Whitestar Consulting & Contr., Inc. v JT Constr. & Mgt. Inc.
2021 NY Slip Op 30330(U)
February 5, 2021
Supreme Court, New York County
Docket Number: 160099/2015
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHLOMO S. HAGLER **PART** IAS MOTION 17EFM

Justice

----------X

WHITESTAR CONSULTING & CONTRACTING, INC.,SCOTTSDALE INSURANCE COMPANY

Plaintiffs,

- v -

JT CONSTRUCTION & MANAGMENT INC.,PREFERRED CONTRACTORS INSURANCE COMPANY,

Defendants.

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INDEX NO.	160099/2015
MOTION DATE	N/A, N/A, N/A
MOTION SEQ. NO.	004 005 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 98, 111

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 110, 112, 113, 114, 119

were read on this motion to/for JUDGMENT - SUMMARY.

In this insurance coverage dispute, plaintiffs Whitestar Consulting & Contracting, Inc. (Whitestar) and Scottsdale Insurance Company (Scottsdale) move, pursuant to CPLR 3212, for summary judgment declaring that defendant Preferred Contractors Insurance Company, Risk Retention Group, LLC (PCIC) is obligated to defend and indemnify Whitestar in an action captioned *Liu v Safon, LLC*, Index No. 452625/15 (Sup Ct, NY County) (hereinafter, the underlying action) (motion sequence numbers 004 and 005).[1]

[1] The moving papers in motion sequence number 004 are identical to those in motion sequence number 005.

PCIC moves, pursuant to CPLR 3212, for summary judgment declaring that it is not obligated to defend or indemnify Whitestar in the underlying action (motion sequence number 006).

BACKGROUND

The Underlying Action

Noah Liu (Liu) commenced the underlying action for injuries that he allegedly sustained on May 1, 2013 at 26 Washington Street in Manhattan (NY St Cts Elec Filing [NYSCEF] Doc No. 89, complaint, ¶¶ 47-48).

Liu alleges that Whitestar was the general contractor for the project, and that Whitestar hired JT Construction & Management, Inc. (JT) as a subcontractor (*id.*). Whitestar subsequently brought a third-party action against JT, seeking common-law indemnification, contractual indemnification, contribution, and damages for failure to procure insurance (NYSCEF Doc No. 78, third-party complaint, ¶¶ 8-15, 16-19, 20-27).

Liu testified at his deposition that, on May 1, 2013, his position at JT was project manager/estimator (NYSCEF Doc No. 91, Liu 3/13/19 tr at 5). When asked whether he owned part of the company, he answered, "[l]ike a handshake partnership" (*id.* at 6). When asked if he was the president of the company, Liu stated "Semi. Like I told you, a handshake partnership" (*id.* at 8). Liu testified that his accident occurred as follows: "I go to check the basement just to check, start checking my rounds, just checking on the guys and stuff. And when I went to a corridor where there's a staircase, there wasn't a staircase no more, there was just a ramp and I just fell down the ramp" (*id.* at 13). Liu testified that he fell about 30 feet (*id.* at 14). He did not receive workers' compensation benefits because he was an officer of the company (*id.* at 12-13). When asked how he was paid, Liu stated by "W-2 check" (*id.* at 19-20). Liu also stated that he

received W-2s (*id.* at 20). He further testified that a "Mr. Ting" formed the company and was the owner of the company (*id.* at 9, 10). Liu also stated that "[t]he project was for a school"; it was for Nyack College (NYSCEF Doc No. 83, Liu 2/6/17 tr at 136).

The Policy

PCIC issued a commercial general liability insurance policy, policy number PC86336, to JT for the period from January 3, 2013 through January 3, 2014 (NYSCEF Doc No. 88, PCIC policy, declarations page).

PCIC'S policy contains a blanket additional endorsement, which provides:

> "The section of the policy entitled III. – 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 have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy"

(*id.*, PCIC policy, blanket additional insured endorsement).

The policy contains the following fall from heights exclusion:

> "**ah. Fall from Heights**
>
> 'Bodily injury' sustained by any person at the location of the incident, whether working or not, arising out of, resulting from, caused by, contributed to by, or in any way related to, in whole or in part, from a fall from heights. For purposes of this exclusion, fall from heights shall include, but not be limited to, a fall from scaffolding, hoists, stays, ladders, slings, hangers, blocks, or any temporary moveable platform where there is a height differential to the ground"

(*id.*, PCIC policy, form PCIC 02 TC 06 12, at PCIC 09 of 23).

The policy also contains an employer's liability exclusion:

> "2. Exclusions
> This insurance does not apply to:
>
> **a. Employer's Liability**
>
> Notwithstanding the provisions of Section IV Conditions, Paragraph 7, Separation of insureds, 'bodily injury' to:

(1) Any 'employee' of any insured or any contractor or subcontractor working directly or indirectly on any insured's behalf arising out of and in the course of:

(i) employment by the insured; or

(ii) performing duties related to the conduct of the insured's business or the business of any contractor or subcontractor working directly or indirectly on the insured's behalf.

(2) The spouse, child, parent or sibling of that 'employee' as a consequence of Paragraph (1) above.

This exclusion applies:

(i) Whether the insured may be liable as an employer or in any other capacity; and
(ii) To any obligation to share damages with or repay someone else who must pay damages because of the injury"

(*id.*, PCIC policy, form PCIC 02 TC 06 12, at PCIC 02 of 23).

In addition, the policy contains the following exclusion:

"**m. School or Playground**

"Bodily injury' or 'property damage' arising out of 'your work' or 'your product' involving or related to a school, playground, sports field or recreational facility"

(*id.*, PCIC policy, form PCIC 02 TC -6 12, at PCIC 04 of 23).

Plaintiffs' Tender and PCIC's Disclaimer

By letter dated June 10, 2013, Scottsdale tendered, on behalf of its insured, Whitestar, the defense and indemnification of Liu's claim to PCIC (NYSCEF Doc No. 79).

On May 30, 2014, Network Adjusters, Inc., the third-party administrator for PCIC, disclaimed coverage, stating that:

"no coverage is afforded to JT Construction under the Commercial General Liability Policy issued to JT Construction by PCIC based upon exclusion a. Employer Liability, Exclusion b. Action Over, Exclusion d. Workers Compensation, Exclusion ah. Fall From Heights, Common Policy Exclusion e. Cross Suits, and Common Policy Exclusion k. Contractual Liability"

(NYSCEF Doc No. 80 at 1).

The letter also stated that "[a]s there is no coverage under this policy of insurance, due to the above exclusions, we are not specifically addressing the status of Whiteside [sic], as an insured under this policy, at this time" (*id.*).

Procedural History

Plaintiffs commenced this action on October 1, 2015, seeking declarations that PCIC is obligated to defend and indemnify Whitestar in the underlying action, and that Scottsdale's coverage is excess to PCIC's coverage (NYSCEF Doc No. 81).

In their answer, JT and PCIC assert eight affirmative defenses that there is no coverage for the underlying action (*id.*).

The Parties' Contentions

Plaintiffs now move for summary judgment, arguing that Whitestar qualifies as an additional insured under the blanket additional insured endorsement. Plaintiffs argue that the employer's liability exclusion is ambiguous as to whether owners and directors of a company are also employees. Therefore, plaintiffs assert, PCIC owes coverage to Whitestar. According to plaintiffs, even if the employee exclusion is not ambiguous, the exclusion does not apply because Liu was not JT's employee.

In addition, plaintiffs contend that PCIC's disclaimer was untimely and defective. PCIC disclaimed coverage nearly a year after the tender, and never sent Whitestar a letter concerning its additional insured status. Plaintiffs further contend that the delay has prejudiced Scottsdale because Whitestar proceeded with defending the underlying action, incurring costs and expenses.

PCIC also moves for summary judgment, relying on the fall from heights exclusion and employer's liability exclusion.[2] PCIC contends that there is no question that Liu fell from the

[2] In opposition to plaintiffs' motion, PCIC also relies on the school exclusion.

first floor to the basement when he fell down the ramp. Further, Liu was employed by JT when his accident occurred. Finally, PCIC maintains that Insurance Law § 3420 (d) (2) does not apply to PCIC. Thus, PCIC asserts that the common-law rule applies, and that plaintiffs cannot demonstrate any prejudice resulting from PCIC's delay in disclaiming coverage.

In opposition to PCIC's motion, plaintiffs argue that Liu did not fall from a height; rather, he fell down the ramp. Furthermore, plaintiffs argue that PCIC is estopped from relying on the school exclusion, since it was not raised in its notice of disclaimer.

DISCUSSION

"It is well settled that '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'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise an issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"In determining a dispute over insurance coverage, we first look to the language of the policy" (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221 [2002]). Where "an insurer wishes to exclude coverage from its policy obligations, it must do so 'in clear and unmistakable' language" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984], quoting *Kratzenstein v Western Assur. Co. of City of Toronto*, 116 NY 54, 59 [1889]). "To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear

and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case" (*Continental Cas. Co. v Rapid–American Corp.*, 80 NY2d 640, 652 [1993]). "[A]lthough the insurer has the burden of proving the applicability of an exclusion, it is the insured's burden to establish coverage" (*Platek v Town of Hamburg*, 24 NY3d 688, 694 [2015] [citations omitted]).

It is well settled that "unambiguous provisions [of an insurance policy] must be given their plain and ordinary meaning" (*Sanabria v American Home Assur. Co.*, 68 NY2d 866, 868 [1986], *rearg denied* 69 NY2d 707 [1986]). "Ambiguity arises when the contract, read as a whole, . . . fails to disclose its purpose and the parties' intent" (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]), or when "the agreement on its face is reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). Moreover, in deciding whether an agreement is ambiguous, the court "'should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed'" (*Kass v Kass*, 91 NY2d 554, 566 [1998]). "[A] contract is not rendered ambiguous just because one of the parties attaches a different, subjective meaning to one of its terms" (*Moore v Kopel*, 237 AD2d 124, 125 [1st Dept 1997]).

Here, the fall from heights exclusion is clear and unambiguous and must be enforced as written (*see Porch v Preferred Contrs. Ins. Co., RRG*, 2019 WL 1116674, *5, 2019 US Dist LEXIS 38743, *11-*12 [D Mont Mar. 11, 2019], *affd* 819 Fed Appx 560 [9th Cir 2020]; *Navarro v Golden State Claims Adjusters*, 2018 WL 4471782, * 9, 2018 US Dist LEXIS 160205, *27 [ND Tex Aug. 27, 2018], *report and recommendation adopted* 2018 WL 4471645, 2018 US Dist LEXIS 159265 [ND Tex Sept. 18, 2018]). The fall from heights exclusion precludes coverage for bodily injuries "in any way related" to a fall from heights, including, but not limited

to, falls from "temporary or moveable platforms where there is a height differential to the ground" (NYSCEF Doc No. 88, PCIC policy, form PCIC 02 TC 06 12, at PCIC 09 of 23).

Moreover, PCIC has demonstrated that the exclusion applies in this case. Liu testified that he "fell down the ramp," "[p]robably 30 feet" to where he landed (NYSCEF Doc No. 91, Liu 3/13/19 tr at 13-14; NYSCEF Doc No. 83, Liu 2/6/17 tr at 109 [he fell "20 feet, 25 feet"]). Although plaintiffs argue that the exclusion does not apply because Liu fell down the ramp, Liu's accident involved a height differential from the top of the ramp to the basement. Thus, plaintiffs' argument that the exclusion does not apply is without merit (*see Porch*, 819 Fed Appx at 561 ["Because it was undisputed that Mr. Porch fell from a ladder where a height differential to the ground existed, the exclusion applied"]; *Navarro*, 2018 WL 4471782, *10, 2018 US Dist LEXIS 160205, *27 [fall from heights exclusion applied where plaintiff fell through attic floor to garage space below]; *cf. United Specialty Ins. Co. v Everest Constr.*, 2019 WL 977899, *3, 2019 US Dist LEXIS 33133, *6 [D Utah Feb. 28, 2019] [fall from heights exclusion did not apply to object thrown from above]).[3]

The court rejects plaintiffs' contention that PCIC's disclaimer precludes PCIC from denying coverage in this case.

The parties agree that the timeliness of PCIC's disclaimer is not governed by Insurance Law § 3420. In *Nadkos, Inc. v Preferred Contrs. Ins. Co. Risk Retention Group LLC* (34 NY3d 1, 8 [2019]), the Court of Appeals held that Insurance Law § 3420 (d) (2), requiring an insurer to disclaim or deny coverage as soon as reasonably practicable, did not apply to PCIC, a nondomiciliary insurer. Therefore, any delay in PCIC's disclaimer must be analyzed under

[3] In fact, plaintiff argues in the underlying action that plaintiff's accident involved a fall from a height and therefore constitutes a violation of Labor Law § 240(1).

common-law waiver and/or estoppel principles (*see KeySpan Gas E. Corp. v Munich Reins. Am., Inc.*, 23 NY3d 583, 590-591 [2014]).[4]

Plaintiffs only argue that PCIC is estopped from denying coverage based upon its late disclaimer, and do not contend that PCIC waived any defenses to coverage.

"Under the principles of estoppel, an insurer, though in fact not obligated to provide coverage, may be precluded from denying coverage upon proof that the insurer 'by its conduct otherwise lulled [the insured] into sleeping on its rights under the insurance contract'" (*Provencal, LLC v Tower Ins. Co. of N.Y.*, 138 AD3d 732, 734 [2d Dept 2016], quoting *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988]). "[In the absence of § 3420 (d) (2)], [u]nder the common law rule, a delay in disclaiming coverage, even if unreasonable, will not estop the insurer to disclaim unless the insured has suffered prejudice from the delay" (*Fairmont Funding v Utica Mut. Ins. Co.*, 264 AD2d 581, 581-582 [1st Dept 1999]; *accord Vecchiarelli v Continental Ins. Co.*, 277 AD2d 992, 993 [4th Dept 2000]). However, "[p]rejudice is established only where the insurer's control of the defense is such that the character and strategy of the lawsuit can no longer be altered" (*Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 39 [1st Dept 2006]). "Where there is no showing of prejudice, the court may

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[4] Contrary to plaintiffs' contention, PCIC's notice of disclaimer was sufficient to apprise plaintiffs of the grounds on which the disclaimer was based. PCIC's notice of disclaimer was sent directly to Scottsdale, and indicates that Whitestar received a copy (NYSCEF Doc No. 80). PCIC further stated that there is no coverage to JT based upon the cited exclusions, including the fall from heights exclusion (*id.*). PCIC indicated that "[a]s there is no coverage under the policy of insurance, due to the above policy exclusions, we are not specifically addressing the status of Whiteside [sic] as an insured under the policy at this time" (*id.*). It is well settled that an additional insured is an entity "enjoying the same protections 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]).

determine that there is no estoppel as a matter of law" (*Marino v New York Tel. Co.*, 1992 WL 212184, *11, 1992 US Dist LEXIS 12705, *39 [SD NY Aug. 24, 1992]).

Plaintiffs argue that PCIC's late disclaimer has prejudiced them. Specifically, plaintiffs contend that Whitestar has proceeded with the defense of the underlying action, incurring additional costs and expenses. Nevertheless, plaintiffs have not established any prejudice resulting from PCIC's delay in disclaiming coverage. When PCIC disclaimed coverage, the underlying action had not even been commenced yet (*see State Farm & Cas. Co. v Guzman*, 138 AD3d 503, 503 [1st Dept 2016], *lv dismissed, denied in part* 28 NY3d 1101 [2016] [insured "failed to establish that she was prejudiced by the issuance of the disclaimer four months before the note of issue was filed"]; *Tarry Realty LLC v Utica First Ins. Co.*, 114 AD3d 520, 521 [1st Dept 2014], *lv denied* 23 NY3d 902 [2014] [equitable estoppel did not apply to bar insurer from relying on exclusion, even though insurer had defended contractor in underlying action for two years, where "there [had] been no disposition in the underlying action, and there was no evidence that the action [was] close to trial"]; *206-208 Main St. Assoc. Inc. v Arch Ins. Co.*, 106 AD3d 403, 407 [1st Dept 2013] [insureds failed to establish prejudice by insurer's late disclaimer where the underlying action was still in its "early phase"]; *Boston Old Colony Ins. Co. v Lumbermans Mut. Cas. Co.*, 889 F2d 1245, 1248 [2d Cir 1989] ["The tardy disclaimer was prejudicial because the Bodians had taken actions that could not be undone"]). Liu initially brought the underlying action in 2015 (NYSCEF Doc No. 77). PCIC disclaimed coverage on May 30, 2014 (NYSCEF Doc No. 80). Furthermore, the court's review of the electronically-filed documents in the underlying action, of which the court takes judicial notice (*see Leary v Bendow*, 161 AD3d 420, 421 [1st Dept 2018] [court may take judicial notice of "undisputed court records and files"] [internal quotation marks and citation omitted]), indicates that the note

of issue was filed on January 9, 2020 (NYSCEF Doc No. 166, note of issue filed in *Liu v Safon, LLC*, Sup Ct, NY County, index no. 452625/15). Moreover, plaintiffs have not presented any evidence that PCIC acted in a manner that could be perceived as a promise to provide coverage to Whitestar.

In sum, the fall from heights exclusion clearly and unambiguously bars coverage for the underlying action. In light of this determination, the court need not reach the parties' remaining arguments, including whether the employer's liability and school exclusions apply (*see Provencal, LLC*, 138 AD3d at 735).

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 004) of plaintiffs Whitestar Consulting & Contacting, Inc. and Scottsdale Insurance Company for summary judgment is denied; and it is further

ORDERED that the motion (sequence number 005) of plaintiffs Whitestar Consulting & Contracting, Inc. and Scottsdale Insurance Company for summary judgment is denied; and it is further

ORDERED that the motion (sequence number 006) of defendant Preferred Contractors Insurance Company, Risk Retention Group, LLC for summary judgment is granted; and it is further

ORDERED, ADJUDGED and DECLARED that the policy issued by defendant Preferred Contractors Insurance Company, Risk Retention Group, LLC, policy number PC86336, does not provide additional insured coverage to Whitestar Consulting & Contracting, Inc. in the action captioned *Liu v Safon, LLC*, Index No. 452625/15 (Sup Ct, NY County).

2/5/2021
DATE

SHLOMO S. HAGLER, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE