

Turner Constr. Co. v RLI Ins. Co.

2011 NY Slip Op 32598(U)

September 23, 2011

Supreme Court, New York County

Docket Number: 104964/2011

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER

PART 15

Justice

Index Number : 104964/2011
 TURNER CONSTRUCTION CO
 VS.
 RLI INSURANCE COMPANY
 SEQUENCE NUMBER : 001
 DISM ACTION/INCONVENIENT FORUM

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

this motion to/for _____

PAPERS NUMBERED

1, 2
3
4

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

OCT 03 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/23/11



 HON. EILEEN A. RAKOWER

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: PART 15

-----X
TURNER CONSTRUCTION COMPANY,

Index No.
104964/11

Plaintiff,

**DECISION
and ORDER**

- against -

RLI INSURANCE COMPANY,
HARLEYSVILLE MUTUAL INSURANCE COMPANY,
ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
INDIAN HARBOR INSURANCE COMPANY, and
ZURICH AMERICAN INSURANCE COMPANY,

Mot. Seq.
001

FILED

Defendants.

OCT 03 2011

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

NEW YORK
COUNTY CLERK'S OFFICE

Presently before the court is a motion by RLI Insurance Company ("RLI") to dismiss the complaint of Turner Construction Company ("Turner") pursuant to CPLR §3211(a)(7). The relevant facts are set forth below and are undisputed.

Turner Construction Company ("Turner") entered into a contract with the Dormitory Authority of the State of New York ("DASNY") on May 6, 2003 to act as construction manager for a construction project known as the Brooklyn Quad West project in Brooklyn ("the Project"). On or around February 3, 2006, DASNY entered into a contract with AMCC Corporation ("AMCC") whereby AMCC agreed to serve as general contractor on the Project. The DASNY/AMCC contract provided that AMCC would indemnify the construction manager of the Project for "claims, just or unjust, by third persons ... arising or alleged to arise out of or as a result of or in connection with the performance by [AMCC] of the Work." In addition, the DASNY/AMCC contract required AMCC to procure and maintain a

Commercial General Liability (CGL) with a combined single limit for Bodily Injury, Personal Injury and Property Damages of at least \$2,000,000 per occurrence &

aggregate; and Products Liability and Completed Operations with an Aggregate limit of \$2,000,000. The limit may be provided through a combination of primary and umbrella/excess liability policies.

Pursuant to the DASNY/AMCC contract, AMCC procured a commercial general liability policy from QBE Insurance Corporation ("QBE") (policy number HBG01513-2), effective from March 13, 2008 through March 14, 2009 ("the QBE policy"), with limits of \$1,000,000 per occurrence. The QBE policy names Turner as an additional insured.

RLI Insurance Company ("RLI") issued an excess commercial general liability policy (policy number RXL0260823) to AMCC, effective from March 13, 2008 through March 13, 2009, with a limit of \$5,000,000 per occurrence ("the RLI policy"). Turner is an additional insured on the RLI policy by virtue of a provision of the RLI policy defining an "insured" as any entity which qualifies as an insured under the terms of the underlying insurance policy, *i.e.*, the QBE policy.

On February 26, 2009, Brian Blandina commenced a lawsuit against Turner, among others, alleging that he sustained bodily injuries while performing work for Turner on the Project on December 5, 2008 (*Blandina v. Turner Constr. Co. et al.*, 4750/09) ("the Underlying Action"). Specifically, Blandina alleges that he was an employee of Metalteck, Inc., a subcontractor on the Project, and that, while performing his work, "he was caused to fall and be violently precipitated to the ground" while exiting a scissor lift. QBE is presently defending Turner as an additional insured in the Underlying Action.

With respect to RLI, Turner seeks declarations that (1) "[b]y virtue of the Indemnification Provision in the DASNY/AMCC contract, RLI is obligated to pay any indemnity imposed on Turner prior to any insurance available to Turner as a named insured;" and (2) "[b]y virtue of the additional insured endorsements in the RLI Policy, RLI is obligated to pay any indemnity imposed on Turner prior to any insurance available to Turner as a named insured."

