

City of New York v Zurich American Insurance Co.

2004 NY Slip Op 30140(U)

December 8, 2004

Supreme Court, New York County

Docket Number: 0402240/2003

Judge: Doris Ling-Cohan

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

PRESENT: HON. DORIS LING-COHAN
Justice

PART 62

0402240/2003

CITY OF NEW YORK
VS
ZURICH AMERICAN INSURANCE

INDEX NO. _____

MOTION DATE _____

SEQ 2

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this motion for SJ

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>
Cross-Motion: <u>sub/repies II letter / A letter</u>	<u>5, 6</u>
<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	<u>7, 8</u>

Upon the foregoing papers, it is ordered that the motion s are both
denied in accordance with
the attached document order.

DEC 16 2004

HON. DORIS LING-COHAN

Dated: 12/8/04

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

J.S.C.

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 62

-----x
THE CITY OF NEW YORK,

Plaintiff,

Index No. 402240/03

- against -

ZURICH AMERICAN INSURANCE COMPANY,

Defendant.
-----x

DORIS LING-COHAN, J.:

This is a declaratory judgment action brought by plaintiff City of New York (the "City"), seeking, *inter alia*, a declaration that defendant, Zurich American Insurance Company ("Zurich"), is obligated to defend it in an underlying personal injury action, entitled *Melia Rothfeder and Abraham Rothfeder v City of New York and American Bridge Company*, Sup Ct, Bronx County, Index No. 21891/02 (the "*Rothfeder* action"), and to reimburse it for the costs incurred in defending the *Rothfeder* action. Zurich seeks summary judgment declaring that it is not obligated to defend or indemnify the City in the *Rothfeder* action. In addition to opposing the motion, the City cross-moves for partial summary judgment, seeking a declaration that Zurich is obligated to defend it in the *Rothfeder* action and to pay the costs it has incurred to date in defending that action.

Background

The gravamen of the complaint in this declaratory judgment action is that the City is entitled to coverage for the *Rothfeder* action as an additional insured under Commercial General

Liability Policy number GLO 8322075-02 issued by Zurich to the American Bridge Company (ABC), as the named insured, effective from June 1, 2000 to June 1, 2002 (the "Zurich Policy"). Zurich disclaimed coverage on the ground that its investigation revealed that the underlying accident did not result from work performed by the named insured, ABC.

The declaratory judgment complaint alleges that ABC entered into a contract with the New York City Transit Authority ("NYCTA") in connection with the construction and alteration of communication rooms at the elevated subway station located on Broadway and West 231st Street in the Bronx. The complaint further alleges that in connection with ABC's work for NYCTA under the contract, ABC obtained from the New York City Department of Transportation ("DOT") street opening permits and building operation permits to place materials and equipment on the street (Declaratory Judgment Complaint, at ¶ 5, Affirmation of Melina F. Kuflik, Esq. in Support of Zurich Summary Judgment Motion [Kuflik Affirm.], Ex. A). The City notes that DOT's Highway Rules require that permit applicants obtain a commercial general liability insurance policy in the minimum amount of \$1 million per occurrence naming the City and DOT as additional insureds (34 RCNY § 2-02[a][3][i][A] and [B]) (Declaratory Judgment Complaint, at ¶ 6). The Highway Rules further require that the policy indicate that coverage provided "is broad enough to cover all operations adjacent to the work site or premises,

including roadways and sidewalks providing access to the work site or premises" (34 RCNY § 2-02[a][3][i][E]). The verified complaint in the *Rothfeder* action states, *inter alia*, that the City granted to ABC a contract or permit to perform work at the intersection of Broadway and West 231st Street, and that plaintiff Melia Rothfeder sustained injuries when she tripped and fell on cracked, uneven pavement in the area where ABC was performing work (*Rothfeder* verified complaint, Affirmation of Richard J. Costa, Esq. In Support of City's Cross Motion [Costa Affirm.], Ex. A).

By order, entered March 2, 2004, this Court denied the City's motion for summary judgment, concluding that the City failed to establish, as a matter of law, that it is covered as an additional insured under the Zurich Policy. The Court noted that the City failed to submit the contract between ABC and the NYCTA.

Current Summary Judgment Motions

Zurich now moves for summary judgment, asserting that based on the language of the Automatic Additional Insureds Endorsement of the Policy and the contract between the City and the NYCTA (the ABC Contract), the City is not entitled to coverage as an additional insured with respect to the *Rothfeder* action. Zurich has now submitted to the Court a copy of the contract between ABC and the NYCTA (the ABC Contract, Kuflik Affirm., Ex. G). The City cross-moves for partial summary judgment, asserting that it is entitled to a defense from Zurich in the *Rothfeder* action, as

it is an additional insured under the Zurich Policy, based upon the ABC Contract and the fact that the allegations in the *Rothfeder* complaint come within the terms of the Zurich Policy. For the reasons stated below, the Court denies summary judgment to both sides with the option to renew as provided below.

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 from the case" (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The City, as the party claiming insurance coverage as an additional insured, has the burden of establishing its entitlement to such coverage (*Moleon v Kreisler Borg Florman Gen. Constr., Inc.*, 304 AD2d 337, 339 [1st Dept 2003]).

Furthermore, the terms of the Zurich Policy determine whether the City is covered as an additional insured (see *Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 31 [1st Dept 1979], *affd* 49 NY2d 924 [1980]).

The submissions do not include any provision in the Zurich Policy specifically designating the City as an additional insured. Thus, the City's entitlement to coverage as an additional insured must be determined based on the language of the Automatic Additional Insureds Endorsement of the Policy,

which defines an additional insured, as follows in pertinent part:

Any entity you [ABC] are required in a written "insured contract" (hereinafter called additional insured) to name as an insured but only with respect to liability arising out of your premises, "your work" for the additional insured or acts or omissions of the additional insured in connection with the general supervision of "your work"

(Zurich Policy, Kuflik Affirm., Ex. C [parenthetical supplied]).

In addition, the Zurich Policy defines the term "insured contract" to mean, in pertinent part:

That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization.

(Zurich Policy, Section V [9] [f]).

The written contract between ABC and the NYCTA clearly comes within the above definition of an "insured contract" in the Zurich Policy. The ABC Contract requires ABC to obtain a commercial general liability insurance policy naming the NYCTA and the City, among others, as additional insureds (ABC Contract, Article 6.05[a][1], Kuflik Affirm., Ex. G). The ABC Contract further provides that ABC is solely responsible for "injuries or damage occurring on account of, or in connection with, the performance of the [work]" contemplated by the Contract, and that ABC must indemnify the NYCTA and the City for "loss and liability

upon any and all claims and expenses, including but not limited to attorney's fees, on account of such injuries to persons or such damage to property" (ABC Contract, Articles 6.01, 6.02[a] and 6.03[a]).

Furthermore, as stated, the Automatic Additional Insureds Endorsement in the Zurich Policy covers an additional insured "only with respect to liability arising out of your premises, 'your work' for the additional insured **or acts or omissions of the additional insured in connection with the general supervision of 'your work' ...**". (emphasis supplied).

"The duty to defend arises whenever the allegations in the complaint against the insured fall within the risks covered by the policy." (*Agoado Realty Corp. v United Intl. Ins. Co.*, 95 NY2d 141, 145 [2000]).¹ An insurer can only be relieved of the duty to defend by establishing that the allegations of the underlying complaint are wholly within a policy exclusion, which is subject to no other reasonable interpretation and "that there is no possible factual or legal basis under which the insurer may eventually be held obligated to indemnify the insured under any policy provision" (*Frontier Insulation Contrs., Inc. v Merchants*

¹"It is well established that the duty of an insurer to defend is broader than its duty to indemnify" (*Agoado Realty Corp. v United Intl. Ins. Co.*, 95 NY2d 141, 145 [2000]). "If, liberally construed, the complaint is within the embrace of the policy, the insurer must come forward to defend its insured" (*id.*; see also *Frontier Insulation Contrs., Inc. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]) ("The duty of an insurer to defend its insured arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim, or where the insurer 'has actual knowledge of facts establishing a reasonable possibility of coverage'...[citation omitted]).

Mut. Ins. Co., 91 NY2d at 175). As explained further below, Zurich has failed to establish that there is "no possible factual or legal basis under which the insurer may eventually be held obligated". *Id.*

The allegations in the *Rothfeder* complaint indicate that the injuries allegedly sustained by plaintiff Melia Rothfeder did not occur on ABC's premises. Rather, the *Rothfeder* complaint alleges, among other things, that the plaintiff sustained injuries when she tripped and fell on cracked, uneven pavement at the intersection of Broadway and West 231st Street, where ABC was purportedly performing road work, pursuant to a contract or permit from the City (*Rothfeder* complaint, at ¶¶ 10-13, 21, 31-32). The ABC Contract, however, establishes that ABC performed work at the subway station located at the intersection of Broadway and West 231st Street **for the NYCTA, not the City**. Accordingly, ABC's work, which is at issue in the *Rothfeder* action, was **not** performed for the additional insured, in this case the City, within the meaning of the Automatic Additional Insureds Endorsement of the Zurich Policy.

The *Rothfeder* complaint, however, further alleges that the **City had a duty to inspect and supervise ABC's work and was negligent in its inspection and supervision** (*Rothfeder* complaint, at ¶¶ 19-20, 27, 30). The ABC Contract does **not** provide that the City has a duty to inspect and supervise ABC's work. Nevertheless, it may be established, during the course of the

underlying litigation, that there is another basis for the City's had a duty to inspect and supervise ABC's work, such as perhaps by statute, regulation or common law. Accordingly, the allegations in the *Rothfeder* complaint concerning the City's alleged breach of its duty to inspect and supervise ABC's work are potentially within the ambit of the Automatic Additional Insureds Endorsement of the Zurich Policy, to the extent that such allegations involve "liability arising out of ... **acts or omissions of the additional insured in connection with the general supervision of 'your work'**".

The Court notes that the contract between NYCTA and ABC does provide (in the section labeled "Audit and Inspection" that

"The Contractor shall permit authorized representatives of the Authority, Contracting Party, Government, State or City to inspect and review all of Contractor's work, materials... and other relevant construction, equipment... pertaining to the Project or Contract".

(Article 10.09 of the ABC Contract, Kuflik Affirm., Ex G). Such section raises the issue that perhaps there is a general duty on the part of the City to inspect and supervise as the Contractor was required to provide access "to the City to inspect and review all of the Contractor's work". *Id.* However, there is not enough evidence submitted by either side in their motions for the Court to make a determination as to this issue.

As both sides have not made 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, summary judgment must be denied at this juncture. Thus, in the interest of justice and as neither side has: (1) briefed the issue of whether the City has a separate duty to inspect and supervise ABC's work, either in common law or by statute or regulation (apart from the contract between NYCTA and ABC, which does not indicate an affirmative duty on the part of the City); and (2) provided discovery from the underlying personal injury action which articulates the precise statute, regulation or common law relied upon by plaintiff for the proposition that the City had a general duty to "inspect and supervise" or other proof that plaintiff has no basis for relying on any statute, regulation or common law; both motions are denied ~~subject~~ to renewal, if appropriate, with the above information (with a copy of this decision).

Accordingly, it is

ORDERED that motion for summary judgment of defendant Zurich American Insurance Company and cross motion of plaintiff City for partial summary judgment is denied; and it is further

ORDERED that, within 30 days of entry, both sides shall serve a copy of this decision, order and judgment, with notice of entry.

This constitutes the decision and order of this Court.

Dated:

W. S. Loy

ENTER:

Doris Ling-Cohan

HON. DORIS LING-COHAN

Doris Ling-Cohan, J. S. C.

H:\Supreme Court\Summary Judgment\NYC.Zurich InsDLCinterimOrder.wpd