Live Nation Worldwide, Inc. v Best Buy Stores, L.P.
2020 NY Slip Op 32366(U)
July 20, 2020
Supreme Court, New York County
Docket Number: 450475/2020
Judge: Alan C. Marin

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

LIVE NATION WORLDWIDE, INC. and LIVE NATION MARKETING, INC.,

Plaintiffs,

-against-

DECISION and ORDER
Index no. 450475/2020
Motion no. 001

BEST BUY STORES, L.P.,

Defendant.

The Court has considered efiled documents 11 through 17; 19 through 31; 34 through 42.

This is a case involving plaintiffs' insurance coverage regarding the lawsuit brought by Mark Perez, which was tried before a jury with a verdict in Mr. Perez's favor on December 9, 2019 (*Perez v Beach Concerts, Inc.*, index no. 158373/2013).

Plaintiffs Live Nation Worldwide, Inc. and Live Nation Marketing, Inc. ("Live Nation"[1]) are licensed to manage and operate the theater at Jones Beach in Nassau County. In such capacity, they offer companies the use of vendor booths so as to advertise their products or services. To that end, Best Buy and Live Nation entered into a sponsorship agreement on about May 7, 2013, which, among other things, granted Best Buy the right: to place an agreed-upon number of vinyl signs along the main walkway of the orchestra; to distribute literature and promotional items for up to ten agreed-upon concerts; to have one metal trussing display of fifteen by twenty feet to conduct interactive promotional activity; and to show a 30-second commercial ten times during each concert on the theater's interactive TV monitors and video screens.

[1] Pursuant to paragraph 5(a)(v) of the sponsorship agreement, Best Buy agreed to "list Manager [Live Nation Marketing, Inc.] (and its landlord, if any), and their respective parents, members, partners, affiliates, divisions and subsidiaries, and their respective officers, directors, shareholders, employees, agents and representatives as 'Additional Insureds' with respect to any and all Claims arising from Sponsor's operations" (document 13, p. 3).

At all relevant times, Live Nation Marketing, Inc. has been a wholly owned subsidiary of Live Nation Worldwide, Inc.; see the June 15, 2020 affidavit of Michael G. Rowles, executive vice-president, general counsel and secretary of Live Nation Entertainment, Inc. (document 39).

Justice Gerald Lebovits described Mark Perez's accident in his Decision and Order of June 30, 2016, which granted him summary judgment against Live Nation under Labor Law § 240 (1). The citations are omitted; the information was all supplied by Mr. Perez; Michael Brogden, the operator of the forklift, was a Live Nation employee.

> According to plaintiff, he entered into an agreement with . . . Best Buy to create artwork to improve the aesthetic design to Best Buy's vendor booth at Jones Beach Theater. On June 26, 2013, plaintiff "assist[ed]" defendant Brogden in building the second level to the Best Buy booth. The first level to the booth had already been erected. According to plaintiff, the first level measured "10 feet deep, 20 feet wide and 10 feet high." Brogden was operating a forklift to "lift the horizontal sections of the aluminum trussing [the second level], approximately 15 feet high, to the top of the vertical sections of the structure."
>
> Plaintiff was standing 10 feet off the ground on the first level while Brogden was operating the forklift. According to plaintiff, "Brogden, while operating the forklift, hit the structure, causing [plaintiff] to plummet to the ground."
> (2016 WL 3566115).

The First Department, in affirming Justice Lebovits, indicated that the work required more than one person: "When he fell, plaintiff was helping set up the second tier truss system of a sponsorship booth . . . [which] extended the height of the booth from 10 feet to 16 feet [and which] was comprised of several interlocking parts that were connected in a specific way, and required a forklift and several people to construct it" (154 AD3d 602). Similarly from Justice Lebovits' Order: "[Perez] explained at his ebt that he needed help to assemble the trussing -- the second tier to the Best Buy booth . . . Once he realized that Brogden was the only person whom Live Nation sent to help him, plaintiff decided to assemble the trussing."[2]

Live Nation does not dispute that the proximate cause of Perez's accident was the negligent operation of the forklift by Michael Brogden. Both sides agree that the sole remaining cause of action is count four of Live Nation's complaint, for breach of contract, and they use the identical language: "Did the Sponsorship Agreement require Best Buy to purchase additional insured coverage for Live Nation that would cover Perez's claim?"[3] Each moves for summary judgment thereon.

* * *

[2] In finding liability under Labor Law §240 (1), the First Department upheld Justice Lebovits' determination that Mark Perez was engaged in the alteration of the existing structure at the time of the accident, not in decorative modification; see *Saint v Syracuse Supply Co.*, 25 NY3d 117.

[3] Defendant's Reply Affirmation (document 41, §3) and plaintiffs' Affirmation in Opposition (document 38, §4); section 19 of plaintiffs' Affirmation phrases it a little differently.

Consider the insurance contract at issue in *Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, where an additional insured under the commercial general liability policy (CGL) was covered only with respect to bodily injury or property damage "caused, in whole or in part, by your acts or omissions" [i.e., that of the insured, excavator contractor, BSI]. A Transit Authority employee fell off a platform when he tried to avoid an explosion after a BSI machine touched a live electrical cable buried in concrete. Inasmuch as additional insured Transit Authority had not identified, marked or protected the buried cable, nor turned it off, BSI was not at fault and therefore, the Transit Authority was not an additional insured under the policy..

The Burlington policy is one that required proximate cause, unlike insurance contract language cast in terms of "arising from" - - as is the case with our sponsorship agreement. The Court of Appeals explained that "arising from" is a term that "refers to a link in the chain leading to an outcome . . . that 'any given event, including an injury, is always the result of many causes' " and that not all such causes result in liability. "In contrast 'proximate cause' refers to a 'legal cause' to which the Court has assigned liability." 29 NY3d at 321.

The sponsorship agreement required Best Buy to ensure that all its contractors maintain insurance in specified amounts for commercial general liability and to list them "as 'Additional Insureds' with respect to any and all claims arising from Sponsor's operations." [4]

Defendant argues that Mark Perez could have just as easily been injured being run over by Brogden's forklift while walking in a parking lot at the facility. This hypothetical was not hypothetical in *Christ the King Regional High School v Zurich Ins. Co. of N. Am.*, 91 AD3d 809, 2d Dept, *lv denied* 19 NY3d 806. A company, Talent All American, rented the school's auditorium and three classrooms for a two-day dance competition, during which a woman fell while walking from the parking lot to the front entrance. Such did not come within the "arising from" clause of the insurance contract:

> Rather, All American's "operations" at the school merely furnished the occasion for the accident, much like in *Worth Constr. Co.*, where the fact that the named-insured subcontractor installed a staircase on which the injured plaintiff fell, thus furnishing "the situs of the accident," did not demonstrate that the accident, caused by the installation of fireproofing on the staircase by another subcontractor, arose from the named-insured subcontractor's "operations" (*Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 416).

In *Regal Constr. Corp v National Union Fire Ins. Co. of Pittsburgh, Pa*, 15 NY3d 34, the City of New York had engaged URS Corporation as the construction manager for a renovation project. URS, by written agreement, hired Regal Construction Corporation as the prime contractor, and the agreement required Regal to purchase a CGL policy naming URS as an additional insured. Regal's project manager, Ronald LeClair, was walking through the work site in an area that was

[4] Paragraph 5(a)(v) of the sponsorship agreement (document 13, pp 2-3).

in the process of demolition and had sheets of plywood spread over steel floor joists. When LeClair stepped from the plywood onto a floor joist to show which wall needed to be demolished, he slipped on the joist that had just been painted by URS employees.

The additional insured endorsement provided that URS was an additional insured "only with respect to liability arising out of [Regal's] ongoing operations." The Court of Appeals stated:

> We have interpreted the phrase "arising out of" in an additional insured clause to mean "originating from, incident to, or having connection with" (*Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472). It requires "only that there be some causal relationship between the injury and the risk for which coverage is provided" . . . That the underlying complaint alleges negligence on the part of URS and not Regal is of no consequence, as URS's potential liability for LeClair's injury "arose out of" Regal's operation and, thus, URS is entitled to a defense and indemnification according to the terms of the CGL policy. (15 NY3d at 38).

Admiral Ins. Co v American Empire Surplus Lines Ins. Co., 96 AD3d 585, 1st Dept, goes into some depth on why *Regal* and *Worth*, applying the same principle, came out differently.[5] The case involved a construction project with Cross County Contracting as the contractor for the concrete superstructure. Cross County subcontracted the steel reinforcing work to B & R Rebar Consultants, Inc. Li Xiong Yang, an employee of B & R Rebar, was struck by falling plywood while straightening rebar dowel rods that extended from the concrete floor so that pre-formed concrete could be attached to the rods and create a wall. Cross Country was an additional insured under the primary policy issued to B & R Rebar, "but only with respect to liability arising out of [B & R Rebar's] operations" (96 AD3d at 587). Rebar had been found to be not responsible in any way for Mr. Yang's injuries. The First Department held that Cross County was a covered additional insured inasmuch as the accident arose from B & R Rebar's operations.

To answer the dispositive question: the sponsorship agreement required Best Buy to purchase additional insured coverage for Live Nation that would cover Perez's claim, which arose from the operations of the primary insured.

* * *

[5] See also the Second Circuit's *Federal Ins. Co. v American Home Assur. Co.*, 639 F3d 557.

NOW therefore, in view of the foregoing,

IT IS ORDERED, that motion no. 001 by plaintiffs is granted and defendant's cross motion is denied.

IT IS FURTHER ORDERED that a conference on damages is scheduled for August 19 at 11:30 a.m., or at such other day and time as is mutually agreeable.

ENTER July 20, 2020

Alan C. Marin J.S.C.

ALAN C. MARIN
JUSTICE OF THE SUPREME COURT