Cushman & Wakefield, Inc. v JP Morgan Chase & Co.
2011 NY Slip Op 34290(U)
October 17, 2011
Supreme Court, New York County
Docket Number: 104776/11
Judge: Eileen A. Rakower

[* 1]

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

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CUSHMAN & WAKEFIELD, INC. and THE AMERICAN HOME ASSURANCE COMPANY, INC.,

Plaintiff,

Index No.104776/11

Seq No.: 001

- against -

Decision and Order

JP MORGAN CHASE & COMPANY, and LIBERTY MUTUAL INSURANCE COMPANY,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs Cushman & Wakefield, Inc. and its insurer, The American Home Assurance Company, Inc. (collectively "Cushman") seek reimbursement for expenses and legal fees in excess of $50,000 incurred in the defense of a third-party action initiated by defendant JP Morgan Chase and Co. ("JP Morgan").

In the underlying action, Dennis Parente and Mary Ann Parente v. 277 Park Avenue LLC, 277 Park Avenue Condominium and JP Morgan Chase, Index No. 101656/06, plaintiffs sought damages for injuries Dennis Parente sustained while employed by Cushman as an "operating engineer." Mr. Parente was allegedly injured when he fell off a ladder while inspecting a malfunctioning booster fan at 277 Park Avenue in the County and State of New York on December 17, 2005. The premises is owned by JP Morgan. Cushman managed the property pursuant to a management agreement between it and JP Morgan.

JP Morgan brought a third-party action against Cushman for defense and indemnification of the claims asserted against JP Morgan by Dennis Parente. Cushman alleges, however, that during discovery, it was revealed that Cushman was an additional insured under JP Morgan's Commercial General Liability Policy ("The Policy"), issued by defendant Liberty Mutual Insurance Company ("Liberty"), thus, JP Morgan was barred from bringing suit pursuant to the anti-subrogation rule.

On January 21, 2010, the underlying action was settled, without contribution from, or on behalf of, Cushman or American Home, for the amount of $320,000. The underlying action and the third-party action were discontinued with prejudice. Thereafter, Cushman commenced the instant action, claiming that it was entitled to reimbursement of legal fees expended in defending the third party action. Liberty now moves to dismiss the complaint pursuant to CPLR 3211(a)(1). Cushman and American Home oppose.

Liberty does not contest that Cushman is an additional insured. However, Liberty asserts that the "employee exclusion" clause contained in The Policy expressly excludes coverage of Cushman for the claims raised in JP Morgan's third-party action, including any duty to defend.

Cushman asserts that it still must be determined if Liberty urged its insured JP Morgan to wrongfully commence the third-party action against it, which would entitle Cushman to recover its damages directly against Liberty based on its wrongful conduct and breach of the insurance contract[1].

On a motion to dismiss pursuant to CPLR 3211(a)(1) "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) "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).

In its complaint, Cushman alleges that:

> during the course of discovery in the Parente action, it was revealed that Cushman . . . was named as an additional insured under the insurance policy issued to JP Morgan by . . . Liberty . . .

Cushman further alleges that, under the terms of the policy, it is "entitled to coverage as an insured, and to reimbursement of legal fees and expenses."

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[1]Cushman does not allege breach of contract in its complaint.

Section 2(e)(1), Employer's Liability states, in relevant part:

> 2. Exclusions
> This insurance does not apply to:
> e. Employer's Liability
> "Bodily injury" to:
> (1) An "employee" of the insured arising out of and in the course of:
> (a) Employment by the insured; or
> (b) Performing duties related to the conduct of the insured's business.
> . . .
> This exclusion applies:

(1) Whether the insured may be liable as an employer or in any other capacity; and

(2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

. . .
This exclusion does not apply to liability assumed by the insured under an "insured contract."

Section (V)(9)(f) states, in relevant part:

9. "Insured contract" means:

> f. That part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for "bodily injury" . . . to a third person . . .

The terms "you" and "yours" are defined on the first page of "The Commercial General Liability Coverage Form" as referring only to "the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy."

The primary purpose of an employee exclusion clause is to exclude coverage as to an insured who would be "required to carry, workmen's compensation

insurance for the protection of an injured employee." (*Greaves v. Public Service Mutual Insurance Co.*, 4 AD2d 609[1st Dept. 1957]). It is undisputed that Mr. Parente was employed by Cushman, and that he was acting in the course of his employment at the time he sustained his injuries.

Cushman, in opposition, fails to address Liberty's arguments with regard to the employee exclusion clause, but rather asserts that the action should stand as against Liberty for wrongfully impleading it. Since the anti-subrogation rule is not triggered where an employee exclusion clause would serve to bar coverage of the claim in the first instance, that argument is without merit. (see; *Larson v. City of New York*, 214 AD2d 413[1st Dept. 1995]).

Wherefore it is hereby

ORDERED that the motion is granted and the complaint is dismissed in its entirety.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: October 17, 2011

EILEEN A. RAKOWER, J.S.C.