

City of New York v National Cas. Co.

2014 NY Slip Op 31189(U)

May 2, 2014

Supreme Court, New York County

Docket Number: 451489/2012

Judge: Margaret A. Chan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. Margaret A. Chan
Justice

**PART 52
DECISION AND ORDER**

THE CITY OF NEW YORK ,
Plaintiff,

Index # 451489/2012

- against -

NATIONAL CASUALTY COMPANY,
Defendant.

In this insurance action, the City of New York's (the City) partial summary judgment motion seeks a declaration that defendant National Casualty Company is obligated to defend it, as an additional insured, in three separate underlying personal injury actions in Kings County Supreme Court: (1) *Dianna Lindsey v City of New York, et. al.*, Index 1465/11; (2) *James Gimblet v City of New York, et. al.*, Index 16124/11; and (3) *Ana Lopez v City of New York, et. al.*, Index 20438/11. National Casualty Company cross-moved for partial summary judgment and a declaration that it had no duty to defend the City of New York as an additional insured in the three aforementioned tort actions in Kings County Supreme Court.

Facts

New York City Economic Development Corporation (NYCEDC) entered into a contract with Trocom Construction Co. (Trocom) in July 2008 in connection with the reconstruction of the Flatbush Avenue streetscape in Brooklyn, New York. In August, 2008 NYCDEC and Trocom entered into another contract in connection with the reconstruction of Fulton Mall streetscape in Brooklyn, New York. Each contract required Trocom to procure a commercial general liability insurance policy naming the City and NYCEDC as additional insureds. This, Trocom did.

On or about August 31, 2010, Dianna Lindsey allegedly sustained injuries when she tripped and fell on a raised, broken, cracked and/or uneven section of the crosswalk in the intersection of Fulton and Smith Streets where Trocom had a permit to perform work as part of the Fulton Street reconstruction. Lindsey filed suit against the City, among other defendants. The City received the summons and complaint on January 25, 2011. By letter dated March 8, 2011, the City tendered its defense to National Casualty Company (National) (d/b/a Scottsdale Insurance Company). National did not respond to the City's letter or disclaim coverage; it just did not defend the City in the underlying *Lindsey* action.

On or about October 16, 2010, James Gimlet allegedly sustained injuries when he tripped and fell on uneven, broken, and/or cracked crosswalk containing a pothole with differences of elevation on the crosswalk in the intersection of Flatbush and Myrtle Avenues where Trocom had a permit to perform work as part of the Flatbush Avenue reconstruction. Gimlet filed suit against the City, among other defendants. A notice of claim was served on the City on January 26, 2011. A supplemental summons and third amended complaint was served on the City on October 7, 2011. By letter dated October 31, 2011, the City tendered its defense to National, which National did not undertake. The City defended itself in the *Gimlet* action until May 16, 2013, when National, acting on behalf of Trocom and the City, settled the matter.

On or about December 11, 2010, Ana Lopez allegedly sustained injuries when she tripped and fell on a broken, uneven, depressed trap-like condition on the sidewalk in front of 505 Fulton Street in the area where Trocom had a permit to perform work as part of the Fulton Street reconstruction. Lopez filed suit against the City, among other defendants. A notice of claim was served on the City on January 7, 2011. By letter dated February 15, 2011, and again on March 3, 2011, the City tendered its defense to National, which did not respond to the City and did not provide a defense on its behalf. The summons and complaint were served on the City on September 16, 2011. By letter dated October 20, 2011, the City tendered its defense to National. On March 12, 2012, National responded to the City claiming that it did not have sufficient information to accept or deny the tender. National has not defended the City or denied the tender to date in the *Lopez* action.

