Hotels AB, LLC v Permasteelisa, CS
2013 NY Slip Op 32181(U)
September 11, 2013
Sup Ct, New York County
Docket Number: 114758/09
Judge: Paul Wooten

[* 1]

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

HOTELS AB, LLC and PAVARINI MCGOVERN, LLC,

Plaintiffs,

INDEX NO. 114758/09

-against-

MOTION SEQ. NO. 001

PERMASTEELISA, CS, ZURICH INSURANCE IRELAND LTD., and ZURICH AMERICAN INSURANCE COMPANY,

Defendants.

The following papers were read on this motion by plaintiffs for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ Yes ☒ No

This is a declaratory judgment action wherein plaintiffs seek a declaration that defendants are obligated to defend and indemnify plaintiffs in an underlying personal injury action pending in New York County Supreme Court entitled *Quinn v Hotels AB, LLC, Pavarini McGovern, LLC, et al*, Index No. 109733/08 (the Quinn Action). Plaintiffs also assert a cause of action for breach of contract, based on the alleged failure to procure insurance. Before the Court is a motion by plaintiffs, pursuant to CPLR 3212, for summary judgment on the complaint. Defendants are in opposition to the motion. Discovery in this matter is complete and the Note of Issue has been filed.

BACKGROUND

Pavarini McGovern LLC (Pavarini) was the general contractor on a hotel construction project at the Standard Hotel located at 844 Washington Street, New York, NY (the project). Hotels AB, LLC (Hotels) is the owner of the Standard Hotel, where the subject

construction took place. Pavarini and Hotels (collectively, plaintiffs) and Permasteelisa, CS (Permasteelisa) entered into a "Trade Contract" (Trade Contract), in which Permasteelisa agreed to act as trade contractor on the project and to purchase commercial general liability (CGL) insurance naming plaintiffs as additional insureds. Permasteelisa procured insurance, but not in the amount stated in the Trade Contract.

A worker John Quinn (Quinn) who was employed by Permasteelisa, was injured on the job site on May 19, 2008. On July 16, 2008, John Quinn and his wife Theresa Quinn commenced the Quinn action. The defendants in this action are not parties in the Quinn action. Subsequently, the plaintiffs brought the herein action because defendants Zurich Insurance Ireland Ltd. (Zurich Ireland) and Zurich American Insurance Company (Zurich) allegedly refused to provide plaintiffs with defense and indemnity in the Quinn action. According to plaintiffs, discovery in this action revealed that Zurich Ireland had not issued any policy, and the case was discontinued without prejudice as against that insurer. Plaintiffs seek coverage under the CGL policy that Zurich issued to Permasteelisa as the named insured on April 1, 2008 (the Policy). Both sides agree that plaintiffs are additional insureds under the Policy. The question before the Court is whether the Policy obligates Zurich to defend and indemnify plaintiffs in the Quinn action.

DISCUSSION

An insurance policy may require the insurer to defend the insured in an underlying legal proceeding, even though the insurer may not be required to pay any damages once the litigation has concluded (*BP A.C. Corp. v One Beacon Ins. Group,* 33 AD3d 116, 121 [1st Dept 2006], *mod* 8 NY3d 708 [2007]). The insurer's duty to defend is greater than its duty to indemnify (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]). The duty to defend is not negated by an ultimate determination in the underlying action that the insured is not liable (*see Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 670 [1981]). The duty to

defend is "exceedingly broad" and an insurer will be obligated to provide a defense whenever the allegations of the underlying claim "suggest . . . a reasonable possibility" that the insured may be held liable for some act or omission covered by the policy (*Automobile Ins.*, 7 NY3d at 137 [citation and quotation marks omitted]). The duty exists even if facts outside the underlying pleadings indicate that the claim may be meritless or not covered by the policy (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 66 [1991]), or if the pleadings contain debatable theories against the insured or include additional claims which fall outside the policy's general coverage or within its exclusionary clauses (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 444 [2002]).

In determining whether the insurer must defend, the court affords the underlying claim a liberal construction (*Ruder,* 52 NY2d at 670). "[T]he focus of the inquiry 'is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained'" (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010], quoting *Worth Constr. Co. v Admiral Ins. Co.*, 10 NY3d 411, 416 [2008]). A policy that is ambiguous as to whether the claims in question are covered will be construed against the insurer, and the insurer will have to defend (*Charles F. Evans Co., Inc. v Zurich Ins. Co.*, 95 NY2d 779, 780-781 [2000]).

The complaint in the Quinn action alleges negligence against the plaintiffs and contains no mention of Permasteelisa or the related company that employed Quinn (Notice of Motion, exhibit A). An accident report attached to defendants' opposition papers states that Quinn was an ironworker, and that he was moving trash when a steel channel fell on his left foot (*see* Pascoe Affirmation [Aff.], exhibit B). No more information is provided on the underlying personal injury action. According to the additional insured endorsement in the Policy, coverage applies to "bodily injury ... caused, in whole or in part, by:

1. Your acts or omissions; or

> 2. The acts or omissions of those acting on your behalf; and resulting directly from:
> "a. Your ongoing operations performed for the additional insured, which is the subject of the written contract or written agreement; or
> "b. 'Your work' completed as included the 'products-completed operations hazard,' performed for the additional insured, which is the subject of the written contract or written agreement" (Notice of motion, exhibit I).

In the Policy, "you" and "your" refer to the named insured, which is Permasteelisa (Notice of Motion, exhibit G, U-GL-1287-A CW at 1 of 16). "Your work" means work or operations performed by "you or on your behalf" (*id.* at 16 of 16).

In *Regal,* the court found that the named insured's insurer had to defend the additional insured in the underlying case, which was brought by the employee of the named insured. The named insured alleged that the additional insured was responsible for the item on which the employee slipped at the construction site. Nonetheless, the court found that the accident arose out of the named insured's operations, notwithstanding the additional insured's negligence (*Regal,* 15 NY3d at 38). The court found "a connection between the accident and [the named insured's] work, as the injury was sustained by [the named insured's] own employee while he supervised and gave instructions to a subcontractor regarding work to be performed" (*id.* at 39). It must also be noted that the named insured who employed the injured worker was not a party in the worker's case (*id.*). Permasteelisa is not a party in the Quinn action. That does not affect whether the Policy covers plaintiffs.

Where, as in the instant case, an employee of the named insured is injured while performing the named insured's work, there is a sufficient connection between the work and the injury to trigger the coverage for the additional insured (*see National Union Fire Ins. Co. of Pittsburgh, PA v Greenwich Ins. Co.*, 103 AD3d 473, 474 [1st Dept 2013]; *Admiral Ins. Co. v American Empire Surplus Lines Ins. Co.*, 96 AD3d 585, 588-589 [1st Dept 2012]; *W & W Glass Sys., Inc. v Admiral Ins. Co.*, 91 AD3d 530, 531 [1st Dept 2012]; *Hunter Roberts Constr. Group,*

LLC v Arch Ins. Co., 75 AD3d 404, 408 [1st Dept 2010]). The policies in *Regal*, *Hunter,* and *Admiral* covered injuries "arising out of [the named insured's] ongoing operations." The policies in *National Union* and *W& W* employed the phrase, "caused by," the same as in this case, instead of "arising out of." As used in insurance policies, the two phrases do not have significantly different meanings (*National Union,* 103 AD3d at 474, quoting *W & W,* 91 AD3d at 530).

Here, plaintiffs, as additional insureds, are covered in regard to bodily injury caused by Permasteelisa's acts or the acts of those acting on Permasteelisa's behalf and resulting from Permasteelisa's operations for plaintiffs. Quinn was on the site as an employee of a company related to Permasteelisa when he was injured. It is reasonable to assume that he was injured while engaged in operations related to his employment. There is nothing to suggest otherwise. Plaintiffs establish in their *prima facie* case that they are entitled to be defended by Zurich, as well as indemnified, if the Quinn action proves them liable for the accident.

In turning to the opposition, defendants cite to *Plaza Constr. Corp. v American Home Assur. Co.* (2009 NY Misc LEXIS 6700, NYLJ, Dec. 3, 2009 at 26, col 1 [Sup Ct, NY County 2009]) and *International Bus. Machs. v United States Fire Ins. Co.* (17 Misc 3d 1108[A], 2007 NY Slip Op 51871[U] [Sup Ct, NY County 2007]). The court in *Plaza* ruled that the insurer of the named insured was not obligated to insure the additional insured. The additional insured did not show that the named insured or persons acting on its behalf performed an act that caused the injuries, and the named insured could not be held liable simply because the injured worker was employed by the named insured and the accident happened in the course of doing work for the named insured (*Plaza,* 2009 NY Misc LEXIS 6700, *19-20). Defendants argue that it is not enough that Quinn was working for Permasteelisa's related company, and that there is no showing of any act that caused injuries. However, there is a distinction between this case and *Plaza*. In *Plaza,* the court in the underlying action had already determined that

another party, not the named insured, was responsible for the accident, and the *Plaza* court noted that the facts of the accident had been fully litigated by all affected parties (*id.* at *22). In this case, there has been no determination of liability, and nothing suggests that Zurich is not liable for the accident. Based on what is known about the Quinn action, Zurich is obligated to defend.

In *IBM*, the court determined that the named insured did not perform any work in the basement area of the building where the named insured's employee had his accident (*IBM,* 2007 NY Slip Op 51871[U], *7). Evidence indicated that the named insured's work had nothing to do with the unsafe condition that caused the accident, as the named insured's work took place on a different floor from where the accident happened (*id.* at *4-5). The fact that the injured person worked for the named insured was not enough to attribute his accident to his employer (*id.*). The *IBM* court made this last statement in the context of evidence showing that the named insured was not liable for the accident. In this case, as already stated, there is no evidence that Permasteelisa, the named insured, did not cause the accident.

Plaintiffs further argue for coverage on the basis that Zurich waived any defenses to coverage by failing to disclaim in a timely manner. On July 16, 2008, plaintiffs tendered the matter to Zurich. On July 31, 2008, Zurich responded, asking for more information to review the tender. Plaintiffs provided more information on September 12, 2008. Zurich made no response.

A disclaimer pursuant to Insurance Law § 3420(d) is unnecessary when a claim does not fall within the coverage terms of an insurance policy (*Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648 [2001]). But if the claim is covered, and the insurer finds other reasons allowable under the policy to deny coverage, it must do so in a timely fashion (*id.* at 648-649). By not issuing a timely disclaimer or not issuing one at all, the insurer waives its right to deny coverage (*Estee Lauder Inc. v OneBeacon Ins. Group, LLC*, 62 AD3d 33, 35 [1st Dept 2009]). Here, the Policy covered the claim, and Zurich's failure to disclaim means that it cannot raise

objections to the demand for coverage. Accordingly, Zurich is required to defend and, if necessary, indemnify.

However, Zurich raises an issue concerning another policy, the New Hampshire Policy (NH Policy) (Pascoe Aff., exhibit C). In the NH Policy, Pavarini is a named insured by endorsement and Hotels is an additional insured. Based on the "other insurance" clauses in the Policy and the NH Policy, Zurich argues that it and the other insurer share primary coverage for Hotels. However, despite the NH Policy being an attachment to defendants' papers, the court cannot make any determinations about that insurance, because the insurer is not party to this action (*BP A.C.*, 8 NY3d at 716; *McLean v 405 Webster Ave. Assoc.*,28 Misc 3d 1219[A], 2010 NY Slip Op 51396[U], *23 [Sup Ct, Kings County 2010], *affd* 98 AD3d 1090 [2d Dept 2012]; *City of New York v Continental Cas. Co.*, 2010 WL 149103, 2010 NY Misc LEXIS 1251, 2010 NY Slip Op 30025[U], *16 [Sup Ct, NY County 2010]).

Concerning plaintiffs' breach of contract claim, in Exhibit F to the Trade Contract, Permasteelisa promised to obtain CGL insurance for the additional insureds "with a combined single limit of at least $5,000,000 per occurrence and aggregate. The limit may be provided through a combination of primary and umbrella/excess liability policies" (Notice of motion, exhibit F, ¶ 2). Permasteelisa provided Pavarini with a certificate of insurance showing that Permasteelisa had purchased CGL insurance from Zurich in the amount of $2 million per occurrence, and umbrella coverage from Zurich Ireland in the amount of $5 million per occurrence. Later, Permasteelisa provided Pavarini with another certificate of insurance, indicating the same coverage from Zurich, and umbrella coverage in the amount of $15 million per occurrence from Zurich Ireland. Plaintiffs do not seek coverage under any insurance pertaining to these certificates. According to plaintiffs, policies pertaining to these certificates have not been produced and there are no such policies.

The Policy has a per occurrence limit of $3 million and a general aggregate limit of $10

million (Notice of motion, exhibit H), less than the per occurrence limit in the Trade Contract. Failure to obtain insurance in the full amount required by a contract to procure insurance constitutes a breach of that contract (*Nrecaj v Fisher Liberty Co.*, 282 AD2d 213, 214 [1st Dept 2001]). Accordingly, plaintiffs are granted summary judgment as to liability on their claim for failure to procure insurance.

CONCLUSION

It is accordingly,

ORDERED that plaintiffs' motion for summary judgment is granted to the extent that it is

ORDERED, ADJUDGED and DECLARED that defendant Zurich American Insurance Company is obligated to defend and indemnify plaintiffs Hotels AB, LLC and Pavarini McGovern, LLC in the underlying personal injury action against them entitled *John Quinn and Theresa Quinn v Hotels AB, LLC*, Supreme Court, New York County, index No. 109733/08; and it is further,

ORDERED that plaintiffs are awarded summary judgment as to liability against defendant Permasteelisa, CS on their claim against it for failure to procure insurance; and it is further,

ORDERED that plaintiffs are directed to serve a copy of this order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 9-11-13

PAUL WOOTEN J.S.C.

Check one: ■ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

ONTERED 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).