

Tarry Realty LLC v Utica First Ins. Co.

2013 NY Slip Op 33603(U)

October 18, 2013

Supreme Court, New York County

Docket Number: 156966/2012

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 19

Index Number : 156966/2012
TARRY REALTY LLC
vs.
UTICA FIRST INSURANCE
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause --- Affidavits --- Exhibits _____ No(s). _____
Answering Affidavits --- Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 10/18/13
which disposes of motion sequence(s) no. _____

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

Dated: 10/18/13

_____, J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X

TARRY REALTY LLC,

Plaintiff,

Index Number: 156966/12

Submission Date: 5/8/13

- against -

**DECISION, ORDER
AND JUDGMENT**

UTICA FIRST INSURANCE COMPANY and
SINIS CONTRACTING, INC.,

Defendants.

----- X

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Papers considered in review of defendant Utica's motion to dismiss and motion for summary judgment (motion seq. no. 001) and cross-motions:

Notice of Motion/Affirm. of Counsel in Supp./Memo of Law.....	1
Notice of Cross-Motion/Memo of Law in Opp. and Supp. Cross-Motion.....	2
Notice of Cross-Motion/Affirm. Counsel/Affidavit.....	3
Notice of Cross-Motion/Memo of Law in Supp. Cross-Motion.....	4
Reply Memo in Supp. of Cross-Motion.....	5
Reply Memo in Opp. to Motion and Supp. of Cross-Motion.....	6

HON SALIANN SCARPULLA, J.:

In this insurance coverage action, defendant Utica First Insurance Company ("Utica") moves for summary judgment dismissing the complaint and for a declaration that it is not obligated to provide defense and indemnification to plaintiff Tarry Realty LLC ("Tarry") pursuant to CPLR § 3212. In the alternative, Utica moves to dismiss the

complaint based on Tarry's failure to state a cause of action and based on the documentary evidence under CPLR §§ 3211(a)(1) and (a)(7).

All parties cross-move for summary judgment on the issue of whether Utica is obligated to defend and indemnify defendant Sinis Contracting, Inc. ("Sinis"). Specifically, Tarry cross-moves for summary judgment on its fifth cause of action seeking a declaration that Utica is obligated to provide defense and indemnification to Sinis. Sinis cross-moves for summary judgment on its cross-claim for a declaration that Utica has an obligation to provide defense and indemnification to Sinis. Utica cross-moves for summary judgment dismissing Sinis' cross-claim for defense and indemnification and for a declaration that Utica has no obligation to defend or indemnify Sinis.

Tarry is the owner of the premises located at 18 Mill Street, Port Chester, New York ("the premises"). In 2007, Tarry began a renovation project of a restaurant located on the premises. Defendant Sinis Contracting, Inc. and non-party Briga Landscaping, Inc. ("Briga") are companies that worked on the renovation project.

On July 2, 2007, one of Briga's employees, Jose Vidals ("Vidals"), fell from a scaffolding at the premises and suffered personal injuries. On May 29, 2010, Vidals commenced a tort action against Tarry and Sinis (*Vidals v. Sinis Contracting, Inc., et al.*, New York Supreme Court, Westchester County, Index No. 16525/10) ("the underlying action").

After the commencement of the underlying action, Sinis sought coverage from its insurer Utica under a general liability policy covering the period from July 23, 2006 to July 23, 2007, with a \$1,000,000 per occurrence limit and \$2,000,000 aggregate limit (“the policy”). After receiving notice of Sinis’ claim under the policy, Utica undertook the defense of Sinis and appointed a law firm to represent Sinis.

The parties in the underlying action conducted depositions of Tarry’s managing member Mark Coscia (“Coscia”) on November 18, 2011, and Sinis’ principal, John S. Sinis (“Mr. Sinis”) on January 20, 2012. The main topics addressed at the depositions concerned whether Tarry or Sinis served as the general contractor of the project, and whether Tarry or Sinis hired Briga to perform the exterior work that Vidals performed at the time of his accident. To date, there has been no disposition in the underlying action.

Subsequently, on August 30, 2012, Utica notified Sinis that it may not be covered under the policy. Specifically, Utica stated in the letter that if “it is determined that you were acting general contractor on site at the time of this loss, Utica First Insurance will not provide coverage” pursuant to applicable exclusions under the policy.

On October 4, 2012, Tarry then commenced this insurance coverage action against Utica and Sinis. Tarry asserts five causes of action for: (1) a breach of contract claim against Utica for failing to pay for insured costs; (2) a declaration that Utica is obligated to defend and indemnify Tarry under the policy; (3) a declaration that Sinis is liable for costs in the underlying action because it breached an agreement to obtain insurance on

Tarry's behalf; (4) a declaration that Utica is estopped from raising any coverage defenses against Sinis; and (5) a declaration that Utica is obligated to defend and indemnify Sinis.

By letter dated November 9, 2012, Utica disclaimed coverage to Tarry. Utica later disclaimed coverage to Sinis by letter dated March 7, 2013.

1. Utica's Motion for Summary Judgment Against Tarry

In the current motion, Utica argues that it is not obligated to defend and indemnify Tarry because it is not an additional insured under the policy. Utica further argues that Tarry does not have standing to challenge its coverage of Sinis.

In opposition, Tarry argues that it is entitled to coverage from Utica because Utica is estopped from denying coverage to Sinis. Tarry also argues that it has standing because Sinis asserted a cross-claim against Utica.

2. Tarry and Sinis' Cross-Motion for Summary Judgment Against Utica

Tarry and Sinis cross-move for summary judgment seeking a declaration that Utica must defend and indemnify Sinis in the underlying action. Tarry and Sinis argue that Utica is estopped from denying coverage to Sinis. First, they argue that Utica knew or should have known that Sinis served as the general contractor for the project based on the allegations in the *Vidals* complaint and subsequent discovery. Second, they argue that Utica is estopped from denying coverage because Sinis will suffer prejudice from Utica's two-year delay in disclaiming coverage.

In support of its cross-motion, Sinis submits an affidavit from its principal John S. Sinis dated March 4, 2013. Mr. Sinis states that “Utica knew in August 2010, based on my conversations with its representatives at that time, that Sinis hired Vidals’ employer, Briga, to work at the Tarry renovation job. This fact was also confirmed by me and Tarry during the discovery in the Vidals action when Sinis was being defended by the law firm hired by Utica to represent it.”

In opposition, Utica argues that: (1) Sinis is not covered under the policy because an exclusion applies (“the contractor exclusion”); and (2) Utica is entitled to disclaim coverage because the time to disclaim did not accrue until it learned facts that triggered the disclaimer. Utica claims that it did not learn that Sinis served as the general contractor until it received Mr. Sinis’ affidavit dated March 4, 2013.

Utica submits a copy of the contractor exclusion, which is entitled “Exclusion of Injury to Employees, Contractors, and Employees of Contractors.” The contractor exclusion states that: “[t]his 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.”

Utica further submits an affidavit from its claims manager Susan Wheaton (“Wheaton”). Wheaton states that upon receiving notice of Sinis’ insurance claim, Utica conducted an investigation and “spoke with John Sinis who advised Utica First that Tarry Realty LLC (“Tarry”) acted as the general contractor for the Project, not Sinis, and that Tarry retained all subcontractors that worked at the Project, including Briga.”¹ Wheaton further states that “Mr. Sinis further advised Utica First that Sinis did not hire Briga to work at the Project.” Wheaton attaches to her an affidavit a statement signed by John S. Sinis on April 6, 2010. In the statement, Sinis stated that “Tarry Realty Inc. was responsible for hiring the subcontractors” and that “Briga was hired by and paid by the building owner directly.”

The parties also submit the transcripts of the depositions of Tarry’s managing member Mark Coscia and Sinis’ principal John S. Sinis (“Mr. Sinis”) from the underlying action. At his deposition, Mark Coscia testified that he is a managing member of Tarry, and that he served as the lead person from Tarry for the renovation project. Coscia testified that Tarry hired an architect Michael Boender for the project, and that he believed that Tarry hired Sinis as the general contractor. Coscia could not recall whether Tarry entered into any written contract with Sinis.

¹ “Utica” and “Utica First” are used interchangeably herein.

Coscia testified that Mr. Sinis “managed various aspects of the project.”

According to Coscia, Sinis retained subcontractors and purchased materials for the project. Coscia could not recollect whether Tarry hired any subcontractors although he stated that Tarry became more involved towards the end of the project.

Coscia also testified that Sinis introduced Briga to Tarry, and that Briga’s work mainly entailed performing exterior stucco work or finishes on the outside of the building. Coscia believes that Sinis hired Briga to work on the exterior of the building. Coscia stated that Briga may have performed other work at the premises.

Sinis’ principal John S. Sinis testified at his deposition that Tarry hired Sinis to perform interior remodeling of the building. Mr. Sinis testified that Coscia asked Sinis to serve as the general contractor for the project, and that he entered into a verbal agreement with Coscia to that effect.

Mr. Sinis also testified that Coscia solicited bids from subcontractors on the project, and that Mr. Sinis gave Coscia recommendations on which subcontractors to hire. Mr. Sinis collected bids from subcontractors and submitted them to Coscia, and Coscia also received bids from other subcontractors on his own as well. Mr. Sinis testified that Coscia selected subcontractors based on the lowest bids and that for “[s]ome bids, he did not use any of my subs. He had his own subs.”

Mr. Sinis explained that Briga is a company that performs masonry landscaping. Mr. Sinis testified that he contacted Briga first and asked them to send in a bid, but that he then transferred the bid to Coscia. According to Mr. Sinis, Briga initially sent him paperwork, but that Coscia then worked with Briga directly.

Mr. Sinis testified that Briga sent invoices to both Coscia and to him. Mr. Sinis paid Briga \$10,000 for work performed at the restaurant, but he could not recall what type of work the payment related to.

Mr. Sinis testified that when he first agreed to do the renovation project, the scope of the work was limited to interior work of the restaurant only and to fix the sign outside. He testified that Tarry made the decision to change the exterior at a later point, and that the architect Michael Boender was in charge of the exterior work and pulling the permits. Mr. Sinis stated that Tarry did not pay him for any outside work, and that he was not involved with all of the work performed at the premises.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

I. Utica's Duty to Defend and Indemnify Tarry

In an insurance coverage action, the insured bears the initial burden of showing that the "insurance contract covers the loss for which the claim is made." *Kidalso Gas Corp. v. Lancer Ins. Co.*, 21 A.D.3d 779, 780-81 (1st Dep't 2005). The burden then shifts to the insurer to demonstrate that a policy exclusion defeats the insured's claim. *Monteleone v. Crow Constr. Company*, 242 A.D.2d 135, 139 (1st Dep't 1998).

In interpreting an insurance policy, the court must enforce the plain and ordinary meaning of the policy when its provisions are clear and unambiguous. *Roundabout Theatre Co., Inc. v. Cont'l Casualty Co.*, 302 A.D.2d 1, 6 (1st Dep't 2002). The issue of whether a provision of an insurance policy is ambiguous is a question of law for the court. *Atlantic Mut. Ins. Co. v. Terk Technologies Corp.*, 309 A.D.2d 22, 28 (1st Dep't 2003).

Here, I find that Utica is not obligated to defend or indemnify Tarry in the underlying action. The policy contains a blanket additional insured provision which expressly states that an additional insured includes any organization whom the insured is required to "name as an additional insured on this policy under a written contract or written agreement." Mr. Sinis testified at his deposition that no written contract existed between Sinis and Tarry related to the renovation project, and Tarry's managing member Mark Coscia could not recall whether a written contract existed between Sinis and Tarry. Based on the absence of any written contract requiring Sinis to name Tarry as an

additional insured under the policy, I find that Sinis' policy does not cover Tarry as an additional insured.

Accordingly, Utica's motion for summary judgment dismissing the complaint and for a declaration that it is not obligated to defend and indemnify Tarry is granted.

II. Utica's Duty to Defend and Indemnify Sinis

I also grant Utica's motion for summary judgment seeking a declaration that it does not have a duty to defend or indemnify Sinis in the underlying action.

Utica demonstrated that it is not obligated to defend or indemnify Sinis because the contractor exclusion applies. This exclusion specifically states that coverage does not extend to claims for bodily injury by an employee of a contractor hired by the insured, if the bodily injury claim arises out of his or her employment by the insured. Here, Sinis seeks coverage for a bodily injury claim by Vidals, an employee of Briga. In his affidavit, Mr. Sinis stated that Sinis hired Briga as a subcontractor to perform work at the premises. As Vidals is an employee of a contractor hired by Sinis, the contractor exclusion applies and therefore Sinis is not covered under the policy for the *Vidals* action.

I also find that Utica's disclaimer of coverage on March 7, 2013 is valid. Utica demonstrated that it did not have the requisite knowledge to determine that the contractor exclusion applied until it received Mr. Sinis' affidavit dated March 4, 2013. In his affidavit, Mr. Sinis expressly stated – for the first time – that Sinis hired Briga to perform work at the renovation project. Prior to that time, Mr. Sinis had represented to Utica that

Tarry was the general contractor that hired Briga, not Sinis – as established by Utica through the affidavit of its claims manager, Susan Wheaton.

Tarry and Sinis argue that Utica knew or should have known that Sinis was the general contractor for the project based on the allegations in the *Vidals* complaint, and the subsequent discovery in that case. However, Utica was entitled to rely on Mr. Sinis' representations that Sinis was not the general contractor of the project, and that Sinis did not hire Briga as a subcontractor to perform exterior work at the premises. *Federated Dept. Stores v. Twin City Fire Ins. Co.*, 28 A.D.3d 32, 39 (1st Dep't 2006) (finding that an insurer is entitled to rely on the representations of a purported insured and that an insured is obligated to provide correct information to the insurer).

Furthermore, the *Vidals* complaint contains blanket allegations that all of the defendants were the general contractor of the project, and the issue of whether Tarry or Sinis served as the general contractor has been highly contested throughout the *Vidals* litigation. Mr. Sinis' own deposition testimony in January 2012 was inconclusive as to whether Sinis served as the general contractor of the project. Although Mr. Sinis appeared to testify at the beginning of his deposition that Sinis was the general contractor of the entire project, he later testified that he did not have any involvement with the exterior work of the project involving Briga.

Tarry and Sinis also claim that Utica should be estopped from disclaiming coverage to Sinis. An insurer can be equitably estopped from issuing a disclaimer if the insured demonstrates prejudice by the insurer's actions. *Federated Dept. Stores*, 28 A.D.3d at 39; *206-208 Main Street Assoc., Inc. v. Arch Ins. Co.*, 106 A.D.3d 403, 406 (1st Dep't 2013).

I find that equitable estoppel does not apply here, and that Utica's disclaimer of coverage to Sinis is valid. Although Utica has defended Sinis for two years, Sinis fails to show that Utica's control of its defense is such that the "character and strategy of the lawsuit can no longer be altered." *Federated Dept. Stores*, 28 A.D.3d at 35. There has been no disposition in the underlying action, and Sinis did not introduce any evidence that the underlying action is close to trial. *206-208 Main Street Assoc., Inc.*, 106 A.D.3d at 406. Contrary to Sinis' claim, estoppel cannot simply be presumed because Utica agreed to defend Sinis without a reservation of rights. *Federated Dept. Stores*, 28 A.D.3d at 36 (a "delay in giving notice of reservation of rights will be excused where it is traceable to the insurer's lack of actual or constructive knowledge of the available defense, especially where, in addition to such lack of knowledge, the insurer is misled by misrepresentations into defending the suit" (internal quotations omitted)).

Accordingly, Utica's cross-motion for summary judgment seeking a declaration that it has no obligation to indemnify Sinis is granted, and Tarry and Sinis' cross-motions for summary judgment seeking a declaration that Utica is obligated to defend and indemnify Sinis is denied. Further, Sinis' cross-claim against Utica are dismissed.

In accordance with the foregoing, it is hereby

ORDERED that defendant Utica First Insurance Company's motion for summary judgment dismissing the complaint and for a declaration that it is not obligated to defend and indemnify plaintiff Tarry Realty LLC in the *Vidals* action is granted, and the complaint against Utica First Insurance Company is dismissed; and it is further

ORDERED that defendant Utica First Insurance Company's cross-motion for summary judgment dismissing defendant Sinis Contracting, Inc.'s cross-claim and for a declaration that it is not obligated to defend and indemnify defendant Sinis Contracting, Inc. in the *Vidals* action is granted; and it is further

ORDERED that defendant Sinis Contracting, Inc.'s cross-claim against Utica First Insurance Company is dismissed; and it is further

ORDERED that plaintiff Tarry Realty LLC's cross-motion for summary judgment seeking a declaration that Utica is obligated to defend and indemnify defendant Sinis Contracting, Inc. in the *Vidals* action is denied; and it is further

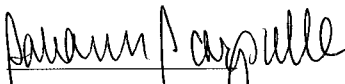
ORDERED that defendant Sinis Contracting, Inc.'s cross-motion for summary judgment seeking a declaration that Utica is obligated to defend and indemnify defendant Sinis Contracting, Inc. in the *Vidals* action is denied; and it is further

ADJUDGED and DECLARED that defendant Utica First Insurance Company has no obligation to defend or indemnify plaintiff Tarry Realty LLC or defendant Sinis Contracting, Inc. in the *Vidals* action.

This constitutes the decision, order, and judgment of the Court.

Dated: New York, New York
 October 18, 2013

ENTER:


Saliann Scarpulla, J.S.C.