

470 4th Ave. Fee Owner, LLC v Wesco Ins. Co.

2021 NY Slip Op 32780(U)

December 23, 2021

Supreme Court, New York County

Docket Number: Index No. 651184/2020

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DEBRA JAMES

PART 59

Justice

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470 4TH AVENUE FEE OWNER, LLC,TPH 470 4TH
AVENUE INVESTORS LLC, and TRINITY PLACE
HOLDINGS INC.

INDEX NO. 651184/2020

MOTION DATE 07/16/2020

MOTION SEQ. NO. 001

Plaintiffs,

- v -

WESCO INSURANCE COMPANY and AMTRUST NORTH
AMERICA INC.,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12,
13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for DISMISS.

ORDER

Upon the foregoing documents, it is

ORDERED that defendants' motion to dismiss the complaint
against defendant AMTRUST NORTH AMERICA INC., is GRANTED and the
complaint against AMTRUST NORTH AMERICA INC., in its entirety as
against such defendant, is dismissed, with costs and disbursements
to such defendant as taxed by the Clerk of the Court, and the Clerk
is directed to enter judgment accordingly in favor of such
defendant; and it is further

ORDERED that the action is severed and continued against the
remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the defendants' motion to dismiss the second and third cause of actions (declaratory judgment and defamation, respectively) of the complaint against defendant WESCO INSURANCE COMPANY is granted; and it is further

ORDERED that defendant WESCO INSURANCE COMPANY is directed to serve an answer to the complaint within thirty (30) days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed compliance conference order or proposed competing compliance conference orders on February 28, 2022.

DECISION

Defendants move to dismiss the complaint against co-defendant Amtrust North America Inc. (Amtrust North) and the causes of action for defamation and declaratory judgment against co-defendant Wesco Insurance Company (Wesco).

The court shall grant the motion to dismiss the defamation cause of action. Plaintiff alleges that the following statement in the Wesco's letter of December 5, 2019, denying coverage is actionable:

"To the extent that a false date of loss was intentionally provided in the first notice of loss and again in the Sworn Statement Proof of Loss, the following Condition would bar coverage for this loss: The CONCEALMENT, MISREPRESENTATION OR FRAUD Condition is replaced by the following: FRAUD We do not provide coverage for any insured ("insured") who has made fraudulent statements or engaged in fraudulent conduct in connection with any loss ("loss") or damage for which coverage is sought under this policy . . . For these, and possibly other reasons, none of which Wesco intends to waive, Wesco has no liability for the Insured's claimed loss and its Sworn Statement in Proof of Loss is rejected."

Contrary to plaintiff's allegations, the cited statement in a statutorily required letter disclaiming insurance coverage for plaintiff's claim (see generally CPLR 3420) is not defamatory. Rather, the defendant merely quoted the portions of the policy justifying its disclaimer and cited the facts upon which it

relied thereupon. The truth of the terms of the policy are not capable of defamatory meaning and the conditions which satisfy such disclaimer terms similarly are not defamatory. See Konrad v Brown, 91 AD3d 545, 546 (1st Dept 2012) (motion court correctly found that defendant's allegedly defamatory statements in his letter were either not susceptible to a defamatory meaning, true or substantially true or pure opinion, when considered as a whole, in context and based on its tone and apparent purpose as well as the lack of any implication that it was based on undisclosed facts in light of defendant's reference).

The plaintiff also fails to demonstrate that non-signatory parent Amtrust is subject to suit upon the insurance policy issued by signatory Wesco.

"Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences. Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance."
TNS Holdings, Inc. v MKI Sec. Corp., 92 NY2d 335, 339 (1998).

Even assuming plaintiff sufficiently alleges domination by Amtrust, the complaint fails to allege facts the if proved would establish that such alleged domination led to fraud or malfeasance in issuance of the policy. The only meritorious claim raised here is breach of contract.

Finally, defendants seek dismissal of plaintiff's declaratory judgment cause of action. As stated by the Court, "[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract." Apple Records, Inc. v Capitol Records, Inc., 137 AD2d 50, 54 (1st Dept 1988). Here, plaintiff fails to set forth that there are future damages requiring a declaration of rights of the parties apart from those resulting from the alleged breach of contract.

Debra A. James

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<u>12/23/2021</u>			<u>DEBRA JAMES, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE