

A.J. McNulty & Co., Inc. v Lloyd's of London

2002 NY Slip Op 30066(U)

July 26, 2002

Supreme Court, New York County

Docket Number: 0604398/2001

Judge: Marcy S. Friedman

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

PRESENT: _____

Justice

PART 2

(V.L.B.)

604398/0

A.J. McMulty

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

Lloyd's of London

001

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

judgt

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavit — Exhibits ...

Notice of Cross-Motion

Answering Affidavits — Exhibits _____

Replying Affidavits _____

See Reply

1
2
3, 4
5, 6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is denied +

cross-motion is granted as per accompanying
decrees/order dated 7/26/02

SCANNED

AUG 12 2002

MOTION/CASE IS RESOLUTIVE REFERRED TO JUSTICE

Dated: _____

7/26/02

[Signature]

Check one:

FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 57
-----X

A.J. MCNULTY & CO., INC., VISTA ENGINEERING CORPORATION, UNDERPINNING & FOUNDATION CONSTRUCTORS, INC., and PETER SCALAMANDRE & SONS, CO., INC.,

Plaintiffs,

Index No.:
604398/2001

-against-

LLOYD’S OF LONDON,

Defendant.

..... X

Marcy S. Friedman, J.:

This is a declaratory judgment action brought by plaintiffs, which were subcontractors on a project to construct a new terminal at JFK International Airport, to obtain a declaration that defendant Lloyd’s of London (“Lloyd’s”) is obligated, pursuant to the insurance policy that it issued, to defend and indemnify them in certain third-party actions. Plaintiffs move, and defendant Lloyd’s cross-moves, pursuant to CPLR 3212, for summary judgment on the merits of the complaint.

Background

The Project

In May, 1997, The Port Authority of New York and New Jersey (the “PA”) leased to JFK International Air Terminal LLC (“JFK IAT”) a certain portion of land and structures known as

Terminal Four at JFK International Airport. Pursuant to the lease agreement, JFK IAT agreed to submit to the PA a comprehensive plan for the construction of a new passenger terminal building.

In connection with its obligations under the lease agreement, JFK IAT, as the Developer, entered into a Construction Agreement with Morse Diesel International, Inc. (“MDI”), as the Contractor, under which MDI agreed to act as the construction manager for the project. Article 12 of the Construction Agreement (“Insurance, Indemnity and Waiver of Subrogation”) required MDI to indemnify JFK IAT for all claims arising out of or resulting from the performance of the work. (*Id.* at § 12.1.) The Construction Agreement further required JFK IAT to provide insurance covering all contractors and subcontractors in connection with the work at the project site. (*Id.*, at §§ 12.2, 12.2.1, 12.2.1.2 & 12.2.1.3.) In contrast, the Construction Agreement provided for the contractor, MDI, and all subcontractors to procure general liability insurance for operations of the contractor or subcontractors away from the project site (*Id.* at § 12.2.3.4.)

Plaintiffs are all subcontractors which performed work at the project site. Plaintiff **A.J. McNulty & Co., Inc.** (“McNulty”) was a subcontractor of SMI/OWEN, which in turn was a subcontractor of MDI. Plaintiff Vista Engineering corporation (“Vista”) was a subcontractor of McNulty. Plaintiff Underpinning and Foundation Constructors, Inc. (“UFC”) was a subcontractor of Halmar Builders of New York, Inc. which in turn was a subcontractor of MDI. Plaintiff Peter Scalmandre & Sons, Co., Inc. (“Scalamandre”) was a subcontractor of Interstate Industrial Corp.. a subcontractor of MDI.

The Underlying Actions

Kyle Aaman (“Aaman”), an employee of McNulty, was allegedly injured on January 14,

2000 while working at the project. As a result, on or about June 26,2000, Aaman commenced an underlying personal injury action in the Supreme Court, New York County against MDI (“Aaman action”). On or about January 5,2001, MDI commenced a third-party action against McNulty, seeking contribution and common law indemnification in the event that MDI is found to be liable to Aaman.

John Meslin (“Meslin”), an employee of Vista, was allegedly killed as a result of an accident which occurred on November 19, 1999, while he was working at the project. As a result, on or about November 16,2000, Meslin’s estate commenced an underlying wrongful death and personal injury action in the Supreme Court, New York County against the PA, MDI and McNulty (the “Meslin action”). On or about February 8,2001, the PA and MDI commenced a third-party action against Vista, seeking contribution and common law indemnification in the event that they are found to be liable to Meslin.

Michael McCloskey (“McCloskey”), an employee of UFC, was allegedly injured due to an accident which occurred on February 26, 1999, while he was working at the project. As a result, on or about October 21, 1999, McCloskey commenced an underlying personal injury action in the Supreme Court, New York County against the PA and JFK IAT (the “McCloskey action”). On or about February 1,2001, the PA and JFK IAT commenced a third-party action against UFC, seeking contribution and common law indemnification.

Francisco Rodrigues (“Rodrigues”), an employee of Scalamandre, was allegedly killed as the result of an accident which occurred on April 13, 1999, while he was working at the project. As a result, on or about April 4,2000, the estate of Rodrigues commenced an underlying wrongful death and personal injury action in the Supreme Court, Bronx county against, among

others, the PA, JFK IAT, MDI, and Gomaco Corp. (the “Rodrigues action”). On or about June 19, 2001, Gomaco commenced a third-party action against Scalmandre for contribution and indemnification.

The Insurance Policies

Defendant Lloyd’s issued Airport Contractors Liability Insurance Policy No. ABA 1649 to JFK IAT and other related entities for a policy period from May 13, 1997 until November 13, 2002 (the “Lloyd’s policy”). The “Named Insureds” under the Lloyd’s policy included, among others, “* * * all contractors and subcontractors of all tiers and their employees and agents including consultants and consultant subcontractors as their interests may appear arising out of the construction project, as more fully defined herein.” (Id. at Schedule, § 1.)

The Lloyd’s policy contains the following exclusion for bodily injury to employees:

This Policy does not apply:

* * * 4. Employers Liability:

to Bodily Injury to any employee of the Insured arising out of and in the course of his employment by the Insured, or any obligation for which the Insured or any carrier as their insurer may be held liable under any workmen’s compensation law, occupational disease law, unemployment compensation law, disability benefits law or any similar law.

(Id. at Exclusions, § 4.)

The Lloyd’s policy further provides:

25. CONTRACTUAL LIABILITY

In the event that the Named Insured shall in connection with the insured projects and operations, prior to a loss, assume liability covered by this Policy for and on behalf of, or hold harmless, any person or organization under any contract or agreement, it is agreed that the assumption of liability under such contract or agreement shall be automatically covered hereon.

Nothing contained in this clause shall be construed to extend the coverage provided by this policy to apply to risks not otherwise insured hereunder. **All**

such hold harmless agreements or additional insureds are included subject to the policy coverage, terms, conditions, limitations and exclusions.

(Id. at Conditions, § 25.)

It is not disputed that JFK IAT was required by the Construction Agreement to procure, and did procure, a policy which provides workers' compensation and employers' liability coverage for the contractors and subcontractors which worked on the Terminal Four project. (See Aff. of Bruce Wildermuth In Support of Cross-Motion, ¶ 14.) This policy, which was obtained from AIG, includes coverage for benefits that the insured employers are obligated to pay under the Workers' Compensation Law, as well as Employers' Liability Insurance covering bodily injury arising out of the course of injured employees' work at the project site. (Cf. Cross-Motion, Ex. 6.)

Lloyd's has been providing a defense under its policy to defendants in the underlying actions brought by Aaman, Meslin, McCloskey and Rodrigues. **AIG** has been providing a defense under its policy to plaintiffs in their capacity as third-party defendants in the underlying third-party actions.

The Instant Declaratory Judgment Action

On or about September 5, 2001, plaintiffs commenced the instant action, seeking a judgment declaring that they are insureds under the Lloyd's policy and that Lloyd's is obligated to defend and indemnify them in the third-party actions. Lloyd's served its answer on or about September 26, 2001.

Discussion

It is undisputed that the plaintiff subcontractors are all "named insureds" under the

Lloyd's policy, which is part of JFK IAT's developer's insurance program for the Terminal Four project. Lloyd's correctly asserts, however, that its policy specifically excludes coverage for bodily injury and death of any employee of any insured "arising out of and in the course of his employment by the Insured," or any obligation for which the insured or its insurer may be held liable under the Workers' Compensation Law.

The Employers' Liability exclusion is applicable, as the third-party actions involve liability for bodily injuries and death resulting from the employees' work in the course of their employment in the Terminal Four project. Prior decisions have enforced similar employers' liability and workers' compensation exclusions from general liability policies. (See, e.g., North River Ins. Co. v United Natl. Ins. Co., 81 NY2d 812 [1993]; Commissioners of the State Ins. Fund v Insurance Co. of No. Am., 80 NY2d 992 [1992]; Monteleone v Crow Constr. Co., 242 AD2d 135 [1st Dept 1998], lv denied 92 NY2d 818.)

Plaintiffs acknowledge the existence of the Employers' Liability exclusion. However, they assert that, pursuant to Insurance Law § 3420(d), Lloyd's is precluded from relying upon this exclusion to decline to defend and indemnify them in the third-party actions, because it failed to disclaim coverage promptly.

Insurance Law § 3420(d) is not a bar to the instant action. This statute provides that an insurer that disclaims liability or denies coverage "shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured." It is well settled that "failure by the insurer to give written notice of disclaimer based on an exclusion or failure to comply with a policy condition as soon as is reasonably possible renders the disclaimer ineffective." (Columbia Cas. Co. v National Emergency Servs.. Inc., 282 AD2d 346,347 [1st

Dept 20011; Hartford Ins. Co. v County of Nassau, 46 NY2d 1028 [1979], rearg denied 47 NY2d 95.) However, “[t]he timeliness 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.” (Matter of Allcity Ins. Co. v Jimenez, 78 NY2d 1054, 1056 [1991], rearg denied 79 NY2d 823. See City of New York v Investors Ins. Co. of Am., 287 AD2d 394 [1st Dept 20011].)

Contrary to plaintiffs’ contention, the mere commencement of the third-party actions did not give defendant notice of the claims against plaintiffs. The policy specifically requires the insured to give prompt notice to the insurer, and thus provides: “If claim is made or Suit is brought against the Insured, the Insured shall, as soon as reasonably practicable, forward to the Insurers or their representative every demand, notice, summons or other process received by them or their representatives. (Lloyd’s Policy, § 5 at 13.) However, plaintiffs do not contend that they ever forwarded the third-party complaints to Lloyd’s or Willis, its agent, or that they made any demand that Lloyd’s defend or indemnify them in the third-party actions. Rather, plaintiffs argue in effect that Lloyd’s is charged with notice of the third-party complaints because the counsel (Condon & Forsyth) that Lloyd’s retained to defend defendants in the underlying actions was also the counsel that filed the third-party complaints in the Aaman, Meslin and McCloskey matters, and that Lloyd’s therefore also had notice that the third-party complaints involved claims that plaintiffs (there, third-party defendants) were liable for injuries to employees.

Plaintiffs cite no authority in support of this contention. Moreover, under these circumstances in which one insurer, Lloyd’s, provided general liability insurance, and a different insurer, AIG, provided workers’ compensation coverage and coverage for employees’ injuries,

Lloyd's cannot be charged with knowledge that a claim was being made against it based on the merely filing of the third-party complaints. Rather, it was not until plaintiffs themselves gave notice that claims had been made for which plaintiffs were requesting coverage from Lloyd's that Lloyd's duty to disclaim ran.

Such notice was not given until the instant declaratory judgment action was served.'

Lloyd's gave notice of disclaimer in its timely filed answer to this action. The court accordingly holds that this notice of disclaimer was timely. (See, Thomson v Power Auth. of the State of New York, 217 AD2d 495 [1st Dept 1995].)²

In so holding, the court further notes that Insurance Law § 3420(d) was enacted "to protect the insured, the injured person, and any other interested party who has a real stake in the outcome, from being prejudiced by a belated denial of coverage. It was not intended to be a technical trap that would allow interested parties to obtain more than the coverage contracted for under the policy." (Excelsior Ins. Co. v Antretter Contr. Co., 262 AD2d 124, 127 [1st Dept

'Plaintiffs submitted a sur-reply which purports to show that Lloyd's agent, Willis, had notice of the third-party complaints from about the time these complaints were served. However, this sur-reply does not show, or raise a triable issue of fact as to whether, Lloyd's or its agent had notice that a claim was being made for Lloyd's to defend plaintiffs. In one case, that of Aaman, Condon & Forsyth sent notice of the third-party complaint to AIG with a letter proposing settlement discussions. Willis was merely copied on this transmission. (Sur-Reply, **Ex. A.**) In the cases of Meslin and Rodrigues, Willis sent notice to AIG in March and July 2001, respectively, forwarding the third-party complaints. (Sur-Reply, **Exs. B, D.**) There is no indication as to how Willis received these complaints (and no claim by plaintiffs that they transmitted the complaints to Willis). Moreover, while Willis obviously had notice of these third-party complaints, there is no indication that any demand was made that Lloyd's, as opposed to AIG, defend or indemnify plaintiffs on these complaints. As to the McCloskey case, the third-party complaint was forwarded to Willis by an entity named Slattery, with a letter requesting that it be forwarded to the carrier to answer under the "JFK IAT Redevelopment-Terminal 4 Owner Controlled Insurance Program." (Sur-Reply, **Ex. C.**) The letter does not identify the carrier as either Lloyd's or AIG.

19991.) Plaintiffs have not been prejudiced by Lloyd's assertion of the Employers' Liability exclusion, as they are being defended by **AIG**. Plaintiffs' application of Insurance Law § 3420(d) would negate the Employers' Liability exclusion and extend the coverage provided by the Lloyd's policy beyond the scope of the coverage for which the parties contracted.

