

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

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

NORTHFIELD INSURANCE COMPANY,

-against-

Plaintiff,

INDEX NO. 156573/16
MOTION DATE 01-24-2018
MOTION SEQ. NO. 002
MOTION CAL. NO.

ECKINGER CONSTRUCTION CO., FORZA CONTRACTING LLC, DAVE & BUSTER'S OF NEW YORK, INC., DAVE & BUSTER'S INC., EKLECCO NEWCO LLC, AMD ELECTRIC, INC., ALL WIRING ELECTRIC LLC, METROPOLIS HVAC CONTRACTORS, INC., WILLIAM A. ROBERTS and JENNIFER ROBERTS,

Defendants.

The following papers, numbered 1 to 11 were read on this motion pursuant to CPLR §3215 for a default judgment and pursuant to CPLR §3212 for summary judgment:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion for an Order: (a) pursuant to CPLR §3215 granting plaintiff a default judgment against Defendant, Forza Contracting LLC, declaring that plaintiff has no duty to defend or to indemnify defendants, Forza Contracting LLC, Eckinger Construction Co., Dave & Buster's of New York, Inc., Dave & Buster's Inc., and/ or any other party in the underlying bodily injury actions, entitled Roberts v. Eklecco Newco, et al., Index No. 6230/2014 (Supreme Court, Orange County) and Roberts v. Forza Contracting, LLC, Index No.3726/2014 (Supreme Court, Orange County); and (b) pursuant to CPLR §3212, granting plaintiff summary judgment against all of the named defendants and/or any other party in the underlying bodily injury actions, is granted as stated herein.

Plaintiff brought this declaratory judgment action alleging that it has no duty to defend or indemnify the defendants in two separate labor law personal injury actions brought by defendants William A. Roberts and Jennifer Roberts v. Eklecco Newco, et al., Index No. 006230/2014 (Supreme Court, Orange County) and Roberts v. Forza Contracting, LLC, Index No. 003726/2016 (Supreme Court, Orange County). The actions are alleged to arise out of an accident that occurred on July 2, 2013, at a renovation project at the Dave & Busters located in the Palisades Center Mall, at 4661 Palisades Center Drive, West Nyack, New York (hereinafter referred to as "the project") (Mot. Valverde Aff. Exhs. L and M).

It is alleged that defendant William Roberts was employed as Construction Site Superintendent for Eckinger on July 2, 2013, when he was struck in the head and injured by a falling pipe. Forza Contracting, LLC (hereinafter referred to individually as "Forza") performed demolition work as a subcontractor on the project (Valverde Aff., Exh. S). Forza was retained by defendant Eckinger Construction Co., the general contractor on the project (hereinafter referred to individually as "Eckinger") (Mot. Valverde Aff., Exh. Q). Dave & Buster's of New York, Inc. and Dave & Buster's Inc. (hereinafter referred to jointly as "D & B") had the renovation work performed on their premises and are identified as the "owner" in the contracts for the project (Mot. Valverde Aff., Exh. P). Eklecco Newco LLC, is allegedly the corporate owner of the Palisades Center Mall and the property. AMD Electric, Inc. and Metropolis HVAC Contractors, Inc. were subcontractors on the project.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Plaintiff's motion seeks an Order: (a) pursuant to CPLR §3215 granting plaintiff a default judgment against Forza, declaring that plaintiff has no duty to defend or to indemnify defendants, Forza, Eckinger, D & B, and/ or any other party in the underlying bodily injury actions, entitled Roberts v. Eklecco Newco, et al., Index No. 6230/2014 (Supreme Court, Orange County) and Roberts v. Forza Contracting, LLC, Index No. 3726/2014 (Supreme Court, Orange County); and (b) pursuant to CPLR §3212, granting plaintiff summary judgment against all of the named defendants and/or any other party in the underlying bodily injury actions.

William A. Roberts and Jennifer Roberts, AMD Electric, Inc. and Metropolis HVAC Contractors, Inc., did not oppose and take no position on plaintiff's motion. Forza has not appeared in this action, failed to oppose the motion and is in default. Eckinger, D & B and Eklecco Newco LLC, oppose the relief sought in this motion as additional insureds under plaintiff's policy.

In order to prevail on a motion for summary judgment the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to produce contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645, 569 N.Y.S. 2d 337 [1999]). Conclusory assertions, speculation, surmise and conjecture without admissible evidence are insufficient to raise any issues of fact (Smith v. Johnson Prods. Co., 95 A.D. 2d 675, 463 N.Y.S. 2d 464 [1st Dept., 1983]).

Plaintiff has prima facie established that New Jersey Law applies in this action because Forza is domiciled in New Jersey, the policy was meant to cover New York and New Jersey constituting a "multi-state" risk, and neither the project or the defendants are specifically identified or named in the policy.

The method typically used in New York to resolve a conflict of law dispute where there is no choice of law provision, is "center of gravity" or "grouping of contacts." The test applies the law of the state with the most significant contacts to the outcome of the dispute (See, Zurich Insurance Co. v. Shearson Lehman Hutton, Inc., 84 N.Y. 2d 309, 642 N.E. 2d 1065, 618 N.Y.S. 2d 609 [1994] and Liberty Surplus Ins. Corp. v. National Union Fire Ins. Co. of Pittsburgh, P.A., 67 A.D. 3d 420, 888 N.Y.S. 2d 35 [1st Dept., 2009]). The "grouping of contacts" or "center of gravity" test is applied, unless another state has a more significant relationship to the parties. In the absence of a contractual choice of law provision, an insurance policy covering multiple states requires that the insured's domicile be regarded as the principal location of the insured source of risk. Entities that are additional insureds but not specifically named or identified in the policy, fail to establish there was delivery in New York State (Certain Underwriters at Lloyd's of London v. Foster Wheeler Corp., 36 A.D. 3d 17, 822 N.Y.S. 2d 30 [1st Dept., 2006] aff'd 9 N.Y. 3d 928, 876 N.E. 2d 500, 844 N.Y.S. 2d 773 [2007] and FC Bruckner Associates, L.P. v. Fireman's Fund Ins., 95 A.D. 3d 556, 944 N.Y.S. 2d 84 [1st Dept., 2012]). A policy that is not actually "issued" or "delivered" in New York is not required by Insurance Law §3420 [d], to make a timely disclaimer of coverage (Preserver Ins. Co. v. Ryba, 10 N.Y. 3d 635, 893 N.E. 2d 97, 862 N.Y.S. 2d 820 [2008]).

Forza's work performed on the project and the accident occurred in New York, but none of the parties to the contracts were from New York. The policy's first declaration page specifically states "This insurance is issued pursuant to the New Jersey Surplus Lines Law" (See Mot. Crecelius Aff., Exh. 1, pg. S1D-IL (9/05)). The second declaration page for "Commercial General Liability Coverage" does not specifically refer to "New Jersey Surplus Lines Law," but it incorporates the first declaration page as the "Common Policy" with the combination of coverage identified as a "complete" policy, warranting the application of New Jersey Law (See Mot. Crecelius Aff., Exh. 1, pg. S284D-CG (9/07)). Plaintiff provides a copy of the Superior Court of New Jersey Law Division Hudson County decision in *Marchut v. Tekton Development Corporation, et al.*, Docket No. HUD-L0552-14, wherein there was an accident in Weehawken, New Jersey, that was covered by the Northfield Insurance Company policy issued to Forza, to further show

that the policy covered a multi-state risk (Mot. Valverde Aff. Exh. T). The multi-state risks covered in the policy, and the failure of the policy to specifically name Eckinger, D & B or Eklecco Newco LLC as additional insureds, or to identify the project, brings this action under New Jersey law.

Eckinger's arguments that discovery is needed because it could reveal an ambiguity in the policy and for plaintiff to establish that New Jersey law applies, are speculative and fail to raise an issue of fact. A claim that discovery is needed can only avoid summary judgment if an evidentiary basis is provided establishing that the discovery sought will produce relevant evidence (Lee v. Ana Development Corp., 83 A.D. 3d 545, 921 N.Y.S. 2d 232 [1st Dept., 2011] and Cioe v. Petrocelli Electric Co., Inc., 33 A.D. 3d 377, 823 N.Y.S. 2d 359 [1st Dept., 2006]). D & B and Eklecco Newco LLC's conclusory argument that plaintiff provided no evidence to indicate the parties understood the principal location of the insured risk is New Jersey fails to raise an issue of fact. They rely solely on the hearsay affidavit of an attorney which does not support a motion for summary judgment or state an evidentiary basis to deny relief to plaintiff (Kase v. H.E.E. Co., 95 A.D. 3d 568, 944 N.Y.S. 2d 95 [1st Dept., 2012] and Santana v. Danco Inc., 115 A.D. 3d 560, 982 N.Y.S. 2d 455 [1st Dept. 2014]).

Under New Jersey Law "an insurer's duty to defend an action brought against its insured depends upon a comparison between the allegations set forth in the complainant's pleading and the language of the insurance policy" (CB Richard Ellis, Inc. v. Harleysville Ins. Co. of New Jersey, 140 A.D. 3d 412, 33 N.Y.S. 3d 221 [1st Dept., 2016] citing to Flomerfelt v. Cardiello, 202 N.J. 432, 997 A. 2d 991 [2010]).

Plaintiff has prima facie established that a comparison of the pleadings and exclusion provisions in the policy are a basis to deny coverage to the defendants.

Plaintiff provided Forza with policy number WH003252 effective for the policy period November 8, 2012 to November 8, 2013 with limits of liability of \$1,000,000.00 per occurrence and a per occurrence deductible of \$1,000.00 (See Mot. Crecelius Aff., Exh. 1). Plaintiff's Policy under "Commercial General Liability Coverage, Section I - Coverages, Coverage A Bodily Injury and Property Damage Liability, 1. Insuring Agreement," provides coverage for "bodily injury" but creates an exclusion under paragraph (2) "Exclusions" (b) "Contractual Liability" for "Bodily Injury or "property damage" for which the insured is obligated to pay for damages by reason of the assumption of liability in a contract or agreement." (Mot. Crecelius Aff., Exh. 1, page 2 of 15 CG 001 12 07).

A subsequent endorsement change titled "Exclusion - Injury to Employees, Workers or Contracted Persons of Insureds or Contracted Organizations" amended paragraph (2) "Exclusions" to read:

"Bodily Injury to Employees, Workers or Contracted Persons Of Insureds Or Contracted Organizations"

"This insurance does not apply to "bodily injury" to:

(1) Any person who is an "employee," "leased worker," "temporary worker," "volunteer worker" of you or any insured arising out of and in the course of:

- (a) Employment by you or any insured; or**
- (b) Performing duties related to the conduct of you or any insured's business...For purposes of this exclusion, contracted with includes contracting with an oral or written contract.**

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and**
- (2) Whether the insured may have any obligation to share damages with or repay someone else who must pay damages because of the injury" (Mot. Crecelius Aff., Exh. 1, page 1 of 2 S94-CG 10/08 and Exh. 2)**

The "Blanket Additional Insured (Contractors)" in the policy applies to amend Section II to "include any person or organization that you agree in a "written contract requiring insurance" to include as an additional insured on the Coverage Part." The provision only applies to liability for "bodily injury" "property damage" or "personal injury" for acts or omissions caused by Forza in the performance of work which requires insurance (Mot. Crecelius Aff., Exh. 1, page 1 of 2 S2802-CG 7/07)

Eckinger's argument that summary judgment should be denied without further discovery to determine the period plaintiff first obtained notice of the accident, is unavailing. Eckinger has not argued that the disclaimer is invalid under New Jersey law, and failed to raise an issue of fact. Eckinger is not entitled to indemnification or a defense until the date of this decision, there was no cross-motion for that relief or a prima facie showing of entitlement to that relief.

D & B and Eklecco Newco LLC's argument that the disclaimer did not state the specific reasons are contradicted by the September 29, 2016 letter (Mot. Crecelius Aff., Exh. 10), they have not argued that the disclaimer is invalid under New Jersey law, and failed to raise an issue of fact. D & B and Eklecco Newco LLC's argument that further discovery is needed is speculative, and unavailing.

An insurer's entitlement to a default judgment pursuant to CPLR §3215, in a declaratory judgment action, is not granted on pleadings alone, the plaintiff must establish a right to a declaration against the defendant. The CPLR §3215 relief sought may not be granted where judgment affects the rights of other non-defaulting parties (Levy v. Blue Cross and Blue Shield of Greater New York, 124 A.D. 2d 900, 508 N.Y.S. 2d 660 [3rd Dept., 1986] and Merchants Ins. Co. of New Hampshire, Inc. v. Long Island Pet Cemetery, Inc., 206 A.d. 2d 827, 616 N.Y.S. 2d 299 [4th Dept. 1994]).

Forza has failed to appear in this action or to oppose this motion and is in default. Eckinger, D & B and Eklecco Newco, LLC as additional insureds have not raised any issues of fact to deny plaintiff summary judgment. Plaintiff is entitled to a default judgment pursuant to CPLR §3215 against Forza, for failure to appear in this action or oppose this motion.

Accordingly, it is ORDERED that plaintiff's motion for an Order: (a) pursuant to CPLR §3215 granting plaintiff a default judgment against Defendant, Forza Contracting LLC, declaring that plaintiff has no duty to defend or to indemnify defendants, Forza Contracting LLC, Eckinger Construction Co., Dave & Buster's of New York, Inc., Dave & Buster's Inc., Eklecco Newco, LLC and/ or any other party in the underlying bodily injury actions, entitled Roberts v. Eklecco Newco, et al., Index No. 6230/2014 (Supreme Court, Orange County) and Roberts v. Forza Contracting, LLC, Index No.3726/2014 (Supreme Court, Orange County); and (b) pursuant to CPLR §3212, granting plaintiff summary judgment against all of the named defendants and/or any other party in the underlying bodily injury actions, is granted, and it is further,

ORDERED, ADJUDGED and DECLARED, that pursuant to CPLR §3215, plaintiff, Northfield Insurance Company, is granted a default judgment against defendant, Forza Contracting LLC, and has no duty to defend or indemnify Forza Contracting LLC, in connection with the July 2, 2013 accident in which William A. Roberts is alleged to have sustained bodily injuries during the course of his employment for Eckinger Constuction Co., or in the underlying bodily injury actions, entitled Roberts v. Eklecco Newco, et al., Index No. 6230/2014 (Supreme Court, Orange County) and Roberts v. Forza Contracting, LLC, Index No.3726/2014 (Supreme Court, Orange County), and it is further,

ORDERED that plaintiff, Northfield Insurance Company, is granted summary judgment pursuant to CPLR §3212, and is entitled to a declaration that Northfield Insurance Company has no duty to defend or indemnify any party in connection with the July 2, 2013 accident in which William A. Roberts is alleged to have sustained bodily injuries during the course of his employment for Eckinger Constuction Co. or provide a defense or indemnity to Eckinger Construction Co., Dave & Buster's of New York, Inc., Dave & Buster's Inc., Eklecco Newco, LLC and/ or any other party to the underlying bodily injury actions, entitled Roberts v. Eklecco Newco, et al., Index No. 6230/2014

(Supreme Court, Orange County) and Roberts v. Forza Contracting, LLC, Index No.3726/2014 (Supreme Court, Orange County), and it is further,

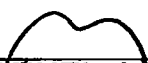
ORDERED, ADJUDGED and DECLARED, that plaintiff, Northfield Insurance Company, has no duty to defend or indemnify any party in connection with the July 2, 2013 accident in which William A. Roberts is alleged to have sustained bodily injuries during the course of his employment for Eckinger Constuction Co. or provide a defense or indemnity Eckinger Construction Co., Dave & Buster's of New York, Inc., Dave & Buster's Inc., Eklecco Newco, LLC, and/ or any other party to the underlying bodily injury actions, entitled Roberts v. Eklecco Newco, et al., Index No. 6230/2014 (Supreme Court, Orange County) and Roberts v. Forza Contracting, LLC, Index No.3726/2014 (Supreme Court, Orange County), and it is further,

ORDERED that pursuant to CPLR §3212, plaintiff is granted summary judgment against all of the named defendants and/or any other party in the underlying bodily injury actions, including to any counterclaims asserted against the plaintiff, and it is further,

ORDERED, ADJUDGED and DECLARED, that any counterclaims asserted by the named defendants and/or any other party to this declaratory judgment action are dismissed, and it is further,

ORDERED that the Clerk of the Court shall enter judgment accordingly.

ENTER:



MANUEL J. MENDEZ, MANUEL J. MENDEZ
J.S.C. J.S.C.

Dated: February 21, 2018

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE