

**Union Mut. Fire Ins. Co. v C&K 28 Realty Corp.**

2020 NY Slip Op 33333(U)

October 9, 2020

Supreme Court, Kings County

Docket Number: 520715/17

Judge: Karen B. Rothenberg

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underlying personal injury action against C&K and Tres Marias, alleging violations of Labor Law §§200, 240(1), 241(6) and common-law negligence.

After receiving notice of the occurrence on October 4, 2017, Union Mutual disclaimed coverage on October 16, 2017 based on exclusions contained in the policy's "Independent or Sub-Contractors Conditions Endorsement" and "Designated Ongoing Operations" endorsement. Nonetheless, Union Mutual agreed to retain counsel to defend C & K in the underlying action, subject to the resolution of this declaratory judgment action. Union Mutual now moves for summary judgment for a declaration that it is not obligated to defend or indemnify C & K in the underlying action and that it may withdraw from the defense of C & K in such action.

The policy's "Independent Contractors and Subcontractors Conditions Endorsement" provides in relevant part:

"This policy shall only afford independent or subcontractor's coverage when all of the following conditions have been met:

**CONDITIONS – INDEPENDENT CONTRACTORS AND SUBCONTRACTORS COVERAGE**

1. With respect to work performed on your behalf by independent contractors or subcontractors, if (1) each such independent contractor or subcontractor carries insurance providing for coverage for the "bodily injury" or "property damage" that would be subject to the exclusions in paragraphs 2, 3, and 4 below and; (2) such insurance provides coverage and limits at least equal to that provided by this policy but for the exclusions in paragraphs 2, 3 and 4 below and; (3) you have been named as an additional insured on such insurance coverage, then the exclusions in paragraphs 2, 3, and 4 below shall not apply and this policy shall be excess over such insurance.

Otherwise;

2. This insurance does not apply to "bodily injury" or "property damage" arising out of any and all work performed by independent contractors and subcontractors, regardless of whether such work is performed on your behalf or whether such work is performed for you or for others. This exclusion applies regardless of where such work is performed.
3. This insurance does not apply to "bodily injury" or "property damage" included in the "products-completed operations

hazard” and arising out of any and all work performed by independent contractors or subcontractors, regardless of whether such work on your behalf or whether such work is performed for you or for others. This exclusion applies regardless of where such work is performed.

4. This insurance does not apply to “bodily injury” or “property damage” sustained by any owner, partner or employee of any independent contractor or subcontractor working for you or on your behalf, regardless of whether such work is performed on your behalf or whether such work is performed for you or for others. This exclusion applies regardless of where such work is performed.”

In addition, the policy’s endorsement entitled “EXCLUSION-DESIGNATED ONGOING OPERATIONS” states in relevant part:

“This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description of Designated Ongoing Operation(s):

Any construction, renovation or repair work being performed at any insured location, except when performed by independent contractors and/or subcontractors who have met the conditions of the Independent or SubContractors Endorsement...

...

The following exclusion is added to paragraph 2., Exclusions of COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I – Coverages):

This insurance does not apply to “bodily injury” and “property damage” arising out of the ongoing operations described in the Schedule of this endorsement, regardless of whether such operations are conducted by you or on your behalf or whether the operations are conducted for yourself or for others.”

“The duty to defend is triggered whenever the allegations of a complaint, liberally construed, suggest a reasonable possibility of coverage, or the insurer has actual knowledge of facts establishing a reasonable possibility of coverage” (*Bruckner Realty, LLC v. County Oil Co., Inc.*, 40 AD3d 898, 900 [2d Dept. 2007]). “[A]n insurance carrier

can be relieved of its duty to defend if it establishes, as a matter of law, that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision” (*Matter of Transtate Ins. Co.*, 303 AD2d 516, 516 [2d Dept 2003). “An insurer may also disclaim coverage on the basis of a policy exclusion by demonstrating that the allegations of the complaint cast that pleading solely and entirely within the exclusion” (*Bruckner* at 900). “An exclusion from coverage ‘must be specific and clear in order to be enforced’ (*Seaboard Sur. Co. v. Gillette Co.*, 64 NY2d 304, 311 [1984]), “and an ambiguity in an exclusionary clause must be construed most strongly against the insurer” (*Guachichulca v. Laszlo N. Tauber & Assoc., LLC*, 37 AD.3d 760, 761 [2d Dept 2007). “However, the plain meaning of a policy’s language may not be disregarded to find an ambiguity where none exists” (*Howard & Norman Baker, Ltd. v. American Safety Cas. Ins. Co.*, 75 AD3d 533, 534 [2d Dept 2010]).

Union Mutual demonstrates its prima facie entitlement to judgment as a matter of law by establishing that the underlying claims fall solely and entirely within the exclusions for “bodily injury” as contained in both the “Independent Contractor or Subcontractor” and “Ongoing Operations” endorsements (*see Holman v Transamerica Ins. Co.*, 81 NY2d 1026 [1993]). The plain language of the exclusions bar coverage for damages arising out of bodily injuries sustained by an independent contractor or subcontractor during the course of construction work performed for the insured or others where no insurance policy exists indemnifying and holding harmless the insured (*see Yangtze Realty, LLC v Sirius America Ins. Co.*, 90 AD3d 744 [2d Dept 2011]). Here, the underlying complaint, verified bill of particulars, and Ramos’ deposition testimony indicate that Ramos was an independent contractor who was injured during his performance of construction/renovation work at the commercial space of the premises; and, no evidence exists of an insurance policy indemnifying and holding harmless the insured which would make the exclusions inapplicable (*see Bingham v 347 11<sup>th</sup> Street*, 140 AD3d 686 [2d Dept 2016]).

In opposition, C & K fails to raise a triable issue of fact to defeat Union Mutual’s prima facie showing of entitlement to judgment as a matter of law on the issue of its duty to defend or indemnify C & K (*see Burgund v.ESP Café, Inc.*, 84 AD3d 849 [2d Dept 2011]). Despite C & K’s contentions, the plain language of the exclusion clauses in the policy clearly and unambiguously excludes coverage for the subject claim (*see Bingham v 347 11<sup>th</sup> Street*, 140 AD3d 686 [2d Dept 2016]).

Moreover, C & K fails to demonstrate that Union Mutual is equitably estopped from disclaiming or denying coverage. An insurer who assumes the defense of an action on behalf of an insured, "with knowledge of facts constituting a defense to the coverage of the policy and without disclaiming liability or giving notice of a reservation of its right to deny coverage, [] may be estopped from later asserting that the policy does not cover the

claim” (*Brooklyn Hosp. Center v Centennial Ins. Co.*, 258 AD2d 491, 491-492 [2d Dept 1999] quoting *Touchette Corp. v Merchants Mut. Ins. Co.*, 76 AD2d 7, 12 [4<sup>th</sup> Dept 1980]). Here, however, Union Mutual disclaimed coverage within two-weeks of its receipt of notice of the occurrence and informed C & K that the defense provided was subject to resolution of this declaratory judgment action (*cf. Mazi Building, LLC v Greenwich Insurance Co.*, 162 AD3d 655 [2d Dept 2018]). Thus, C & K cannot demonstrate that it relied to its detriment on the defense or was otherwise prejudiced by Union Mutual’s actions in the underlying matter (*see Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 38 [1st Dept 2006], *Tarry Realty LLC v Utica First Ins. Co.*, 114 AD3d 520 [1st Dept 2014]).

Accordingly, Union Mutual’s motion for summary for a declaration that it is not obligated to defend or indemnify C & K and that it may withdraw from its defense in the underlying matter is granted.

This constitutes the decision/order of the Court

Dated: October 9, 2020

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Karen B. Rothenberg  
J.S.C.