277 A.D.2d 305, 716 N.Y.S.2d 77, 2000 N.Y. Slip Op. 10030
(Cite as: 277 A.D.2d 305, 716 N.Y.S.2d 77)

H

Supreme Court, Appellate Division, Second Department, New York.
Llewlyn SMITH, et al., Plaintiffs,
v.
AJ CONTRACTING COMPANY, INC., et al., Defendants and Third-Party Plaintiffs-Appellants,
and
Neighborhood Partnership Housing Development Fund Company, Inc., et al., Defendants;
L & L Painting Co., Inc., Third-Party Defendant-Respondent, et al., Third-Party Defendant
(and another Third-Party action).
Nov. 13, 2000.

Employee of painting subcontractor brought suit against general contractor, premises owner, and managing agent, seeking to recover for injuries sustained in workplace accident, and defendants asserted third-party claims against subcontractor. The Supreme Court, Kings County, Rappaport, J., granted summary judgment to subcontractor dismissing third-party claims. Defendants appealed. The Supreme Court, Appellate Division, held that: (1) appeal was not rendered academic by settlement during its pendency which resolved most claims and cross-claims, and (2) fact issue as to whether contract requiring subcontractor to procure insurance for defendants existed at time of accident precluded summary judgment on breach of contract claim.

Reversed.

West Headnotes

[1] Appeal and Error 30 ⚿781(6)

30 Appeal and Error
30XIII Dismissal, Withdrawal, or Abandonment
30k779 Grounds for Dismissal
30k781 Want of Actual Controversy
30k781(6) k. Effect of Settlement in General. Most Cited Cases
Appeal from trial court order which granted in part and denied in part painting subcontractor's motion for summary judgment dismissing third-party claims asserted against it by general contractor, premises owner, and managing agent, after they were sued by employee of subcontractor for injuries sustained, was not rendered academic by fact that parties settled most claims and cross-claims while appeal was pending, where written stipulation of settlement contained agreement that third-party breach of contract claim against subcontractor would survive settlement.

[2] Stipulations 363 ⚿17(1)

363 Stipulations
363k15 Conclusiveness and Effect
363k17 Persons Concluded
363k17(1) k. In General. Most Cited Cases
A stipulation is not binding on a party that did not sign or ratify the stipulation.

[3] Judgment 228 ⚿181(19)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(19) k. Contract Cases in General. Most Cited Cases
Genuine issue of material fact as to whether agreement requiring painting subcontractor to procure insurance in favor of general contractor, and premises owner and managing agent, was in existence on date when employee of subcontractor sustained injuries, precluded summary judgment on breach of contract claims asserted against subcontractor.

[4] Insurance 217 ⚿1702

217 Insurance
217XII Procurement of Insurance by Persons Other Than Agents
217k1702 k. Contracts. Most Cited Cases
Failure of painting subcontractor to formalize its

agreement with general contractor, premises owner, and managing agent until after accident in which employee of subcontractor was injured did not constitute absolute bar to finding that, before work was commenced, subcontractor had entered into agreement requiring it to provide insurance naming contractor, owner, and agent as additional insureds.
****77** Quirk and Bakalor, P.C., New York, N.Y. (Timothy J. Keane and Anne E. Pettit of counsel), for defendants third-party plaintiffs-appellants.

Ohrenstein & Brown, LLP, New York, N.Y. (Bennett R. Katz and Theresa Brennan Murphy of counsel), for third-party defendant-respondent.

DAVID S. RITTER, J.P., ANITA R. FLORIO, HOWARD MILLER and SANDRA J. FEUERSTEIN, JJ.

****78** MEMORANDUM BY THE COURT.

***305** In an action to recover damages for personal injuries, etc., the defendants third-party plaintiffs appeal, as limited by their notice of appeal and brief, from so much of an order of the Supreme Court, Kings County (Rappaport, J.), dated July 8, 1999, as granted that branch of the motion of the third-party defendant L & L Painting Co., Inc., which was for summary judgment dismissing their third-party claims sounding in breach of contract for failure to procure insurance.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and the aforementioned branch of the motion is denied.

