

Pav-Lak Indus., Inc. v Arch Ins. Co.
2008 NY Slip Op 31987(U)
July 14, 2008
Supreme Court, New York County
Docket Number: 0600432/2006
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan

PART 36

Justice

Index Number : 600432/2006

PAV-LAK INDUSTRIES, INC.,

VS.

ARCH INSURANCE COMPANY

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 600432-06

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

read on this motion to/for Summary judgment

PAPERS NUMBERED

1, 2

7, 8

3, 4, 5, 6

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 & cross-motion for summary judgment are decided in accordance with the attached memorandum decision.

FILED

JUL 16 2008

COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN
J.S.C.

Dated: 7/14/08

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 36

-----X

PAV-LAK INDUSTRIES, INC. and ZURICH
AMERICAN INSURANCE COMPANY,

Plaintiffs,

Index No.
600432/06

-against-

ARCH INSURANCE COMPANY, B&J WELDING &
IRON WORKS, n/k/a MID ISLAND STEEL
CORP., RANGER STEEL CORP. [pertaining
to underlying action Cohen v Pav-Lak],

Defendants.

-----X

DORIS LING-COHAN, J.:

Plaintiffs Pav-Lak Industries, Inc. (Pav-Lak) and

Zurich American Insurance Company (Zurich) move, pursuant to CPLR 3212, for a judgment declaring that (i) defendant Arch Insurance Company (Arch) affords primary additional insured coverage for claims asserted against Pav-Lak in an underlying personal injury action, Cohen v Pav-Lak Industries, Inc. (Supreme Court, Nassau County, Index No. 000161/05) (the Cohen Action), under a commercial general liability policy Arch issued to defendant B&J Welding & Iron Works (B&J), n/k/a/ Mid Island Steel Corp. (the Arch Policy); (ii) the coverage afforded to Pav-Lak by plaintiff Zurich is excess to the coverage afforded under the Arch Policy; (iii) Arch is obligated to defend and indemnify Pav-Lak in the Cohen Action; (iv) Arch is required to reimburse Zurich for any

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defense costs and any indemnity payment incurred on behalf of Pav-Lak.

Defendant Arch cross-moves for a judgment declaring that the Arch policy does not afford coverage to Pav-Lak in the Cohen Action and that Arch has no duty to defend or indemnify Pav-Lak in the Cohen Action. Alternatively, if this court finds that the Arch policy applies to Pav-Lak in the Cohen Action, Arch cross-moves for a judgment declaring that (i) the Arch Policy provides insurance in excess of the coverage provided by Zurich in its policy issued to Pav-Lak; (ii) the Arch Policy shall not contribute towards any payments made or to be made by Zurich for Pav-Lak with respect to the Cohen Action; and (iii) under the Endorsement No. 9 of the Arch Policy (the Deductible Endorsement), a \$1 million deductible applies in the Cohen Action and must be paid by Pav-Lak before Arch pays any damages or expenses in the Cohen Action.

Defendant Illinois Union Insurance Company (Illinois Union) also cross-moves for summary judgment dismissing the complaint asserted against it, and all cross claims by Arch.

On March 20, 2002, Pav-Lak, as general contractor for a construction project (the Project) at the Brentwood Ross/Sonderling High School in Brentwood, New Jersey, entered

into a contract with B&J for steel fabrication and erection for the Project (the Contract). B&J performed the fabrication and subcontracted the steel erection to defendant Ranger Steel Corp. (Ranger). Stephen Cohen, a Ranger employee, was injured at the Project's site on August 28, 2004, and filed the Cohen Action in January 5, 2005.

On March 18, 2005, Pav-Lak submitted a general liability notice of occurrence to Zurich, its insurance carrier. Zurich subsequently notified Arch of the Cohen Action, and requested that Arch defend and indemnify Pav-Lak pursuant to the terms of the Arch Policy and the Contract (Plaintiff's Exhibit G, letter dated 3/22/05 from Zurich to Arch). Arch disclaimed coverage to Pav-Lak for the Cohen Action.

The instant action ensued as follows: (1) against Arch for costs incurred by plaintiffs in Pav-lak's defense and indemnity in the Cohen Action and a declaration of Arch's duty to defend and indemnify Pav-Lak in the Cohen Action ; (2) against B&J for breach of contract and a declaration that B&J failed to obtain primary additional insured coverage for Pav-Lak; (3) against Illinois Union, Ranger's general liability insurer, for costs incurred by plaintiffs in Pav-Lak's defense and indemnity in the Cohen Action, and a declaration that Illinois Union has a

duty to defend and indemnify Pav-Lak in the Cohen Action; and (4) against Ranger for breach of contract, and a declaration that Ranger failed to obtain additional insured coverage for Pav-Lak (Plaintiffs' Exhibit I, Complaint). In Arch's Amended Answer, it asserted affirmative defenses, a counterclaim against Pav-Lak and Zurich for contribution and indemnification, cross claims against Ranger and Illinois Union for contribution and indemnification, and a cross claim against B&J for breach of the insurance policy, or alternatively, for indemnification and contribution (Plaintiffs' Exhibit J, Arch's Answer dated 4/3/06).

The parties now move for summary judgment for various relief. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once a prima facie showing has been made, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists, warranting a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]).

In support of their motion, plaintiffs initially seek a declaration that Arch affords primary additional insured coverage

for the claims asserted against Pav-Lak in the Cohen Action, arguing that Pav-Lak is an additional insured under the Arch Policy, pursuant to the terms of the Contract and the Arch Policy. It is well settled that the party seeking a declaration of coverage is obligated in the first instance to demonstrate the existence of coverage and the satisfaction of all conditions precedent (Thomson v Power Authority of State of New York, 217 AD2d 495 [1st Dept 1995]).

Plaintiffs refer to the Arch Policy, which contains a Blanket Additional Insured endorsement amending "who is an insured" "to include as an insured the person or organization as an insured where required by contract but only with respect to liability arising out of your operations ... or your work" (Plaintiffs' Exhibit C, Endorsement titled Blanket Additional Insured). The policy defines "your work" as "(a) (1) work or operations performed by you or on your behalf; and (a) (2) materials, parts or equipment furnished in connection with such work or operations" (Plaintiff's Exhibit B, the Policy, § V, ¶ 22 [a] [1 & 2]). A review of the Contract discloses that B&J was required to obtain general liability insurance coverage of at least \$6 million, naming Pav-Lak as an additional insured to that coverage (see Plaintiff's Exhibit A, the Contract, "Insurance

Requirements/Indemnification Agreement" dated 3/20/02).

Arch argues that, even if B&J was required by contract to add Pav-Lak as an additional insured to the Arch Policy, coverage still does not apply because Pav-Lak's liability, if any, in the Cohen Action does not arise out of B&J's operations or work. An insurer's "duty to defend is broader than the duty to indemnify" and "arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy" (Fitzpatrick v American Honda Motor Co., 78 NY2d 61, 65 [1991]). In determining whether coverage under the additional insured endorsement was triggered, the issue is whether the accident arose out of B&J's work or its subcontractor's work performed by it for B&J at the Project's site (see Structure Tone, Inc. v Component Assembly Systems, 275 AD2d 603 [1st Dept 2000]). Here, Cohen, an employee of Ranger, a subcontractor hired by B&J, was injured while performing work required by B&J under the Contract. The language of the subject endorsement is sufficiently broad to cover the present situation (see id.).

Additionally, Arch argues that, even if Pav-Lak qualifies as an additional insured under the Policy, under the "Designated Operation or Entities Exclusion Endorsement,"

coverage is excluded for any claims arising out of the "operations" by Ranger (Arch's Exhibit 4, "Designated Operation or Entities Exclusion Endorsement") (the Ranger Steel Exclusion).

In opposition, Pav-Lak contends that it is not subject to the exclusion, since Arch waived its defenses to coverage by failing to timely respond to Pav-Lak's tender, pursuant to Insurance Law § 3420 (d).

In response to Pav-Lak's argument, Arch alleges that since the subject claim fell outside the scope of the policy's coverage, a disclaimer, pursuant to Insurance Law § 3420 (b), was not required. Alternatively, it argues that, assuming, arguendo, that this section applied, its disclaimer letter on May 12, 2005 was issued in a timely fashion after it completed its investigation of the Cohen Action and the involvement, if any, of its named insured, B&J.

"Insurance Law § 3420 (d) requires an insurer disclaiming coverage to do so 'as soon as is reasonably possible'; failure to do so in such timely manner 'precludes effective disclaimer'" (Paul M. Maintenance, Inc. v Transcontinental Ins. Co., 300 AD2d 209, 212 [1st Dept 2002]). As argued by Arch, "[a] disclaimer is unnecessary when a claim does not fall within the coverage terms of an insurance policy"

(Markevics v Liberty Mutual Insurance Co., 97 NY2d 646, 648 [2001]). However, "[c]onversely, a timely disclaimer, pursuant to Insurance Law § 3420 [d], is required when a claim falls within the coverage terms but is denied based on a policy exclusion" (id. at 648-649). "An insurer's failure to comply with Insurance Law § 3420 (d) precludes it from denying coverage based upon a policy exclusion" (City of New York v St. Paul Fire and Marine Ins. Co., 21 AD3d 978, 980-981 [2d Dept 2005]).

In a letter dated March 22, 2005, Zurich, on behalf of Pav-Lak requested, inter alia, that Arch defend and indemnify Pav-Lak in connection with the Cohen Action under the Arch Policy (Plaintiff's Exhibit G, correspondence from Zurich to Arch dated 3/22/05). In May 2005, Arch sent a letter to its own insured, B&J advising that because injuries were sustained by Ranger's employee while working for Ranger, the injured party's claims arose out of the operations of Ranger, and thus were excluded by the Ranger Steel Exclusion (Arch's Exhibit 8, correspondence from Arch to B&J dated 5/12/05). This letter was copied to Pav-lak, in addition to others (see id.). Pav-Lak does not dispute receipt of this letter. A later letter was sent to Zurich by Arch, disclaiming coverage based on the Ranger Steel Exclusion, and plaintiffs' delay in notifying Arch of the Cohen accident

(Plaintiffs' Exhibit H, Arch's letter to Zurich dated 1/30/06).

The May 12, 2005 disclaimer letter demonstrates that the disclaimer of coverage therein was based solely on an exclusion, i.e., the Ranger Steel Exclusion. Therefore, contrary to Arch's argument, Insurance Law § 3420 (d) applies, and Arch was required to issue a timely disclaimer of coverage (Markevics v Liberty Mutual Insurance Co., 97 NY2d 646, *supra*).

"[T]imeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage" (First Financial Insurance Company v Jetco Contracting Corp., 1 NY3d 64, 68-69 [2003], quoting Matter of Allcity Ins. Co. [Jimenez], 78 NY2d 1054, 1056 [1991]). Further, "an insurer's explanation is insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of the delay" (*id.* at 69).

Here, Arch claims that it first learned of the Cohen Action when it received the letter from Zurich on March 28, 2004 advising it of the Cohen claim. In its letter, Zurich informed Arch that the "claimant, an employee of your subcontractor, Ranger Steel, fell from a height," and attached therewith, *inter alia*, the Summons and Complaint (Arch's Exhibit 6, Zurich's

letter to Arch dated 3/22/05). It was not until May 12, 2005, 45 days later, that Arch sent its disclaimer based solely on the Ranger Steel Exclusion. The sole ground on which Arch disclaimed coverage was apparent from Zurich's letter and accompanying complaint, and contrary to its claim, Arch had no need to conduct an investigation before determining whether to disclaim (Gotham Constr. Co., LLC v United Natl. Ins. Co., 35 AD3d 289 [1st Dept 2006]; West 16th Street Tenants Corp. v Public Service Mutual Ins. Co., 290 AD2d 278 [1st Dept], lv denied 98 NY2d 605 [2002]). Therefore, Arch's 45-day delay in disclaiming coverage was unreasonable as a matter of law under Insurance Law § 3420 (d) (see West 16th Street Tenants Corp. v Public Service Mutual Ins. Co., 290 AD2d 278, supra; see also 2833 Third Avenue Realty Associates v Marcus, 12 AD3d 329 [1st Dept 2004]).

Arch also claims that Pav-Lak's failure to comply with its notice requirements vitiates the Arch Policy. However, Arch's failure to give timely notice to plaintiffs precludes it from disclaiming coverage based on untimely notice of claim (see City of New York v Utica Mutual Ins. Co., 35 AD3d 197 [1st Dept 2006]). Additionally, the court notes that plaintiffs' alleged delay in timely notifying Arch of the occurrence giving rise to the claim was obvious from the face of the notice of claim and

the accompanying complaint, and Arch did not assert a late notice claim until its letter to Zurich in January 2006, over a year after Zurich's tender. Thus, the January 2006 letter to Zurich was clearly untimely, pursuant to Insurance Law § 3420 (d) (see 2833 Third Avenue Realty Associates v Marcus, 12 AD3d 329, supra). Therefore, Arch may not rely on the Ranger Steel Exclusion to disclaim coverage to Pav-Lak.

Additionally, Arch argues that the Arch Policy is excess to the Zurich Policy, and thus, has no obligation to contribute towards any payments for the Cohen Action. In opposition, plaintiffs contend that the Zurich Policy is excess to the Arch Policy based on the Arch Policy's "Other Insurance" clause.

Generally, "where there are multiple policies covering the same risk, and each generally purports to be excess to the other, the excess coverage clauses are held to cancel each other out and each insurer contributes in proportion to its limit amount of insurance" (Osorio v Kenart Realty, Inc., 48 AD3d 650, 652 [2nd Dept 2008]). "In contrast, however, if one party's policy is primary with respect to the other policy, then the party issuing the primary policy must pay up to the limits of its policy before the excess coverage becomes effective" (id. at

653).

Here, both the Arch and Zurich policies cover Pav-Lak for the same risk, and both have "other insurance" clauses specifying when their coverage is primary as opposed to excess.

The Arch Policy's "other insurance" clause provides that:

[t]his insurance is excess over any other valid and collectible insurance that applies to any claim or "suit" to which this insurance applies, whether such other insurance is written on a primary, excess, contingent or on any other basis (except if that other insurance is specifically written to apply excess of this insurance), and this insurance will not contribute with any other insurance

(The Arch Policy, § 4 [4]).

The Zurich Policy provides that it is primary except that it is excess over "any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement" (the Zurich Policy, § 4 [4] [b] [2]).

Since the subcontract agreement required primary coverage to satisfy the additional insured coverage requirement, and B&J's coverage under the Arch Policy is primary, Pav-Lak's

additional insured coverage under the Arch Policy is also primary (Pecker Iron Works of New York, Inc. v Traveler's Ins. Co., 99 NY2d 391 [2003]). Thus, pursuant to the language in the Arch Policy, since the Zurich Policy is written to apply in excess of any other primary insurance naming Pav-Lak as an additional insured regarding the subject circumstances, the Arch Policy affords primary insurance to Pav-Lak in the Cohen Action, and is obligated to defend Pav-Lak therein.

Additionally, Arch argues, if the Arch Policy provides primary coverage to Pav-Lak, it is subject to a \$1 million deductible under its "Subcontractor Endorsement-Deductible Policy Version" Endorsement (the Deductible Endorsement) of the Arch Policy arising from its insured breach of the conditions therein.

In opposition, Pav-Lak maintains that Arch waived its right to assert a breach of the conditions in the Deductible Endorsement, since it did not timely disclaim coverage based on such breach. It further argues that the Deductible Endorsement is unenforceable, since it constitutes a warranty by B&J, pursuant to Insurance Law § 3106.

The Deductible Endorsement provides, in relevant part, as follows:

[t]he Conditions of this policy are amended

to included the following:

3. The Named Insured, and any other insured under the policy for whom the "subcontractor" is working will be named as additional insured on all of the "subcontractors" Commercial General Liability policy(s)...

If any one of the above conditions is not satisfied, a deductible of \$1,000,000 per "occurrence" or offense will apply to any claim or "suit" under this policy seeking damages for "bodily injury," "property damage," "personal injury and advertising injury" arising out of work performed by the "subcontractor" for the insured.

For the purposes of this endorsement only, "subcontractor" or "subcontractors" means any person or entity who is not an employee of an insured and does work or performs services for or on behalf of the Insured

(Arch's Exhibit 10, Deductible Endorsement). Arch notes that B&J was not named as an additional insured on Ranger's commercial liability policy issued by defendant Illinois Union (Arch's Exhibit 11, Ranger's insurance policy with Illinois Union). It thus argues that, since one of the conditions of the Deductible Endorsement was not satisfied, the \$1 million deductible is applicable to the Cohen Action, and its obligation, if any, to pay damages and expenses applies only to the amount of damages and expenses in excess of the \$1 million deductible.

Contrary to Pav-Lak's argument, the time requirements for disclaiming coverage, under Insurance Law § 3420 (d), are not

inapplicable, since the deductible provision is not a policy exclusion, and does not bar coverage under the Arch Policy (see Power Authority of State of New York v National Union Fire Ins. Co. of Pittsburgh, 306 AD2d 139 [1st Dept 2003]). It instead limits Arch's obligation under the Arch Policy arising from a breach of the conditions set forth in the Deductible Endorsement by its insured.

Further, a warranty under Insurance Law § 3106 is:

any provision of an insurance contract which has the effect of requiring, ... as a condition precedent of the insurer's liability thereunder, the existence of a fact which tends to diminish, or the non-existence of a fact which tends to increase, the risk of the occurrence of any loss, damage, or injury within the coverage of the contract.

The conditions listed in the Deductible Endorsement do not constitute facts as described in Insurance Law § 3106 that would diminish or increase "the risk of the occurrence of any loss, damage or injury within the coverage" of the Policy (Insurance Law § 3106; see Star City Sportswear, Inc. v Yasuda Fire & Marine Ins. Co. of America, 1 AD3d 58 [1st Dept 2003], affd 2 NY3d 789 [2004]). Thus, Insurance Law § 3106 is inapplicable.

Therefore, since one of the conditions in the

Deductible Endorsement has not been complied with, the \$1 million deductible is applicable. The Arch Policy provides, in pertinent part, that "[t]he insured is responsible for all payments within the deductible amount," and that Arch's obligation to pay damages and expenses "applies only to the amount of damages and expenses in excess of the deductible amounts" (Arch's Exhibit 12, Deductible Liability Endorsement). Thus, Arch's obligation to indemnify plaintiffs is subject to any damages and expenses in excess of the \$1 million deductible.

Therefore, plaintiffs' motion and Arch's cross motion for declaratory relief is decided to the extent of declaring that the Arch Policy provides primary additional insured coverage to Pav-Lak in the Cohen Action; (2) that the coverage afforded to Pav-Lak under the Zurich Policy is excess to the coverage afforded under the Arch Policy; (3) Arch is obligated to defend Pav-Lak in the Cohen Action; and (4) Arch is obligated to indemnify if Pav-Lak is subject to any damages and expenses in excess of the \$1 million deductible. In all other aspects, plaintiffs' motion and Arch's cross motion are denied.

Illinois Union cross-moves for summary judgment dismissing the claims and cross claims asserted against it by plaintiffs and Arch, and for declaratory relief in its favor.

In support of its cross motion, Illinois Union argues that the blanket additional insured endorsement of its policy requires, prior to the occurrence, the existence of a contract between its insured and a third party requiring additional insured coverage (the Illinois Union Policy) (Illinois Union's Exhibit I, the Illinois Union Policy, "Additional Insured-Owners, Lessees or Contractors - (Form B)" Endorsement). Illinois Union notes that the sub-contract agreement between B&J and Ranger is devoid of any language requiring B&J, Pav-Lak or Zurich to be named as additional insureds (Illinois Union's Exhibit F, Sub-Contract Agreement dated 10/2/03). Therefore, in the absence of a written contract as required by the Illinois Union Policy, there existed no additional insured coverage for plaintiffs or B&J at the time of the occurrence (see National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, PA, 33 AD3d 570 [1st Dept 2006]).

In opposition, Arch does not dispute that neither plaintiff nor B&J are additional insureds under the Union Illinois Policy. It instead claims that Illinois Union is responsible for the \$1 million deductible discussed previously. However, the court notes that "[a]n insurance policy is a contract between the insurer and the insured" (Bovis Lend Lease

LMB, Inc. V Great American Ins. Co., __ AD3d __, 855 NYS2d 459, 464 [1st Dept 2008]), and that "each insurer [has the right] to rely upon the terms of its own contract with its insured" (id. at 464, quoting State Farm Fire & Cas. Co. v LiMauro, 65 NY2d 369, 373 [1985]). Here, the policy terms relied on by Arch are between it and the named insured or any insured under the policy. Arch fails to demonstrate a basis for imposing those terms on Illinois Union.

Therefore, Illinois Union's cross motion is granted dismissing the plaintiffs' fifth cause of action and Arch's cross claim, and declaring that the Illinois Union Policy does not afford additional insured coverage to plaintiffs, and Illinois Union does not have a duty to defend and indemnify Pav-Lak for the claims asserted against it in the Cohen Action.

Accordingly, it is

ORDERED that plaintiffs' motion and Arch's cross motion for declaratory relief is decided to the extent of declaring that the Arch Policy provides primary additional insured coverage to Pav-Lak in the Cohen Action; (2) that the coverage afforded to Pav-Lak under the Zurich Policy is excess to the coverage afforded under the Arch Policy; (3) Arch is obligated to defend Pav-Lak in the Cohen Action; and (4) Arch's obligation to

indemnify Pav-Lak is subject to any damages and expenses in excess of the \$1 million deductible; and it is further

ORDERED that Illinois Union's cross motion is granted, dismissing the plaintiffs' fifth cause of action and Arch's cross claim, and declaring that the Illinois Union Policy does not afford additional insured coverage to plaintiffs, and Illinois Union does not have a duty to defend and indemnify Pav-Lak for the claims asserted against it in the Cohen Action; it is further

ORDERED that within 30 days of entry of this order, plaintiffs shall serve a copy upon all parties with notice of entry.

Dated: July 14, 2008



Hon. Doris Ling-Cohan, J.S.C.

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