

City of New York v Starr Indem. & Liab. Ins. Co.

2021 NY Slip Op 32639(U)

December 15, 2021

Supreme Court, New York County

Docket Number: Index No. 451458/2020

Judge: Erika M. Edwards

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ERIKA EDWARDS

PART 11

Justice

-----X

INDEX NO. 451458/2020

THE CITY OF NEW YORK

MOTION DATE 01/15/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

STARR INDEMNITY AND LIABILITY INSURANCE
COMPANY,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the court denies Defendant Starr Indemnity & Liability Insurance Company's ("Starr") motion to dismiss Plaintiff City of New York's ("City") complaint and denies the City's cross-motion for summary judgment in its favor as against Starr.

The City brings this action seeking a declaratory judgment that Starr has a duty to defend the City and reimburse the City for its defense costs and attorney's fees under Starr's general liability policy issued to non-party Burtis Construction Co., Inc. ("Burtis") in connection with the City's defense of a personal injury action in this court entitled *Michael Klar v. The City of New York*, Index No. 451323/2018, which was transferred from Kings County under Index No. 504098/2015. In the underlying action, Michael Klar alleged in substance that the City is liable for personal injuries he sustained on May 6, 2014 when he tripped and fell while walking on the pedestrian walkway/bicycle pathway on the Williamsburg Bridge. Mr. Klar further alleged in substance that the City was negligent as a result of a defective, dangerous and hazardous condition resulting from a broken, uneven, deteriorated area of the walkway.

Starr now moves to dismiss the City's complaint based upon documentary evidence and for the City's failure to state a cause of action, pursuant to CPLR 3211(a)(1) and (a)(7), respectively. Starr argues in substance that Starr properly disclaimed coverage as to the City's tender and determined that the City did not qualify as an additional insured under Burtis' policy. Starr further argues that it has no duty to defend or indemnify the City because there is no allegation that the accident was caused by the acts or omissions of Burtis, or anyone acting on Burtis' behalf, in the performance of its ongoing operations for the City under the contract since Burtis did not commence work under its contract with the City until July 28, 2014, more than two months after Mr. Klar's alleged accident.

The City cross-moves for summary judgment in its favor as against Starr and for a declaratory judgment that Starr has a duty to defend the City in the underlying action, plus reimbursement of defense costs and attorney's fees in the defense of the underlying action. After receiving the complaint in the underlying action, the City tendered its defense by email to Starr and the authorized claim service provider on July 26, 2019. The claims service provider requested additional information and the City complied, but neither Starr, nor its claims service provider responded.

The City argues in substance that Starr should have recognized the City as an additional insured under Burtis' policy because Burtis had an earlier contract with the City from 2008 which performance began in 2011 (Contract No. HBCY097). The City argues that this contract was extended so it was in effect on the date of Mr. Klar's accident. The City further argues that the contract required Burtis to perform structural repairs, construction work and maintenance on bridges within New York City, including the pedestrian walkway/bicycle pathway on the Williamsburg Bridge. The City further argues that Starr is improperly relying on a later contract

(Contract No. HBCY099) which included work to begin after the date of Mr. Klar's alleged accident.

Both parties oppose each other's motion.

A. Starr's Motion to Dismiss

When considering Defendants' motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A court may freely consider affidavits submitted by a plaintiff to remedy any defects in the complaint, but the court should not consider whether the plaintiff has simply stated a cause of action, but rather whether the plaintiff actually has one (*Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]). Normally, a court should not be concerned with the ultimate merits of the case (*Anguita v Koch*, 179 AD2d 454, 457 [1st Dept 1992]). However, these considerations do not apply to allegations consisting of bare legal conclusions as well as factual claims which are flatly contradicted by documentary evidence (*Simkin v Blank*, 19 NY3d 46, 52 [2012]).

Dismissal is warranted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (CPLR 3211[a][1]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Dismissal is proper where the documents relied upon definitively disposed of a plaintiff's claim (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 634 NYS2d 62, 63 [1995]).

Here, after accepting all facts in the complaint as true and according the City the benefit of every possible inference, the court denies Starr's motion to dismiss and finds that the factual

allegations set forth in the City's complaint sufficiently establish a cognizable legal theory which is not contradicted by documentary evidence. The court determines that Starr failed to present documentary evidence to conclusively refute the City's claims as questions remain as to the scope of work to be performed under the terms of the contract extension in effect on the date of Mr. Klar's alleged accident. Furthermore, in its initial motion, Starr failed to discuss the applicability of the extension under Contract No. HBCY099, so none of the evidence submitted refuted the City's arguments.

As such, the court denies Starr's motion to dismiss.

B. The City's Cross-Motion for Summary Judgment

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the

existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is “often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue” (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

Here, the City argues that the 2008 contract with Burtis was extended to July 27, 2014 because Burtis was the only company retained by the City to perform essential structural repairs on the bridges, to repair the 672 outstanding repair flags and to respond to emergencies on the bridges. The City claims that it has a reasonable possibility of coverage under the policy.

Burtis argues in substance that Mr. Klar did not allege in his complaint that Burtis contributed to his alleged accident and the City failed to bring a third-party action against Burtis for contribution or indemnification. Additionally, Burtis argues that the extension from April 29, 2014 through July 27, 2014, which includes the date of Mr. Klar’s alleged accident, was only for two urgent flag repairs at a location on the FDR Drive and 204th Street pedestrian bridge, which are unrelated to the Williamsburg Bridge.

The court denies the City’s motion for summary judgment and finds that the City failed to meet its initial burden of demonstrating the absence of any material issues of fact and that questions of fact remain to be determined by the trier of fact. Although the City demonstrated that the earlier contract with Burtis (Contract No. HBCY097) was extended to include the date of Mr. Klar’s alleged accident and that the duty to defend is broad, material questions of fact remain, including, but not necessarily limited to, whether Burtis’ obligations under the applicable contract extension included a duty to perform structural work and repairs on all bridges,

including the pedestrian walkway/bicycle pathway on the Williamsburg Bridge, or whether it included work pursuant to all 672 outstanding repair flags which included the pedestrian walkway/bicycle pathway on the Williamsburg Bridge, or just the two urgent repair flags on the FDR Drive and 204th Street pedestrian bridge. Additionally, if Burtis had an obligation to repair the pedestrian walkway/bicycle pathway on the Williamsburg Bridge on the date of the alleged accident, then there is a question of whether the City is an additional insured under Burtis' insurance policy with Starr and whether the City is entitled to a defense and reimbursement of defense costs and attorney's fees under the policy.

Therefore, the court denies the City's motion for summary judgment.

The court has considered any additional arguments raised by the parties which are not discussed herein and the court denies all requests for relief not expressly granted herein.


As such, it is hereby

ORDERED that the court denies Defendant Starr Indemnity & Liability Insurance Company's motion to dismiss and Plaintiff City of New York's cross-motion for summary judgment; and it is further

ORDERED that the parties are directed to appear for a preliminary conference before this court on February 15, 2022, at 9:30 a.m., separate link will be provided via email.

This constitutes the decision and order of the court.

12/13/2021
DATE


ERIKA EDWARDS, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE