

Mazariego v Hunterfly Holdings, LLC

2021 NY Slip Op 31324(U)

April 16, 2021

Supreme Court, Kings County

Docket Number: 512185/2019

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 512185/2019
Motion Date: 3-1-21
Mot. Seq. No.: 3

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IVAN MAZARIEGO,
Plaintiff,

-against-

HUNTERFLY HOLDINGS, LLC and E&M BUILDERS
GROUP CORP.,

Defendants.

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HUNTERFLY HOLDINGS, LLC and E&M BUILDERS
GROUP CORP.,

DECISION/ORDER

Third-Party Plaintiffs,

-against-

RICHMOND CONSTRUCTION, INC. and
METROPOLITAN PROPERTY AND CASUALTY
INSURANCE COMPANY,

Third-Party Defendants,

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Upon the following e-filed documents, listed by NYSCEF as item numbers 112-141,143-151, the motion is decided as follows:

The third-part defendant, METROPOLITAN PROPERTY AND CASUALTY INSURANCE (“Metropolitan”), moves pursuant to CPLR §§ 603 and 3212 for an order severing the third-party insurance coverage claims from the bodily injury claims, awarding Metropolitan summary judgment on its cross-claims and counterclaims and dismissing all claims asserted against it in their entirety, together with such other and further relief as this Court may deem just and proper.

Background:

A. The Pleadings:

In the complaint in the main action, the plaintiff, Ivan Mazariego, alleges that he suffered injuries on March 20, 2019 when he fell from an elevation while working at the premises located at 15 Hunterfly Place, Brooklyn, New York. Plaintiff commenced this action to recover damages for his injuries and named Hunterfly Holdings, LLC (“Hunterfly”) and E&M Builders

Group Corp. (“E&M”) as defendants. After appearing in the action, Hunterfly and E&M commenced a third-party action against Richmond Construction, Inc. (“Richmond”), plaintiff’s employer, and Metropolitan, Richmond’s insurer. As against Metropolitan, Hunterfly and E&M alleged that there were entitled to coverage under a policy of insurance that Metropolitan had issued to Richmond.

B. The Disclaimer:

Metropolitan issued a disclaimer of coverage as to Richmond, Hunterfly and E&M claiming that the alleged loss fell within an endorsement to the policy which excluded coverage for claims of “bodily injury to any employee of any insured, to any contractor hired or retained by or for any insured or to any employee of such contractor, if such claim for bodily injury arises out of and in the course of his/her employment or retention of such contractor by or for any insured, for which any insured may become liable in any capacity.” Metropolitan also denied coverage as to Hunterfly on the ground that Hunterfly was not an additional insured under the policy.

C. Metropolitan’s Contentions:

Metropolitan maintains that the endorsement containing the above exclusion was part of the policy issued to Richmond even though the endorsement, as well a number of other endorsements, were mistakenly removed from declarations page of the policy following the policy’s issuance. Metropolitan maintains that these endorsements were mistakenly removed from declarations page of the policy on November 14, 2018, due to a computer glitch, when the policy was amended, at Richmond’s request, to remove an endorsement from the policy that provided terrorism coverage. Metropolitan maintains that when the terrorism coverage endorsement was removed on this date, a new Schedule of Forms and Endorsements was generated which reflected the removal of the terrorism coverage and as well as the removal of other endorsements that were not supposed to be removed. Including in the endorsements that were not supposed to be removed was the endorsement that formed the basis of Metropolitan’s disclaimer that there was no coverage under the policy because the plaintiff was an employee of Richmond. Metropolitan maintains that a similar error occurred on May 9, 2019 when Richmond sought to amend the policy to reflect a change in its address.

Metropolitan maintains there was a mutual mistake on the part of both Metropolitan and Richmond inasmuch as neither party to the Policy intended or requested that the subject

endorsement be removed from the policy. For this reason, Metropolitan maintains that policy should be reformed to include this endorsement and the other endorsements that were mistakenly removed.

With respect to defendant Hunterfly, Metropolitan maintains that aside from the issue of whether the policy should be reformed to include the endorsements that were mistakenly removed, Hunterfly unlike E&M, was not an additional insured under the policy and is not entitled to coverage under the policy regardless of whether the policy is reformed. Metropolitan maintains that Richmond is the only named insured on the Policy and that although there is an endorsement to the policy which extends coverage to additional insureds, Hunterfly is not an additional an insured under the endorsement. This endorsement provides:

ADDITIONAL INSURED - OWNERS, LESSEES OR
CONTRMCTORS - WITH ADDITIONAL INSURED
REQUIREMENT IN CONSTRUCTION CONTRACT

The following is added to Paragraph C. **Who Is An Insured in Section II-Liability**

3. Any person(s) or organization(s) for whom you are performing operations is also an additional insured, if you and such person(s) or organization(s) **have agreed in writing in a contract or agreement that such person(s) or organization(s) be included as an additional insured on your policy**, Such person(s) or organization(s) is an additional insured but only with respect to liability for "bodily injury" caused in whole or in part, by:

- a. Your acts or omissions; or
- b. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured.

Metropolitan maintains that although Richmond was required to included E&M as an additional insured pursuant to its written contract with E&M, there is no written contract or agreement between Richmond and Hunterfly pursuant to which Richmond agreed to include Hunterfly as an additional insured on its policy.

Discussion:**A. The Motion to Sever:**

It has long been recognized that it is inherently prejudicial to insurers to have the issue of insurance coverage tried before the jury that considers the underlying liability claims, even where common questions of law and fact exist (*see Kelly v. Yannotti*, 4 N.Y.2D 603, 176 N.Y.S.2d 637, 152 N.E.2d 69; *Poalacin v. Mall Props., Inc.*, 155 A.D.3d 900, 64 N.Y.S.3d 310; *Isidore Margel Trust Mitzi Zank Trustee v. Mt. Hawley Ins. Co.*, 155 A.D.3d 618, 619, 63 N.Y.S.3d 476; *Christensen v. Weeks*, 15 A.D.3d 330, 331, 790 N.Y.S.2d 153; *Schorr Bros. Dev. Corp. v. Continental Ins. Co.*, 174 A.D.2d 722, 573 N.Y.S.2d 874; *Dreizen v. Morris I. Stoler, Inc.*, 98 A.D.2d 759, 469 N.Y.S.2d 471; *Mancuso v. Bellerive*, 50 A.D.2d 802, 375 N.Y.S.2d 401). In light of this principle, all claims against Metropolitan, including all third-party claim, cross-claims and counterclaims are properly severed. The branch of Metropolitan's motion to sever all such claims from the bodily injury claims is therefore **GRANTED**.

B. Metropolitan's Motion for Summary Judgment:

Hunterfly and E&M point out that there is significant pre-trial discovery that remains outstanding concerning the claims against Metropolitan, including a deposition of Metropolitan and other relevant witnesses. "A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated" (*Matter of Fasciglione*, 73 A.D.3d 769, 770, 899 N.Y.S.2d 645; *see CPLR* 3212[f]; *Jones v. American Commerce Ins. Co.*, 92 A.D.3d 844, 845, 939 N.Y.S.2d 115). This is especially so where the motion for summary judgment was made prior to the parties conducting depositions (*see Wesolowski v. St. Francis Hosp.*, 108 A.D.3d 525, 526, 968 N.Y.S.2d 181; *Bond v. DeMasco*, 84 A.D.3d 1292, 1293, 923 N.Y.S.2d 902; *Cardone v. Poidamani*, 73 A.D.3d 828, 828, 902 N.Y.S.2d 121; *Valdivia v. Consolidated Resistance Co. of Am., Inc.*, 54 A.D.3d 753, 755, 863 N.Y.S.2d 720). Metropolitan's motion for summary judgment is therefore denied as premature.

Accordingly, it is hereby

ORDRED that all third-party claims, cross-claims and counterclaims against Metropolitan are hereby severed from the main action. Within 45 days of this order, the third-party plaintiffs, HUNTERFLY HOLDINGS, LLC and E&M BUILDERS GROUP CORP., shall acquire a new index number and a file a complaint against Metropolitan setting forth the causes

of action now contained in the third-party complaint. Metropolitan and Richmond Construction, Inc. shall interpose answers to the complaint within 30 days of service; and it is further

ORDERED that Metropolitan's motion for summary judgment is **DENIED** as premature and may be renewed upon the completion of discovery in the new action.

This constitutes the decision and order of the Court.

Dated: April 16, 2021



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020