

Essex Ins. Co. v G-1, Inc.
2012 NY Slip Op 30795(U)
January 26, 2012
Sup Ct, Suffolk County
Docket Number: 08-44658
Judge: Daniel M. Martin
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SHORT FORM ORDER

INDEX No. 08-44658

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL M. MARTIN
Justice of the Supreme Court

MOTION DATE 4/26/11
ADJ. DATE 11/15/11
Mot. Seq. #002 - MG

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ESSEX INSURANCE COMPANY,

Plaintiff,

- against -

G-1, INC., SALT CONSTRUCTION CORP.,
SILVERLINING WOODWORKING, INC.,
FRAME TO FINISH, INC., and VINCENT
GIACOIA, as Administrator for the Estate of
JUAN CARLOS SALINA,

Defendants.
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Upon the following papers numbered 1 to 29 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-17; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 18-23; Replying Affidavits and supporting papers 25-29; Other plaintiff's memorandum of law;

(and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment declaring that it has no duty to defend or indemnify defendant G-1, Inc. in a wrongful death action entitled *Giacoa v Salt Constr. Corp.* (Sup Ct, Suffolk County, Index No. 08-13902), is granted.

This is an action for a judgment, *inter alia*, declaring that the plaintiff has no duty to defend or indemnify G-1, Inc. ("G-1") in the underlying wrongful death action pursuant to a commercial general liability insurance policy issued by the plaintiff to G-1 as named insured, effective July 6, 2007 through July 6, 2008.

On November 20, 2007, Juan Carlos Salina was working in an elevated area at a construction site located at 37 Nostrand Parkway, Shelter Island, New York, when he fell and sustained serious injuries resulting in his death. The underlying wrongful death action was commenced on April 14, 2008. It appears from the complaint in the underlying action that Salt Construction Corp. ("Salt"), the general contractor hired to perform construction and renovation work at the premises, hired Frame to Finish, Inc. and Silverlining Woodworking, Inc. as subcontractors, and that Salina was employed by Frame to Finish, Inc. at the time of his accident. In or about October 2008, Salt commenced a third-party action against Frame to Finish, Inc. and a second third-party action against G-1, in which Salt alleges, *inter alia*, that G-1 entered into a contract with Salt whereby G-1 agreed to perform certain supervisory, inspection, construction, and renovation services in which it was engaged on the date of the accident. Salt pleads four causes of action in the second third-party complaint. The first and second causes of action are for contribution and common-law indemnification, on the theory that if Salt is held liable for any portion of Salina's damages in the underlying action, those damages were caused, in whole or in part, by G-1's negligent acts and omissions; the third, for contractual indemnification; and the fourth, for breach of contract, alleging that G-1 failed to procure general liability coverage naming Salt as an additional insured. Notwithstanding the allegations contained in the fourth cause of action, it appears that Salt is an additional insured under the policy.

On November 21, 2007, the plaintiff received a claim notice of the accident. By letter dated November 28, 2007, as supplemented by letter dated December 18, 2007, the plaintiff advised G-1 that there was no coverage for the claim because (i) to the extent Salina could be considered an employee of G-1, the policy excludes coverage for bodily injury to employees of any insured, and (ii) the policy excludes coverage for bodily injury sustained by the employee of another contractor. After it received a copy of the second third-party complaint on November 14, 2008, the plaintiff advised G-1 by letter dated December 2, 2008 that it would provide a gratuitous defense, but that there was no coverage for the claim for the additional reasons that (iii) the policy excludes coverage for injury or damage arising out of the alleged negligence or other wrongdoing in the hiring, training, placement, supervision or monitoring of others by an insured, (iv) the policy excludes coverage for injury or damage which an insured is obligated to pay by reason of the assumption of liability in a contract or agreement, unless the liability was assumed in an "insured contract" and the injury or damage occurred subsequent to its execution, and (v) the policy excludes coverage for claims arising out of a breach of contract. By letter dated December 15, 2008, the plaintiff, having apparently just learned that G-1 was hired to perform site safety for the job site, supplemented its December 2, 2008 letter by advising that there was no coverage

for the claim because (vi) the policy excludes coverage for any safety or risk management operations which G-1 performed at the site.

Paragraph 6 of the policy's Combination General Endorsement provides, in relevant part, that

This insurance does not apply to liability for "Bodily Injury" to: (A) an "employee" of any insured arising out of and in the course of employment or while performing duties related to the conduct of an insured's business; or (B) any injury or damage to any other person including but not limited to spouse, child, parent, brother, sister or relative of the "employee" as a consequence of (A).

Paragraph 1 (D) of the policy's Additional Conditions Endorsement provides that "[i]f contractors or subcontractors are used * * * there is no coverage under this policy for 'bodily injury,' 'personal injury' or 'property damage' sustained by any contractor, self-employed contractor, and/or subcontractor, or any employee, leased worker, temporary worker or volunteer help of same." Paragraph 10 (e) of the policy's Combination General Endorsement provides that "[t]his insurance does not apply to 'bodily injury' * * * arising out of, caused by or contributed to as a result of alleged negligence or other wrongdoing in the hiring, training, placement, supervision, or monitoring of others by the insured." Section V of the policy's Commercial General Liability Coverage Form defines "bodily injury" to include death resulting from such injury. Section I (A), paragraph 2 (b) of the policy's Commercial General Liability Coverage Form excludes coverage for bodily injury or property damage "for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement"; however, the exclusion does not apply to liability for damages

- (1) That the insured would have had in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract" * * *.

Paragraph 4 of the policy's Combination General Endorsement defines "insured contract" as any written

(A) - Lease of premises excluding indemnification to another for damage by fire to premises while rented to you or temporarily occupied by you, and/or (B) - Easement agreement except in connection with construction or demolition operations on or adjacent to a railroad, and/or (C) - Indemnification of a municipality as required by ordinance, except in connection with work for the municipality, and/or (D) Sidetrack agreement or any easement or license agreement in connection with vehicle or pedestrian private railroad crossing at grade, and/or (E) - elevator maintenance agreement.

Paragraph 5 of the policy's Combination General Endorsement provides that "[t]his insurance does not apply to claims arising out of breach of contract, whether written or oral, express or implied, implied-in-law, or implied-in-fact contract." Paragraph 1 of the policy's Combination General Endorsement provides that "[c]overage under this insurance is limited to operations described under 'business description' and/or 'classification' on the declarations' pages of policy." The policy's declaration pages list G-1's business description as "contractor" and its classifications as "Contractors-Executive

Supervisors or Executive Superintendents,” “Contractors–Sub–Const/Repair/Erection of 1-2 Family Dwg,” and “Carpentry–Interior.”

The plaintiff now moves for summary judgment declaring that it has no duty to defend or indemnify G-1 in the underlying action.

The duty of an insurer to provide a defense for its insured is broader than its duty to indemnify (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 486 NYS2d 873 [1984]), and arises whenever the allegations of the underlying complaint potentially give rise to a covered claim, or where the insurer has actual knowledge of facts establishing a reasonable possibility of coverage (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 667 NYS2d 982 [1997]). However, this duty does not extend to claims which are not covered by the policy, including those which are specifically excluded from coverage (*Campagna & Langella v Certain Underwriters at Lloyd’s, London*, 305 AD2d 526, 759 NYS2d 346 [2003]; *National Gen. Ins. Co. v Hartford Acc. & Indem. Co.*, 196 AD2d 414, 601 NYS2d 4 [1993]; *30 W. 15th St. Owners Corp. v Travelers Ins. Co.*, 165 AD2d 731, 563 NYS2d 784 [1990]).

On a motion for summary judgment, a liability insurer denying the duty to defend and indemnify has the burden “to establish that the injury complained of falls outside the coverage of the policy or is exempted by reason of an exclusionary clause * * *. If the insurer can establish, as a matter of law, that the claims against the assured are unambiguously excepted from coverage, summary judgment in favor of the insurer is proper” (*Smith Jean, Inc. v Royal Globe Ins. Cos.*, 139 AD2d 503, 504, 526 NYS2d 604, 605 [1988]). Exclusions from coverage “must be specific and clear in order to be enforced” (*Seaboard Sur. Co. v Gillette Co.*, *supra* at 311, 486 NYS2d at 876 [1984]) and ambiguities in exclusionary clauses are to be construed most strongly against the insurer (*see Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 469 NYS2d 655 [1983]). However, an unambiguous policy provision must be accorded its plain and ordinary meaning (*see Sanabria v American Home Assur. Co.*, 68 NY2d 866, 508 NYS2d 416 [1986]), and a court may not disregard the plain meaning of the policy’s language in order to find an ambiguity where none exists (*Guachichulca v Laszlo N. Tauber & Assoc.*, 37 AD3d 760, 831 NYS2d 234 [2007]). Once the insurer shows that an exclusion applies, the burden shifts to the insured to establish that an exception to the exclusion applies (*see Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 NY2d 621, 657 NYS2d 564 [1997]).

Here, the Court finds that the plaintiff is entitled to summary judgment in its favor. As to the causes of action for contribution and common-law indemnification, paragraph 1 (D) of the policy’s Additional Conditions Endorsement expressly excludes coverage for bodily injury (including death) sustained by an employee of any contractor or subcontractor (*see Essex Ins. Co. v Giampetruzzi*, Sup Ct. Queens County, Nov. 17, 2010, Index No. 09-1696; *Essex Ins. Co. v Barillaro*, 2010 NY Slip Op 33111[U] [Sup Ct. Queens County 2010]; *Essex Ins. Co. v Bossart Bldrs.*, 2010 NY Slip Op 31142[U] [Sup Ct. Queens County 2010]; *but see Gabriele v Lyndhurst Residential Community*, 2008 WL 588543, 2008 NJ Super Unpub LEXIS 2665 [App Div], *certification denied* 195 NJ 524, 950 A2d 910 [2008]). Although the insureds assert that there is an ambiguity because the policy does not define the terms “contractor” and “subcontractor,” the Court finds no ambiguity. As with the interpretation of any contract, the unambiguous terms of an insurance policy must be accorded their plain and ordinary meaning (*e.g. Teichmann v Community Hosp. of W. Suffolk*, 87 NY2d 514, 640 NYS2d 472 [1996]).

Black's Law Dictionary defines "contractor," *inter alia*, as "[o]ne who contracts to do work or provide supplies for another"; "subcontractor" is defined as "[o]ne who is awarded a portion of an existing contract by a contractor" (Black's Law Dictionary [9th ed 2009]). It is alleged in the underlying complaint that at the time of his accident, Salina was employed by Frame to Finish, Inc., a subcontractor at the construction site. Even assuming, as the insureds now contend, that Frame to Finish, Inc. was hired not by either of them but by Silverlining Woodworking, Inc.—itself a subcontractor—the Court finds the terms "contractor" and "subcontractor" sufficiently definite and expansive to include a sub-subcontractor (*see U.S. Underwriters Ins. Co. v Beckford*, 1998 WL 23754, 1998 US Dist LEXIS 574 [ED NY 1998]). Nor, despite the insureds' vague claims to the contrary, does it appear that the plaintiff failed to timely disclaim coverage. As to the causes of action for contractual indemnification and breach of contract, section I (A), paragraph 2 (b) of the policy's Commercial General Liability Coverage and paragraph 5 of the policy's Combination General Endorsement expressly exclude coverage for liability assumed under a contract and for claims arising out of breach of contract (*see Preserver Ins. Co. v Ryba*, 10 NY3d 635, 862 NYS2d 820 [2008]); neither of the insureds even attempts to demonstrate the applicability of the "insured contract" exception to the exclusion for liability assumed under a contract. Accordingly, the plaintiff is entitled to the entry of judgment declaring that it is not obligated to defend or indemnify G-1 in the underlying action.

To the extent that the plaintiff, by way of this action, seeks declaratory relief relative to the other defendants, the Court notes that the plaintiff does not seek summary judgment as to those claims.

The Court directs that the claim as to which summary judgment was granted is hereby severed and that the parties' remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: January 26, 2012



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION