

Wesco Ins. Co. v Peninsula Constr. Inc.

2021 NY Slip Op 31043(U)

March 31, 2021

Supreme Court, New York County

Docket Number: 652713/2020

Judge: Arthur F. Engoron

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

PRESENT: HON. ARTHUR F. ENGORON **PART** **IAS MOTION 37EFM**

Justice

-----X

WESCO INSURANCE COMPANY,

Plaintiff,

- v -

PENINSULA CONSTRUCTION INC., DORADO HOUSE
FLUSHING CONDOMINIUM CORP.

Defendant.

-----X

INDEX NO. 652713/2020

MOTION DATE 12/10/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents and for the reasons stated hereinbelow, (1) the instant request by plaintiff, Wesco Insurance Company, pursuant to CPLR 3212, for summary judgment against defendant Dorado House Flushing Condominium Corp. is granted; (2) the instant request by plaintiff, pursuant to CPLR 3215, for a default judgment against defendant Peninsula Construction Inc. ("Peninsula") is granted on the merits and on default; and, (3) the instant request by plaintiff for a judgment declaring that plaintiff is not obligated to defend or indemnify Peninsula in the underlying action captioned Sang Sik Kim v Dorado House Flushing Condominium Corp., et al., Index No. 16563/2015, New York State Supreme Court, Queens County, is granted.

Background

The Underlying Action

Defendant Dorado House Flushing Condominium Corp. ("Dorado") hired defendant Peninsula Construction Inc. ("Peninsula") as a contractor (NYSCEF Doc. 9).

Plaintiff, Wesco Insurance Company, issued a "Workers' Compensation and Employers' Liability Insurance Policy" numbered WWC3097926, effective August 18, 2014 to August 18, 2015, ("the Wesco Policy," NYSCEF Doc. 18) to Peninsula. "Subject to its other terms and conditions," among which is an exclusion for liability assumed under a contract, the Wesco Policy applies to damages that Peninsula must pay due to bodily injury to an employee. The Wesco Policy apparently also requires Wesco "to defend, at our expense, any claim, proceeding or suit against you for damages payable by this insurance." (NYSCEF Documents 1 and 9.)

By summons and complaint dated November 5, 2014 (NYSCEF Doc. 10), non-party Sang Sik Kim ("Kim") commenced an action captioned Sang Sik Kim v Dorado House Flushing

Condominium Corp., et al., Index No. 16563/2015, in New York State Supreme Court, Queens County (“the Underlying Action”). In that litigation, Kim sought damages for injuries that he allegedly suffered on October 14, 2014 while Peninsula employed him at a construction project on premises that Dorado owned in Queens, New York. By third-party summons and complaint dated January 22, 2018 (NYSCEF Doc. 11), Dorado asserted causes of action against Peninsula for (1) common-law indemnification and contribution; (2) contractual indemnification; and (3) breach of contract for failure to procure insurance. (NYSCEF Documents 1 and 9.)

On or about April 30, 2018, by correspondence dated April 23, 2018 from Peninsula’s commercial general liability insurer Northfield Insurance Company (NYSCEF Doc. 19), plaintiff learned of the Underlying Action. By correspondence dated May 24, 2018 (NYSCEF Doc. 20), plaintiff notified Peninsula that plaintiff was disclaiming coverage of the contractual-indemnification and breach of contract claims against it in the Underlying Action. (NYSCEF Doc. 9.)

By Order dated October 23, 2019 (NYSCEF Doc. 12) in the Underlying Action, the Hon. Robert I. Caloras granted Peninsula’s motion for summary judgment “dismissing Dorado’s common-law claims against it” on the ground that “Kim’s alleged accident occurred in the course of employment with Peninsula and that the injuries he allegedly sustained do not rise to the level of a ‘grave injury’ as Workers’ Compensation Law § 11 defines that term and requires to sustain a common-law third-party claim against the worker’s employer.” (NYSCEF Documents 1 and 9.)

The Instant Action

On June 25, 2020, plaintiff commenced the instant action, (1) asserting that the Wesco Policy does not cover the remaining causes of action against Peninsula in the Underlying Action, and, thus, (2) seeking a judgment declaring that plaintiff has no duty to defend or indemnify Peninsula in the Underlying Action (NYSCEF Doc. 1).

On September 30, 2020, Dorado answered the instant complaint with various denials and five Affirmative Defenses (NYSCEF Doc. 6).

Plaintiff now moves (1), pursuant to CPLR 3212, for summary judgment against Dorado; (2), pursuant to CPLR 3215, for a default judgment against Peninsula; and (3) for a judgment declaring that plaintiff has no duty to defend or indemnify Peninsula in the Underlying Action (NYSCEF Doc. 8).

Dorado opposes plaintiff’s requests for summary judgment against Dorado and for a declaration that plaintiff is not obligated to defend or indemnify Peninsula in the Underlying Action. Dorado asserts, inter alia, the following: (1) plaintiff’s instant motion is premature, as neither a preliminary conference nor discovery has occurred; see CPLR 3212(f); and (2) there are issues of fact as to the receipt of notice of the subject third-party action and as to the service of the alleged partial disclaimer of coverage. (NYSCEF Doc. 25.)

In reply, plaintiff asserts, inter alia, the following: (1) Dorado fails to dispute that the Wesco Policy does not cover the remaining claims against Peninsula in the Underlying Action and instead attempts to raise issues of fact as to the timeliness and procedural efficacy of plaintiff’s

coverage disclaimer; and (2) Dorado has failed to provide evidence that anyone denied receiving plaintiff's claim disclaimer (NYSCEF Doc. 28).

Discussion

Plaintiff's Request for Summary Judgment against Dorado

To prevail on summary judgment, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact and entitlement to judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d, 1062 (1993). Once the movant has met its initial burden, it then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept. 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment").

Plaintiff is entitled to summary judgment against Dorado declaring that plaintiff is not obligated to defend or indemnify Peninsula in any of the matters here at issue because (1) the court in the Underlying Action has dismissed Kim's claims against Peninsula; and (2) plaintiff is not obligated to defend Peninsula against Dorado's claims because they arise out of the Dorado-Peninsula contract, and the subject insurance expressly excludes claims arising out of contract.

Plaintiff's Request for a Default Judgment against Peninsula

Plaintiff has established that it is entitled to a default judgment against Peninsula by complying with CPLR 3215(f) and (g) by submitting the following, among other documents: copies of the subject summons and complaint (NYSCEF Doc. 13); the subject affidavit of service and CPLR 3214(g)(4) notice (NYSCEF Documents 14 and 15); and the October 5, 2020 affidavit of facts of Lowell Aptman, plaintiff's general managing agent (NYSCEF Doc. 17). To date, Peninsula has failed to answer the instant complaint and/or oppose or otherwise respond to the instant motion, and its time to do so has expired.

Additionally, plaintiff has made out a prima facie case that it no longer has a duty to defend or indemnify Peninsula in the Underlying Action. A duty to defend is not "interminable ... and will end if and when it is shown unequivocally that the damages alleged would not be covered by the policy." Sturges Mfg. Co. v Utica Mut. Ins. Co., 37 NY2d 69, 74 (1975). As plaintiff asserts, "even if an insurer's duty to defend is initially triggered because the complaint alleged a covered claim against the insured, that duty terminates if and when that claim is dismissed or discontinued." The Wesco Policy excludes "liability assumed under a contract" (NYSCEF Doc. 18, at 12), thereby excluding contractual indemnification and breach of contract claims. (NYSCEF Doc. 21).

Therefore, plaintiff is entitled to a default judgment against Peninsula, declaring that plaintiff has no duty to defend or indemnify Peninsula in the Underlying Action.

Conclusion

Thus, for the reasons stated hereinabove, (1) the instant request by plaintiff, Wesco Insurance Company, pursuant to CPLR 3212, for summary judgment against defendant Dorado House

Flushing Condominium Corp. is hereby granted; (2) the instant request by plaintiff, pursuant to CPLR 3215, for a default judgment against defendant Peninsula Construction Inc. ("Peninsula") is hereby granted on the merits and on default, and, (3), accordingly, the Clerk is hereby directed to enter judgment declaring that plaintiff is not obligated to defend or indemnify Peninsula in the underlying action captioned Sang Sik Kim v Dorado House Flushing Condominium Corp., et al., Index No. 16563/2015, in New York State Supreme Court, Queens County.



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3/31/2021

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: