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

PRESENT: Ramos, Justice — PART 53

I. J. White Corp

- v -

Columbia Casualty

INDEX NO. 651505/2011

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with accompanying memorandum decision and order.

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

Dated: 1/6/12

CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 53

----------X

I.J. WHITE CORP.,

Plaintiff,

Index No. 651505/2011

-against-

COLUMBIA CASUALTY CO.,

Defendant.

----------X

Hon. Charles Edward Ramos, J.S.C.:

In motion sequence 002, defendant Columbia Casualty Co. (Columbia) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff I.J. White Corp. (White) cross-moves, pursuant to CPLR 3212, for partial summary judgment, seeking a declaration that Columbia has a duty to defend White in the action Hill Country Bakery, LLC v I.J. White Corporation, currently pending in the United States District Court for the Eastern District of New York (the Underlying Action), and that White has the right to select its defense counsel in that action.

Background

The Underlying Action

On May 20, 2010, Hill Country Bakery, LLC (Hill) filed a complaint against White in the Texas state court (Original Complaint). The Original Complaint alleged that, in June 2006, Hill, an upscale cake bakery, agreed to purchased a spiral

freezer system (the Spiral Freezer) from White to greatly enhance the production times and efficiencies of its cakes. Hill purchased the Spiral Freezer as part of its manufacturing process. The manufacturing process involved freezing the cakes to a certain temperature, and immediately cutting the cakes at that temperature in order to properly package for distribution. Hill alleged that White completed and installed the Spiral Freezer in its newly constructed bakery facility (the Bakery Facility), but that it never operated as promised. Hill alleged that when the cakes emerged from the Spiral Freezer, their temperature was too high, and thus, they could not be properly cut, ruining the product. White allegedly tried to fix the problem, but after several months, Hill had to hire another contractor to resolve the issue. Hill alleged that the Bakery Facility ceased production for eight months because of the problems with the Spiral Freezer.

In the Original Complaint, Hill alleged damages due to loss of production, contracts, revenue, and profits, as well as out-of-pocket expenses to fix the Spiral Freezer. The Original Complaint asserted six formal causes of action: breach of contract, breach of express warranty in the sale of goods, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, money had and received, and negligent misrepresentation.

In June 2010, the Texas state court action was removed to the United States District Court for the Western District of Texas, and in February 2011, transferred to United States District Court for the Eastern District of New York (EDNY), where it is currently pending.

On April 8, 2011, Hill filed an amended complaint, which was followed by a second amended complaint, filed on May 18, 2011 (the Second Amended Complaint). The factual allegations in the Second Amended Complaint are substantially similar to those in the Original Complaint. However, the Second Amended Complaint adds formal causes of action for unjust enrichment and fraudulent inducement, and omits the cause of action for negligent misrepresentation contained in the Original Complaint. The Second Amended Complaint also contains more detailed allegations.

Duty to Defend Action

On November 7, 2007, Columbia issued a Commercial General Liability Policy to White, covering the policy period from November 7, 2007 through November 7, 2008 (Primary Policy). The Primary Policy provided $1,000,000 in coverage per occurrence with a $2,000,000 products-completed operations aggregate limit, subject to a $5,000 deductible. White also purchased an Umbrella Policy from Columbia, covering the same policy period, providing $3,000,000 in limits (Umbrella Policy).

On August 20, 2008, Hill's claims against White were

reported to Columbia by insurance agent Sterling & Sterling. The August 20, 2008 Notice of Occurrence form stated, "Hill Country Bakery - alleges that equipment is not functioning properly and has reflected on their production" (Marian Hertz's Affirmation in Opposition to Motion for Preliminary Injunction and in Support of Request for Summary Judgment, Exhibit B). On March 10, 2009, Columbia responded to the Notice of Occurrence, stating that it was investigating the matter subject to its right to deny coverage for allegations failing to meet the definition of "occurrence," as well as certain exclusions that may apply (*id.*, Exhibit D).

On February 23, 2010, Columbia sent another letter to White disclaiming coverage. Columbia cited various policy exclusions and its finding that the re-working or re-engineering of the Spiral Freezer did not qualify as an "occurrence" under the Primary Policy, as it was not an accident and there was no property damage (*id.*, Exhibit E). This disclaimer of coverage letter stated that, in the event that White was sued by Hill, a copy of the complaint must be forwarded to Columbia for its review to determine whether it has a duty to defend (*id.*).

On May 20, 2010, Hill filed the Underlying Action. On May 27, 2010, White was served with a copy of the Summons and Original Complaint, which was forwarded that same day to Danny Hart, a Columbia Litigation Consultant. On June 30, 2010, Mr.

Hart sent an e-mail to White stating that Columbia reviewed the Original Complaint and concluded that it had a duty to defend, and would assign the defense to one of its approved law firms; however, Columbia was reserving its rights in the defense and indemnification due to potentially non-covered counts in the Original Complaint.

On July 29, 2010, Columbia tendered a formal reservation of rights letter, stating that it would defend White under the Primary Policy, even though there were numerous issues present that may result in no coverage, subject to its full reservations of rights regarding coverage. On May 18, 2011, Columbia sent a letter to White disclaiming any obligation to defend and/or indemnify, based on the allegations of the first amended complaint filed in the EDNY. On May 24, 2011, Columbia sent a second letter to White continuing to disclaim any obligation to defend and/or indemnify, based on the allegations of the Second Amended Complaint, filed on May 18th.

On June 1, 2011, White commenced this action seeking to enforce its alleged right to an ongoing defense and indemnification from Columbia pursuant to the terms of the Primary Policy and/or the Umbrella Policy.

Analysis

The Primary Policy states, in relevant part,

"Section I - Coverages

Coverage A Bodily Injury and Property Damage Liability

1. Insuring Agreement
a. [Columbia] will pay those sums that [White] becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. [Columbia] will have the right and duty to defend [White] against any 'suit' seeking those damages. However, [Columbia] will have no duty to defend [White] against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply.

* * * *

b. This insurance applies to 'bodily injury' and 'property damage' only if:
(1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory';
(2) The 'bodily injury' or 'property damage' occurs during the policy period; ..."

(Hertz Affirmation in Support of Motion for Summary Judgment, Exhibit F, Primary Policy, Section I, ¶ 1 [a] and [b]).

The Primary policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" (*id.* at Section V, ¶ 13).

Further, the Primary Policy defines "property damage" as:

"a. Physical injury to tangible property, including all resulting from loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it"

(*id.* at Section V, ¶ 17).

The Primary Policy also includes an exclusion for "property

damage" to (1) White's product, defined, in relevant part, as any goods or products manufactured, sold, handled, distributed, or disposed of by White, and (2) White's work, defined, in relevant part, as work performed by White and materials, parts, or equipment furnished in connection with such work (*see* Hertz Affirmation in Support of Motion for Summary Judgment, Exhibit F, Primary Policy, Section I, ¶ 2 [k] and [l]; Section V, ¶ 21 and 22).

It is well settled that "an insurer's duty to defend is broader than its duty to indemnify" (*General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 NY3d 451, 456 [2005]). The duty to defend an "insured arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim, or where the insurer 'has actual knowledge of facts establishing a reasonable possibility of coverage'" (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997] citing *Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 67 [1991]).

An insurer may be relieved of its duty to defend on the basis of a policy exclusion, but

> "the insurer bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision"

(*id.* at 175).

Here, Columbia argues that it has no obligation to defend White in the Underlying Action because the claims asserted in that action do not involve an "occurrence" resulting in "property damage," as required under the Primary Policy.

As stated above, the Primary Policy applies to "bodily injury" and "property damage" only if the "bodily injury" or "property damage" is caused by an "occurrence." Stating it in the simplest form, Hill is suing White because the Spiral Freezer that White engineered, constructed, and installed did not operate as promised, rendering it unusable for Hill's purposes. The Second Amended Complaint clearly alleges property damage to the Spiral Freezer itself, damages resulting from repair of the Spiral Freezer, and the loss of production at the Bakery Facility for months due to the faulty Spiral Freezer.

It is well settled in New York that a commercial general liability policy, containing work product exclusions, such as the one at issue, "does not insure against faulty workmanship in the work product itself but rather faulty workmanship in the work product which creates a legal liability by causing bodily injury or property damage to something other than the work product" (*George A. Fuller Co. v United States Fid. & Guar. Co.*, 200 AD2d 255, 259 [1st Dept 1994]). Therefore, a covered "occurrence" may be found where the damages alleged in an underlying action are

for damage to property distinct from the insured's own work product (*id.; see also Baker Residential Ltd. Partnership v Travelers Ins. Co.*, 10 AD3d 586, 587 [1st Dept 2004]).

White argues that the allegation that cakes were ruined by the Spiral Freezer falls squarely under the Policy's first definition of "property damage," i.e., "physical injury to tangible property," and that the allegation of loss of production by the Bakery Facility falls squarely under the second definition of "property damage," i.e., "loss of use of tangible property that is not physically injured." Thus, White concludes there was third-party property damage arising from an "occurrence."

This court agrees. The Second Amended Complaint alleges that Hill lost use of the Bakery Facility, as the Facility was incapable of production, and that, as a result, Hill lost lucrative contracts and substantial revenues. The loss of use of the Bakery Facility clearly falls within the Primary Policy's second definition of "property damage." Such loss would be associated with a legal liability incurred by "property damage" to something other than White's work product, and thus, is "property damage" caused by an "occurrence" covered under the Primary Policy.

Columbia argues that commercial general liability policies do not provide coverage for contractual liability of the insured for economic loss due to faulty workmanship. However, this case

is distinguishable from the cases cited by Columbia in that the economic losses here resulted from the loss of use of tangible property belonging to a third person, and not economic losses incurred to remedy the insured's own work product.

It is clear that the Second Amended Complaint alleges an occurrence, resulting in property damage, within the meaning of the Primary Policy. Therefore, as a matter law, White is entitled to partial summary judgment in its favor on the issue of Columbia's alleged duty to defend.

Further, White seeks the right to retain independent counsel in the Underlying Action. As Columbia does not address this portion of White's cross motion, White is granted the right to select independent counsel to represent it in the Underlying Action.

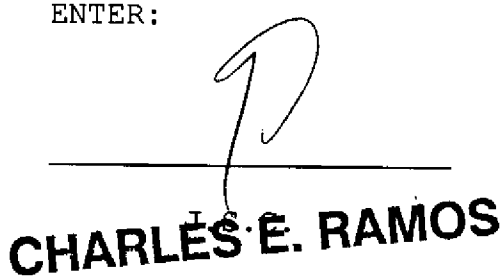
Accordingly, it is

ORDERED that defendant Columbia Casualty Co.'s motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that plaintiff I.J. White Corp.'s cross motion for partial summary judgment seeking a declaratory judgment is granted; and it is further

ADJUDGED and DECLARED that Columbia Casualty Co. is obligated to defend I.J. White Corp. in the action, Hill Country Bakery, LLC v I.J. White Corporation, currently pending in the

United States District Court for the Eastern District of New York, and that I.J. White Corp. has the right to select counsel to represent it in that action.

Dated: January 6, 2012

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