

**Bovis Lend Lease LMB, Inc. v Travelers Insurance
Company**

2005 NY Slip Op 30222(U)

November 4, 2005

Supreme Court, New York County

Docket Number: 0600459/2004

Judge: Marilyn Shafer

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

0600459/2004

PART _____

BOVIS LEND LEASE LMB
VS
TRAVELERS INSURANCE

SEQ 1

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

denied pursuant to attached Mem + X motion

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 11/4/05

HON. MARILYN SHAFER, JSC
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
BOVIS LEND LEASE LMB, INC. and NATIONAL
UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, PA.,

Plaintiffs,

Index No. 600459/04

-against-

TRAVELERS INSURANCE COMPANY and
TRANSCONTINENTAL INSURANCE COMPANY
(pertaining to an underlying action
entitled *Michael DeVito v Bovis Lend Lease
LMB f/k/a Lehrer McGovern Bovis, Inc.*),

Defendants.

-----X

Marilyn Shafer, J.:

In this action for various declaratory judgments,
plaintiffs Bovis Lend Lease LMB, Inc. (Bovis) and National Union
Fire Insurance Company of Pittsburgh, Pa. (National) move,
pursuant to CPLR 3212, for declaratory judgments: (1) that the
underlying action (*DeVito*) is covered by the terms of the policy
issued by defendant Travelers Indemnity Company of America
(i/s/h/a Travelers Insurance Company) (Travelers) to non-party
Aspro Mechanical Contracting, Inc. (Aspro), policy number DT-CO-
963K0712-TIA-99 (the Travelers/Aspro policy), which covers Aspro
as a named insured; (2) that the Travelers/Aspro policy affords
primary coverage to Bovis as an additional insured in *DeVito*; (3)
that Travelers is obligated to defend and indemnify Bovis in
DeVito; (4) that *DeVito* is covered by the terms of the policy

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issued by defendant Transcontinental Insurance Company (Transcontinental) to non-party Gilston Electrical Contracting Corp. (Gilston), policy number C 1079842323 (the Transcontinental/Gilston policy), which covers Gilston as a named insured; (5) that the Transcontinental/Gilston policy affords primary coverage to Bovis as an additional insured in *DeVito*; (6) that Transcontinental is obligated to defend and indemnify Bovis in *DeVito*; and (7) that defendants are jointly and severally obligated to reimburse plaintiff National for all attorneys' fees, costs, disbursements, and other expenses, plus interest, paid to defend Bovis in *DeVito*. National is currently defending Bovis in *DeVito* pursuant to the policy which National issued to Bovis, policy number GL 933-09-12 RA.

Transcontinental cross-moves, pursuant to CPLR 3212, for a declaratory judgment that it owes no coverage in *DeVito*, resulting in the dismissal of the complaint and all cross claims asserted against it.

Travelers cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against it.

BACKGROUND

This is an action in which the various parties seek this court's determination of insurance coverage in *DeVito*.

On July 3, 2000, plaintiff in the underlying action,

Michael DeVito (DeVito), was injured at a construction site located at the Queens Hospital Center on 164th Street, Jamaica, New York. Non-party Dormitory Authority of the State of New York (DASNY) was the owner of the property where the construction took place. It had hired Bovis as the construction manager for the project. DASNY also hired Aspro to perform the plumbing work, and Gilston to do the electrical work at the project. DeVito was employed by Aspro as an apprentice plumber, and on that day, was working on the fifth floor, installing cast iron pipe. The accident occurred when he tripped over a small piece of electrical conduit and debris which were covered with dust and fireproofing (DeVito Depo., at 15, 20, 25, 26). DeVito brought an action against Bovis (*DeVito v Bovis Lend Lease LMB f/k/a Lehrer McGovern Bovis, Inc.*, Index No. 3385/01, Sup Ct, Kings County) (*DeVito*), alleging common-law negligence and violations of Labor Law §§ 200, 240, and 241 (6). Bovis, in turn, brought separate third-party actions against Aspro and Gilston, alleging claims against Aspro and Gilston, respectively, for contractual indemnification (by reason of Aspro and Gilston's agreements to indemnify Bovis in the DASNY/Aspro and DASNY/Gilston contracts), common-law indemnification or contribution, and breach of the DASNY/Aspro and DASNY/Gilston contracts by failure to procure general liability insurance for the benefit of Bovis. The *DeVito* action is currently pending.

