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

PRESENT: JANE S. SOLOMON PART 55

Justice

Index Number : 104581/2010

BD OF MANAGERS

VS.

CONTINENTAL CASUALTY CO.

SEQUENCE NUMBER : 001

DISMISS

INDEX NO.

MOTION DATE 1/24/11

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision.

N.B. -- preliminary conference is scheduled for 4/18/11 at 11 AM.

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: 2/18/11

J.S.C.

JANE S. SOLOMON

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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THE BOARD OF MANAGERS OF THE SCHAEFER LANDING NORTH CONDOMINIUM and SCHAEFER and LANDING NORTH CONDOMINIUM an Unincorporated Association,

Plaintiff,

-against-

CONTINENTAL CASUALTY CO., AGCS MARINE INSURANCE CO. f/k/a INTERSTATE INDEMNITY CO., STRATHMORE INSURANCE CO., AMERICAN GUARANTEE & LIABILITY INSURANCE CO., PETER GRONTAS and VALENTINA SCHEMBRI,

Defendants.

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DECISION, ORDER, DECLARATION and PARTIAL JUDGMENT

Index No. 104581/10

Jane Solomon, J.:

This is an insurance coverage action by plaintiffs The Board of Managers of the Schaefer Landing North Condominium (Board) and Schaefer Landing North Condominium (Condominium) arising from an underlying action brought against them by the owners of a condominium unit, for defective design and construction of the building (Building) and the unit. Defendant American Guarantee & Liability Insurance Co. (American Guarantee) moves, pursuant to CPLR 3211 (a)(1), (a)(2) and (a)(7), for an order dismissing the complaint for failure to state a cause of action. For the reasons stated below, the motion is granted in part and denied in part.

1. Background

The Condominium comprises 134 residential units at 440 Kent Avenue in Brooklyn, New York. It was declared a condominium on June 9, 2005.

On November 16, 2006, defendants Peter Grontas and Valentina Schembri purchased unit 22C. Shortly thereafter, according to the complaint in the underlying action (Underlying Complaint), they began to experience significant water intrusion and leaks in their living room during heavy periods of rain.

In November of 2009, Grontas and Schembri commenced an action (Underlying Action) against, among others, the Board, the Condominium, Kent North Associates LLC, which was the Sponsor and Kent Waterfront Associates LLC, which was the Developer of the building.

The Underlying Complaint alleges, among other things, that the building was defectively designed and constructed. Relevant here, it asserts that the Board failed to disclose to the underlying plaintiffs various items that required repair in order for the Unit to be free from such design and construction defects. It also alleges that the Board failed to cure the water infiltration problems despite numerous letters and phone calls from the underlying plaintiffs. Underlying Complaint, ¶¶ 1, 87, 138, 142,

157.

The Underlying Complaint sets forth claims against the Board for breach of contract, negligence and breach of fiduciary duty. The plaintiffs also assert a derivative claim against the Board on behalf of the Condominium.

The Board and the Condominium commenced the instant action in April of 2010, against various insurance companies which allegedly issued policies to the Condominium and the Board during the period from 2001 to 2010. Relevant here, plaintiffs allege that American Guarantee issued a series of umbrella liability policies to The Board, commencing June 1, 2001 up through and including June 10, 2011, "following form" to certain policies issued by the other insurers who are defendants here. Complaint, ¶ 67.

The Board and the Condominium seek a declaration that the American Guarantee policies were in effect during some or all of the time period alleged in the Underlying Complaint and that American Guarantee is obligated to indemnify The Board and the Condominium for any verdict, judgment or settlement of the Underlying Action. Complaint, ¶ 73.

American Guarantee moves to dismiss the complaint for failure to state a cause of action. "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction."

Amaro v Gani Realty Corp, 60 AD3d 492 [1st Dept 2009], citing *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]. "The court must accept the facts alleged in the complaint as true and accord the plaintiffs the benefit of every possible favorable inference." *Id.*, citing *Leon v Martinez*, *supra* at 87.

2. Discussion

A. Policy Period

As a threshold matter, the parties disagree about the period during which American Guarantee provided coverage to the plaintiffs. Plaintiffs allege that American Guarantee issued a series of umbrella liability policies insuring The Board from June 1, 2001 through June 10, 2011. Complaint, ¶ 67.

