Colony Ins. Co. v International Contr. Servs., LLC
2019 NY Slip Op 32717(U)
September 13, 2019
Supreme Court, New York County
Docket Number: 655528/2016
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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COLONY INSURANCE COMPANY,

Plaintiff,

- v -

INTERNATIONAL CONTRACTORS SERVICES, LLC,THE CITY OF NEW YORK, A.H. HARRIS & SONS, INC.,MICHAEL FITZGERALD

Defendant.

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INDEX NO. 655528/2016

MOTION DATE N/A, N/A

MOTION SEQ. NO. 008 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 271, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 367, 379, 380, 381, 382

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 009) 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 345, 346, 347, 348, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 375, 376, 377, 378

were read on this motion to/for JUDGMENT - SUMMARY.

Motion sequences 007, 008, and 009 are consolidated for disposition. Upon the foregoing documents and for the reasons set forth on the record (9/11/2019), (1) A.H. Harris & Sons, Inc. (**Harris**)'s motion for summary judgment (Mtn. Seq. 008) and (2) Colony Insurance Company (**Colony**)'s motion for summary judgment (Mtn. Seq. 009) are denied.

The Relevant Facts and Circumstances

In the underlying actions captioned *Michael Fitzgerald v. The City of New York, A.H. Harris & Sons. Inc., and International Contractors Services, LLC* (Index No. 304808/09) and *The City of New York v. A.H. Harris & Sons. Inc. and International Contractors Services, LLC* (Index No.

83839/10) (collectively, the **Underlying Action**), Michael Fitzgerald alleged that he was injured on February 20, 2009 after he was pinned between a concrete column and a supported shoring tower (NYSCEF Doc. No. 205, ¶ 2). International Contractor Services, LLC (**ICS**) designed and fabricated the subject shoring jack (*id.*, ¶ 3). Colony issued policy no. AR4360263-0 to International Contractor Services, LLC (**ICS**) for the period May 3, 2008 to May 3, 2009 with a limit of $1 million per occurrence (the **Policy**).

In the Underlying Action, the Supreme Court, Bronx County entered orders on August 3, 2010, February 1, 2011, and May 2, 2012 requiring ICS to produce a witness for deposition (NYSCEF Doc. No. 314, ¶ 22). Around September 2012, the law firm of Baxter, Smith & Shapiro, P.C. (the **Baxter Firm**) assumed the defense of ICS (*id.*, ¶ 21). After Harris filed a motion to compel ICS to produce certain discovery and designate a witness for deposition, ICS was directed to produce a witness for deposition on May 9, 2013 (*id.*, ¶ 23).

The record indicates that Michele Stanisci, a senior paralegal at the Baxter Firm, and Cindi Skowronski, former senior technical specialist at Colony, attempted to contact ICS's President and CEO, William Liddell via email and telephone on multiple occasions between April 8, 2013 and July 23, 2013 (NYSCEF Doc. Nos. 331, 333). During this period, Mr. Liddell responded twice: on April 30, 2013 when he refused to appear for the court ordered May 9, 2013 deposition and (2) in an email, dated June 22, 2013, requesting certain information from Ms. Skowronski, to which she responded (*id.*).

On June 13, 2013, July 23, 2013, and August 18, 2013, the City served discovery demands on ICS, to which ICS responded that it had no documents applicable (NYSCEF Doc. No. 234, ¶ 29). The City then filed a motion to strike on the basis of ICS's failure to comply with the three prior document demands. On December 5, 2013, ICS was directed to provide a Jackson Affidavit in response to every document requested by the City (*id.*, ¶ 30). Mr. Liddell refused to provide the affidavit despite "multiple requests" by the Baxter Firm (NYSCEF Doc. No. 332, ¶ 16).

The City subsequently filed a motion to strike ICS's answer on June 13, 2014. In a decision and order, dated July 30, 2015, the Supreme Court, Bronx County conditionally struck ICS's answer unless it provided a Jackson Affidavit and produced a representative for deposition within 60 days (NYSCEF Doc. No. 340; the **2015 Order**). In September 2015, the Baxter Firm retained a private investigator, Mark Nucci, to seek Mr. Liddell's cooperation to comply with the 2015 Order (NYSCEF Doc. No. 334). Mr. Nucci spoke with Mr. Liddell by telephone on December 1, 2015 regarding execution of a Jackson Affidavit but Mr. Liddell did not sign the affidavit or return any other communication from Mr. Nucci (*id.*, ¶¶ 7-8).

The Baxter Firm then appealed the 2015 Order, which was affirmed by the First Department in a decision, dated July 7, 2016 (NYSCEF Doc. No. 325; the **First Department Decision**). On August 12, 2016, Colony disclaimed coverage to ICS in the Underlying Action for breach of duty to cooperate under the Policy (NYSCEF Doc. No. 332, ¶ 22).

Colony commenced this action on October 19, 2016 to obtain a declaratory judgment that (1) Colony is not obligated to defend, indemnify, or provide any insurance coverage to ICS for the

Underlying Action under the Policy, (2) Colony has no duty to pay any other expenses incurred by ICS in the Underlying Action, (3) Colony is not obligated to defend, indemnify, afford any insurance coverage, reimburse any fees, or pay any settlement, award, verdict or judgment rendered in the Underlying Action, and (4) the City, Harris, and Mr. Fitzgerald are bound by the court's determination and have no right to make a claim against Colony with respect to any fees incurred or any settlement, award, verdict, or judgment rendered in the Underlying Action (NYSCEF Doc. No. 1).

The parties now move for summary judgment regarding their respective claims. In Mtn. Seq. 008, Harris moves for summary judgment dismissing Colony's complaint. In Mtn. Seq. 009, Colony moves for summary judgment in favor of its complaint and to dismiss Harris' counterclaim.

Motion Sequence 008

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 evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The opposing party must then "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]). A mere conclusion of fact or law is insufficient to raise a triable issue of fact (*Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]).

Harris moves for summary judgment on the basis that (i) Colony failed to satisfy its burden of proving ICS's lack of cooperation under the legal test in *Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 168 [1967], and (ii) in the alternative, that Colony's disclaimer was untimely as a matter of law under Insurance Law § 3420 (d). Colony argues that its disclaimer of ICS' coverage was proper due to ICS's lack of cooperation and that in any event, Insurance Law § 3420 (d) does not apply because the Policy was issued and delivered in the state of Florida, rather than New York. If Insurance Law § 3420 does apply, then Colony asserts that the disclaimer of coverage was timely issued after the First Department Decision.

In *Thrasher*, the New York Court of Appeals held that an insurer bears a heavy burden of proving lack of cooperation by its insured and that the insurer must demonstrate that it (1) acted diligently in seeking to bring about the insured's cooperation, (2) that the efforts employed by the insurer were reasonably calculated to obtain the insurer's cooperation, and (3) that the attitude of the insured was one of willful and avowed obstruction (*Thrasher*, 19 NY2d at 168). In light of the affidavit evidence adduced by Colony, there remain material issues of fact concerning whether Colony acted diligently in seeking ICS's cooperation in the period of time preceding the denial of coverage issued to ICS.

Insurance Law § 3420 (d)(2) provides that:

> If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

In its reply brief, Harris relies on *Carlson v Am. Intl. Group, Inc.*, 30 NY3d 288, 306 [2017] for the proposition that the application of Insurance Law § 3420 (d)(2) is not limited to policies issued or delivered in New York, but that said provision applies when an insurance policy "covers both insureds and risks located in this state." In *Carlson*, the New York Court of Appeals determined that the insured company was located in New York because it had a "substantial business presence and create[d] risks in New York" (*id.*). However, Harris does not provide sufficient evidence to establish that ICS had a substantial business presence in New York. Under these circumstances, Harris has not established that Insurance Law § 3240 (d)(2) and its timeliness requirements apply to the Policy that was issued to ICS (*see Vista Eng'g Corp. v Everest Indem. Ins. Co.*, 161 AD3d 596, 598 [1st Dept 2018] [refusing to apply Insurance Law § 2430 (d)(2) because "the record [was] not sufficiently developed … to decide whether [the insured company] had a substantial business presence in New York under the Court of Appeals' decision in Carlson"]). Accordingly, Harris' motion for summary judgment is denied.

Motion Sequence 009

For the reasons set forth above, Colony's motion for summary judgment is denied because there are material issues of fact to resolve regarding whether Colony met the three-prong test in *Thrasher*.

Accordingly, it is

ORDERED that A.H. Harris & Sons, Inc.'s motion for summary judgment (Mtn. Seq. 008) is denied; and it is further

ORDERED that Colony Insurance Company's motion for summary judgment (Mtn. Seq. 009) is denied; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference at 60 Centre Street, Room 238 on October 11, 2019 at 11:30 am.

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9/13/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE