

Plaza Constr. Corp. v Zurich Am. Ins. Co.

2011 NY Slip Op 30709(U)

March 23, 2011

Sup Ct, NY County

Docket Number: 112070/08

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 112070/2008
PLAZA CONSTRUCTION CORP.
vs.
ZURICH AMERICAN INSURANCE COMPANY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits Additional Submissions

PAPERS NUMBERED

1, 2

3

4, 5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by plaintiff Plaza Construction Corporation is granted in part and denied in part,
in accordance with the attached memorandum decision.

Note:
By separate order PC 4/13/11 @ 10 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: 3/23/11

[Signature]
JUDGE DORIS LING-COHAN J.S.C.

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: IAS PART 36

-----X
PLAZA CONSTRUCTION CORPORATION, :

Plaintiff, :

-against- :

ZURICH AMERICAN INSURANCE COMPANY, :

Defendant. :

DORIS LING-COHAN, J.:

Index No. 112070/08

Motion Seq. No. 001

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).

Plaintiff Plaza Construction Corporation ("Plaza Construction") commenced this declaratory judgment action against defendant Zurich American Insurance Company ("Zurich Insurance"), following commencement of a personal injury action in which the plaintiff herein was sued. On July 30, 2003, Lev Broytman ("Broytman"), a pedestrian, allegedly tripped and fell on mesh netting attached to construction site scaffolding at 2935 West 5th Street, Brooklyn, New York. Plaza Construction, the general contractor hired to renovate the property, subcontracted with O'Farrell Scaffolding & Equipment Corporation ("O'Farrell") to provide all the scaffolding and sidewalk bridges on the project. The contract between Plaza Construction and O'Farrell required O'Farrell to obtain general liability insurance and name both Plaza Construction and non-party Trump Village Section 3, Inc. ("Trump"), the owner of the premises, as additional insured parties. Also, the contract specified that such insurance be considered primary insurance with respect to the additional insureds. O'Farrell obtained such insurance from defendant Zurich Insurance.

Broytman commenced an action against a number of defendants including Plaza Construction and Trump (the "*Broytman Action*"). The *Broytman Action* settled in November

2008 with Plaza Construction and Trump agreeing to pay Broytman \$187,000. An additional \$128,605.10 was spent by Plaza Construction's insurer, St. Paul Fire and Marine Insurance Company ("St. Paul Insurance"), to defend Plaza Construction and Trump in the lawsuit.

In this action, plaintiff seeks a declaration that defendant Zurich Insurance is obliged to: (1) defend plaintiff and Trump in the underlying personal injury action; (2) reimburse non-party St. Paul Insurance for all sums expended in defending plaintiff and Trump in the underlying action; and (3) indemnify plaintiff and Trump for any verdict, judgment, or settlement in the underlying action up to the limits of the insurance policy. Plaintiff now moves for summary judgment, arguing that under the plain meaning of the Zurich insurance policy, it and Trump are additional primary insured parties and, thus, Zurich is obligated to defend and indemnify both parties in the underlying action.

Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). However, it should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). "Moreover, the motion court should draw all reasonable inferences in favor of the nonmoving party in determining whether to grant summary judgment." *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 (1st Dep't 2002). In deciding such a motion, the court's role is "issue-finding, rather than issue-determination." *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted).

Duty to Defend

An insurer's duty to defend has been held to be "exceedingly broad" and larger in scope

than the duty to indemnify. *BP Air Conditioning Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 (2007) (internal quotations omitted); *Fitzpatrick v Am. Honda Motor Co.*, 78 NY2d 61, 65 (1991). An insurer is obligated to provide a defense “whenever the allegations of the complaint suggest a reasonable possibility of coverage.” *BP Air Conditioning Corp.*, 8 NY3d at 714 (internal quotations omitted). Whether an insurer has a duty to defend depends “from the allegations of the complaint and the terms of the policy. If a complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend.” *Id.* (internal quotations omitted). As a result of the difference in scope between the duties to defend and indemnify, “an insurer may be contractually bound to defend even though it may not ultimately be bound to pay.” *Fitzpatrick*, 78 NY2d at 66.

The endorsement, which modified the insurance policy entered into between O’Farrell and Zurich Insurance with respect to additional insured, provides that: “Who is an insured . . . is amended to include as an insured the person or organization shown in the schedule, but only with respect to liability arising out of your work for that insured by or for you.” Robert J. Tracy Affirmation, Exh I. Further, the “person or organization” is defined in the schedule as “Any person or organization with whom you [O’Farrell] have agreed, through written contract, agreement or permit to provide primary additional insured coverage.” *Id.*

Here, the allegations set forth by the injured party in the *Broytman* Action fall within the scope of O’Farrell’s work at the premises. As the allegations “suggest a reasonable possibility of coverage,” Zurich Insurance’s duty to defend is triggered. *BP Air Conditioning Corp.*, 8 NY3d at 714. In his personal injury action, Broytman alleged that he tripped and fell on netting that was erected around a scaffold pedestrian bridge at the project site and was injured because the safety

scaffold nets were carelessly and improperly placed in the middle of the walking passage. *See* Tracy Aff, Exh C ¶¶ 6, 10. The netting on the sidewalk bridges was installed by O'Farrell's subcontractor. In determining whether liability arose out of the work of a subcontractor, the subcontractor's work includes all work performed under the subcontract, including any work performed for the subcontractor by a sub-subcontractor. *Structure Tone, Inc. v Component Assembly Sys.*, 275 AD2d 603, 603 (1st Dep't 2000). As the netting was attached to the scaffolding that O'Farrell provided, Broytman's claim falls under the ambit of the insurance policy; thus, Plaza Construction is an additional insured.

As such, defendant Zurich Insurance acknowledges that it is obligated to defend plaintiff Plaza Construction as an additional insured under the insurance policy. *S. Dwight Stephens Aff* in Opp ¶ 6. Thus, there is no dispute that defendant must pay Plaza Construction's reasonable defense costs.

However, defendant contests that any declaration should be made that it also had a duty to defend Trump. First, defendant contends that since Trump is not a party in this action, any ruling in this action would not bind Trump. Def Memo of Law in Opp at 1. Second, defendant argues that even if the court were to consider plaintiff's motion with respect to Trump, defendant is still not obligated to defend Trump because Trump is not an additional insured under the terms of the policy. Zurich Insurance contends that the language in the policy requires that there be a written contract between the named insured and any additional insured party. Defendant relies on *Linarello v City University of New York*, 6 AD3d 192 (1st Dep't 2004), in which the First Department found that a construction manager was not an additional insured under the plain language of a general liability policy because he had no written contract with the named insured.

Linarello, 6 AD3d at 193.

Plaintiff, however, contends that the court may grant declaratory relief with regard to defendant's duty to defend and indemnify Trump because plaintiff is not seeking to bind Trump to any judgment, but instead seeks a declaratory judgment that would bind defendant Zurich Insurance. Also, plaintiff asserts that since it was the party who contracted with O'Farrell on its and Trump's behalf for insurance coverage, Trump is not needed to determine Zurich Insurance's obligations, nor is Zurich prejudiced by Trump's absence. Moreover, plaintiff argues that under the plain reading of the policy, Trump is an additional insured.

Although Trump is not a party in this action, Trump's rights will not be adversely affected by any decision reached; thus, Trump is not a necessary party. Plaza Construction's insurance company, St. Paul Insurance, ultimately defended both Plaza Construction and Trump in the underlying action since defendant did not do so. As such, Trump would have no real interest here, as its defense and settlement was paid for by St. Paul Insurance. Further, as correctly pointed out by plaintiff, plaintiff is not seeking a declaratory judgment to bind Trump, but instead to bind Zurich Insurance under its own insurance policy.

