

United Nations Fed. Credit Union v Arch Ins. Co.

2010 NY Slip Op 33511(U)

December 22, 2010

Sup Ct, NY County

Docket Number: 116188/08

Judge: Eileen A. Rakower

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

HON. EILEEN A. RAKOWER

PRESENT:

PART 15

Index Number : 116188/2008

UNITED NATIONS FEDERAL

vs
ARCH INSURANCE

Sequence Number : 003

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

1

2, 3

4

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

Dated: 12/22/10


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
UNITED NATIONS FEDERAL CREDIT UNION and
TISHMAN CONSTRUCTION CORPORATION OF
NEW YORK,

Index No.
116188/08

Plaintiffs,

**DECISION
and ORDER**

- against -

Mot. Seq.
003

ARCH INSURANCE COMPANY and PETROCELLI
ELECTRIC CORPORATION,

Defendants

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).

-----X
HON. EILEEN A. RAKOWER

Plaintiffs United Nations Federal Credit Union ("UNFCU") and Tishman Construction Corporation of New York ("Tishman") (collectively "Plaintiffs") bring this action seeking a judgment declaring that they are entitled to additional insured status under the insurance policy issued by Arch Insurance Company ("Arch") to Petrocelli Electric Corporation, Inc. ("Petrocelli") for the policy period including October 31, 2006, and including location of work performed by Petrocelli at 24-01 44th Road, in Long Island City, New York ("the site"). Plaintiffs claim that additional insured coverage was triggered based upon the pleadings in the matter titled *DelRosario v. United Nations Federal Credit Union et al.*, Index No. 303940/08, in Supreme Court, Bronx County ("*DelRosario* action" or "underlying action").

Plaintiffs state that underlying action-plaintiff Sandy Delrosario commenced an action against Plaintiffs in April 2007, wherein Delrosario alleged that on October 31, 2006, in the course of performing construction work at the above premises, he was caused to fall from a ladder as a result of a defective condition at the work site. DelRosario brought the underlying action against UNFCU, Tishman, and Petrocelli, as property owner, general contractor, and electrical subcontractor, respectively, alleging each of them to be liable for his injuries. UNFCU and Tishman subsequently added Eurotech Construction Corporation ("Eurotech"),

DelRosario's employer, as a third-party defendant seeking indemnification. UNFCU and Tishman tendered their defense to Petrocelli, claiming entitlement to additional insured status. After Petrocelli denied the tender, Plaintiffs commenced this action.

Presently before the Court is Plaintiffs' motion for summary judgment, which seeks an order declaring that Plaintiffs are entitled to defense and indemnification from Arch as additional insureds in the underlying action. Arch and Petrocelli oppose the motion and cross-move for an order (1) vacating Plaintiffs' note of issue ("NOI"); consolidating this action with the underlying action for purposes of joint discovery, or staying the instant action pending disposition of the underlying action; or alternatively (3) dismissing the action entirely.

In their Complaint, Plaintiffs state that UNFCU entered into a Construction Management Agreement with Tishman, whereby Tishman would act as Construction Manager at the site. Thereafter, Tishman entered into a subcontract with Petrocelli to perform work at the site on behalf of UNFCU. Pursuant to the terms and conditions of the Petrocelli subcontract, Petrocelli was required to procure primary commercial general liability insurance for \$10,000,000 identifying Plaintiffs as additional insured parties. Accordingly, Petrocelli did procure insurance from Arch, which issued a policy bearing the number 11PKG2083401, in which Plaintiffs were additional insureds. Relevant to the instant action, the policy contains the following provision:

ADDITIONAL INSURED - AUTOMATIC STATUS WHEN
REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU -
COMPLETED OPERATIONS - PRIMARY AND NON-
CONTRIBUTORY ENDORSEMENT

This endorsement modifies insurance provided under the following:

Section II - Who is an Insured is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization is an additional insured on your policy. Such person or organization is an additional insured only with respect to liability arising out of:

- i) “your [i.e., Petrocelli’s] work” at the location designated; or
- ii) the “products-completed operations hazard.”