American Guarantee asserts that, beginning in 2001, it issued commercial umbrella policies to a risk-purchasing company called Insmart, Inc. However, it states that neither the Board nor the Condominium were listed as insureds on any of those policies, with the exception of the 2007-2009 policy, which lists the Condominium as an insured. [1]

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[1] American Guarantee states that the Board members would also be covered under the Umbrella Policy because the Condominium was a named insured.

American Guarantee has demonstrated that the only insurance coverage at issue here is the coverage provided to the Condominium under the 2007-2009 policy (Policy).

First, it is undisputed that the Condominium and the Board did not come into existence until June of 2005. Moreover, American Guarantee has provided documentary evidence, in the form of Named Insured Endorsements, for the period from June of 2004 to June of 2010, which demonstrates that neither the Board nor the Condominium is listed as an insured under any of the policies, with the exception of the 2007-2009 policy, which lists that Condominium as an insured. Plaintiffs submit no evidence in opposition to contradict American Guarantee's evidence.

B. Excess Insurance

Section I (A) (Coverage A) of the Policy provides that American Guarantee would pay "those damages covered by this insurance in excess of the total applicable limits of underlying insurance." The Schedule of Underlying Insurance for the policy included commercial general liability coverage and directors and officers coverage. It also provided for a $2 million limit in coverage for the commercial liability insurance and a $1 million limit in coverage for the directors and officers insurance. The

Policy also stated that Coverage A applied only in excess of the greater of the actual limits of the underlying insurance or the limits shown on the Schedule of Underlying Insurance (Policy, Section II [C]).

American Guarantee moves to dismiss that portion of the complaint which seeks a declaration that American Guarantee is obligated to indemnify plaintiffs pursuant to the Coverage A portion of the Policy. American Guarantee argues that such a declaration is premature because the Underlying Action has not been resolved and the limits of the underlying insurance have thus not yet been reached.

"The liability of [an] excess carrier does not attach until the limits of the collectible insurance under the primary policy or policies has been exceeded." *Cutro v Sheehan Agency,* 96 AD2d 669 (3d Dept 1983) (citations omitted). "It is only after exhaustion of the primary insurance that plaintiff can sustain any damage as a result of a denial of coverage under the excess policy." *Id.* Thus, the granting of declaratory relief is usually premature where the underlying action has not yet been settled or resolved and the limits of the underlying insurance have not yet been exceeded. *See id.*

In some cases, declaratory relief may be appropriate if it

appears that there is the potential for liability which could reach the excess coverage or where any judgments likely to be recovered in the underlying action would reach the excess coverage. *See Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253 (1st Dept 2006); *Booth Memorial Hosp. & Medical Center v Merson & Co., Inc.*, 162 AD2d 100 (1st Dept 1990); *Cabrini Medical Center v KM Ins. Brokers*, 142 AD2d 529, 530 (1st Dept 1988). However, mere speculation as to the amount of damages that may be recovered in the underlying action is not sufficient to warrant declaratory relief. *Combustion Engineering, Inc. v Travelers Indem. Co.*, 75 AD2d 777 (1st Dept 1980), aff'd 53 NY2d 875 (1981).

Here, the excess insurance is not implicated until the damages in the Underlying Action have exceeded at least $2 million with respect to the underlying commercial general liability insurance and $1 million with regards to the underlying directors and officers insurance, as set forth above. However, the Underlying Action has not yet been settled or resolved. Thus, the excess insurance coverage has not yet been reached, since the Board and the Condominium have not yet sustained any damages in the Underlying Action. *See Cutro v Sheehan Agency, Inc., supra*. As such, declaratory relief as to American Guarantee's obligation to indemnify plaintiffs under Coverage A is premature.

Plaintiffs contend that declaratory relief is appropriate here because the damages in the Underlying Action are likely to exceed the extent of the underlying insurance. However, this is merely speculative at this point. The Underlying Complaint sets forth that the plaintiffs in that action are seeking damages "believed to be in excess of $150,000." However, there are no specific allegations in the Underlying Complaint which demonstrate that such damages are likely to exceed the $1 million and $2 million limits at issue here.[2] The Underlying Complaint alleges generally that the water damage rendered the condominium unit unmarketable. However, no specific facts are alleged in support of this allegation which would warrant the granting of declaratory relief in the instant action. Therefore, defendant's motion to dismiss the complaint with respect to plaintiffs' claims under Coverage A is granted.

C. Umbrella Insurance

Section I (B) of the policy (Coverage B) provides umbrella liability insurance. It states that American Guarantee would

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[2] Oral argument on this motion was held together with a conference in the Underlying Action, where it was learned that the plaintiffs in the Underlying Action are seeking no more than $250,000.

provide coverage for, among other things, damages the insured became legally obligated to pay because of property damage caused by an "occurrence". The term "occurrence" was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Policy, Section V (9).

American Guarantee argues that there is no coverage under Coverage B in connection with the Underlying Action because the damages sought in that action did not arise from an "occurrence" as defined in the Policy. Instead, it contends that the damages arose from the defective construction of the unit and the failure to fix such defects, as alleged in the Underlying Complaint.

The Board and the Condominium argue that the damages did, in fact, arise from an occurrence, i.e. from the persistent water leaks into the apartment.

Based on the allegations in the Underlying Complaint, the court finds that American Guarantee has not demonstrated that the cause of action arising under Coverage B should be dismissed.

The Policy defines an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Here, the Underlying Complaint specifically alleges that the property damage suffered by the underlying

plaintiffs was the result of continuous and repeated exposure to the same harmful condition, i.e., the persistent water leaks in the apartment. Based on such allegations, the plaintiffs here have adequately pleaded that the property damage was the result of an occurrence, as defined by the policy.

American Guarantee argues that dismissal is required pursuant to the decision in *Baker Residential Ltd. Partnership v Travelers Ins. Co.* (10 AD3d 586 [1st Dept 2004]), in which the Appellate Division, First Department, construed certain commercial general liability policies which covered, among other things, property damage caused by an "occurrence." Similar to the policy at issue here, occurrence was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions which resulted in bodily injury or property damage..." *Id.* at 586

In *Baker*, the underlying action alleged that the *Baker* plaintiffs had installed defective structural beams that had deteriorated from water penetration because of improper installation, flashing and waterproofing. In affirming the trial court's granting of summary judgment to the defendant insurer, the court stated that "[t]he motion court, aptly characterizing the underlying action as 'a classic faulty workmanship/construction

contract dispute,' correctly held that the damages sought therein did not arise from an 'occurrence' resulting in damage to property distinct from plaintiffs' own work product, as contemplated by the policy." *Id.* at 587.

The case at hand is distinguishable from *Baker* in that here, the claims against the Board do not arise from faulty workmanship by the Board in constructing the building or the unit. Instead, the claims at issue arise from the Board's failure to remedy the ongoing water leaks. As such, this is not the type of faulty workmanship and construction dispute that was at issue in *Baker*.

American Guarantee also argues that there is no coverage here because of an exclusion set forth in section IV (C) (9) (f) of the policy regarding work performed by the insured. That section provides that Coverage B was not applicable to property damage to "[t]hat particular part of any property that must be restored, repaired or replaced because **your work** was incorrectly performed on it..."(emphasis in original). "Your work" was defined as including "[w]ork or operations performed by you or on your behalf; and [m]aterials, parts or equipment furnished in connection with such work or operations." Policy, section V (15), (a) and (b).

This argument is not persuasive. The underlying claims against the Board arise from its alleged failure to cure the water

leaks. However, it is not clear from the Underlying Complaint whether such failure arose from specific repair work attempted by the Board or from its failure to attempt any repairs at all. Thus, it cannot be said, at this point, that the exclusion relied on by American Guarantee bars coverage for the damages at issue.

Accordingly, it is

ORDERED, ADJUDGED and DECLARED that American Guarantee is not now obligated to provide coverage to plaintiffs under Coverage A of the policy, and American Guarantee's motion to dismiss is granted to the extent that plaintiffs' claim under Coverage A of the policy is dismissed; and it is further

ORDERED that the motion otherwise is denied; and it further is

ORDERED that American Guarantee shall file and serve an answer within twenty days of service of a copy hereof with notice of entry, and counsel for all parties shall appear in Part 55, 60 Centre Street, Room 432, New York, NY for a preliminary conference on April 11, 2011 at 11 AM.

DATED: February 18, 2011

ENTER:

J.S.C.

JANE S. SOLOMON

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).