State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: April 1, 2021 531037

MATTHEW HILGREEN,
Plaintiff,
v

POLLARD EXCAVATING, INC., et al.,
Defendants,
and

JOHN J. POLLARD III et al., Individually and Doing Business as THE HOMEFRONT CAFÉ,
Defendants and Third-Party Plaintiffs-Respondents;

CENTRAL MUTUAL INSURANCE COMPANY,
Third-Party Defendant-Appellant, et al.,
Third-Party Defendants.

MEMORANDUM AND ORDER

Calendar Date: January 6, 2021

Before: Egan Jr., J.P., Aarons, Pritzker, Reynolds Fitzgerald and Colangelo, JJ.

Rivkin Radler LLP, Albany (Michael C. Cannata of counsel), for third-party defendant-appellant.

E. Stewart Jones Hacker Murphy, Troy (James E. Hacker of counsel), for defendants and third-party plaintiffs-respondents.

Colangelo, J.

Appeal from an order of the Supreme Court (Ryba, J.), entered January 10, 2020 in Albany County, which, among other things, denied a motion by third-party defendant Central Mutual Insurance Company to dismiss the second amended third-party complaint against it with prejudice.

In June 2016, plaintiff allegedly sustained personal injuries when he fell while descending an exterior staircase outside of his apartment located at 196 Main Street in the Village of Altamont, Albany County. Plaintiff thereafter commenced this negligence action against defendants John J. Pollard III and Clinda Pollard (hereinafter collectively referred to as the Pollards), who own plaintiff's apartment complex and operate the Homefront Café on the lower level of 196 Main Street. Plaintiff also named defendants Pollard Excavating, Inc. and Pollard Disposal Service Inc., each of which are companies owned and operated by the Pollards. After the action was commenced, the Pollards sought liability coverage from third-party defendant Central Mutual Insurance Company under an insurance policy issued to Pollard Excavating and sought liability coverage from third-party defendant National Interstate Insurance Company under a policy issued to Pollard Disposal. Both Central Mutual and National Interstate disclaimed coverage on the ground that the Pollards were not named insureds under the respective policies.

Upon the denial of coverage, the Pollards commenced a third-party action seeking defense and indemnification in the underlying action (hereinafter the declaratory judgment action)

from both Central Mutual and National Interstate. The Pollards also named, among others, third-party defendant Avid Insurance Agency, Inc. and its principal, third-party defendant Roger Saddlemire (hereinafter collectively referred to as Avid), who procured the insurance policies on behalf of the Pollards. The Pollards thereafter filed an amended third-party complaint in the underlying action to assert, as relevant here, causes of action against Central Mutual for reformation of the insurance policy contract between Central Mutual and Pollard Excavating to include the Pollards as insureds. The Pollards also sought a declaration that Central Mutual is obligated to defend and indemnify the Pollards under the reformed contract. As relevant here, Central Mutual moved, pre-answer, to dismiss the amended third-party complaint on the grounds that the complaint failed to state a cause of action for reformation and that the Pollards were not the named insureds under the insurance policy contract. The Pollards, in opposition, defended the sufficiency of the pleading and, alternatively, sought leave to re-plead. Supreme Court denied Central Mutual's motion and granted the Pollards leave to re-plead the reformation claim.

The Pollards filed a second amended third-party complaint that, among other things, reasserted the same causes of action as the prior amended complaint. Central Mutual moved to dismiss the second amended third-party complaint with prejudice for failure to state a cause of action for reformation and for a declaration that the Pollards are not entitled to coverage under the policy issued to Pollard Excavating. The Pollards and Avid opposed the motion. Supreme Court denied the motion, finding that the second amended third-party complaint sufficiently pleaded a cause of action for reformation based on mutual mistake. Central Mutual appeals.

"On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a claim, we must afford the complaint a liberal construction, accept the facts as alleged in the pleading as true, confer on the nonmoving party the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory" (Graven v Children's Home R.T.F., Inc., 152 AD3d 1152, 1153 [2017] [internal

quotation marks and citations omitted]; accord Matter of Santander Consumer USA, Inc. v Kobi Auto Collision & Paint Ctr., Inc., 183 AD3d 984, 987 [2020]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (Simkin v Blank, 19 NY3d 46, 52 [2012] [internal quotation marks and citation omitted]; see Graven v Children's Home R.T.F., Inc., 152 AD3d at 1153; Town of Tupper Lake v Sootbusters, LLC, 147 AD3d 1268, 1269 [2017]). "Moreover, a claim predicated on mutual mistake must be pleaded with the requisite particularity necessitated under CPLR 3016 (b)" (Simkin v Blank, 19 NY3d at 52), which provides that "[w]here a cause of action or defense is based upon misrepresentation, fraud [or] mistake . . ., the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]; see Friedland Realty, Inc. v 416 W, LLC, 120 AD3d 1185, 1187 [2014]).

The party seeking reformation bears the burden to show "by clear and convincing evidence, that the writing in question was executed under mutual mistake or unilateral mistake coupled with fraud and to demonstrate in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties" (Imrie v Ratto, 187 AD3d 1344, 1346 [2020] [internal quotation marks and citations omitted]; see George Backer Mgt. Corp. v Acme Quilting Co., 46 NY2d 211, 219 [1978]). "In a case of mutual mistake, the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (Chimart Assoc. v Paul, 66 NY2d 570, 573 [1986] [citations omitted]). "Reformation may be granted when clear and convincing evidence establishes that the parties reached an oral agreement that, without their knowledge, was not embodied in the subsequent written contract" (Imrie v Ratto, 187 AD3d at 1347 [citation omitted]; see Chimart Assoc. v Paul, 66 NY2d at 573).

As relevant here, the Pollards allege in the second amended third-party complaint that Central Mutual mistakenly failed to name the Pollards as insureds or additional insureds under the insurance policy contract issued to Pollard

Excavating, that Central Mutual mistakenly believed that the Pollards were covered in their individual capacities under said insurance policy contract, that Avid mistakenly believed that the Pollards were covered in their individual capacities under the insurance policy contract, and that it was the intent of Avid, as the agent of Central Mutual, that the Pollards be covered individually. The Pollards further allege that they believed that they were covered in their individual capacities and that the failure of Central Mutual to name them as such was the product of a mutual mistake. "It is well established that when interpreting an insurance contract, as with any written contract, the court must afford the unambiguous provisions of the policy their plain and ordinary meaning" (Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co., 36 AD3d 441, 442 [2007] [citations omitted]).

Here, the second amended third-party complaint asserts that the Pollards own the buildings located at 192-198 Main Street and that they are shareholders of Pollard Excavating and Pollard Disposal. The coverage form contained in the policy issued to Pollard Excavating specifically identifies the insured under the policy as a "corporation in the business of excavating" and further identifies, as relevant here, that "your stockholders are also insureds, but only with respect to their liability as stockholders." Inasmuch as the express provisions of the insurance policy contract do not include individual coverage for the Pollards, it was incumbent upon the Pollards to allege sufficient facts showing mutual mistake. To that end, the second amended third-party complaint fails to contain any factual allegations that Central Mutual agreed to provide coverage to the Pollards in their individual capacities or that any oral agreement was reached by which Central Mutual was obligated to do so. We therefore find that the second amended third-party complaint fails to allege with sufficient particularity that the parties "reached an oral agreement and, unknown to either [party], the signed writing does not express that agreement" (Chimart Assoc. v Paul, 66 NY2d at 573; see Friedland Realty, Inc. v 416 W, LLC, 120 AD3d at 1186-1187; Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co., 36 AD3d at 443; compare Imrie v Ratto, 187 AD3d at 1346-

1347). Accordingly, Supreme Court erred to the extent that it denied Central Mutual's motion to dismiss the second amended third-party complaint, and that part of the motion is granted, without prejudice.

Aarons and Reynolds Fitzgerald, JJ., concur.

Egan Jr., J.P. (dissenting).

Because we believe that the second amended third-party complaint filed by defendants John J. Pollard III and Clinda Pollard (hereinafter collectively referred to as the Pollards) sufficiently pleaded a cause of action for reformation based upon mutual mistake, we respectfully dissent.

On a motion to dismiss a pleading pursuant to CPLR 3211 (a) (7) for failure to state cause of action, the relevant pleading must be liberally construed, the facts alleged therein must be accepted as true and the plaintiff is entitled to the benefit of every favorable inference in determining whether the alleged facts fit within a cognizable legal theory (see Duffy v Baldwin, 183 AD3d 1053, 1054 [2020]). As relevant here, a claim predicated on mutual mistake must be pleaded with the requisite particularity, meaning that "the circumstances constituting the wrong" must be stated in detail (CPLR 3016 [b]; see Simkin v Blank, 19 NY3d 46, 52 [2012]). To that end, "[a] claim of mutual mistake is stated where the allegations indicate that the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (Friedland Realty, Inc. v 416 W, LLC, 120 AD3d 1185, 1186 [2014] [internal quotation marks and citations omitted]; see Matter of Gould v. Board of Educ. of Sewanhaka Cent. High School Dist., 81 NY2d 446, 453 [1993]).

This case involves a claim by plaintiff, a tenant, that he was injured while on a staircase outside his apartment located at 196 Main Street in the Village of Altamont, Albany County. The second amended third-party complaint alleges that the Pollards own this property, that they are also shareholders of

defendant Pollard Excavating, Inc., that third-party defendant Central Mutual Insurance Company issued an insurance policy covering 192-198 Main Street in the name of Pollard Excavating, that the Pollards requested that third-party defendants Avid Insurance Agency, Inc. and Roger Saddlemire, as agents of Central Mutual, name them as insureds on the policy and that, despite their request, Avid, Saddlemire and Central Mutual mistakenly failed to name them as insureds.

Notably, "[w]here it is apparent that an innocent mistake occurred with respect to a named insured and it is evident that the parties intended to cover the risk, the error may be deemed mutual for purposes of reformation even though the insurer was not aware of the error" (Cheperuk v Liberty Mut. Fire Ins. Co., 263 AD2d 748, 749 [1999]). In our opinion, since it is specifically alleged that Avid and Saddlemire, as agents of Central Mutual, were asked to procure coverage on behalf of the Pollards, in their individual capacities, under the policy issued to Pollard Excavating, against personal injuries sustained at the Pollards' 192-198 Main Street property, they pleaded their claim with the requisite particularity, have stated a cognizable claim for reformation and may litigate whether the issuance of the policy in the name of Pollard Excavating rather than the Pollards individually was the result of a mutual mistake as to the identity of the actual insureds (see e.g. Imrie v Ratto, 187 AD3d 1344, 1346 [2020]; Cheperuk v Liberty Mut. Fire Ins. Co., 263 AD2d at 749-750; Anand v GA Ins. Co. of N.Y., 228 AD2d 397, 398-399 [1996]; Court Tobacco Stores v Great E. Ins. Co., 43 AD2d 561, 561-562 [1973]; compare Friedland Realty, Inc. v 416 W, LLC, 120 AD3d at 1187; Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co., 36 AD3d 441, 443 [2007]).[1] Accordingly, we would affirm Supreme

[1] As the majority correctly indicates, the Pollards will eventually need to prove, by clear and convincing evidence, that the policy was executed upon a mutual mistake (see Chimart Assoc. v Paul, 66 NY2d 570, 573 [1986]; Imrie v Ratto, 187 AD3d 1344, 1346 [2020]). However, at this early stage of the litigation, they need not meet such a high evidentiary burden to defeat a pre-answer motion to dismiss.

Court's denial of Central Mutual' s motion to dismiss the second amended third-party complaint.

Pritzker, J., concurs.

ORDERED that the order is modified, on the law, with costs to third-party defendant Central Mutual Insurance Company, by reversing so much thereof as denied said third-party defendant's motion to dismiss the second amended third-party complaint against it; said motion granted to that extent; and, as so modified, affirmed.

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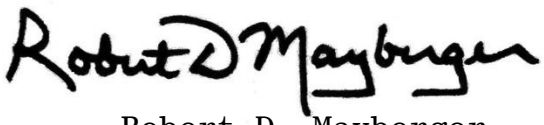

Robert D. Mayberger
Clerk of the Court