

BP Air Conditioning Corp. v One Beacon Insurance Group

2004 NY Slip Op 30129(U)

September 24, 2004

Supreme Court, New York County

Docket Number: 0400941/2003

Judge: Paula J. Omansky

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

PRESENT: PAULA J. OMANSKY
Justice

PART 47

0400941/2003

BP AIR CONDITIONING
vs
ONEBEACON INSURANCE GROUP

SEQ 4

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 7/23/04

MOTION SEQ. NO. _____

MOTION CAL. NO. 17

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 the accompanying memorandum of law*

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

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Dated: 9/24/04

[Signature]

J.S.C.

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Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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BP AIR CONDITIONING CORP.

Index No. 400941/03

Plaintiff,

DECISION AND ORDER

-against-

ONE BEACON INSURANCE GROUP

Defendant.

----- X

PAULA J. OMANSKY, J.:

Plaintiff BP Air Conditioning Corp. moves, pursuant to CPLR 3212, for partial summary judgment declaring that defendant carrier, One Beacon Insurance Group, is obligated to pay the costs and expenses to defendant plaintiff in the underlying personal injury action entitled Cosentino v Henegan Construction Company, Inc. et. al., (Index no. 110853/01) (the "Cosentino Action") and for an order directing defendant to pay plaintiff's past defense costs.

FACTS

Joseph Cosentino, the plaintiff in the Cosentino Action and an employee of Karo Sheet Metal ("Karo", a non-party) alleged that on December 5, 2000, he slipped and fell on oil allegedly spilled by Alfa Piping Corp. ("Alfa") while working at a construction site located at the World Trade Center. At the time of the accident, Cosentino was located on the 39th floor. He was pushing a "duct lift" which is a forklift-like apparatus with wheels, to his work area. Cosentino allegedly slipped and fell on an oil spot located near a pipe threading machine, which is a device used for cutting

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and threading metal pipe for use in sprinkler systems.

Cosentino testified that the oil came from a pipe threader used at the site. According to Cosentino, there were identifying marks on the threader. Plaintiff's vice president of construction, Steven Heiderstadt, opined that there could have been other subcontractors on the site who were not employed by his company and who were using cutting oil. According to Heiderstadt, the sprinkler company could have been using equipment which produced the oil spill

Henegan Construction Co., Inc. ("Henegan"), the alleged general contractor, hired plaintiff to perform the HVAC installation at the construction site. Plaintiff states that it subcontracted the steam fitting work at the site to Alfa pursuant to a written purchase order dated October 10, 2000 (see, Plaintiff's Ex. 9). In addition, plaintiff submits a copy of Exhibit A of the purchase order (ibid.). This section of the contract contains, inter alia, the indemnification and insurance procurement terms. Paragraph 1 of the subcontract requires Alfa to indemnify the owner, construction manager and other entities

against all claims, damages, losses and expenses, including, but not limited to attorneys fees, arising out of or resulting from the performance of the Work, provided that any claims, damages, losses or expenses are (1) attributable to bodily injury, sickness, disease or death or to injury or to destruction of tangible property including the loss of use resulting therefrom and (2) caused in whole or in part by any negligent act or omission of [Alfa], any sub-contractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.

Alfa obtained a Commercial General Liability Insurance policy

(the "CGL policy") "CGL policy" from General Assurance Company "General Assurance", policy number CPP 1148546-04. Defendant is the successor in interest to General Assurance. The effective dates of the policy were May 10, 2000 through May 10, 2001, the period covering Cosentino's alleged accident. The CGL policy was changed by endorsement number CG 20 33 03 97 which amended the insured section

to include as an insured any person or organization for whom you are performing operation 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 arising out of your ongoing operations performed for that insured. A person's or organization's status as an insured under this endorsement ends when your operations for that insured are completed.

Defendant denied that coverage existed for plaintiff under the CGL policy issued to Alfa on the grounds that the notice of the occurrence giving rise to the claim was not furnished promptly and that coverage was not triggered under the policy on the ground that there was no adjudication of Alfa's liability. Defendant has withdrawn its first ground for disclaiming coverage. However, defendant still argues that there is no evidence that Cosentino fell upon oil emanating from plaintiff's work activities.

Michael Sheeran, an employ of Henegan, testified that both Alfa and Forest Electric (a non-party) had treading machines at the site. Sheeran, however, was unable to determine which contractor or subcontractor was responsible for the spill at the site.

Plaintiff also has a policy with Yasuda Fire and Marine Insurance Co. ("Yasuda"), a non-party. Yasuda contacted Alfa, in a letter dated June 26, 2001, stating that defendant's insured (Alfa) had the duty to provide primary insurance (plaintiff's Ex. 13).

DISCUSSION

Contrary to defendant's arguments, this matter is not premature since a declaratory judgment action is the appropriate vehicle for testing the propriety of an insurer's disclaimer (Laura Assocs., Inc. v A.P.A. Warehouse, Inc., 140 AD2d 182 [1st Dept 1988]).

Defendant has not refuted the authenticity of the purchase order between plaintiff and Alfa, the insured. Under the terms of the policy's automatic additional insured endorsement, plaintiff is an additional insured under Alfa's CGL policy (Garcia v Great Atlantic and Pacific Tea Co., Inc., 231 AD2d 401 [1st Dept 1996]) and is entitled to the same protections as Alfa, the named insured (Pecker Iron Works of New York, Inc. v Traveler's Ins. Co., 99 NY2d 391, 393 [2003]). Defendant is obligated to indemnify plaintiff for damages in the event that plaintiff is found liable to Cosentino for injuries arising out of Alfa's work or for the work of a subcontractor hired by Alfa (Consolidated Edison Co. of New York, Inc. v Hartford Ins. Co., 203 AD2d 83, 84 [1st Dept 1994]).

However, this court is unable to determine the origin of the oil leak and is unable to determine, as a matter of law, whether Alfa or one of its subcontractors created the condition which was the

alleged proximate cause of Cosentino's injuries (see, Structure Tone, Inc. v. Component Assembly Sys., 275 AD2d 603, 603-604 [1st Dept 2000] and Tishman Constr. Corp. of New York v CNA Ins. Co., 236 AD2d 211 [1st Dept 1997]).

Defendant's duty to furnish a defense is broader than its obligation to indemnify and must be determined from the allegations of the complaint and the terms of the insurance policy (Seaboard Surety Co. v Gillette Co., 64 NY2d 304, 310 [1984]). If the complaint contains any facts or allegations which bring the claim potentially within the protection purchased, the insurer is obligated to defend (Technicon Electronics Corp. v American Home Assur. Co., 74 NY2d 66, 73, rearg dismissed 74 NY2d 893 [1989]). "The insured's right to representation and the insurer's correlative duty to defend suits, however, groundless, false or fraudulent, are in a sense 'litigation insurance' expressly provided by the insurance contract" (Servidone Constr. Corp. v Security Ins. Co., 64 NY2d 419, 423-424 [1985], quoting Intl. Paper Co. v Continental Cas Co., 35 NY2d 322, 325-326 [1974]).

At this point, defendant is unable to show, as a matter of law, that the terms of Alfa's policy preclude coverage for personal injuries arising from a construction accident. The pleadings in the Cosentino action allege that Alfa either caused the oil spill or that the condition occurred during the course of Alfa's work on the site (see, Tishman Constr. Corp. of New York v CNA Ins. Co., 236 AD2d 211 [1st Dept 1997]). Accordingly, pleadings in the Cosentino action allege a sufficient factual and legal basis, which

if proven, would support plaintiff's claim in this declaratory action that the defendant carrier might eventually be held to be obligated to indemnify plaintiff under the provisions of the insurance policy (Servidone Constr. Corp. v Security Ins. Co., supra, 64 NY2d, at 424). Defendant is therefore obligated to defend plaintiff.

The issue of whether Yasuda or another insurance carrier must also provide primary coverage to plaintiff, and whether that coverage limits defendant's contribution to the defense is not properly before this court (see., State Farm Fire and CAS. Co. v LiMauro, 65 NY2d 369 [1985]). In order for this court to find that both carriers (defendant and Yasuda) must contribute a pro rata share, the policies must insure the same entities, the same interests in the same property and against the same casualty (Federal Ins. Co. v Empire Mut. Ins. Co., 181 AD2d 568, 569 [1st Dept 1993]; 16 Couch Insurance 2d 62:142, at 612).

Here, the other insurance providers are not defendants in this action. Moreover, copies of the other relevant policies have not been submitted and the court is unable to ascertain whether Yasuda, or some other carrier, should be treated as a co-insurer or an excess carrier to defendant. The amount of defendant's ultimate contribution for defense and indemnification if any, cannot be determined from the present submissions (cf., Federal Ins. Co. v Atlantic Natl. Ins. Co., 25 NY2d 71, 75 [1969]; Federal Ins. Co. v Empire Mutual Ins. Co., supra; Firemen's Ins. Co. of Washington, D.C. v Federal Ins. Co., 233 AD2d 193 [1st Dept 1996], lv denied 90

NY2d 803 [1997]).

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment is granted to the extent that defendant is obligated to defend plaintiff in the Cosentino action; and it is further

ORDERED that those branches of plaintiff's motion which seek indemnification and finding as to which carrier's policies is primary are denied for the reasons stated herein.

DATED: September 24, 2004

ENTER:



PAULA J. OMANSKY
J.S.C.

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