Public Administrator of Queens County v. Two Corners

2008 NY Slip Op 50026(U) (2008) | Cited 0 times | New York Supreme Court | January 8, 2008

On September 7, 2002, plaintiffs' decedent Refugio Rendon Zuniga, was employed by defendant T.K.U. Construction Corp. at a construction site known as 39-07 Prince Street, Flushing, New York. It is alleged that Mr. Zuniga "was caused to fall, suffer and sustain severe and serious injuries, conscious pain and suffering all of which resulted in his death while working upon the aforesaid premises and work site". It is also alleged that Mr. Zuniga was "struck by construction materials, objects and/or debris thrown and/or dropped and/or inadequately secured at or from a height above him upon said premises and work site". Plaintiffs allege in their complaint that all of the defendants, except Safeway Steel Products, Co. and Safeway Steel Services, Inc., owned, developed, managed, maintained, and controlled the subject premises.

The note of issue was filed in this action on May 1, 2006, and the matter was scheduled for the trial scheduling part in January 2007. The 120-day period in which to serve all motions for summary judgment expired on August 29, 2006 (CPLR 3212[a]).

In a so-ordered stipulation dated October 5, 2006, plaintiffs discontinued their action against defendant T.K.U. Construction Corp.(T.K.U.), and the parties agreed to relegate T.K.U. to third-party defendant status and all claims by the defendants against T.K.U. now survive as third-party claims.

On August 25, 2006, third-party defendants Mutual Marine Office Inc., and New York Marine and General Insurance Company, (sued herein as Mutual Marine Office Inc. t/a New York Marine and General Insurance Company) served its motion for summary judgment dismissing the third-party complaint. This motion for summary judgment is clearly timely. Third-party defendants NYMAGIC served its cross motion to sever the third-party declaratory judgment action (Third-Party Index Number 75857/03) no earlier than October 16, 2007. As this is not a request for summary judgment, the 120-day period is not applicable (CPLR 3212[a]).

The motion and cross motion, along with separately filed motions, were adjourned multiple times. The matter was apparently marked "settled" in the trial scheduling part on August 22, 2006, as the parties had agreed to proceed to mediation. Although mediation was scheduled for April 11, 2007, it became apparent that the parties would not be unable to pursue that course, as one of the parties' insurer was in liquidation and the Department of Insurance would not consent to mediation. The

pending motions were fully submitted in this part on November 14, 2007. Since the matter was never "marked off" the calendar, it was not necessary for the parties to move to restore the matter to the calendar.

The main action and second third-party action for common law indemnification involve issues of negligence and statutory liability under the Labor Law. The first third-party action, entitled Two Corners, Inc. v Mutual Marine Office, Inc. t/a New York Marine and General Insurance Company, (Third-Party Index Number 75857/03) is an action for declaratory judgment, pertaining to an insurance policy. In a so-ordered compliance conference dated January 25, 2006, it was ordered that "after the completion of discovery the parties agree to enter into a stipulation severing the third-party declaratory action against Mutual Marine". After the completion of discovery, the insurer's counsel prepared and executed such a stipulation dated August 27, 2007, which was circulated, but not executed by the other parties.

It is undisputed that third-party defendant NYMAGIC issued a comprehensive general liability policy issued by NYMAGIC to T.K.U., for the period of October 22, 2001 to October 22, 2002, which was in effect on the date of the decedent's accident. This policy includes a blanket additional insured endorsement, identified as Endorsement No.19, which provides as follows:

"1. ADDITIONAL INSUREDS

Effective from inception, it is agreed that this Policy shall include as additional Insureds any person or organization to whom the Named Insured has agreed by written contract to provide coverage, but only with respect to projects covered hereunder and operations performed by or on behalf of the Named Insured and only with respect to occurrences subsequent to the making of such written contract".

In a letter dated April 29, 2003, counsel for T.K.U. forwarded a copy of the summons and complaint to the insurer, and requested that the insurer file an answer on behalf of its insured T.K.U., and on behalf of Two Corners, Inc., as an additional insured under the subject policy. The insurer, in a letter dated May 27, 2003 and addressed to Two Corners, Inc., declined coverage as to Two Corners, Inc. The insurer stated that it had reviewed the October 25, 2001 agreement between Two Corners and T.K.U., as well as the terms and conditions of the AIA Document A201-1997 which was incorporated by reference into the construction contract; that these agreements did not require T.K.U. to procure general liability insurance coverage for Two Corners with respect to the work T.K.U. would be performing on behalf of Two Corners; that instead the agreement required each party to procure their own individual liability insurance with respect to the construction project; and that the agreement stated that Two Corners would not require T.K.U. to include Two Corners as an additional insured on the general liability insurance coverage procured by T.K.U. for the subject project. The insurer, in declining coverage, set forth the blanket additional insured endorsement contained in Endorsement #19, and stated as the agreement between Two Corners, Inc. and T.K.U.

did not contain a requirement by T.K.U. to procure general liability insurance coverage for Two Corners, and as the agreement prohibited Two Corners from requiring T.K.U. to name it as an additional insured under T.K.U.'s general policy of insurance, the provisions of Endorsement #19 had not been triggered. The insurer stated that as a result, Two Corners did not qualify as an additional insured under the policy and was not entitled to coverage. The insurer further stated that the certificate of liability insurance dated October 22, 2001, provided by Two Corners to MMO (the insurer), which states that Two Corners is an additional insured under the policy, does not entitle Two Corners to coverage, as this certificate is not an MMO certificate of insurance and was not issued by or on behalf of the insurer. The insurer recited the language contained in the certificate which states as follows: "THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW". The insurer stated that given the language of the disclaimer, the certificate was insufficient to establish that the certificate holder is an additional insured under the listed policies of insurance. The insurer further stated that the certificate is an information document only, and does not provide insurance coverage.

Two Corners, in a letter dated June 3, 2003, requested that the insurer reconsider its decision, and the insurer in a letter dated August 20, 2003, reconfirmed its position that Two Corners was not covered under the terms of the policy. Two Corners thereafter commenced this third-party action for declaratory judgment. The insurer has served its answer and all discovery has been completed.

The evidence presented here conclusively establishes that third-party plaintiff Two Corners Inc., is not insured under the NYMAGIC policy. The third-party plaintiff has the burden of establishing that it is either a named insured, or an additional insured, under the subject policy, and has failed to do so (see Sixty Sutton Corp. v Illinois Union Ins. Co., 34 AD3d 386 [2006]; Moleon v Kreisler Borg Florman Gen. Constr. Co., Inc., 304 AD2d 337, 339 [2003]). The four corners of an insurance agreement govern who is covered and the extent of coverage (Stainless Inc. v Empl. Fire Ins. Co., 69 AD2d 27, 33 [1979], affd 49 NY2d 924 [1980]). In addition, where a third-party seeks the benefit of coverage, the terms of the contract must clearly evince such intent (Stainless, supra). Here, the unambiguous language of the NYMAGIC policy comports with its position that third-party plaintiff Two Corners Inc., was not covered, either as a named or additional insured under the policy.

Two Corners cannot rely upon the Certificate of Insurance issued by T.K.U.'s broker Charles Yang, an employee of Giraffe Professional Insurance Agency, Inc., in order to establish the existence of coverage. A certificate of insurance purporting to afford a party coverage, which on its face states that it is issued for informational purposes only, cannot by itself establish coverage (Tribeca Broadway Associates, LLC v Mount Vernon Fire Insurance Company, 5 AD3d 198,[2004]; Moleon v Kreisler Borg Florman General Construction Company, Inc., supra; American Motorist Insurance Company v. Superior Acoustics, Inc., 277 AD2d 97 [2000]; Buccini v 1568 Broadway Associates, 250 AD2d 466 [1998]; Trapani v 10 Arial Way Associates, 301 AD2d 644 [2003]; American Ref-Fuel

Company of Hempstead v Resource Recycling, Inc., 248 AD2d 420 [1998]); Kaufman v Puritan Insurance Company, 126 AD2d 702 [1987]).

In opposition to the motion for summary judgment, Two Corner's seeks to rely upon Mr. Yang's deposition testimony regarding blanket additional insured coverage, in order to establish that it was automatically insured under the blanket additional insurance endorsement at the time the policy was bound. It is well-settled that an insurance binder is a temporary or interim policy until a formal policy is issued (see, Springer v Allstate Life Ins. Co., 94 NY2d 645, 649 [2000]). A binder provides interim insurance, usually effective as of the date of application, which terminates when a policy is either issued or refused (see, Springer v Allstate Life Ins. Co., supra; Bedessee Imports, Inc. v Cook, Hall & Hyde, Inc.,AD3d , 2007 NY Slip Op 9352 [November 27, 2007]). A "binder does not constitute part of an insurance policy, nor does it create any rights for the insured other than during its effective period" (12A Appleman, Insurance Law and Practice § 7227, at 154). Here, Two Corners has submitted T.K.U.'s application for insurance, which requested blanket additional insured coverage, as well as a series of faxes pertaining to items necessary for obtaining a rate quote. Mr. Yang testified that he placed all the necessary information in an insurance application, including the request for blanket additional insured coverage, which he then sent to I. Arthur Yanoff Agency, a wholesale broker, for a rate quote. He stated that the Yanoff agency was experienced with insurance for construction projects, and that he did was not experienced with this type of a policy. Mr. Yang stated that he had never read a blanket additional insured endorsement or any materials regarding such coverage, or attended any course regarding such coverage. Rather, he stated that he obtained his understanding of such coverage based on information provided by Ron Yanoff. However, Mr. Yang stated that Mr. Yanoff had not explained to him the requirements for blanket additional insured coverage to be effective. Mr. Yang he stated that it was his understanding that when a policy contained blanket additional insured coverage, a property owner would automatically be insured under the policy. Mr. Yanoff testified that he had 25 years of experience dealing with general liability insurance and blanket additional insured endorsements, and that while terms may vary slightly from policy to policy, blanket additional insured endorsements always required that there be a written agreement between the insured and another entity that required the named insured to provide insurance coverage for the named entity. Keiran Xanthos, the underwriter of the subject insurance policy also testified that the insurer's blanket additional insured endorsement required that there must be a written contract between the insured and the third party requiring that the named insured procure insurance covering the third party. It is undisputed that at the time the insurer agreed to be bound, it also agreed to add a blanket additional insured endorsement. However, the evidence presented does not establish that a binder was issued by the insurer which contained a blanket additional insured endorsement providing insurance to Two Corners, merely because it was the property owner. Two Corners's reliance upon a binder to establish coverage as a blanket additional insured, therefore, is rejected.

Endorsement #19 was not issued until September 17, 2002, ten days after the date of the accident. The insurer asserts that Endorsement #19 was issued after the accident in order to clarify the terms and

conditions of coverage, and as it had agreed to provide such coverage. Two Corners asserts that this endorsement is not valid, as it was issue after the accident. However, in the absence of a valid blanket additional insured endorsement, Two Corners is not entitled to any coverage under the policy, as it is neither a named insured nor a named additional insured. In view of the fact that the insurer concedes that it intended to be bound by its blanket additional insured endorsement, as Endorsement #19 was the only such endorsement that existed in 2001 for primary coverage, the court finds that this endorsement is valid and binding. Since the contract between T.K.U. and Two Corners required that the parties each obtain their own general liability insurance, and expressly provided that T.K.U. was not required to obtain insurance naming Two Corners as an insured, Two Corners does not qualify as an additional insured under said endorsement.

In view of the foregoing, third-party defendants' motion for summary judgment is granted and it is the declaration of the court that Two Corners Inc. is not an insured under the policy issued by the third-party defendants to T.K.U.

Third-party defendant NYMAGIC's unopposed cross motion for severance of this third-party action from the main action is granted, as the injection of the issue of insurance coverage into the main action would be inherently prejudicial to NYMAGIC (see Kelly v Yannotti, 4 NY2d 603 [1958]; ; Cruz v Taino Constr. Corp., 38 AD3d 391, 392 [2007]; Emmetsberger v Mitchell, 7 AD3d 483 [2004]; Schorr Bros. Dev. Corp. v Continental Ins. Co., 174 AD2d 722, 722 [1991]; Winstead v Uniondale Union Free School Dist., 170 AD2d 500 [1991]). Since the third-party defendants' motion for summary judgment is granted, the severed action is dismissed. (CPLR 603, 1010).