could have been procured.

As a final matter, there is no merit to Dimver's argument that Omni's claims against it are barred under the voluntary payment doctrine. This "common-law doctrine bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material facts of law" (*Dillon v U-A Columbia Cablevision of Westchester, Inc.*, 100 NY2d 525, 526 [2003]). In particular, when a payor voluntarily makes a payment to a payee, the payor may not subsequently seek to recover the payment from the payee. Here, as a general contractor, Omni was subject to vicarious liability for Snop's injuries under both Labor Law §§ 240 (1) and 241 (6). Omni's settlement of Snop's underlying claims against it does not preclude it from seeking recovery against Dimver for failing to procure the coverage allegedly requested by Omni.

**Summary**

In summary, that branch of Reliable’s motion which seeks summary judgment dismissing Omni’s breach of contract and negligence claims against it is denied. That branch of Reliable’s motion which seeks summary judgement dismissing Dimver’s cross claims against it is granted. Dimver’s motion for summary judgment dismissing Omni’s complaint against it is denied.

WHEREFORE, it is hereby ORDRED that the Dimver’s cross claims against Omni are dismissed.

This constitutes the decision and order of the court.

ENTER,



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J. S. C.