Coverage afforded to these additional insured parties will be primary to, and non-contributory with, any other insurance available to that person or organization.

All other terms and conditions of this Policy remain unchanged.

Plaintiffs state that coverage under the Arch insurance policy’s additional insured endorsement was triggered by the underlying action. Specifically, Plaintiffs state that Delrosario’s complaint “clearly alleges that [he] was performing construction/renovation work pursuant to and in the scope of his employment on the project at the time of his injury, and that [he] injured himself through an electric shock” (emphasis in original).

In opposition to Plaintiffs’ motion, Arch and Petrocelli (“Defendants”) argue that Delrosario’s accident did not arise out of Petrocelli’s work, and that Plaintiffs failed to properly notify Arch of its additional insured claim. First, Defendants point out that Plaintiffs attach the wrong Delrosario complaint in support of their motion. That complaint, bearing index number 14381/07, pertained to an action that Delrosario discontinued without prejudice on January 4, 2008. The actual complaint in the underlying action relevant to the matter herein bears Index No. 303940/08¹. For this reason alone, Defendants argue, Plaintiffs’ motion must be denied as procedurally defective.

In further opposition to Plaintiffs’ motion, Defendants state that Plaintiffs failed to provide any evidence of timely tender of its defense to Arch. Defendants note that Plaintiffs’ purported November 9, 2007 tender letter (Plaintiffs’ Ex. D) is in fact a letter addressed to QBE Ins. Co., insurer of Eurotech, Delrosario’s employer. In any event, Defendants claim they properly and timely disclaimed coverage by way of interposing their answer on January 13, 2009. Defendants claim that, in light of the foregoing, the Court must deny Plaintiffs summary judgment, and grant Defendants summary judgment instead.

¹The action herein was commenced by Plaintiffs on December 4, 2008 - eleven months after discontinuance of the 14381/07 action, and around seven months after the 303940/08 action. Nevertheless, the actions arise from the same incident.

On reply, Plaintiffs state that the original Delrosario complaint was properly attached in support of its motion “to illustrate . . . the initial notice of the *Delrosario* claim,” arguing that defense costs began with receipt of the initial pleading. Plaintiffs also annex a copy of the current Delrosario complaint. In response to Defendants’ claim of late and/or no tender of Plaintiffs’ defense, Plaintiffs state that it inadvertently annexed a copy of the wrong letter in its initial papers. Plaintiffs further provide a November 9, 2007 letter to Arch tendering its defense of the underlying action. Plaintiffs argue that, to the extent that Defendants claim that Plaintiffs’ tender is untimely, such a denial of coverage fails because Defendants failed to timely disclaim coverage.

With respect to the portion of the cross-motion seeking to strike the NOI, Defendants argue that Plaintiffs have failed to fully respond to Defendants’ discovery demands, and that Plaintiffs’ depositions and Eurotech’s deposition have yet to take place.

Defendants also seeks joint discovery in this action and the *Delrosario* Action. In the underlying action, Plaintiffs have interposed cross-claims against co-defendant Petrocelli sounding in contribution, common law indemnification and contractual indemnification. Plaintiffs brought a third party complaint against Eurotech in the underlying action.

Plaintiffs oppose both vactur of the NOI and consolidation for joint discovery, claiming that both would unnecessarily prolong this action at Plaintiffs’ expense.

“An insurer’s duty to defend arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim. . . . This standard applies equally to additional insureds and named insureds” (*Worth Constr. Co. v. Admiral Ins. Co.*, 2008 NY Slip Op 3992, *3 [2008]) (citations and internal quotations omitted). “The insured’s right to representation and the insurer’s correlative duty to defend suits, however groundless, false or fraudulent, are in a sense ‘litigation insurance’ expressly provided by the insurance contract” (*Hotel des Artistes, Inc. v. General Accident Ins. Co. of America*, 9 A.D.3d 181, 187 [1st Dept. 2004]) (citations omitted). An insurer may avoid the duty to defend under its policy “only if it could be concluded as a matter of law that there is no possible factual or legal basis on which the insurer might eventually

be held to be obligated to indemnify the insured under any provision of the insurance policy” (*id.*) (citations omitted).

Here, it is undisputed that the Arch policy insures Plaintiffs with respect to liability “arising out of” Petrocelli’s “work”. Delrosario’s current complaint, which names both Plaintiffs and Petrocelli as defendants, alleges that, on October 31, 2006, Delrosario was “performing construction, excavation, demolition, repair or alteration work on the premises, as an employee of Eurotech,” and that, in the course of performing this work, he was caused to fall off a ladder and sustain injuries. Plaintiff alleges that “[t]he incident occurred as a result of the negligence, carelessness and recklessness of the defendants . . . , and that “[t]he defective conditions were caused [and/or created] by the defendants, their agents, servants and/or employees.” While the initial complaint alleged an “electric shock,” and “electric shock” is absent from the subsequent pleading, the alleged “negligence” of Petrocelli persists in both complaints.

Arch has a duty to defend Plaintiffs in the underlying action because the four corners of the *Delrosario* Complaint “potentially give rise” to a claim by Plaintiffs as additional insureds under the Arch policy. As held by the Court of Appeals in *BP Air Condition Corp. v. One Beacon Ins. Group*, a case directly on point, “[s]ince there is a possibility” that the underlying plaintiff’s injuries arose out of the work performed by the subcontractor (Petrocelli), Arch’s obligation to provide Plaintiff’s with a defense is triggered (2007 NY Slip Op 5581, *5 [2007]).

Although the duty to defend was triggered by the *Delrosario* Complaint, there remains a question as to whether (1) Plaintiffs gave Arch proper and timely notice of their claim; and/or (2) Arch properly disclaimed coverage. The policy provides the following notification provisions:

2. Duties in the Event of An Act, Error Or Omission, or “Claim or Suit”

- A. You must see to it that we are notified as soon as practicable of an act, error or omission which may result in a “claim”. To the extent possible, notice should include:
 - 1. What the act, error or omission was and when it occurred; and

2. The names and addresses of anyone who may suffer damages as a result of the act, error or omission.
- B. If a "claim" is made or "suit" is brought against any insured, you must:
 1. Immediately record the specifics of the "claim" or "suit" and the date received; and
 2. Notify us as soon as practicable. . . .

Plaintiffs provide a copy of their November 9, 2007 tender letter to Arch, which they claim was served upon Arch on that date by certified mail, return receipt requested. Defendants note that Plaintiffs do not provide an affidavit or other proof of service; however, defendants do not explicitly deny having received the letter. Further, Defendants clearly received the letter at some point. Plaintiffs provide a May 5, 2009 discovery response from Defendants, wherein Defendants provide a copy of the November 9, 2007 letter. "[A]n insurer must give written notice of disclaimer on the ground of late notice as soon as is reasonably possible after it learns of the accident or of grounds for disclaimer of liability, and failure to do so precludes effective disclaimer" (*Estee Lauder, Inc. v. OneBeacon Ins. Group, LLC*, 2009 NY Slip Op 1313, *2 [1st Dept. 2009]). Since Arch failed to timely disclaim coverage, such disclaimer is waived.

Wherefore it is hereby

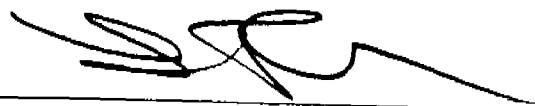
ORDERED, ADJUDGED and DECLARED that the motion for summary judgment is granted and that Arch Insurance Company has a duty to defend Plaintiffs in connection with the *Delrosario* actions (Index Nos. 14381/07 & 303940/08), and that Arch has a duty to reimburse Plaintiffs for legal fees and expenses already incurred in defense of those actions; and it is further

ORDERED that Defendants' cross-motion is denied.

[* 8]

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: December 22, 2010



EILEEN A. RAKOWER, J.S.C.

UNFILED JUDGMENT

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