In this action, plaintiffs allege two causes of action against both Travelers and Transcontinental: (1) for a declaratory judgment that Travelers and Transcontinental are required to afford primary coverage for the defense and indemnification of Bovis in *DeVito*; and (2) for a declaratory judgment that the National/Bovis policy is excess to the Travelers/Aspro and Transcontinental/Gilston policies, and that Travelers and Transcontinental are obligated to reimburse National for the costs of its defense of Bovis in *DeVito*.

In its answer, Travelers asserts a cross claim against Transcontinental for indemnification or contribution by reason of Transcontinental being a co-insurer of Bovis.

In its answer, Transcontinental alleges a counterclaim against plaintiffs for a declaratory judgment that Transcontinental has no obligation to defend or indemnify Bovis in *DeVito*, and a cross claim against Travelers for a declaratory judgment that Transcontinental is entitled to indemnification or contribution from plaintiffs and Travelers for their allocated share of responsibility.

The Contracts

The DASNY/Aspro contract requires Aspro to name Bovis as an additional insured on Aspro's commercial general liability policy, and further that:

- c. Policy or policies must be endorsed to be primary as respects the coverage

afforded the Additional Insureds ...

(DASNY/Aspro Contract, § 15.01 [A] [2] [b], [c]). The DASNY/Gilston contract contains identical terms with respect to Gilston.

There are no contracts between Bovis and either Aspro or Gilston.

The Policies

As set forth above, both Aspro and Gilston procured insurance policies for their work. The Travelers/Aspro policy, for the period September 1, 1999 to September 1, 2000, contains a Blanket Additional Insured (Contractors) endorsement (form CG D2 10 07 98), that provides, in relevant part:

1. WHO IS AN INSURED - (Section II) is amended to include any person or organization you are required to include as an additional insured on this policy by a written contract or written agreement in effect during this policy period and executed prior to the occurrence of any loss.
2. The insurance provided to the additional insured is limited as follows:
 - a) The person or organization is only an additional insured with respect to liability arising out of "your work" for that additional insured.

The Transcontinental/Gilston policy, for the period December 1, 1999 to December 1, 2000, contains a Contractor's Blanket Additional Insured Endorsement (form G-17957-F [Ed. 04/98]) that provides, in relevant part:

A. WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization (called additional insured) whom you are required to add as an additional insured on this policy under:

1. A written contract or agreement[.]

B. The insurance provided to the additional insured is limited as follows:

1. That person or organization is only an additional insured with respect to liability arising out of:

b. "Your work" for that additional insured[.]

Plaintiffs' Motion as Against Travelers

Plaintiffs argue that Travelers owes Bovis a defense and indemnification in DeVito because it failed to timely disclaim coverage, as required by Insurance Law § 3420 (d). Determination of this issue requires discussion of two distinct issues: whether Bovis is an additional insured under the Travelers/Aspro policy, and if so, whether Travelers was required to give Bovis timely written disclaimer of coverage.

Whether Bovis is an Additional Insured Under the Travelers/Aspro Policy

Bovis alleges that it is an additional insured under the Travelers/Aspro policy because DeVito's accident "arose out of" Aspro's work for Bovis, and DeVito was an employee of Aspro.

Aspro contends that it worked for DASNY, not Bovis, and that Bovis was merely a liaison between DASNY and its contractors. As set forth above, Bovis was the construction manager at the site, not the general contractor, and it was DASNY that contracted with Aspro, not Bovis.

The DASNY/Aspro contract requires Aspro to name Bovis as an additional insured on Aspro's commercial general liability policy. Thus, Bovis is an additional insured, pursuant to the Blanket Additional Insured (Contractors) endorsement of the Travelers/Aspro policy.

Insurance Law § 3420 (d)

Insurance Law § 3420 (d) provides:

If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for ... bodily injury within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and ... any other claimant.

"The purpose of Insurance Law § 3420 (d) is to protect the insured, the injured party and any other interested party who has a real stake in the outcome from prejudice resulting from a belated denial of coverage [internal quotation marks and citations omitted]" (*AIU Insurance Co. v Investors Insurance Co.*, 17 AD3d 259, 260 [1st Dept 2005]).

Disclaimer pursuant to section 3420 (d) is unnecessary when a claim falls outside the scope of the policy's coverage portion ...

[but] disclaimer pursuant to section 3420 (d) is necessary when denial of coverage is based on a policy exclusion without which the claim would be covered [citations omitted]. Failure to comply with section 3420 (d) precludes denial of coverage based on a policy exclusion

(*Matter of Worcester Insurance Co. v Bettenhauser*, 95 NY2d 185, 188-189 [2000]). A "failure to disclaim coverage does not create coverage" where none exists (*Zappone v Home Insurance Co.*, 55 NY2d 131, 134 [1982]), and the "burden is on the insured to prove that a loss falls within the policy's coverage [citation omitted]. However, it is the insurer's burden to demonstrate that a loss falls within a policy's exclusion" (*AB Recur Finans v Nordstern Insurance Co. of North America*, 130 F Supp 2d 596, 599 [SD NY 2001]).

Whether a Timely Written Denial was Necessary Because of a Policy Exclusion

The Appellate Division, First Department, in *Tishman Construction Corp. of New York v CNA Insurance Co.* (236 AD2d 211 [1st Dept 1997]) found that an endorsement in a policy is an addition to coverage, not an exclusion (*id.* at 211, interpreting an additional insured endorsement which also limited coverage for additional insureds). Thus, Travelers need not prove that DeVito's accident falls within an exclusion to its coverage. Rather, in order to prevail in their contention that Travelers had to give them a timely written disclaimer of coverage, plaintiffs must demonstrate that DeVito's claims fall within the

policy's coverage.

This plaintiffs cannot do. One of the limitations on Travelers's coverage of Bovis is that the coverage only applies to "liability arising out of [Aspro's work] for [Bovis]."

Aspro's contract was with DASNY, not Bovis, and that contract makes it clear that Aspro worked for DASNY, the owner of the site:

The Owner shall give all orders and directions contemplated under the Contract relative to the execution of the Work. The Owner shall determine the amount, quality, acceptability of the Work and shall decide all questions which may arise in relation to said Work

(DASNY/Aspro Contract, General Conditions, Article 3, ¶ 3.01 [A]). Thus, whether DeVito's accident "arose out of" Aspro's work or not has nothing to do with whether the Travelers/Aspro policy covers Bovis for the accident. Since Aspro did not work for Bovis, Travelers's coverage of Bovis was not triggered, and DeVito's claims against Bovis do not fall within the ambit of Travelers's coverage. Because of this, Travelers had no obligation to disclaim or deny coverage to Bovis under Insurance Law § 3420 (d).

Since this court has found that the Travelers/Aspro policy does not cover Bovis with respect to the claims in *DeVito*, it need not discuss the other issues and arguments set forth in the parties' papers on these motions.

In light of the above, that part of plaintiffs' motion which seeks declaratory judgments as against Travelers is denied.

Plaintiffs' Motion as Against Transcontinental

Gilston was the electrical contractor for the project. Plaintiffs argue that Transcontinental owes coverage, defense, and indemnity to Bovis in *DeVito* because DeVito tripped over electrical conduit; hence, the accident arose out of Gilston's work.

However, as was the case with the Travelers/Aspro policy, the Transcontinental/Gilston policy provides that Bovis is an additional insured, but limits its coverage to Gilston's work for Bovis (see Transcontinental/Gilston Policy, Contractor's Blanket Additional Insured Endorsement, ¶¶ A [1]; B [1] [b]). Gilston worked for DASNY, not Bovis (see DASNY/Gilston Contract, General Conditions, Article 3, ¶ 3.01 [A]); contracted with DASNY, not Bovis; and was paid by DASNY, not Bovis. Even if this court were to find that DeVito's accident arose out of Gilston's work, that would not bring the accident within the ambit of Transcontinental's coverage of Bovis.

The court need not discuss the other issues and arguments set forth in the parties' papers on these motions.

In sum, that part of plaintiffs' motion which seeks declaratory judgments with respect to Transcontinental is denied. Plaintiffs' motion is denied in its entirety.

The Cross Motions

Because neither defendant's policy provided coverage for Bovis in *DeVito*, the cross motions are granted.

CONCLUSION

Accordingly, it is

ORDERED that plaintiffs' motion is denied; and it is further

ORDERED that the cross motion of Transcontinental Insurance Company is granted; and it is further

ADJUDGED AND DECLARED that Transcontinental Insurance Company owes no coverage to Bovis in the underlying action, *DeVito*; and it is further

ORDERED that the cross motion of Travelers Insurance Company is granted; and it is further

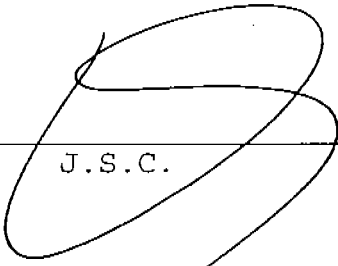
ORDERED that the complaint is dismissed, and the cross claims of Transcontinental Insurance Company and Travelers Insurance Company against each other are dismissed; and it is further

ORDERED that the Clerk shall enter judgment

accordingly.

Dated: 11/4/05

ENTER:



J.S.C.

HON. MARILYN SHAFER, JSC

UNFILED JUDGMENT

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