RLI submits an affirmation and a memorandum of law in support of its motion. Turner first argues that Plaintiff's claim concerning the indemnification provision in the DASNY/AMCC contract fails because Turner's contractual indemnification claim

lies against AMCC, and not RLI. Moreover, RLI asserts that Turner cannot seek a declaration as to RLI's potential coverage obligation to AMCC. RLI further argues that, with respect to Turner's claim as an additional insured on the RLI policy, Plaintiff is not entitled to a declaration of coverage prior to the exhaustion of Turner's own insurance policies since the RLI policy is excess to any primary policies under which Turner is an insured.

Turner submits a memorandum of law in opposition. Turner argues that its first cause of action against RLI is viable because "[i]t is proper for a third-party to an insurance contract to bring a declaratory judgment action against an insurer in order to seek a determination of the policy's coverage when that third-party stands to benefit from the policy." As for Turner's second cause of action against RLI, Turner asserts that under the RLI policy, "Turner's additional insured coverage responds to covered losses directly after the QBE Policy exhausts, but prior to any insurance on which Turner is a named insured." Turner further states that "the RLI Policy incorporates the QBE Policy's Additional Insured Endorsement which states that coverage is primary when required by contract."

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). "When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

With respect to Turner's claim for indemnification based upon the DASNY/AMCC contract, the Court of Appeals has clarified that a party cannot bring a declaratory judgment action against a tortfeasor's insurer without first complying with the statutory requirements of Insurance Law §3420 (*see Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350 [2004]). Accordingly, Turner's first cause of action against RLI must be dismissed.

With respect to Turner's second cause of action against RLI, Section I.A. of the RLI policy provides as follows

A. Coverage

Subject to the other provisions of this policy, we will pay on behalf of the insured the insured's **ultimate net loss** if such loss results from an occurrence insured by the policies designated in the Declarations as **underlying insurance**¹. However, the insurance afforded by this policy shall apply: (a) only in excess of the **underlying insurance**; [and] (b) only after the **underlying insurance** has been exhausted by payment of the limits of liability of such insurance

This policy, except where provisions to the contrary appear herein, is subject to all of the conditions, agreements, exclusions, and limitations of and shall follow the **underlying insurance** in all respects

Turner points to the language of this section in support of its claim that coverage from the RLI policy is triggered after exhaustion of the QBE policy and prior to any policies in which Turner is a named insured. However, as set forth above, Section I.A. explicitly states that the provisions therein are "[s]ubject to other provisions of [the] policy," and Section IV.K. of the RLI policy contains an "other insurance" clause which provides as follows:

K. Other Insurance - If other insurance, whether collectible or not, is available to the insured covering a loss also covered by this policy, other than insurance that is specifically excess of the insurance afforded by this policy, the insurance afforded by this policy shall be in excess of, and shall not contribute with, such other insurance.

"An insurance policy is a contract between the insurer and the insured. Thus, the extent of the coverage (including a given policy's priority vis-a-vis other policies)

¹The RLI policy defines "insured" as "any person or organization qualifying as an insured person under the terms of the **underlying insurance**." The term "underlying insurance" is defined as the policy or policies contained in the "Schedule of Underlying Insurance Excess/Excess Umbrella," which lists the QBE policy.

is controlled by the relevant policy terms..." (*Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.*, 2008 NY Slip Op 3150, *5 [1st Dept. 2008]). "[A]n umbrella or excess liability insurance policy should be treated as just that, and not as a second layer of primary coverage, unless the policy's own terms plainly provide for a different result" (*id.* at *3).

Here, the RLI policy makes clear that it applies only (1) in excess, and after exhaustion of, the RLI policy (pursuant to Section I.A.); and (2) in excess of any "other insurance ... other than insurance that is specifically excess of" the RLI policy. Accordingly, Turner's second cause of action fails as a matter of law.

Wherefore it is hereby

ORDERED that the motion of defendant RLI to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

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

DATED: September 23, 2011 **FILED** 
EILEEN A. RAKOWER, J.S.C.

OCT 03 2011

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