Any determination that a party is an additional insured under an insurance policy is necessarily dependent on the specific contract language. In the case cited by defendant, *Linarello*, the insurance policy contained a more restrictive "additional insured" clause:

Who Is An Insured (Section II) is amended to include as an insured any person or organization for whom you [Westmont] are performing operations *when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy.*

Linarello v City University of New York, 2003 WL 25669421, at *2 (NY Sup Ct, NY County

2003) (emphasis added). The insurance policy by Zurich Insurance, which is significantly more broad, covers “any person or organization with whom you [O’Farrell] have agreed, through written contract, agreement or permit to provide primary additional insured coverage.” Tracy Affirmation, Exh I. Unlike the language in *Linarello*, which requires an additional insured party to have a physical, written contract with the named insured, the insurance policy at issue here, by its plain language, merely requires that the named insured party agreed in a written contract to provide coverage for any person or organization. In this case, since O’Farrell promised to procure additional insurance coverage for both Plaza Construction and Trump in its contract with Plaza Construction, Trump is covered as an additional insured.

In a recent New York case, language substantively similar to that at issue here was found less restrictive than the *Linarello* language, stating:

The additional insured provision of the Zurich policy is less restrictive [than *Linarello*’s]. It extends coverage to any person or organization with whom the insured Hatzel agreed in a written contract to provide insurance for. Thus, Zurich’s additional insured endorsement is not so restrictive as to limit coverage to only the person or organization with whom Hatzel, the named insured, contracted.

Am. Home Assurance Co. v Zurich Ins. Co., 2010 WL 549138, at *3 (NY Sup Ct, NY County 2010); *see also Aetna Cas. & Sur. Co. v Nat’l Union Fire Ins. Co.*, 228 AD2d 385 (1st Dep’t 1996); *Tishman Constr. Corp. of N.Y. v Am. Mfr’s Mut. Ins. Co.*, 303 AD2d 323 (1st Dep’t 2003).

Thus, under the terms of the policy, Trump is an additional insured under the Zurich Insurance policy. As such, defendant also has a duty to defend Trump. Moreover, because St. Paul Insurance already defended both Plaza Construction and Trump, St. Paul is entitled to

reimbursement for the defense costs it expended in defending both entities. Therefore, plaintiff's motion for a declaratory judgment that Zurich Insurance is obligated to defend plaintiff and Trump in the *Broytman* Action is granted.

Further, defendant requests that a Special Referee hear and determine what the reasonable defense costs are, in light of the fact that only a two-page printout of defense costs totaling approximately \$128,605.10 was attached to the motion papers. *See Patricia Manero Aff*, Exh H. As plaintiff does not object to such a referral, plaintiff's motion for a declaratory judgment that defendant reimburse St. Paul Insurance is granted to the extent that the issue of the amount of reasonable defense costs shall be heard and determined by a Special Referee, if necessary; a detailed accounting of defense costs, with supporting affirmation, shall be supplied to defendant within 20 days; defendant shall have 20 days to provide a detailed opposition to such accounting; and within 10 days thereof both sides shall confer as to settlement of such fees prior to meeting with the Special Referee; copy of submissions to be provided to the Special Referee.

Duty to Indemnify

Notwithstanding the fact that Zurich Insurance's duty to defend has been triggered, a more narrow standard regarding an insurer's duty to indemnify exists. An insurance company's duty to indemnify "requires a determination that the insured is liable for a loss covered by the policy." *Lehrer McGovern Bovis, Inc. v Halsey Constr. Corp.*, 254 AD2d 335, 335 (2d Dep't 1998). As stated above, an insurer may owe a duty to defend, even if ultimately not bound to pay. *See Fitzpatrick*, 78 NY2d at 66. The Court of Appeals has defined the difference as such: "The duty to indemnify is, however, distinctly different. The duty to defend is measured against the allegations of pleadings but the duty to pay is determined by the actual basis for the insured's

liability to a third person.” *Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424 (1985).

Defendant argues that summary judgment should be denied because there is an issue of fact as to whether defendant has a duty to indemnify. Defendant claims that this issue can only be resolved by first determining whether O’Farrell was in some way responsible for causing the accident, since the injured claimant was not an O’Farrell employee but rather a passerby. Defendant contends that since a settlement was reached in the *Broytman* Action, no determination of fault was ever made, thus precluding summary judgment at this stage. Furthermore, defendant contends that there is evidence which shows that another entity, A. Best Contracting Co., Inc., might have been responsible for the accident and therefore it is not clear that O’Farrell caused the accident. *See* S. Dwight Stephens Aff in Opp, Exh 3. An allegation exists that workers of A. Best Contracting Co., Inc., the concrete repair contractor, detached the netting in order to gain access to the building’s facade and that the injured party tripped over the improperly placed netting. *See* Tracy Affirmation, Exh B ¶¶ 48-56.

Plaintiff, on the other hand, does not differentiate between defendant’s duty to defend and its duty to indemnify. Instead, plaintiff argues that defendant owes both duties because the plain language of the insurance policy applies to any claims “arising out of” O’Farrell’s work, which has been interpreted to mean “originating from, incident to, or having connection with.” *Regal Constr. Corp. v Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 (2010) (internal quotations and citation omitted). Plaintiff cites to *BP Air Conditioning Corp. v One Beacon Ins. Group*, 8 NY3d 708 (2007), in support of its contention that no determination of liability in the *Broytman* Action is necessary to trigger defendant’s obligation to defend and indemnify.

Plaintiff's motion for summary judgment with respect to defendant's duty to indemnify Plaza Construction and Trump is denied, as there is a material issue of fact remaining. A determination of liability is required in this instance prior to a determination that an insurance company owes a duty to indemnify. "[A] declaration that the insurer has a duty to indemnify the general contractor requires a determination that the underlying accident arose out of the subcontractor's performance of work under its contract with the general contractor, which must await a determination of liability in the underlying personal injury action." *79th Realty Co. v X.L.O. Concrete Corp.*, 247 AD2d 256, 257 (1st Dep't 1998). Here, because the underlying case settled prior to any such determination of liability, and in light of the fact that there is some evidence to suggest that another party may be at fault for causing Broytman's injuries and, thus, the accident may not have arisen out of O'Farrell's work, the motion for summary judgment on defendant's duty to indemnify cannot be granted at this time. Instead, a determination as to liability must first be made in this action.

The case law is clear that different standards apply to an insurer's duty to defend and its duty to indemnify. While Broytman's allegations in the underlying action are sufficient to hold that defendant has a duty to defend, mere allegations are insufficient to require indemnification. *See Servidone Constr. Corp.*, 64 NY2d at 425 ("[F]urther proceedings are required to determine the basis for . . . liability . . . -- not from the pleadings but from the actual facts . . ."). This is especially true when the allegations in the underlying personal injury action name multiple parties as the cause of the accident. In *Servidone Construction Corporation*, the Court of Appeals held that, "[w]here an insurer breaches a contractual duty to defend its insured in a personal injury action, and the insured thereafter concludes a reasonable settlement with the

injured party,” imposing a duty to indemnify on the insurer is improper based on “a possibility of coverage” and “[w]ithout finding that the loss was covered.” *Servidone Constr. Corp.*, 64 NY2d at 421, 423.

Moreover, although plaintiff cites to *BP Air Conditioning Corporation* in support of its arguments that no determination of liability is needed, such language in *BP Air Conditioning Corporation* addresses only an insurer’s duty to defend, not its duty to indemnify. *BP Air Conditioning Corp.*, 8 NY3d at 711, 714–15. Clearly, it is undisputed that a determination of liability is not needed to require an insurer to defend; however, the same cannot be said for an insurer’s duty to indemnify. “While the duty to defend is measured against the possibility of a recovery, the duty to pay is determined by the actual basis for the insured’s liability to a third person.” *Frontier Insulation Contractors, Inc. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 178 (1997). In numerous cases, the courts have declined to impose a duty to indemnify on the insurer prior to a determination of liability in the underlying case. *See, e.g., Frontier Insulation Contractors, Inc.*, 91 NY2d at 178 (“[W]e decline to pass on the question of defendants’ duty to indemnify at this early juncture, which predates any ultimate determination of the insurers’ liability.”); *Servidone Constr. Corp.*, 64 NY2d at 421, 423; 79th *Realty Co.*, 247 AD2d at 257.

Recently, the Court of Appeals revisited the issue of an insurer’s duty to indemnify in *Regal Construction Corporation v National Union Fire Insurance Company of Pittsburgh, PA*, 15 NY3d 34 (2010). However, although the Court in that case found that the accident “arose out of” the operations of the primary insured, that case is factually distinct from the within case. In *Regal Construction Corporation*, the Court noted that “there was a connection between the accident and [the primary insured’s] work, as the injury was sustained by [the primary insured’s]

own employee while he supervised and gave instructions to a subcontractor regarding work to be performed.” *Regal Constr. Corp.*, 15 NY3d at 39 (emphasis added). Thus, the additional insured’s potential liability arose out of the primary insured’s operations since the accident involved its own employee informing the additional insured, the subcontractor, about the subcontractor’s work. Here, however, the alleged accident involved a passerby, someone who clearly had no connection to the work being performed. Therefore, it is not clear from the alleged facts that the incident arose out of O’Farrell’s work, as although O’Farrell contracted with a subcontractor to set up the scaffolding and sidewalk bridges, there are allegations that the netting was removed from the scaffolding by another party, when O’Farrell was not present.

Based on the above, plaintiff’s motion with regard to the portion that seeks a declaratory judgment that defendant has a duty to indemnify Plaza Construction and Trump is denied. Because the underlying case settled, no determination of liability has yet been made. Thus, it is premature at this time to impose a duty to indemnify on defendant, which must await a determination of liability. Although the settlement in the underlying action makes it necessary to determine liability for Broytman’s injuries in this action, the concept of “a trial within a trial” or a “mock trial” is not a new one. *See Servidone Constr. Corp.*, 64 NY2d at 425.

Accordingly, it is

ORDERED, ADJUDGED and DECLARED that plaintiff’s motion is granted only to the extent that defendant Zurich American Insurance Company has a duty to defend Plaza Construction Corporation and Trump Village Section 3, Inc. with respect to the underlying action entitled *Lev Broytman and Zinaida Verbitsky v Trump Village 3, Plaza Construction Corp. and WJE Engineer and Architects, P.C. et al.*, Index No. 27243/04, previously before the Supreme

Court of New York, Kings County; and it is further

ORDERED, ADJUDGED and DECLARED that defendant Zurich American Insurance Company is obligated to reimburse St. Paul Fire and Marine Insurance Company for the reasonable defense costs in an amount to be determined by a Special Referee¹; said claim is hereby referred to a Special Referee to hear and determine, if necessary; and it is further

ORDERED that, within 20 days, a copy of this order with notice of entry shall be served by plaintiff on the Special Referee Clerk (Room 119M) to arrange a date for the reference to a Special Referee, if the parties are unable to consent to the amount of defense costs; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that **counsel shall appear in Part 36, Room 428, 60 Centre Street, New York, New York for a preliminary conference and for an update on the status of the above referral on April 13, 2011 at 10:00 AM**; and it is further

ORDERED that within 30 days of entry of this judgment and order, plaintiff shall serve a copy upon defendant with notice of entry.

Dated: _____

3/23/11



DORIS LING-COHAN, J.S.C.

UNFILED JUDGMENT

J:\INDEMNIFICATION\Plaza Construction, sj on declar judg to defend and indemnify, 06
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).

¹ Prior to such Referee hearing, counsel to comply with submissions and conference as per page 7.