Travelers Indem. Co. v Commerce & Indus. Ins.Co. of Canada
2007 NY Slip Op 33150(U)
September 28, 2007
Supreme Court, Albany County
Docket Number: 0072172/0041
Judge: Joseph C. Teresi

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THE TRAVELERS INDEMNITY COMPANY and FINCH, PRUYN & COMPANY, INC.

Plaintiffs,

-against-

COMMERCE & INDUSTRY INSURANCE COMPANY OF CANADA, GL&V LAVALLEY INDUSTRIES, INC., PEERLESS INSURANCE COMPANY, PINCHOOK & BUCKLEY CONSTRUCTION, INC., FREDERICK L. FISH and SHEILA FISH.

Defendants.

DECISION and ORDER
Index No.: 7217-04
RJI No.: 0105081314

Supreme Court of Albany All Purpose Term, August 27, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Robert H. Coughlin, Jr., Esq.
Flink Smith, LLC
Attorneys for Peerless Insurance Company and Pinchook & Buckley Construction, Inc.
23 British American Blvd.
Latham, NY 12110

Melissa J. Smallacombe, Esq.
Ryan & Smallacombe, LLP
Attorneys for Commerce & Industry Insurance Company of Canada and GL&V/LaValley Industries, Inc.
100 State Street
Suite 800
Albany, New York 12207

TERESI, J

Defendant Peerless Insurance Company ("Peerless"), by notice of motion, seeks an order pursuant to CPLR § 3212 granting summary judgment on its cross-claim for a declaratory

judgment against Defendant Commerce & Industry Insurance Company of Canada ("Commerce"). Peerless seeks a declaration that Commerce is a co-insurer who must share an equal indemnification burden with Peerless. Commerce opposes the motion, and by notice of motion seeks an order pursuant to CPLR § 3025 granting a leave to amend its answer to include a cross-claim against Plaintiff Finch, Pruyn & Company ("Finch") for reimbursement of defense fees. Counsel have stipulated that the only remaining issues are legal issues, which will be decided by the above motions.

The underlying facts are set forth in two prior appeals (28 AD3d 914 (2006); 36 AD3d 1121 (2007)). Briefly, Plaintiff Finch contracted with Defendant GL&V/LaValley Industries, Inc. ("GL&V") to have GL&V build, deliver, and replace a large caustic washer at Finch's paper mill. GL&V sub-contracted the replacement of the washer to Defendant Pinchook & Buckley Construction, Inc. ("Pinchook"). Pinchook, a frequent contractor for Finch, was one of the contractors approved by Finch. Finch was insured by Plaintiff Travelers Indemnity Company ("Travelers"), GL&V was insured by Defendant Commerce, Pinchook was insured by Defendant Peerless. As part of the contract, GL&V and Pinchook named Finch as an additional insured on their respective insurance policies.

During the washer installation on June 13, 2000, the Defendant Frederick L. Fish ("Fish"), an employee of Pinchook working on the Finch project, fell from the washer hood and suffered injuries. Fish commenced an action (hereinafter the underlying action) against Finch and GL&V seeking damages. GL&V impleaded Pinchook. The Supreme Court (Krogmann, J.) Granted Pinchook's cross-claim for dismissal of the third-party complaint against it, and partially granted Fish's summary judgment motion with respect to his Labor Law §240(1) complaint.

Finch and Travelers then commenced an action seeking a declaratory judgment that Commerce must defend and indemnify Finch and Travelers. Commerce asserted a cross-claim against Peerless. On appeal ("Commerce Appeal"), the Supreme Court, Appellate Division, Third Department found that Fish's accident occurred in connection with the work that GL&V subcontracted for, and held that Commerce was the primary insurer, while Travelers was the excess insurer. The cross-claim against Peerless was dismissed as premature.

Finch and Travelers then commenced an action seeking a declaratory judgment that Peerless must indemnify Finch and Travelers. On appeal ("Peerless Appeal"), the Supreme Court, Appellate Division, Third Department held that Finch was an additional insured under Peerless's policy, and that Peerless had a duty to indemnify and defend Finch.

Peerless then moved for a declaratory judgment stating that Peerless and Commerce were both primary and co-insurers of Finch, and that the two must share the cost of indemnification equally.

Subsequently, the Supreme Court (Krogmann, J.) found that Finch bore complete liability, that GL&V was a passive-tortfeasor, and that GL&V was entitled to common-law indemnification from Finch for any liability in this matter. Commerce then moved to amend its answer to include a cross-claim against Finch, seeking legal fees that Commerce incurred while defending GL&V.

Under General Obligations Law §5-322.1, a party cannot seek contractual indemnification "for one's own negligence." Duffy v. Wal-Mart Stores, Inc., 24 A.D.3d 1156, 1158 (3d Dep't 2005). However, "an agreement to procure insurance is not an agreement to indemnify or hold harmless, and the distinction between the two is well recognized." Kinney v.

G.W. Lisk Co., 556 N.E.2d 1090, 1092 (N.Y. 1990). Consequently, an insurance-carrying party can provide insurance for an insurance-requiring party, by naming them as an "additional insured," without violating §5-322.1. See Pecker Iron Works of NY, Inc. v. Traveler's Ins. Co., 786 N.E.2d 863, 863-84 (N.Y. 2003) (validating an additional insured clause); Kinney, 556 N.E.2d at 1091-92 (holding that an agreement to procure insurance does not violate §5-322.1). The term "'[a]dditional insured' is a recognized term in insurance contracts," and the "'well-understood meaning' of the term is 'an entity enjoying the same protection as the named insured.'" Pecker Iron Works of NY, 786 N.E.2d at 864 (quoting Del Bello v. General Accident Ins. Co., 185 A.D.2d 691, 692 (4th Dep't 1992)).

When "determining a dispute over insurance coverage" a court should "first look to the language of the policy." Consolidated Edison Co. of NY v. Allstate Ins. Co., 774 N.E.2d 687, 693 (N.Y. 2002). Examining this language, the court should "construe the policy in a way that 'affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect.'" Id. (quoting Hooper Assoc. v. AGS Computers, 548 N.E.2d 903 (N.Y. 1989)). Thus, "to determine the priority of coverage among different policies, a court must review and consider all of the relevant policies at issue." BP Air Conditioning Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 716 (N.Y. 2007).

In general, leave to amend a pleading "'rests within the trial court's discretion and should be freely granted in the absence of prejudice or surprise resulting from the delay except in situations where the proposed amendment is wholly devoid of merit.'" Bast Hatfield, Inc. v. Schalmont Central School Dist., 37 A.D.3d 987, 988 (3d Dep't 2007) (quoting Berger v. Water Commrs. of the Town of Waterford, 296 A.D.2d 649, 649 (3d Dep't 2002)). The proponent of a

motion to amend is required to "make an evidentiary showing sufficient to support the proposed claim." D'Orazio v. Mainetti, 39 A.D.3d 981, 982 (3 Dep't 2007). "A summary judgment standard is not to be applied." Bast Hatfield, 37 A.D.3d at 988.

After a full review of the record, this court declares that Commerce is a primary co-insurer of Finch, and that Commerce and Peerless owe an equal fifty-percent (50%) duty to indemnify Finch against all liability in this matter. Commerce's motion to amend its answer to include a cross-claim is denied.

The Supreme Court, Appellate Division, Third Department has already held that both the Peerless and Commerce insurance policies name Finch as an additional insured, that the accident involved in the underlying action falls within the scope of each insurer's policy, that each insurer owes a duty to defend Finch, and that both policies are primary. Since an additional insured is entitled to the same protection as the named insured, Peerless and Commerce must insure Finch, as if Finch were the named insured, offering both defense and indemnification to Finch in this matter. The Supreme Court's (Krogmann, J.) finding that Finch was the sole responsible tort-feasor triggers the duty of Peerless and Commerce to indemnify Finch.

As directed by the Court of Appeals in BP Air Conditioning Corp., priority of contribution must be determined by a review and analysis of all relevant policies, namely the policies of Peerless and Commerce. Looking to the language of each relevant policy, and construing them in a way that affords a fair meaning to all the language employed, it is clear that, in the event of multiple contributing insurances, both policies support equal contribution among all insurers. Thus, Commerce and Peerless each owe a duty to contribute an equal fifty percent (50%) to the indemnification of Finch in this matter.

Commerce's argument that the Supreme Court, Appellate Division, Third Department clearly held in the Commerce Appeal that Finch cannot seek indemnification from Commerce is erroneous. The Third Department's statement that "Finch cannot seek contractual indemnification for its own negligence" (Commerce Appeal, 28 A.D.3d 914, 917 (3d Dep't 2006)) precludes only the ability of Finch to have another party, such as GL&V, contractually indemnify or hold-harmless Finch, unless Finch is found free of fault.

Here, the issue is not that Finch sought contractual indemnification from GL&V. Rather, Finch sought, and received, insurance procurement from GL&V and Pinchook, as an additional insured on the Peerless and Commerce insurance policies. Furthermore, the Third Department held that Peerless owes a duty to indemnify and defend Finch as an additional insured, notably without a discussion of Finch's fault or liability. Thus, it would be completely contradictory to find that Finch is unable to seek indemnification from its other insurance carrier (Commerce), as an additional insured, unless Finch is found free of fault or liability. To follow Commerce's argument, and hold that additional insured clauses offer no indemnification unless the additionally insured are found free of liability, would be to upset multiple decisions by the Court of Appeals, and render all additional insured clauses in New York worthless.

In Commerce's notice of cross-motion, and supporting affidavit of Melissa J. Smallacombe, Commerce only asserts a cross-claim against Finch. Commerce fails to assert a cross-claim against Peerless. The only mention of a cross-claim against Peerless is in Commerce's supporting memorandum of law, a document that is not a proper part of the record. Thus, there is no basis to grant Commerce's motion to amend its answer to include a cross-claim against Peerless.

This action is solely a declaratory judgment between Commerce and Peerless; Finch is not a named party, and has not been served by Commerce with any papers regarding this declaratory judgment. For that reason, Commerce's motion to amend its answer to include a cross-claim against Finch is denied. This denial does not address any issue of merit with respect to either cross-claim.

All papers, including this Decision and Order, are being returned to the attorney for Peerless Insurance Company. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So ordered.

Dated: September 28, 2007

Albany, NY

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion for Summary of Peerless, dated February 7, 2007, with Attached Affirmation in Support of Motion for Summary Judgment of Peerless, of Robert H. Coughlin, Jr., Esq., dated February 7, 2007 with Attached Exhibits A-J.
2. Notice of Cross-Motion for Leave to Amend of Commerce, dated July 10, 2007, with Attached Affirmation in Support of Cross-Motion for Leave to Amend of Commerce, of Melissa J. Smallacombe, Esq., dated July 10, 2007, with Attached Exhibits A-C.
3. Affirmation in Support of Motion for Summary Judgment of Peerless, of Robert H. Coughlin, Jr., Esq., dated August 1, 2007, with Attached Exhibits K-L.