

Bovis Lend Lease (LMB), Inc. v Arch Ins. Co.
2017 NY Slip Op 06049
Decided on August 8, 2017
Appellate Division, First Department
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Decided on August 8, 2017

Friedman, J.P., Mazzairelli, Moskowitz, Gische, Gesmer, JJ.

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[*1] Bovis Lend Lease (LMB), Inc., Third-Party Plaintiff-Respondent,

v

Arch Insurance Company, Third-Party Defendant-Appellant.

Torre, Lentz, Gamell, Gary & Rittmaster, LLP, Jericho (Steven H. Rittmaster of counsel), for appellant.

Jennifer W. Fletcher PC, New York (Jennifer W. Fletcher of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about July 22, 2016, which to the extent appealed from and appealable as limited by the briefs, denied third-party defendant Arch Insurance Company's cross motion to renew its motion for summary judgment dismissing the third-party complaint, unanimously reversed, on the law, without costs, renewal granted and, upon renewal, Arch's motion for summary judgment dismissing the third-party complaint granted, without costs. Appeal from order, same court and Justice, entered January 25, 2016, which, to the extent appealed from as limited by the briefs, denied the parties' motions for summary judgment as to the second and third third-party claims for indemnification and breach of the parties' Companion Agreement, unanimously dismissed, without costs, as academic.

The facts of this case are set forth in our decisions upon prior appeals in this matter (143 AD3d 597 [1st Dept 2016]; 108 AD3d 135 [1st Dept 2013]).

Under paragraph 4 of the parties' Companion Agreement, Bovis was required to obtain Arch's consent to the settlement of the claims and counterclaims asserted by and against Bovis and Lower Manhattan Development Corporation (LMDC), in order to seek indemnification from Arch. Bovis's contractual remedy in the event of Arch's refusal to consent to a settlement, whether or not such refusal was reasonable, was to be indemnified by Arch "for all damages suffered in excess of the result that [Bovis] would have obtained if the settlement had been accepted." By entering, contrary to the plain terms of the Companion Agreement, into a settlement with LMDC to which Arch had refused to consent, Bovis breached the Companion Agreement and forfeited its right to the contractual remedy for Arch's refusal to consent to a settlement acceptable to Bovis, whether or not Arch withheld its consent in good faith. Accordingly, Arch is entitled to summary judgment dismissing Bovis's third-party claim against it.

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 8, 2017

CLERK

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