

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

COOPER SQUARE ASSOCIATES, L.P. and HARTZ
MOUNTAIN INDUSTRIES, INC.,
Plaintiffs,

Index No.: 109089/2005

Motion Date: 02/09/10

Motion Seq. No.: 001

- v -

ATLANTIC MUTUAL INSURANCE CO.,
Defendant.

Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1

2

3

FILED

Cross-Motion: Yes No

FEB 16 2010

Upon the foregoing papers,

NEW YORK
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To the extent of defense costs incurred in the settlement,
the court shall grant summary judgment to the plaintiffs in this
declaratory judgment action seeking defense and indemnification
for plaintiffs Cooper Square Associates, L.P. and Hartz Mountain
Industries, Inc. in the underlying personal injury action Araya-
Alva v Cooper Square Associates, L.P., et al, Index No.

100198/2003 (Sup Ct, New York County) ("Araya-Alva"). With
respect to indemnification, the court shall deny a summary
declaration as to any further duty on the part of defendant.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

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

There is no dispute that defendant's insured Village Voice, Inc. ("Village Voice"), as tenant, procured the Atlantic Mutual Insurance Company policy of insurance pursuant to the provisions of its lease of premises known as 36 Cooper Square from the plaintiffs (collectively "owner"). The owner is named as additional insured under such policy, and the policy provides insurance coverage of the tenant's indemnification obligations to the owner under the lease. The lease states that:

Tenant [Village Voice] shall indemnify and save harmless Owner [Cooper Square] against and from all liabilities, obligations, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys fees, paid, suffered or incurred as a result of any breach by Tenant, Tenant's agents, contractors, employees, invitees, or licensees, of any covenant or condition of this lease, or the carelessness, negligence or improper conduct of the Tenant, Tenant's agents, contractors, employees, invitees or licensees.

Defendant's argument is two fold. First, defendant argues that it owes no duty to either defend or indemnify the owner under the policy of insurance in which the owner is named as additional insured since the owner has not established that the accident took place within the premises leased by defendant's insured, the tenant. Second, it argues that because there was no finding of liability against its insured (the tenant in the Araya-Avala action), it has no duty to indemnify the owner for its unilateral payment of settlement monies in that action.

As to its first argument, defendant points to the allegations of the complaint in the underlying action, which

state that Araya-Alva was caused to fall on a ramp, located at 36 Cooper Square, due to the unsafe condition of that ramp. It contends that because the Village Voice was not the only tenant to lease space from the owner at the location in question and because such location included common areas for which the tenant was not responsible, the owner cannot establish that the Village Voice owes the owner any defense.

Defendant is correct that the duty to defend is measured against the allegations of the pleadings.

If the claims asserted, though frivolous, are within the policy coverage, the insurer must defend irrespective of the ultimate liability (citation omitted). A declaration that an insurer is without obligation to defend a pending action could be made "only if it could be concluded as a matter of law that there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision of the insurance policy".

Servidone Const Corp v Security Ins Co of Hartford, 64 NY2d 419, 423-424 (1985).

Here, the provision in the lease describes the premises as "the basement, first floor, second floor, third floor and fourth floor of 34-36 Cooper Square". Based on that provision, the possibility that the place where Araya-Alva fell may be occupied by tenants other than the Village Voice, as argued by the defendant, does not obviate defendant's duty to defend. The Araya-Alva pleadings allege that the ramp of 36 Cooper Square was in an unsafe condition resulting in her injury. Given the lease description, the complaint asserts that the accident took place

in the premises occupied by the Village Voice. Such pleadings provide a factual and legal basis upon which the Village Voice might have eventually been held liable for the failure to maintain such ramp in a safe condition.

Based on this court's holding, the owner is entitled to recover its costs of defending the underlying action from the date of its tender to the defendant. See Davidson v Hilton Hotels Corp., 266 AD2d 336, 337-338 (2d Dept 1999). Furthermore, "interest on any sum awarded plaintiff should run only from the date or dates of actual payment of the moneys paid by plaintiff for the services rendered or expenses incurred." Lapierre, Litchfield and Partners v Continental Cas. Co., 32 AD2d 353, 356 (1st Dept 1969).

As for indemnification for the monies paid in settlement to Araya-Alva in the underlying action, the owner has not proved as a matter of law that Araya-Alva's injury arose from any breach of any covenant or condition of the lease or any negligence, carelessness or improper conduct on the part of the tenant, the basis for indemnification under the lease. There must be further proceedings to determine the basis for the tenant's liability to Araya-Avala, and therefore such issue must await trial at which the "burden of proof will rest with the [defendant] to demonstrate that the loss compromised by the insured was not within the policy coverage." Servidone, supra, at 425.

Accordingly, it is

ORDERED and DECLARED that plaintiff COOPER SQUARE ASSOCIATES, L.P. and HARTZ MOUNTAIN INDUSTRIES, INC.'s motion for summary judgment on the cause of action that defendant is obligated to defend plaintiffs in the underlying action entitled Araya-Alva v Cooper Square Associates, L.P., et al, Index No. 100198/2003 (Sup Ct, New York County) is GRANTED and it is hereby DECLARED that the insurance policy of defendant ATLANTIC MUTUAL INSURANCE COMPANY issued to VILLAGE VOICE MEDIA, LLC under which plaintiffs COOPER SQUARE ASSOCIATES, L.P. and HARTZ MOUNTAIN INDUSTRIES, INC. are additional insureds, provides coverage for all expenses incurred by plaintiffs in defense of claims enumerated in the aforesaid action, including all attorneys fees; and it is further

ORDERED and DECLARED that defendant ATLANTIC MUTUAL INSURANCE COMPANY pursuant to the insurance policy issued to defendant VILLAGE VOICE MEDIA, INC., is required to reimburse plaintiffs for amounts, including attorneys' fees, incurred in the defense of the aforementioned personal injury action; and it is further

ORDERED that summary judgment for a declaration as to defendant's liability for indemnification for any other liabilities or losses incurred by plaintiffs is DENIED and is

required to be determined in further proceedings; and it is further

ORDERED that at the trial of defendant's obligation to save harmless and indemnify plaintiffs for any additional loss, the issue of the amount of damages to be assessed against defendant ATLANTIC MUTUAL INSURANCE COMPANY shall also be determined; and it is further

ORDERED that the parties shall appear for a preliminary conference in IAS Part 59, 111 Centre Street, Room 1254, New York, New York on March 9, 2010.

This is the decision and order of the court.

Dated: February 9, 2010

ENTER:

~~Debra A. James~~
DEBRA A. JAMES J.S.C.

FILED

FEB 18 2010

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COUNTY CLERK'S OFFICE