

Atlantic-Heydt Corp. v Tower Constr., Inc.

2007 NY Slip Op 30281(U)

March 9, 2007

Supreme Court, New York County

Docket Number: 0402196

Judge: Emily Jane Goodman

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SCANNED ON 3/16/2007
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Emily Jane Goodman
Justice

PART 17

Atlantic Hydr Corp.

INDEX NO. 402196/06

- v -

MOTION DATE _____

MOTION SEQ. NO. 001

Tower Construction Inc. AND Burlington Ins. Co.

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 and cross motion are
decided for granted

FOR THE FOLLOWING REASON(S):

FILED
MAR 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/9/07

Emily Jane Goodman
EMILY JANE GOODMAN

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 17

-----X
ATLANTIC-HEYDT CORP.,

Plaintiff,

-against-

Index No. 402196/06

TOWER CONSTRUCTION, INC. and BURLINGTON
INSURANCE COMPANY,

Defendants.

-----X

Emily Jane Goodman, J.:

This is a declaratory judgment action involving insurance coverage for liability in related underlying personal injury actions, *Ornano v 2 Gold LLC* (Index No. 113133/03) and *Villarreal v 95 Maiden Lane LLC* (Index No. 107979/03) which were pending before this court and have now settled prior to trial. The complaint and answer¹ in this action were originally third-party complaints and third-party answers in the underlying *Ornano* and *Villarreal* actions. By January 12, 2006 Compliance Order, the third-party actions were severed from the underlying actions and consolidated. By Order dated May 22, 2006, deciding the motions brought by Atlantic-Heydt Corp. (AH) in *Villarreal* and *Ornano*, this court denied AH's motions for the declaratory judgment sought in AH's third-party actions, with leave to re-file under this separate action and index number. The papers

¹Defendant Tower Construction, Inc. has neither appeared nor answered in this or in the underlying actions.

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MAR 16 2007
NEW YORK
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submitted on these two motions are the same as those submitted in the underlying third-party actions.

Defendant Burlington Insurance Co. (BIC) moves, pursuant to CPLR 3212 and 3001, for a judgment declaring that it has no obligation to defend or indemnify AH in *Ornano* or *Villarreal*. Plaintiff AH moves for a judgment declaring that BIC has that obligation.

BACKGROUND

The facts underlying this action are set forth in *Ornano* and *Villarreal*, and will not be repeated except as necessary here.

The general contractor for the project subcontracted with non-party Big Apple Wrecking & Construction Corp., which, in turn, sub-subcontracted with AH for AH to construct the sidewalk bridge. AH further subcontracted that work out to plaintiff's employer, Tower Construction, Inc. (TC). According to AH, its contract with TC consisted of TC's invoices, a certificate of insurance (dated September 20, 2002), and an indemnification agreement (dated December 1, 2002). TC obtained a commercial general liability policy (the policy) from defendant BIC for the period May 24, 2002 to May 24, 2003. TC obtained the policy through its retail broker, non-party R&W Brokerage (R&W).

TC's invoices, of course, contain no clause mandating that TC name AH as an additional insured, or defend or indemnify

AH. The two-sided certificate of insurance, which was produced by R&W, provides, in relevant part:

This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below.

The certificate holder is listed as AH. With respect to the certificate holder, the certificate further provides:

If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

The Certificate of Insurance on the reverse side of this form does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder, nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon.

The December 1, 2002 indemnification agreement provides, in full:

In consideration of payment of invoices for work performed, the Subcontractor, Tower Construction, agrees to indemnify, hold harmless and defend the Contractor, Atlantic-Heydt Corporation, Big Apple Wrecking and Construction Corp. and Rockrose Construction Corp., against any loss, claim, liability action or expense, of any nature whatsoever which arise out of or are connected with, or are claimed to arise out of or be connected with the performance of the Work performed at the project known as 95 Maiden Lane - Job #2828, whether or not such injuries to

person, including death, or to any other cause. The indemnification hereunder shall be in effect at all times.

The collapse of the sidewalk bridge which injured Ornano and Villarreal occurred on December 14, 2002. According to AH's interrogatory responses in *Ornano and Villarreal*, AH was first informed of the accident "by telephone shortly after its occurrence" (AH Interrog. Responses, #1), and was served with the complaint in *Ornano* on or about July 18, 2003, and in *Villarreal* on or about July 28, 2003 (*id.*, #2). The policy requires that TC provide BIC with notice of an occurrence or suit as soon as practicable (see Form CG 00 01 07 98, Section IV - Commercial General Liability Conditions, ¶¶ [2] [a], [b], page 9 of 13).

Eric Guhring (Guhring), who was then vice president and general counsel to AH, responsible for AH's overall insurance program (Guhring Depo., at 10), testified that he learned about the accident approximately the day after it occurred, because he was to handle the property damage aspect of it (*id.* at 42). He also testified that he was not the first person at AH to hear about the accident, and he named two other AH people who knew about it before him, in addition to Jerry Kenny, who was AH's boom operator at the site that day (*id.* at 42-43). With respect to someone from AH allegedly instructing John Butler, TC's president, to delay notifying BIC of the accident, Guhring testified as follows:

Q Are you aware of anybody at Atlantic instructing John Butler to delay notifying Burlington?

A I'm aware of John Butler believing that there was going to be a delay. That was about the property damage. That's why I was involved. John Butler was told by John Breslin [AH's president] not to notify his carrier about the property damage because Atlantic-Heydt was going to take care of the property damage, which we did. We paid the parking lot owner and the Holiday Inn directly because Rockrose was getting some pressure.

So we wanted to please our customer, so we took care of that directly. It doesn't make sense for him to notify them at the same time, but never to delay notifying the [general liability] carrier or the workers' comp carrier

(*id.* at 45-46).

There are multiple notice of claim, tender of defense and indemnity, and disclaimer letters appended to the motion papers, beginning with TC's April 4, 2003 notice of claim to its retail broker, R&W, and ending with BIC's May 18, 2004 disclaimer letter to TC. AH contends that it is due defense and indemnification from BIC on the bases of: (1) TC's indemnification agreement; (2) the certificate of insurance relating to the policy; and (3) AH's status as an additional insured under the policy issued to TC. BIC maintains that AH is not entitled to defense and indemnification because: (1) TC's notice of claim was untimely; (2) the policy does not contain an endorsement naming AH as an additional insured; (3) no request

that AH be made an additional insured was ever made to BIC; (4) the certificate of insurance is not a binder or policy, was issued for information purposes only, confers no rights, and is subject to the terms, exclusions and conditions of the policy; and (5) coverage for TC and AH are further precluded by exclusions set forth in the policy itself.

THE PLEADINGS

Only the first causes of action in AH's third-party actions in *Ornano* and *Villarreal* allege any claims against BIC, for (1) breach of the BIC policy by rejecting AH's demand as an additional insured; and (2) for a declaratory judgment that BIC is required to defend and indemnify AH up to the limits of its policy for any liability imposed in the *Ornano* and/or the *Villarreal* actions. The other three claims are all asserted as against TC only.

DISCUSSION

Where [a party] is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of fact in dispute, thus entitling it to judgment as a matter of law [citation omitted]. Once [that party] establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to [the opposing party] to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the grant of summary judgment [citation omitted]

(*DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

The first issue that must be addressed is whether AH is

an additional insured under BIC's policy. "When interpreting an insurance contract, a court must determine the rights and obligations of [the] parties under ... [that] contract based on the policy's specific language. Where the provisions of a contract are unambiguous, the terms must be given their plain and ordinary meaning [internal quotation marks and citations omitted]" (*Todd v Wayne Cooperative Insurance Company*, 31 AD3d 1026, 1027 [3d Dept 2006]).

"The party claiming insurance coverage has the burden of proving entitlement. A party that is not named an insured or additional insured on the face of the policy is not entitled to coverage [internal citations omitted]" (*Moleon v Kreisler Borg Florman General Construction Co.*, 304 AD2d 337, 339 [1st Dept 2003]). BIC maintains that no one requested that it add any party as an additional insured under the policy, and that no additional insureds are covered by the policy. Form IFG-I-0101 0301, Common Policy Declarations, names only TC as the insured. AH does not indicate any part of the policy that explicitly shows that it is an additional insured.

The policy itself, in Form IL 00 17 11 98, the Common Policy Conditions, provides that "[t]his policy's terms can be amended or waived only by endorsement issued by [BIC] and made a part of this policy" (§ B). AH does not point to any endorsement that adds AH as an additional insured.

Even if AH was an additional insured, BIC argues that the policy does not provide coverage for TC for the underlying actions based on two exclusions in the policy (the Contractual Liability and Employer's Liability exclusions). AH contends that it is entitled to coverage, as a third-party beneficiary of the policy, because those exclusions are ambiguous, and, at any rate, do not apply because of the "insured contract" exception to those exclusions.

[T]o "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" [citation omitted]. It follows that policy exclusions are given a strict and narrow construction, with any ambiguity resolved against the insurer

(*Belt Painting Corp. v TIG Insurance Co.*, 100 NY2d 377, 383 [2003]). "However, an unambiguous policy provision must be accorded its plain and ordinary meaning, and the court may not disregard the plain meaning of the policy's language in order to find an ambiguity where none exists [internal citation omitted]" (*Bassuk Brothers, Inc. v Utica First Insurance Co.*, 1 AD3d 470, 471 [2d Dept 2003]).

Form CG 00 01 07 98, Commercial General Liability Coverage Form, contains the following exclusions:

SECTION I - COVERAGES
COVERAGE A BODILY INJURY AND PROPERTY DAMAGE
LIABILITY

2. Exclusions

This insurance does not apply to:

b. Contractual Liability

"Bodily injury" ... for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(2) Assumed in a contract or agreement that is an "insured contract"

That same Section I provides:

**SECTION I - COVERAGES
COVERAGE A BODILY INJURY AND PROPERTY DAMAGE
LIABILITY**

2. Exclusions

This insurance does not apply to:

e. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the

conduct of the insured's
business

This exclusion does not apply to
liability assumed by the insured
under an "insured contract."

As provided above, both exclusions do not apply to
liability assumed by the insured under an "insured contract."

SECTION V - DEFINITIONS contains the following definition of
"insured contract":

9. "Insured contract" means:

f. That part of any ...
contract or agreement
pertaining to your
business ... under which
you assume the tort
liability of another
party to pay for "bodily
injury" ... to a third
person or organization.
Tort liability means a
liability that would be
imposed by law in the
absence of any contract
or agreement

Paragraph f. does not include that part of
any contract or agreement:

* * * *

(Form CG 00 01 07 98, Commercial General Liability Coverage Form,
page 11 of 13).

BIC, however, maintains that pursuant to a policy
change found in Form BG-C-3-CW 0301 (FORM 3), Combination

Endorsement - Liability Insurance Combination Endorsement, the "insured contract" exception to the Employer's Liability exclusion was deleted:

1. Under Exclusion e. of COVERAGE A (Section 1) the paragraph "This exclusion does not apply to liability assumed by the "insured" under an "insured contract" is deleted.

Thus, according to BIC, the "insured contract" exception to the Employer's Liability exclusion no longer applies, and, therefore, even if AH were an additional insured, it would not be covered under the policy because both Villarreal and Ornano were injured during the course of their employment.

BIC further asserts that the "insured contract" exception to the two exclusions is negated by a change in the definition of "insured contract" found in Form BG-C-3-CW 0301 (FORM 3), Combination Endorsement - Liability Insurance. Apparently, because the court previously noted that the indemnification agreement requires TC to indemnify AH for AH's negligence, BIC argues that the indemnification agreement is of the type identified in the BIC policy as not fitting under the definition of "insured contract":

3. Definition 9. "Insured contract" of DEFINITIONS (Section V) is replaced by the following:

9. "Insured contract" means:

f. That part of any ... contract or agreement pertaining to your business ... under which you assume the tort liability of another party to pay for "bodily injury" ... to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

* * * *

- (4) That indemnifies any person or organization for "bodily injury," . . . arising out of an "occurrence" caused by the sole negligence of said person or organization.

The court finds no ambiguity in the policy's exclusionary language. Thus, the court must accord it its plain and ordinary meaning (*Bassuk Brothers*, 1 AD3d 470, *supra*).

"It is well settled that where ... the existence of coverage depends entirely on the applicability of an exception to an exclusion, the insured has the duty of demonstrating that the exception governs" (*State of New York v U.W. Marx Inc.*, 209 AD2d 784, 785 [3d Dept 1994]). AH has not met its burden here.

BIC relies on two exclusions to coverage: the Contractual Liability and Employer's Liability exclusions. In the pre-Combination Endorsement policy, an exception to these two

exclusions exists when the liability is assumed in an "insured contract." The Combination Endorsement, however, deletes that exception with respect to the Employer's Liability exclusion. Thus, coverage is denied under the Employer's Liability exclusion, and AH has made no showing that the plain language of the Combination Endorsement does not effectively delete that exception.

