Suin v One Graham LLC
2021 NY Slip Op 33102(U)
December 1, 2021
Supreme Court, Queens County
Docket Number: Index No. 706700/2017
Judge: Maurice E. Muir
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

MANUEL SUIN,

Plaintiff,

-against-

ONE GRAHAM LLC and SKYWORX CONTRACTING INC,

Defendants.

ONE GRAHAM LLC,

Third-Party Plaintiff,

-against-

AG CONTRACTING SERVICES INC.,

Third-Party Defendant.

IAS Part - 42

Index No.: 706700/2017

Motion Date: 2/4/21

Motion Cal. No. 43

Motion Seq. No. 9

The following electronically filed ("EF") documents read on this motion by One Graham, LLC ("One Graham" or "defendant/third-party plaintiff") for order: 1) pursuant to CPLR § 3212 granting summary judgment in favor of One Graham on its third-party claim against AG Contracting Services Inc. ("AG") seeking contractual indemnification and defense in favor of One Graham and against AG; 2) setting this matter down for a hearing to determine the amount of fees and costs to be reimbursed to One Graham by AG; and 3) granting such other and further relief as to the Court may seem just and proper.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service..................................	EF 173 - 187

Affirmation in Opposition-Exhibits.. EF 204 - 218
Reply Affirmation-Exhibits.. EF 221- 222

Upon the foregoing papers, it is ordered that this motion is determined as follows:

BACKGROUND

Manuel Suin ("Mr. Suin" or "plaintiff") commenced this action against One Graham and Skyworx Contracting Inc. ("Skyworx") to recover damages for personal injuries based upon violation of Labor Law §§§ 200, 240 and 241. One Graham is the owner of the property located at 319 Graham Avenue, Brooklyn, New York ("subject premises"). One Graham contracted with non-party Jerusalem Carting Inc. ("Jerusalem") for a new construction entitled the 319 Graham Avenue Project ("the Project"). Moreover, Jerusalem subcontracted part of the work to third-party defendant AG. On or about February 8, 2017, AG entered into a sub-contract with Jerusalem in connection with the Project, which provides, in relevant part, the following:

> Article 1.0 indemnification 1.1 to the fullest extent permitted by law, the subcontractor shall indemnify and hold harmless the contractor and owner, their agents and employee of either of them from and against claims, damages, losses and expenses, including but not limited to attorney fees, arising out of or resulting from the performance of the subcontractor's work, provided that such claim, damage, loss or expense is attributable to bodily injury... Caused in whole or in part by the negligent acts or omissions of the subcontractor or...

The contract further provides:

> Article 2.0 insurance requirements 2.1 the subcontractor shall purchase and maintain insurance of the following types of coverages and limits of liability: commercial general liability-including $1 million each occurrence... The contractor, the owner and their agents are to be named as additional insureds on a primary and noncontributory basis to the subcontractor's comprehensive general liability...

Pursuant to its contractual obligations, AG procured a general liability insurance policy from Hudson Insurance Group ("Hudson") with policy period from 2/8/17 to 2/8/18 with policy limits of $1 million per occurrence, $2 million aggregate. Furthermore, plaintiff was employed by AG, who injured himself while working at the project. In particular, on April 4, 2017, the plaintiff was using a ladder to hang sheet rock at the subject property, when he was caused to fall due to a defective ladder supplied to him by his AG. As a result, on May 17, 2017, the plaintiff commenced this action against the defendants; and on August 18, 2017, issue was joined,

wherein the latter interposed an answer. Thereafter, on March 7, 2018, AG's general liability insurer Hudson issued a letter to RLI Mt. Hawley that it was accepting the tender for a defense and indemnification made on behalf of One Graham on a primary and non-contributing basis in accordance with the contractual provision. However, on March 7, 2018 One Graham's general liability insurer, RLI/Mt. Hawley, issued a letter to Hudson indicating that it was not accepting Hudson's offer of defense and indemnification and would not be transferring the file. Thereafter, on October 17, 2018, One Graham commenced a third-party action against AG; and its insurance Carrier, RLI/Mt. Hawley retained outside counsel to prosecute the third-party complaint action against AG for its alleged failure to defend, indemnify, and hold it harmless, *inter alia*. Thereafter, on November 26, 2018, issue was joined, wherein AG interposed an answer. After a considerably amount of litigation, on July 2, 2020, the parties amicably resolved the main action, wherein AG tendered $550,000 to the plaintiff in settlement of said action. (*Kelly v. New York Telephone Co.*, 100 AD2d 537 [2d Dept 1984]).

APPLICABLE LAW

"Summary judgment is a drastic remedy made in lieu of a trial which resolves the case as a matter of law" (*Reyes v. Arco Wenworth Mgt. Corp.*, 83 AD3d 47, 54 [2d Dept 2011], citing *Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]; *see also Vega v. Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). A summary judgment movant must show *prima facie* entitlement to judgment as a matter of law by producing sufficient admissible evidence demonstrating the absence of any material factual issues (CPLR § 3212(b); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1984]). Failure to make such a showing requires denying the motion, regardless of the sufficiency of any opposition (*Vega*, 18 NY3d at 503). The opposing party overcomes the movant's showing only by introducing "evidentiary proof in admissible form sufficient to require a trial of material questions" (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). Furthermore, considering a summary judgment motion requires viewing the evidence in the light most favorable to the motion opponent (*Vega*, 18 NY3d at 503). Nevertheless, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a summary judgment motion (*Zuckerman*, 49 NY2d at 562). "The court's function on a motion for summary judgment is to determine whether material factual issues exist, not to resolve such issues" (*Ruiz v. Griffin*, 71 AD2d 1112, 1115 [2d Dept 2010] [internal quotations marks omitted]).

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DISCUSSION

Here, the court finds that One Graham failed to establish its *prima facie* entitlement to judgment as a matter, pursuant to CPLR § 3212. In fact, AG has met its contractual obligations wherein, it obtained a general liability policy, which named One Graham as an additional insured with policy limits as required by the contract. Moreover, based upon the contract and general liability policy, AG and its insurer, Hudson, accepted the defense and indemnification of One Graham as an additional insured under the insurance policy. As such, One Graham's claims for contractual indemnification, attorney's fees and failure to procure insurance, must be denied. Further, the court finds that One Graham is not entitled to either contractual or common-law indemnification from AG. In particular, the anti-subrogation rule provides that "[a]n insurer . . . has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered" (*Blanco v. CVS Corp.*, 18 AD3d 685 [2 Dept 2005]; *North Star Reins. Corp. v. Continental Ins. Co.,* 82 NY2d 281, 294 [1993]; *see also Ward v. ELRAC, Inc.,* 96 NY2d 58, 76 [2001]; *Porter v. Annabi*, 65 AD3d 1322 [2d Dept 2009]; *see generally Wesco Ins. Co. v. Travelers Prop. Cas. Co. of Am*, 188 AD3d 476 [1st Dept 2020]). The rule applies to bar indemnification up to the policy limits of the comprehensive general liability policy at issue (*see Ward v. ELRAC, Inc., supra* at 77-78; *Pennsylvania Gen. Ins. Co. v. Austin Powder Co.,* 68 NY2d 465, 473 [1986]; *Curran v City of New York,* 234 AD2d 254, 255 [1996]). Here AG's comprehensive general liability policy named One Graham as an additional insured and it contained a limit of $1,000,000 per occurrence. AG's paid $550,000 in settlement of the instant action, which falls within these policy limits. Since the same insurance company (i.e., "Hudson") covered One Graham and AG for the same risk, the anti-subrogation rule applies to bar One Graham from indemnification. (*see Storms v. Dominican Coll. of Blauvelt,* 308 AD2d 575, 577 [2d Dept 2003]; *Yong Ju Kim v. Herbert Constr. Co.,* 275 AD2d 709, 713 [2d Dept 2000]; *Ramirez v. Cablevision Sys. Corp.,* 271 AD2d 424, 425 [2d Dept 2000]; *Morales v City of New York,* 239 AD2d 566, 567 [1997]). Thus, One Graham's claims must be denied.

Furthermore, the court finds that One Graham did not have the right to elect the counsel of its choice as coverage was offered without reservation of rights. (*Public Service Mut. Ins. Co. v. Goldfarb*, 53 NY2d 392 [1981]; *see generally, First Jeffersonian Associates v. Insurance Co. of North America*, 262 AD2d 13 [1st Dept 1999]; *New York Marine and General Ins. Co. v. Lafarge North America, Inc.,* 599 F.3d 102, 124-25 [2d Cir. 2010] (in order to be entitled to

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independent counsel, conflict of interest must exist which disqualifies the defense lawyer selected by the insurer). Additionally, the court finds that RLI/Mt. Hawley on behalf of One Graham knowingly and intentionally rejected the defense and indemnification offered by AG and Hudson, which constitutes a waiver of One Graham's contractual rights. (*Kamco Supply Corp. v. On the Righ Track, LLC*, 149 AD3d 275 [2d Dept 2017]). Lastly, the court notes that One Graham failed to eliminate triable issues of fact as to whether it has standing to bring this action, in light of the fact that it neither hired counsel nor paid any attorney fees. Rather, it was One Graham's insurance carrier, RLI/Mt. Hawley, who retained counsel to litigate the third-party action. (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

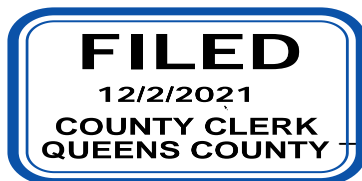
Accordingly, it is hereby

ORDERED that One Graham, LLC's motion for summary judgment, pursuant to CPLR § 3212, is denied in its entirety with prejudice; and it is further,

ORDERED that AG Contracting Services Inc. shall serve a copy of this decision and order with notice of entry upon all the parties and the clerk of this court on or before December 30, 2021.

The foregoing constitutes the decision and order of the court.

Dated: December 1, 2021



MAURICE E. MUIR, J.S.C.

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