

Heuer v Alves Constr. Corp.

2013 NY Slip Op 32452(U)

October 4, 2013

Sup Ct, Suffolk County

Docket Number: 08-45125

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 12-20-12 (#008)
MOTION DATE 3-28-12 (#009)
ADJ. DATE 6-6-13
Mot. Seq. # 008 - MG
009 - XMD; CASEDISP

-----X
KENNETH HEUER and TERESA HEUER,

Plaintiffs,

FRANK S. VIGLIAROLO, ESQ.
Attorney for Plaintiffs
380 North Broadway, Suite 300
Jericho, New York 11753

- against -

ALVES CONSTRUCTION CORP.,
PERFECTION PLUS CONTRACTING, INC. and
ESSEX INSURANCE COMPANY,

SPEYER & PERLBERG, LLP
Attorney for Defendant Alves Construction
115 Broadhollow Road, Suite 250
Melville, New York 11747

Defendants.
-----X

ALVES CONSTRUCTION CORP.,

Third-Party Plaintiff,

FROMMER & CERRATO, LLP
Attorney for Defendant Perfection Plus
42 Nassau Boulevard, P.O. Box 8134
Garden City, New York 11530

- against -

GIBNEY DESIGN GROUP, INC. and RICHARD
W. GIBNEY, RLA, ISA,

CLAUSEN MILLER, P.C.
Attorney for Defendant Essex Insurance
One Chase Manhattan Plaza
New York, New York 10005

Third-Party Defendants.
-----X

L'ABBATE, BALKAN, COLAVITA &
CONTINI, L.L.P.
Attorney for Third-Party Defendant Gibney
Design Group
1001 Franklin Avenue, Room 300
Garden City, New York 11530


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Upon the following papers numbered 1 to 37 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; Notice of Cross Motion and supporting papers 22 - 28; Answering Affidavits and supporting papers 29 - 30; Replying Affidavits and supporting papers 31 - 33; Other Affidavit, 34 - 36; memorandum of law, 37; it is,

ORDERED that this motion by defendant Essex Insurance Company for, *inter alia*, summary judgment dismissing the complaint and all cross-claims as against it is granted; and it is

ORDERED that this cross-motion by plaintiffs for summary judgment in their favor is denied, as moot; and it is further

ADJUDGED AND DECLARED that defendant Essex Insurance Company is not obligated to pay the judgment rendered against Perfection Plus Contracting in the instant action, and that such declaration shall be a full and complete defense in any action brought against it by Perfection Plus Contracting or plaintiffs regarding defending or indemnifying Perfection Plus Contracting in the instant action.

On December 23, 2006, premises owned by Adam Heuer, which is located at 3 Pewter Place, Dix Hills, New York, suffered extensive water damage to the finished basement due to the alleged actions of defendants Alves Construction Corp. and Perfection Plus Contracting, Inc (hereinafter "Perfection"). Kenneth Heuer and Teresa Heuer, parents and natural guardians of Adam Heuer, were substituted as plaintiffs in this action. At the time of the loss, defendant Perfection was covered by a commercial general liability insurance policy issued by defendant Essex Insurance Company. Essex Insurance disclaimed coverage to Perfection for any claims or lawsuits arising out of the subject loss on the ground such damages were excluded under the policy. Plaintiffs obtained a default judgment against Perfection pursuant to an Order of this Court, dated October 4, 2011. An Order of this Court, dated August 30, 2012, granted plaintiffs motion for leave to amend their complaint to add Essex Insurance as a direct defendant. The complaint alleges that Essex Insurance issued a general commercial liability policy to Perfection on December 26, 2006, and that, pursuant to Insurance Law § 3420 (b), there exists a direct cause of action against it as insurer of Perfection for the amount of the judgment entered against the insured. Essex Insurance interposed a counterclaim seeking a declaration that it is not obligated to pay the judgment rendered against the policyholder in the instant action, and that such declaration shall be a full and complete defense in any action brought against it by the policyholder or plaintiffs regarding defending or indemnifying the policyholder in the instant action.

Essex Insurance now moves for summary judgment dismissing the complaint and all cross-claims against it on the ground that coverage to Perfection for the subject loss is excluded. It also seeks summary judgment in its favor on the counterclaim. In support of its motion, Essex Insurance submits, among other things, copies of the pleadings, affidavits of Teresa Heuer and Andy De Montepellier, and a copy of the general commercial liability policy it issued to Perfection.

Plaintiffs oppose the motion and cross-move for summary judgment in their favor against Essex Insurance, arguing that Perfection had a reasonable expectation that the policy would cover the subject loss, and that the subject policy does not exclude coverage for damages caused by the insured's own

negligence. Plaintiffs submit, among other things, a copy of an engineer's report regarding the basement water damage to the subject premises. Essex Insurance opposes plaintiffs' cross-motion, arguing that it has not made a *prima facie* showing of their entitlement to summary judgment.

Teresa Heuer states in her affidavit that in 2006, she and her husband decided to renovate the subject home and retained the services of Perfection and Alves Construction to perform the project. She states that Alves Construction was retained to install a raised patio in the rear of the home and to seal a window opening at ground level in the rear of the house. She states that Perfection was hired to build an extension on the house, to remove and reset gutters on the existing structure, and to replace the gutters at the roof line on the portion to be extended. Teresa Heuer further states that one of contractors installed a pipe to divert water from the roof and away from the house. She was informed that the pipe would prevent any accumulation of water against the home and the basement window. She states that she believes employees of Perfection removed that pipe so that they could work on the roof. She further states that heavy rains that occurred after the pipe was removed caused a flood in her basement.

The subject commercial liability insurance policy issued to Perfection by Essex Insurance contains a provision in a section entitled "Combination General Endorsement" stating, in relevant part, as follows:

10. This insurance does not apply to 'bodily injury', 'property damage', 'personal injury', 'advertising injury' or any injury, loss, or damages, including consequential injury, loss or damage, arising out of, caused by or contributed to:

k. resulting from water or moisture, and/or due to discharge, leakage, seepage, backup or overflow from sewers, mains, drains, pipes, plumbing, heating, refrigeration, air conditioning, standpipes, appliances, sprinkler systems, or ditches, streams, levees, or rain or snow admitted to the building interior

Under the section entitled "Combination Contractors Endorsement," the policy states, in relevant part, as follows:

3. This insurance does not apply to 'bodily injury', 'property damage', 'personal injury', 'advertising injury', or any injury, loss or damages, including consequential injury, loss or damage, arising directly or indirectly out of, caused by or contributed to, or resulting from

c. any invasion or existence of water or moisture, including but not limited to accidental discharge and/or leaks, and/or mold, mildew, bio-organic growth, microorganisms, biological organisms, bioaerosols, organic contaminants, and/or including but not limited to, rot and deterioration of property; and/or

d. related to ‘your work’ below ground surface unless, prior to your commencing work, you have either contacted the appropriate local underground locating service, or verified such contact has been made by another with that responsibility, and said service has responded and marked, including but not limited to, all underground lines, pipes, cables, utilities , prior to commencement of ‘your work’; and/or

e. run off, diversion and/or ponding of water, inadequate drainage, backup and/or overflow, including but not limited to, water, sewer, drains, ditches, pipes, site preparation.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court’s function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (see *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O’Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Generally, it is the insured’s burden to establish coverage and the insurer’s burden to prove the applicability of an exclusion (see *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 746 NYS2d 622 [2002]; *Rhodes v Liberty Mutual Ins. Co.*, 67 AD3d 881, 892 NYS2d 403 [2d Dept 2009]; *Barkan v New York Schools Ins. Reciprocal*, 65 AD3d 1061, 886 NYS2d 414 [2d Dept 2009]). In order to establish an exclusion, the insurer must demonstrate that the exclusion relied upon is “stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case” (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652, 593 NYS2d 966 [1993]; see *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 486 NYS2d 873 [1984]; *Guishard v General Security Ins. Co.*, 32 AD3d 528, 820 NYS2d 645 [2d Dept 2006]). To be enforceable, any exclusions from coverage must be clear and specific and any ambiguities will be construed most strongly against the insurer (see *Matter of New York Cent. Mut. Fire Ins. Co. v Ward*, 38 AD3d 898, 833 NYS2d 182 [2d Dept 2007]; *Guachichulca v Laszlo N. Tauber & Assoc. LLC*, 37 AD3d 760, 831 NYS2d 234 [2d Dept 2007]).


Here, it is undisputed that the loss occurred due to heavy rains causing water to flood the basement of the premises. The commercial general liability policy that Essex Insurance issued to Perfection clearly states that it does not provide coverage for “run off, diversion and/or ponding of water, inadequate drainage, backup and/or overflow” or “resulting from water or moisture, and/or due to discharge, leakage, seepage, backup or overflow from sewers, mains, drains, pipes . . . or rain or snow admitted to the building interior.” There is no ambiguity in the relevant terms of the subject insurance policy, which states that coverage under the insurance does not apply to damages incurred arising from

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rainwater overflowing into plaintiffs' basement (see *Maurice Goldman & Sons v Hanover Ins. Co.*, 80 NY2d 986, 592 NYS2d 645 [1992]; *WestCom Corp. v Greater N.Y. Mut. Ins. Co.*, 41 AD3d 224, 839 NYS2d 19 [1st Dept 2007]; *Morales v Allcity Ins. Co.*, 275 AD2d 736, 713 NYS2d 227 [2d Dept 2000]).

Accordingly, Essex Insurance Company's motion for summary judgment is granted. Having established its entitlement to summary judgment in its favor, Essex Insurance is entitled to a judgment declaring that it is not obligated to pay the judgment rendered against Perfection in the instant action, and that such declaration shall be a full and complete defense in any action brought against it by Perfection or plaintiffs regarding defending or indemnifying Perfection in the instant action. Finally, as Essex Insurance's motion for summary judgment is granted, plaintiffs' cross-motion for summary judgment in their favor is denied, as moot.

Dated: October 4, 2013



Hon. Joseph Farneti
Acting Justice Supreme Court

___ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION