

Decided on June 9, 2008

Supreme Court, Queens County

The Burlington Insurance Company

against

Galindo & Ferreira Corp. Co., et al.

23352/07

Augustus C. Agate, J.

Defendant Utica First Insurance Company has moved for an order pursuant to CPLR 3211(a)(1), (3), and (7) dismissing the complaint and all cross claims asserted against it. Defendant Galindo Construction Corp. has cross-moved for a default judgment on its cross claims asserted against defendant Utica.

Defendant Utica issued a commercial liability policy to Galindo Construction Corp. for the policy period August 17, 2006 to August 17, 2007. The policy contained a blanket additional insured endorsement which provided in relevant part: "7. Insured also includes: d. Any person or organization whom you are required to name as an additional insured on this policy under a written contract or written agreement." The policy also contained a clause captioned "Exclusion of Injury to Employees, Contractors, and Employees of Contractors," which read in relevant part: "This insurance does not apply to: (I) bodily injury to any employee of any insured, to any contractor hired or retained by or for any insured or to any employee of such contractor, if such claim for bodily injury arises out of and in the course of his/her employment or retention of such contractor by or for any insured, for which any insured may become liable in any capacity." Despite this express exclusion, Galindo Construction Corp. alleges that it "purchased the policy upon a reasonable belief that the policy provided, inter alia, a defense or indemnification of subcontractors alleging work-related injuries."

Galindo & Ferreira Corp., the owner of premises located at 104-54 Roosevelt Avenue, Queens, New York, hired Galindo Construction Corp. and Galindo General Construction to serve as the

general contractor and construction manager respectively on a project involving the erection of two new buildings on the premises. Galindo Construction Corp. subcontracted concrete work to Concrete Builders Corp. Galindo Construction Corp. also subcontracted work to Kandos Construction, which was also insured by defendant Utica in a policy effective from [*2]October 31, 2006 and which named Galindo Construction Corp. as an additional insured.

On or about October 7, 2006, several workers on the project employed by Concrete Builders Corp. sustained death or serious injury when the roof on one of the new buildings collapsed. On or about October 19, 2006, the injured workers and the representative of one of the deceased workers began an action in the New York State Supreme Court, County of Queens seeking to recover for personal injury or wrongful death (*Pedro v Galindo & Ferreira Corp.*, Index No. 22984/06).

Defendant Utica received notice about the accident from defendant Galindo Construction Corp. on October 10, 2006. However, by letter dated October 26, 2006, defendant Utica issued a disclaimer of coverage to Galindo Construction Corp. based on the employee exclusion clause in the policy. By letter dated January 5, 2007, defendant Utica also disclaimed any responsibility to provide a defense and indemnification in the underlying personal injury action.

The Burlington Insurance Company issued a commercial general liability policy to Galindo & Ferreira Corp. effective from August 4, 2006 to August 4, 2007. On or about September 18, 2007, The Burlington Insurance Company began this action for a declaratory judgment against contractors and subcontractors who had worked on the project and against their insurers. Plaintiff Burlington seeks a judgment declaring, inter alia, that defendant Utica must indemnify Galindo Construction Corp. under the policy issued to the general contractor and under the policy issued to Kandos.

Defendant Galindo & Ferreira Corp., defendant Galindo Construction Corp, and defendant Galindo General Construction Corp. answered the complaint, and defendant Galindo Construction Corp. asserted cross claims against defendant Utica which, inter alia, attacked the validity of the employee exclusion in the insurance policy. On November 21, 2007, defendant General Construction Corp. delivered the amended verified answer with amended cross claims to defendant Utica's place of business. Defendant Utica allegedly did not answer the cross claims in a timely manner prior to the service of its instant motion to dismiss. Defendant Utica had, however, entered into a stipulation with plaintiff Burlington extending its time to respond to the complaint.

The court will turn first to the cross motion by defendant Galindo Construction Corp. for a default judgment on its counterclaims asserted against defendant Utica. Defendant Galindo Construction Corp. alleges that the defendant insurer was required to answer, move, or otherwise appear concerning the cross claims on or before December 11, 2007. Defendant Utica did not respond to the cross claims until it served the instant motion on January 10, 2008. (Defendant Utica's time to respond to the complaint had been extended until January 10, 2008.) Although the defendant insurer may have responded to the cross claims 30 days late, a default judgment is not warranted because of the shortness of the delay, the absence of prejudice, and the absence of

willfulness. (*See, Cooney v Cambridge Management and Realty Corp.*, 35 AD3d 522 ; *Curry v New York City Metropolitan Transit Authority*, 30 AD3d 299; *New York and Presbyterian Hosp. v Auto One Ins. Co.*, 28 AD3d 441 ; *Harcztark v Drive Variety, Inc.*, 21 AD3d 876 .)

Accordingly, the cross motion by defendant Galindo Construction Corp. for a default judgment on its cross claims against defendant Utica is denied.

Turning to the motion made by defendant Utica, the court will give it summary judgment treatment pursuant to CPLR 3211(c) as requested in the moving papers. Notice of the court's intention to do so usually required by CPLR 3211(c) may be dispensed with. "There are three exceptions to the notice requirement: 1) where the action in question involves no issues of fact [*3]but only issues of law which are fully appreciated and argued by both sides; 2) where a request for summary judgment pursuant to CPLR 3211(c) is specifically made by both sides; and 3) where both sides deliberately lay bare their proof and make it clear they are charting a summary judgment course***." (*Shah v Shah*, 215 AD2d 287, 289; *Four Seasons Hotels Ltd. v Vinnik*, 127 AD2d 310.) In the case at bar, there are no factual disputes, and only issues of law fully argued by both sides need be resolved on the converted motion. (*See, Scattergood v Jamaica Water Securities Corp.*, 234 AD2d 688; *Kaswan v Aponte*, 160 AD2d 324.)

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact***." (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324.) Defendant Utica successfully carried this burden. The policy issued to Kandos Construction did not take effect until after the date of the accident. The policy issued to Galindo Construction Corp. did not cover the accident in which the subcontractor's workers sustained injury. "To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case***." (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652; *see, Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377.) The policy issued by defendant Utica to defendant Galindo Construction Corp. unambiguously excluded coverage for employees of subcontractors such as Concrete Builders Corp. injured while working on the project. The clause captioned "Exclusion of Injury to Employees, Contractors, and Employees of Contractors," excluded coverage for "bodily injury to***to any contractor hired***by***any insured or to any employee of such contractor, if such claim for bodily injury arises out of and in the course of his/her employment***." The burden shifted to the opponents of this motion to rebut the prima facie showing of entitlement to summary judgment made by defendant Utica. (*See, Alvarez v Prospect Hospital, supra.*) They failed to carry this burden. First, a party cannot have the determination of a summary judgment motion postponed upon the mere speculation and hope that discovery will reveal facts supporting a cause of action or defense. (*See, Keeley v Tracy*, 301 AD2d 502; *Baron v Newman*, 300 AD2d 267; *Hampton Living, Inc. v Carlton on the Park, Ltd.*, 286 AD2d 664; *Romeo v City of New York*, 261 AD2d 379.) Second, Galindo's arguments against the validity of the employee exclusion clause based on ambiguity, unconscionability, etc. have no merit, and the court notes that employee exclusion clauses have been upheld and applied on numerous occasions. (*See, e.g., Makan Exports, Inc. v U.S. Underwriters Ins. Co.*, 43 AD3d 883 ; *Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386 ; *Bassuk Bros., Inc. v Utica First*

Ins. Co., 1 AD3d 470 ; *Hayner Hoyt Corp. v Utica First Ins. Co.*, 306 AD2d 806; *Lake Carmel Fire Dept., Inc. v Utica First Ins. Co.*, 2 Misc 3d 1004[A][Table] Westlaw No. 11870/03 [Text]; *U.S. Underwriters Ins. Co. v 614 Constr. Corp.*, 142 F Supp 2d 491, *aff'd* 23 Fed Appx 92.)

Accordingly, the motion by defendant Utica First Insurance Company for an order pursuant to CPLR 3211(a)(1), (3), and (7) dismissing the complaint and all cross claims asserted against it is converted into one for summary judgment, and the motion is granted.

Settle order declaring the rights of the parties.

Dated: June 9, 2008

AUGUSTUS C. AGATE, J.S.C.