Plaintiffs assert, in the alternative, that Lloyd's violated the anti-subrogation rule by maintaining third-party actions against plaintiffs. More particularly, plaintiffs argue that the pleadings in the third-party actions in the Aaman, Meslin and McCloskey matters deliberately omitted any claim against third-party defendants (here, plaintiffs) for contractual indemnification, and asserted only claims for common law indemnification, in order to avoid the impact of the anti-subrogation rule; that under the Lloyd's policy, Lloyd's was obligated to provide coverage to plaintiffs for claims for contractual indemnification; and that plaintiffs did agree to contractually indemnify various parties including the owner and contractor of the job site.

It is well settled that under the anti-subrogation rule, an insurer "has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered."³ (North Star Reins. Corp. v Continental Ins. Co., 82 NY2d 281,294 [1993].)

In response to plaintiffs' attempt to invoke the anti-subrogation rule, Lloyd's contends that the Lloyd's policy excluded contractual indemnification claims based on liability for employees' bodily injuries, and that plaintiffs did not, in any event, agree to be liable for such contractual indemnification.

Contrary to plaintiffs' contention, Conditions § 25 of the Lloyd's policy clearly

³Condition 8 of the Lloyd's policy ("Subrogation") contains the following provision which reflects the anti-subrogation rule: "The Insurers shall have no rights of subrogation against any person or organisation qualifying as an Insured under this Policy."

incorporates an exclusion of coverage for contractual indemnification obligations for bodily injuries to insureds' employees. The first paragraph of this section provides that a named insured's assumption of contractual liability is covered by the policy. The second paragraph provides, however, that "[n]othing contained in this clause [the first paragraph] shall be construed to extend the coverage provided by this policy to apply to risks not otherwise insured hereunder." The second sentence of the second paragraph expressly further provides that "[a]ll such hold harmless agreements or additional insureds are included subject to the policy coverage, terms, conditions, limitations and exclusions."

It is well settled that "unambiguous provisions [of insurance contracts] must be given their plain and ordinary meaning." (Sanabria v. American Home Ass. Co., 68 NY2d 866, 868 [1986], rearg denied 69 NY2d 707.) Section 25 clearly and unambiguously limits the coverage provided for contractual indemnity claims in accordance with the policy's exclusions. Plaintiffs' argument that the policy exclusion for employees' bodily injuries does not apply to contractual indemnification claims depends on a tortured reading of the second sentence of the second paragraph to provide that the policy exclusions are applicable only to claims of additional insureds, as opposed to hold harmless agreements. **As** there is no basis for this reading in the unambiguous language of section 25, the court holds that the Lloyd's policy contains an exclusion for the contractual indemnification claims for employees' bodily injuries that plaintiffs assert should have been put at issue in the third-party actions. (Cf., Monteleone v Crow Constr. Co., 242 AD2d 135, supra. See also, Franklin v Stillwater Hvdro Partners. L.P., 255 AD2d 998 [4th Dept 1998].)

As contractual indemnification claims for employees' bodily injuries are not covered by

the Lloyd's policy, the omission of the claims from the complaints in the third-party actions was not a manipulation of the litigation to avoid Lloyd's obligations to its insureds and to shift liability to a different insurer, and thus does not violate the anti-subrogation rule. (Compare, McGurran v DeCanio Planned Dev. Corp., 216 AD2d 538 [2nd Dept 1995]⁴ with National Union Fire Ins. Co. v. Aetna Cas. & Sur. Corp., 790 F Supp 491 [SD New York 1992], aff'd 983 F2d 1048 [2d Cir].)

In view of this holding, the court need not reach the further issue of whether the construction agreements between JKI IAT and MDI, and between MDI or other contractors and plaintiffs, provided for plaintiffs to indemnify MDI for employees' bodily injuries.

The court has considered plaintiffs' remaining contentions and finds them without merit. Therefore, the underlying third-party actions against plaintiffs are proper, and plaintiffs are not entitled to a defense and indemnification by Lloyd's in the third-party actions.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that the cross motion by defendant Lloyd's of London is granted to the extent that the complaint is dismissed and it is declared that Lloyd's is not obligated to defend or indemnify plaintiffs A.J. McNulty & Company, Vista Engineering Corporation, Underpinning &

⁴In McGurran v DeCanio Planned Dev. Corp. (*supra*), the Appellate Division concluded that the anti-subrogation rule did not bar the project owner's general liability insurer from bringing a third-party action against an additional insured which was the employer of the injured employee. In the McGurran case, as in the instant matter, the owner's general liability policy excluded coverage for employers' liability and, thus, the third-party claims asserted by the general liability insurer against the employer did not encompass the risk for which the employer was covered by that policy. (See also, Franklin, 255 AD2d 998.) Indeed, as in the instant matter, the employer in DeCanio was covered by another insurer, the State Insurance Fund, for workers' compensation claims.

Foundation Constructors, Inc. and Peter Scalamandre & Sons, Co., Inc. with respect to the underlying third-party actions.

This constitutes the decision and order of the court.

Dated: New York, New York
July 26, 2002

ENTER:

J.S.C.