The injured plaintiff Llewlyn Smith was employed by L & L Painting Co., Inc. (hereinafter L & L) as a painter on a construction project located at 625 Atlantic Avenue in Brooklyn (hereinafter the project). L & L was the painting subcontractor on the project. On October 14, 1996, while Llewlyn was performing his duties as a painter, he was injured when he stepped into an uncovered hole at the base of an escalator.

Llewlyn and his wife subsequently commenced this action against, among others, the appellants AJ Contracting Company,***306** Inc. (hereinafter AJ), Atlantic Center Fort Greene, LP, and Atlantic Center Fort Greene, Inc., the general contractor, managing agent, and owner of the premises, respectively. Thereafter, the appellants commenced a third-party action against, among others, L & L, asserting claims for contractual and common-law indemnification and/or contribution, as well as to recover damages for breach of contract for failing to procure insurance.

L & L moved for summary judgment on all third-party claims asserted against it on the grounds that the claims were barred either by Workers' Compensation Law § 11 or because there was no contract in existence prior to the date of the accident. The Supreme Court denied that branch of the motion which sought to dismiss the claim for contractual indemnification, but granted those branches of the motion which sought dismissal of the claims for common-law indemnification and breach of contract to procure insurance.

Prior to the argument of this appeal, the parties settled most of the claims and cross claims. On November 10, 1999, they placed a stipulation of settlement on the record in open court. That stipulation expressly excepted the appellants' breach of contract claim. Thereafter, the plaintiffs' counsel prepared a written stipulation of settlement. The written stipulation purports to settle all claims and cross claims but failed to reserve the appellants' right to continue their claim against L & L. This stipulation was signed only by the plaintiff. Based upon the written stipulation, L & L has moved before this court to dismiss the appeal as academic. We reverse the Supreme Court's determination insofar as appealed from and, in the accompanying decision and order on motion, deny the motion now pending before this court.

[1][2] In light of the stipulation entered into in open court, whereby the parties agreed that the appellants' breach of contract claim would survive the

settlement of all other claims in the action, this appeal has not been rendered academic. It is clear that the parties did not intend that any written stipulation would override the terms of the stipulation made on the record. In any event, the stipulation is not binding on the appellants since it was not signed or ratified by them.

[3] The proof submitted to the Supreme Court shows that the parties finalized the extent of the work to be performed by L & L by way of a formal written agreement dated October 29, 1996, which was after the accident had taken place. By October 29, L & L had already completed close to two-thirds of its work on the project, and had also requested payment for it.

****79 *307** The fact that the formal written agreement had not been signed until October 29, 1996, is not dispositive of the issue of the obligation of L & L to procure insurance. The relationship between the parties commenced with the invitation to bid by AJ dated June 28, 1996, and sent to L & L. The invitation to bid specified the work to be performed, and contained attachments, including attachment E, which obligated L & L to procure insurance in favor of the appellants. L & L submitted an offer to perform the work for $328,000 by letter dated September 13, 1996. Ultimately, it agreed to perform the work for $320,000.

While L & L thereafter immediately commenced work prior to signing a written agreement, various other writings signed on its behalf were subsequently exchanged with the appellants. One such document, an undated "Blanket Purchase Order Agreement", also contained a provision concerning the procurement of insurance. Another such document was a "Partial Waiver of Lien and Release of Claims", dated October 7, 1996, which also contained an indemnification provision. Thus, the proof shows, at the least, a factual question as to the existence of an agreement requiring L & L to procure insurance in favor of the appellants.

[4] Contrary to the contention of L & L, Workers' Compensation Law § 11, as amended by L.1996, ch. 635, § 2, does not require the dismissal of the appellants' claim (*see*, *Santos v. Floral Park Lodge of Free & Accepted Masons [No. 1016]*, 261 A.D.2d 526, 690 N.Y.S.2d 634). Further, the failure to formalize the parties' agreement by a writing until October 29, 1996, after the accident, does not constitute an absolute bar to a finding at trial that before L & L commenced its work, it had entered into a binding agreement with the appellants requiring it to, *inter alia*, procure insurance naming the appellants as insureds (*see*, *Matter of Municipal Consultants & Publishers v. Town of Ramapo*, 47 N.Y.2d 144, 417 N.Y.S.2d 218, 390 N.E.2d 1143; *Conopco, Inc. v. Wathne, Ltd.*, 190 A.D.2d 587, 593 N.Y.S.2d 787; *Evolution Online Systems, Inc. v. Koninklijke Nederland N.V.*, 41 F.Supp.2d 447 (S.D.N.Y.)). Therefore, summary judgment should have been denied (*see generally*, *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 413 N.Y.S.2d 141, 385 N.E.2d 1068).

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History

Direct History

=> 1 **Smith v. AJ Contracting Co., Inc.,** 277 A.D.2d 305, 716 N.Y.S.2d 77, 2000 N.Y. Slip Op. 10030 (N.Y.A.D. 2 Dept. Nov 13, 2000) (NO. 1999-08896)

Related References

2 Smith v. AJ Contracting Co., Inc., 277 A.D.2d 307, 716 N.Y.S.2d 326 (N.Y.A.D. 2 Dept. Nov 13, 2000) (NO. 1999-08896)

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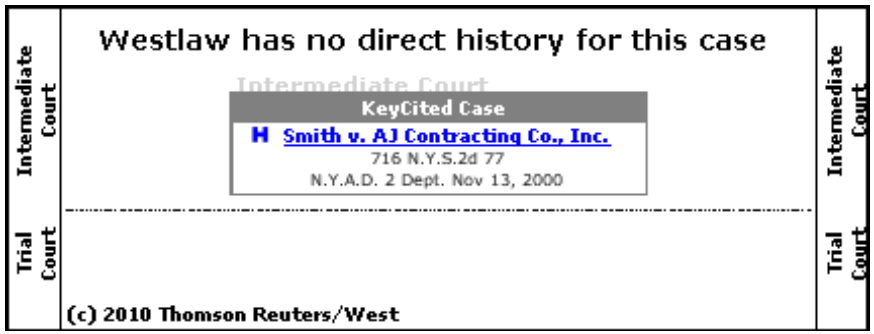
Intermediate Court
Trial Court
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KeyCited Case
H Smith v. AJ Contracting Co., Inc.
716 N.Y.S.2d 77
N.Y.A.D. 2 Dept. Nov 13, 2000
Intermediate Court
Trial Court
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2 Temmel v. 1515 Broadway Associates, 2004 WL 5503716, *5503716+, 2004 N.Y. Slip Op. 30153(U), 30153(U)+ (Trial Order) (N.Y.Sup. Jan 08, 2004) (NO. 0122132/1997) **HN: 3 (N.Y.S.2d)**

H 3 Temmel v. 1515 Broadway Associates, L.P., 2004 WL 5487523, *5487523+ (Trial Order) (N.Y.Sup. Jan 08, 2004) (NO. 122132/97)

4 INSURANCE CORPORATION OF NEW YORK, Mcgraw Hudson Construction Corp., 540 Acquisition, LLC, 540 Acquisition, Inc., Manhattan Pacific Management Corp., and Macklowe Management Co., Inc., Plaintiffs, v. TRANSCONTINENTAL INSURANCE CO., United States Fidelity and Guaranty Co., Royal Insurance Co of America, Commercial Underwriters Insurance Co., Hartford Fire Insurance Co., Nationwide Mutual Insurance Co., Illinois National Insurance Co., AIU Insurance Co.,, 2001 WL 36098545, *36098545 (Trial Order) (N.Y.Sup. Dec 19, 2001) **Decision** (NO. 603352/99)

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H 5 Troy Sand & Gravel Co., Inc. v. New York State Dept. of Transp., 725 N.Y.S.2d 638, 638, 749 N.E.2d 207, 207, 96 N.Y.2d 708, 708 (N.Y. Mar 29, 2001) (Table, NO. 54)

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9 NY Jur. 2d Contracts s 13, Generally (2009) **HN: 3,4 (N.Y.S.2d)**

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