Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IA Part 12
Justice

x

UNITED STATES FIRE INSURANCE COMPANY, et al.

-against-

KNOLLER COMPANIES, INC., et al.

x

Index Number 3238 2005

Motion Date February 18, 2009

Motion Cal. Numbers 27 and 28

Motion Seq. Nos. 3 and 4

The following papers numbered 1 to 7 read on this motion by the plaintiffs for, inter alia, summary judgment declaring that plaintiff Federated Department Stores (Federated) and/or plaintiff Gilman Construction Co. (Gilman) are additional insureds under a policy issued by defendant Hartford Casualty Insurance Co. (Hartford) to defendant Knoller Companies, Inc. (Knoller) and on this motion by defendant Hartford and defendant Knoller for, inter alia, summary judgment declaring that they have no obligation to defend or indemnify Macy's East, Inc.

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Notice of Motion - Affidavits - Exhibits.....	1-2
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Upon the foregoing papers it is ordered that the motions are disposed of as follows:

On or about March 3, 1998, Federated Corporate Services, Inc, acting as the agent of plaintiff Federated, entered into a contract with plaintiff Gilman whereby the latter agreed to renovate a Macy's store located at 155 Glen Cove Road, Carle Place, New York. Plaintiff Gilman subsequently subcontracted HVAC work to defendant Knoller, which, in turn, sub-subcontracted work involving the fabrication and installation of ducts to Ashlor Mechanical Corp.

Plaintiff Gilman also subcontracted carpentry work to Crosstown Interior Contracting, Inc. (Crosstown), which agreed to obtain liability insurance naming Federated Corporate Services, Inc. and Gilman as additional insureds.

Crosstown obtained a comprehensive general liability policy (No. 5031687672) from plaintiff United States Fire Insurance Company (USF), effective from June 30, 1998 to June 30, 1999, which made Gilman an additional named insured. The USF policy provided in relevant part: "XII. Additional Insureds by Written Contract [:] Section II - Who Is an Insured is amended to include as an additional insured any person or organization whom you are required to add as an additional insured to this policy by a written contract or written agreement ***." The USF policy further provided that the insurance was excess to: "Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement."

Defendant Knoller also agreed to obtain liability insurance naming Federated Corporate Services and Gilman as additional insureds. Defendant Hartford issued a liability policy (No. 13 UUN CV 5082) to defendant Knoller which was effective from July 1, 1998 to July 1, 1999. A certificate of insurance names Gilman as an additional insured under the Hartford policy. The policy provided in relevant part: "Additional Insureds - By Contracts, Agreements or Permit [:] a. Who Is an Insured (Section II) is amended to include as an insured any person or organization with whom you agreed, because of a written contract or agreement or permit to provide insurance such as is afforded under this policy, but only with respect to your operations, 'your work' or facilities owned or used by you." The Hartford policy defines "your work" as "work or operations performed by you or on your behalf; and materials, parts or equipment furnished in connection with such work or operations." Section 24 of the policy provided in relevant part: " *** b. Excess Insurance. This insurance is excess over any of the other insurance whether primary, excess, contingent or on any other basis: (1) That is Fire, Extended Coverage, Builder's Risk, Installation Risk, or similar coverage for 'your work' ***." Section 25 of the Hartford policy provided in relevant part: "This insurance is excess over any other insurance, whether primary, excess, contingent, or on any other basis: *** (4) When any of the named insureds under this coverage part are additional insureds under a commercial general liability policy or similar insurance of another party."

On or about November 10, 1998, Vincent DeVita, an employee of Ashlor Mechanical, allegedly sustained personal injury on the job

when he stepped into an opening in the floor which had been made to install electrical equipment. Crosstown allegedly had the responsibility of placing plywood over the opening, but had allegedly neglected to do so. On or about December 11, 1998, DeVita brought an action for personal injury against Macy's East, Inc. and Gilman in the New York State Supreme Court, County of Queens (*DeVita v Macy's East, Inc.*, Index No. 27056/98). On or about June 22, 2000, Federated Corporate Services, Inc. and Gilman began a third-party action against Knoller for, inter alia, contribution (*Federated Corporate Services, Inc. v Knoller Companies, Inc.*, Index No. 350451/00). On or about October 2, 2007, Knoller began a third third-party action against Crosstown for contribution and indemnification (*Knoller Companies, Inc. v Crosstown Interior Contracting, Inc.*, Index No. 27056/98).

On July 21, 1999, USF tendered the defense of Gilman and Federated to Hartford under the policy it had issued to Knoller. By letter dated October 19, 1999, Hartford accepted the tender in regard to Gilman only, reserving its right to withdraw if further investigation revealed that DeVita's accident did not arise from Knoller's work, as defined by the policy, and requesting information about Gilman's insurance coverage in order to determine if a "co-insurance situation exists." On or about February 10, 2005, the plaintiffs began this action which seeks, inter alia, a judgment declaring, inter alia, that the Hartford policy provides primary coverage to Federated and Gilman.

That branch of the plaintiffs' motion which is for summary judgment declaring that Gilman is an additional insured under the Hartford policy is granted. Defendant Hartford does not dispute that Gilman is such.

That branch of the plaintiffs' motion which seeks summary judgment declaring that Federated is an additional insured under the Hartford policy is granted. That branch of the defendants' motion which is for summary judgment declaring that they have no obligation to defend or indemnify Macy's East, Inc. is denied. The Hartford policy provides coverage for "additional insureds," i.e., parties for which Knoller agreed in writing to provide insurance coverage for liability arising from the subcontractor's work. It is true that the subcontract between Knoller and Gilman required the subcontractor to procure coverage for Gilman and Federated Corporate Services. However, Federated Corporate Services was merely the agent of Federated, the true owner of the premises and the party for which coverage was intended. The subcontract between Knoller and Gilman must be construed in accordance with the parties' intent. (*See, Greenfield v Philles Records, Inc.*, 98 NY2d 562.) This is not a case where a

party for whom there was no written contractual obligation to procure insurance seeks additional insured status under a policy procured by a subcontractor. (*Compare*, *Linarello v City University of New York*, 6 AD3d 192.) It is also true that DeVita brought his personal injury action against Macy's East. However, Hartford failed to show that there is a genuine issue of fact concerning whether Federated and Macy's East are in effect the same entity.

That branch of the plaintiffs' motion which is for summary judgment on the cause of action asserted against defendant Knoller for breach of contract to procure insurance is denied. While it is true that a subcontractor who breaches an agreement to procure liability insurance covering a general contractor or an owner is liable for resulting damages (*see*, *Kinney v G.W. Lisk Co., Inc.*, 76 NY2d 215), in the case at bar Knoller met its contractual obligation to procure liability insurance covering Gilman and, as this court holds, Federated also. Moreover, the terms of the subcontract did not require Knoller to procure only primary coverage for Gilman and Federated, and Knoller did not breach its subcontract because the Hartford policy has an excess insurance clause applicable to additional insureds.

That branch of the defendants' motion which is for summary judgment declaring the plaintiff USF and defendant Hartford are co-insurers of defendant Gilman is granted. "[T]he 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 ***." (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324.) In the case at bar, defendant Hartford successfully carried that burden. Gilman is an additional insured under both the USF policy procured by Crosstown and the Hartford policy procured by Knoller as required by the subcontracts. The USF policy attempted to make coverage it provided to additional insureds such as Gilman excess to other insurance available to them as additional insureds. Sections 24 and 25 of the Hartford policy had the same objective. "The general rule is, of course, that where there are multiple policies covering the same risk, and each generally purports to be excess to the other, the excess coverage clauses are held to cancel out each other and each insurer contributes in proportion to its limit amount of insurance ***." (*Lumbermens Mut. Cas. Co. v Allstate Ins. Co.*, 51 NY2d 651, 655; *see*, *State Farm Fire and Cas. Co. v LiMauro*, 65 NY2d 369; *Cheektowaga Cent. School Dist. v Burlington Ins. Co.*, 32 AD3d 1265; *Castricone v Riggi*, 259 AD2d 815; *Allstate Ins. Co. v Insurance Co. of North America*, 215 AD2d 612; *Allstate Ins. Co. v Farmers Ins. Group*, 108 AD2d 284.) The plaintiffs did not show that any exception to the general rule is applicable here, such as where the terms of

one policy specifically identify it as providing coverage in excess of another named policy (*see*, *Allstate Ins. Co. v Farmers Ins. Group*, *supra*) or where one policy was purchased to be primary and the other to be excess. (*See*, *Cheektowaga Cent. School Dist. v Burlington Ins. Co.*, *supra*.) The plaintiffs also did not show that the terms of the USF policy specifically make its coverage secondary to all other "excess" insurance policies. (*See*, *Allstate Ins. Co. v Insurance Co. of North America*, *supra*; *Allstate Ins. Co. v Farmers Ins. Group*, *supra*.) USF did not take itself outside of the general rule: "[W]here there are multiple policies covering the same risk, and each generally purports to be excess to the other, the excess coverage clauses are held to cancel each other out and each insurer contributes in proportion to its limit amount of insurance ***." (*Osorio v Kenart Realty, Inc.*, 48 AD3d 650, 652.) In the case at bar, USF and Hartford provide the same level of insurance to Gilman and Federated, and each insurer must share ratably in their defense and, if necessary, their indemnification.

That branch of the plaintiffs' motion which is for summary judgment declaring that defendant Hartford has a duty to defend Gilman in the underlying personal injury action is granted to the extent that the court declares that Hartford and USF are obligated to share ratably in the expense of defending Gilman and Federated in the underlying personal injury action.

The remaining branches of the motions are denied.

Dated: May 29, 2009

J.S.C.