"Exclusions in policies of insurance must be read *seriatim*, not cumulatively, and if any one exclusion applies there can be no coverage since no one exclusion can be regarded as inconsistent with another' [citation omitted]" (*Monteleone v Crow Construction Co.*, 242 AD2d 135, 140-141 [1st Dept 1998], quoted by *Maroney v New York Central Mutual Fire Insurance Co.*, 5 NY3d 467, 471 [2005] ["in policies of insurance ... if any one exclusion applies there can be no coverage"]). Because coverage on behalf of AH is excluded under the Employer's Liability exclusion, AH can not be covered under the policy.

AH's argument that it is a third-party beneficiary under the policy is also unavailing.

Parties asserting third-party beneficiary rights under a contract must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost" (*Burns Jackson Miller Summit*

& *Spitzer v Lindner*, 59 NY2d 314, 336 [1983])

(*Mendel v Henry Phipps Plaza West*, 6 NY3d 783, 786 [2006]). "The best evidence of an intent to benefit a third party is the language of the agreement itself" (*In re National Bank Ltd. v Security Management Co., Ltd.*, 29 AD3d 408, 408 [1st Dept 2006]).

With respect to the first prong of the test, there is no question that there was a valid and binding policy between BIC and TC at the time of the underlying accidents. However, AH's assertions fail when we consider the second prong. There is no evidence in the policy itself of any intent to benefit AH as a beneficiary of the policy. AH can point only to the AH/TC contract, the certificate of insurance, and the indemnification agreement as indications of BIC and TC's intent to benefit it under the policy. BIC was not a party to either the AH/TC contract or the indemnification agreement; thus, an intent on BIC's part to benefit AH cannot be found there. As for the certificate of insurance, it unambiguously states that it "is issued as a matter of information only and confers no rights upon the certificate holder [AH]"; it "does not confer rights to the certificate holder in lieu of [an] endorsement"; and it does not constitute a contract between the insurer and the certificate holder (see e.g. *Glynn v United House of Prayer For All People*, 292 AD2d 319, 322-323 [1st Dept 2002] ["a certificate of insurance, by itself, is insufficient to raise a factual issue as

to the existence of coverage, particularly where ... the policy itself makes no provision for coverage" (internal citations omitted)). In addition, the entity that produced the certificate was R&W, which was AH's retail broker, not an agent of BIC with authority to bind the insurer.

Accordingly, it cannot be said that AH was an additional insured under the policy.

AH devotes substantial time to arguing that BIC issued untimely, ambiguous disclaimers, and thus, that it must provide coverage to AH, citing Insurance Law § 3204 (a) (1). That provision of the Insurance Law pertains to the contents of a policy, not to a disclaimer of liability or denial of coverage. The provision of the Insurance Law that pertains to the timeliness of disclaimers or denials is section 3420 (d), which requires insurers to "give written notice as soon as is reasonably possible" of such disclaimer or denial. However, the law is well-settled that

"[d]isclaimer pursuant to section 3420 (d) is unnecessary when a claim falls outside the scope of the policy's coverage portion. Under such circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed"
[citations omitted]

(National Union Fire Insurance Co. of Pittsburgh, Pa. v Utica First Insurance Company, 6 AD3d 681, 682 [2d Dept 2004]; see also

Tribeca Broadway Associates, LLC v Mount Vernon Fire Insurance Co., 5 AD3d 198, 200-201 [1st Dept 2004] ["Insofar as the claim fell outside of the policy's coverage, the carrier was not required to disclaim as to coverage that did not exist"]).

Therefore, AH's motion for summary judgment declaring that BIC owes it defense and indemnity in *Ornano* and *Villarreal* is denied, and BIC's motion for a declaration that it has no obligation to defend and indemnify AH in the underlying actions is granted.

In light of the above, the court need not discuss the parties' other arguments.

CONCLUSION

Accordingly, it is

ORDERED that the motion of Burlington Insurance Company for a declaratory judgment is granted; and it is further


ADJUDGED AND DECLARED that Burlington Insurance Company has no obligation to defend or indemnify Atlantic-Heydt Corp. in *Ornano v 2 Gold LLC* (Index No. 113133/03) and *Villarreal v 95 Maiden Lane LLC* (Index No. 107979/03); and it is further

ORDERED that the motion of Atlantic-Heydt Corp. for a declaratory judgment is denied.

This Constitutes the Decision, Order and Judgment of the Court.

Dated: March 9, 2007

ENTER:



J.S.C.

EMILY JANE GOODMAN

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