

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C.

PART 8
AMENDED DECISION/ORDER
INDEX NO. 653398/16

ALL STATE INTERIOR DEMOLITION INC. et al.

MOT. DATE

- v -

MOT. SEQ. NO. 002

SCOTTSDALE INSURANCE COMPANY et al.

The following papers were read on this motion to/for summary judgment
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits
NYSCEF DOC No(s). 19-38
NYSCEF DOC No(s). 40-57
NYSCEF DOC No(s). 58-61

This is a declaratory judgment action. Plaintiffs now move for summary judgment against defendant Scottsdale Insurance Company ("Scottsdale") seeking a declaration that Scottsdale owes plaintiffs additional insured coverage from the claims against them in the underlying Mosley action. Alternatively, plaintiffs seek a declaration that defendant United Interior Renovations, LLC ("United") breached its contractual requirement to procure additional insured coverage for plaintiffs. Plaintiffs further seek an order scheduling a hearing to determine the amount which defendants should reimburse plaintiffs for defense costs to date. Scottsdale opposes the motion. Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available. The court's decision follows.

The underlying action is entitled Mosley v. 75 Plaza LLC, Index Number 162922/15 and is pending in Supreme Court, New York County. In that action, plaintiff, while working for United, claims that he tripped over construction debris on August 19, 2015. The work was taking place at 75 Rockefeller Plaza in Manhattan (the premises").

By contract entered October 16, 2014, RXR Construction and Development, LLC ("RXR Construction"), as Construction Manager, contracted with plaintiff All State Interior Demolition Inc. ("All State") to perform work at the premises. The insurance requirements of that contract required All State to obtain commercial general liability coverage in an amount of not less than \$2,000,000 per occurrence and to include as additional insureds on such coverage, among others, RXR Atlas LLC, the premises owner, RXR Construction and 75 Plaza, LLC ("75 Plaza"), the lessor.

In turn, All State, as contractor, contracted with United, as subcontractor, for United to perform demolition work at the premises, pursuant to a Purchase Order with exhibits dated September 16, 2014 (the "United subcontract"). The United subcontract required United to obtain commercial general liability coverage in the amount of \$1,000,000 per occurrence and excess (umbrella) coverage in the amount of \$4,000,000 per occurrence. This insurance was to include as additional insureds "Contractor, Owner and their respective partners, directors, officers, employees, agents and representatives."

Dated: 10/25/17

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [X] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

The Scottsdale policies

Scottsdale issued a commercial general liability insurance policy to United effective October 21, 2014 to October 21, 2015 with a \$1,000,000 per occurrence limit, No.: CPS2066343 (the "Scottsdale policy"). The Scottsdale policy has an endorsement entitled "Additional insured – Owners, Lessees or Contractors – Automatic Status When Required in Construction Agreement with You", which provides in pertinent part as follows:

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. Section II – Who Is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured.

Scottsdale issued an excess liability insurance policy to United, effective October 21, 2014 to October 21, 2015, with a \$1,000,000 per occurrence limit, applicable above the Scottsdale primary policy, No.: NXS0001503 (the "Scottsdale excess policy"). The Scottsdale excess policy tracks the language of the Scottsdale policy.

On December 22, 2015, the Mosley action was commenced against 75 Plaza, 75 Plaza Holdings LLC, RXR Atlas, RXR Realty and RXR Construction. The Mosley action alleges common law negligence and violations under Labor Law §§ 200, 240 and 241(6). The complaint originally alleged that Mosley was employed by All State, but on or about February 1, 2016, Mosley amended the complaint by removing the allegation that he was employed by All State and adding All State as a direct defendant.

By letter dated February 12, 2016, Colony Insurance Company ("Colony") tendered the Mosley claim to United, Scottsdale and National Union Fire Insurance Company ("National Union") on behalf of plaintiffs. The tender states that 75 Plaza, ground lessor, and RXR Atlas, owner of the premises, retained RXR Construction as the Construction Manager, and RXR Construction hired United to perform demolition. The tender further states that the United subcontract required United to indemnify plaintiffs. Finally, the tender states that plaintiffs are additional insured under the liability policies issued by Scottsdale and National Union.

By letter dated March 2, 2016, Scottsdale denied coverage. The disclaimer noted that the United subcontract "does call for the 'Contractor, Owner and their respective partners, directors, officers, employees, agents and representatives' to be named as additional insureds on the United" liability policies, however "refers to a purchase order for their identities and said purchase order only defines the Contractor as 'All State Interior Demolition, Inc.'" The letter further states that the Mosley complaint fails to establish that Mosley suffered a bodily injury caused, in whole or in part, by the acts or omissions of United or anyone working on United's behalf.

Scottsdale did not respond to the tender under its excess policy, and National Uniion did not respond to the tender under its second layer excess policy. On April 1, 2016, 75 Plaza, RXR Atlas, RXR Realty, RXR Construction and All State commenced a third-party action against United, seeking common law contribution and indemnification and contractual indemnification. This declaration judgment action thereafter ensued.

Parties' arguments

Plaintiffs' counsel claims that "[g]iven the fact that the Scottsdale policy has an additional insured endorsement affording coverage when United "agree[s] in writing" that an entity will be added as an additional insured on the Scottsdale policy and the fact that the United subcontract requires United to procure such coverage for plaintiffs, plaintiffs requested Scottsdale to acknowledge its coverage obligation to them before filing this summary judgment motion. Scottsdale refused to do so stating that there is an issue as to whether United employed Mosley so as to trigger the requirement that Mosley be injured "in the performance of [United's] ongoing operations for [Plaintiffs]."

Plaintiffs otherwise contend that based upon the policy's additional insured endorsement and the Untied subcontract, Scottsdale owes All State coverage. Further, plaintiffs argue that the amended Mosley complaint is sufficient to trigger Scottsdale's duty to defend. Finally, plaintiffs maintain that Scottsdale erroneously reads the "act or omission" language in its endorsement as a negligence requirement. Rather, plaintiffs contend that Scottsdale owes indemnification because the alleged "bodily injury" was caused, at least in part, by United's acts, even if the acts were not negligent. Therefore, plaintiffs seek reimbursement of its defense costs together with statutory interest.

Alternatively, plaintiffs argue that if the court does not grant the declaration sought against Scottsdale, plaintiffs are entitled to summary judgment against United based upon its breach of contract for failing to procure additional insured coverage for plaintiffs.

In opposition, Scottsdale contends that plaintiffs misconstrue controlling case law and that issues of fact regarding Mosley's employer preclude summary judgment. Finally, Scottsdale maintains that 75 Plaza, RXR Atlas and RXR Construction are not entitled to additional insured coverage since there is no privity of contract between them and United and they were not otherwise identified in the United subcontract.

On reply, plaintiffs withdraw that part of their motion seeking indemnification from Scottsdale, acknowledging the recent decision in *Burlington Ins. Co. v. NYC Transit Authority*, 29 NY2d 313 (June 6, 2017), but maintains that Scottsdale owes it a defense as a matter of law.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

It is well established that the party claiming coverage bears the burden of proving entitlement (*National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 570 [1st Dept 2006]; *Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]). The “well-understood meaning” of “additional insured” is “an entity enjoying the same protection as the named insured” (*Pecker Iron Works of N.Y. v Traveler’s Ins. Co.*, 99 NY2d 391, 393 [2003] [internal quotation marks and citation omitted]).

[A]n insurance company’s duty to defend is broader than its duty to indemnify. Indeed, the duty to defend is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage. If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be.

(*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal quotation marks and citations omitted]). An insurer owes a duty to defend as long as “the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered” (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63 [1991]). “[I]f any of the claims against [an] insured arguably arise from covered events, the insurer is required to defend the entire action” (*Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 17 [1st Dept 2009] [internal quotation marks and citations omitted]).

In *Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.* (89 NY2d 621, 634-635 [1997]), the Court of Appeals further clarified the standard for an insurer’s duty to defend an insured:

A court should not attempt to impose the duty to defend on an insurer through a strained, implausible reading of the complaint that is linguistically conceivable but tortured and unreasonable. Moreover, a court may look to judicial admissions in the insured’s responsive pleadings in the underlying tort action or other formal submissions in the current or underlying litigation to confirm or clarify the nature of the underlying claims” (internal quotation marks and citation omitted).

An insurer may obtain a declaration absolving it of its duty to defend only when a comparison of the policy and the underlying complaint on its face shows that, as a matter of law, “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”

(*Greenwich Ins. Co. v City of New York*, 122 AD3d 470, 471 [1st Dept 2014], quoting *Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424 [1985]).

“While the duty to defend is measured against the possibility of a recovery, the duty to pay is determined by the actual basis for the insured’s liability to a third person” (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 178 [1997] [internal quotation marks omitted]). “[A]n insurer may be contractually bound to defend even though it may not ultimately be bound to pay, either because its insured is not factually or legally liable or because the occurrence is later proven to be outside the policy’s coverage” (*Fitzpatrick*, 78 NY2d at 65).

Here, plaintiffs motion must be granted to the extent that Scottsdale plainly owes plaintiffs a duty to defend them in the Mosley action. The pleadings in the Mosley action triggered the duty to defend because they allege that Mosley’s injury was caused, at least in part, by the acts or omissions of Scottsdale’s insured, United, performing demolition operations at the site.

The court rejects Scottsdale’s argument that there is an issue of fact as to who employed Mosley on the date of his accident. While he testified at his deposition originally that he was employed by All

State, Mosley went on to testify, based upon certified IRS W-2 Wage and Tax Statement, that he was employed by United. Mosley's inaccurate testimony which he later recanted does not raise a triable issue of fact on this point.

Scottsdale's privity of contract argument is also rejected, since the Scottsdale policies expressly incorporate the trade contracts which required United to include as additional insureds "Contractor, Owner and their respective partners, directors, officers, employees, agents and representatives."

Plaintiff's motion is therefore granted to the extent that plaintiff is entitled to a declaration that that Scottsdale has a duty to defend plaintiffs from the claims against them in the underlying Mosley action and this matter is referred to a Special Referee to hear and determine the amount for which defendants should reimburse plaintiffs for the defense costs incurred to date, with statutory interest.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion is therefore granted to the extent that plaintiff is entitled to a declaration that that Scottsdale has a duty to defend plaintiffs from the claims against them in the underlying Mosley action; and it is further

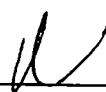
ORDERED that that the issue of the amount for which defendants should reimburse plaintiffs for the defense costs incurred to date, with statutory interest, is referred to the Special Referee Clerk for assignment to a Special Referee to hear and determine; and it is further

ORDERED that plaintiffs' counsel shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a complete Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that plaintiff's motion is otherwise denied without prejudice.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 10/25/17
New York, New York

So Ordered:


Hon. Lynn R. Kotler, J.S.C.