Discussion

Generally, an insurer's duty to defend is "exceedingly broad" and is triggered when any of the liberally construed allegations within the four corners of a complaint fall within the coverage of an insurance policy (*Regal Const. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 37 [2010]; see *National Union Fire Ins. Co. of Pittsburgh, PA v Greenwich Ins. Co.*, 103 AD3d 473, 473-74 [1st Dept 2013]). An insurer has the duty to defend whenever the complaint suggests the possibility of recovery (see *Regal Const. Corp.*, at 37). Summarily, the relevant allegations in the four corners of the underlying complaints as against the City are that plaintiff was caused to trip and fall due to the negligence of the City which owned, and had the duty to maintain, repair and control the sidewalk that was raised, depressed, uneven, cracked, worn, holey and broken; and the City had contracted with Trocom to perform repairs, renovations, excavations, and maintenance at the site of the respective accident sites (see Ash Aff in Support of Pltf's Motion, Exh M - *Lindsey* complaint, ¶¶ 15-20, 32; Exh Q - *Gimlet* complaint ¶¶ 17-25, 28-37; Exh Y - *Lopez* complaint ¶¶ 16-18, 45-47, 57-60, 67).

National argues that it need not defend the City because the contracts are between Trocom and NYCEDC; the City has not shown that it qualifies for added insured status; the endorsement page naming the City as an added insured does not confer that status to the City; and that the City's motion is premature because the City did not furnish the documents it requested to assess whether National should provide coverage. In so arguing, National posits that it is entitled to declaratory relief or dismissal of the instant complaint. National's argument of non-coverage takes itself out of the general legal precepts of an insurer's duty to defend or to provide a timely denial.

The City points out that the Trocom policy at National, under “Additional Insured - Owners, Lessees Or Contractors - Completed Operations” covers “any person or organization that the insured has agreed and/or is required by contract to name as an additional insured, per schedule on file with the company” (City’s Motion, Ash Aff, Exh H, p 29). Under section 1.8.2 entitled “Commercial General Liability” of the contract between NYCEDC and Trocom, the contractor was required to provide coverage for NYCEDC and the City (*see* City’s Motion, Ash Aff, Exh C p 11 and Exh F, p14). Thus, the question of whether the City was an additional insured under Trocom’s commercial general liability insurance policy is a non-issue (*see Zurich American Ins. Co. v Lonero Transit, Inc.*, 115 AD3d 532, 532 [1st Dept 2014]). The three underlying personal injury actions against the City, among other defendants, all alleged the respective plaintiffs’ injuries arose out of the negligence of the City, on the work Trocom was performing, thus triggering National’s obligation to defend the City as an additional insured under Trocom’s insurance policy (*see* City’s Motion, Ash Aff, Exh H, p 9).

Aside from the above-stated evidence, the City also submitted a Certificate of Liability Insurance, which the City was one of the few entities specified as “additional insureds as per written contract” (*see* City’s Motion, Ash Aff, Exh I). However, National’s view is that these certificates/endorsements are not worth the paper they were written on. To support its claim that the City is not additional insured, National provides an exhibit as proof that the City is not qualified (*see* Odelson Aff in Support of Cross-Motion, Exh D). However, National did not refer to the specific parts of this unpaginated 75 or more sheets of paper making up this exhibit. This exhibit also noted that some notes and typing may not appear on the policy received by the insured. Therefore, this exhibit is not the ultimate insurance policy to which both National and Trocom agreed. Much like National’s argument that the certificate of insurance does not indicate an intent to confer coverage, neither does the exhibit it portends to show that negates coverage to the City. As such, National failed to present a *prima facie* case entitling it to partial summary judgment or raise an issue of fact regarding its obligation to defend the City.

Further, National waived its defenses as to the *Lindsey* and *Gimlet* matters, as it did not respond to the City’s tender. As to the *Lopez* matter, National claims it is premature as it did not receive sufficient documents. Without going into whether it is premature, the City’s motion for a declaration that National is obligated to defend the three underlying personal injury actions is granted as each of the three complaints contained allegations that obligates National to defend the City under the insurance policy.

As National failed to fulfill its obligation, the City may recover the expenses it reasonably incurred in its defense of the three underlying actions (*see Sucrest Corp. v Fisher Governor Co.*, 83 Misc2d 394, 407 [Sup Ct, NY Cty 1975], *aff’d* 56 AD2d 564 [1st Dept 1977]). When the issue becomes ripe, as the *Gimlet* action is since it settled, a determination of the amount to be reimbursed to the City may be assigned to a court referee upon the application of any party.

Conclusion

For the foregoing reasons, it is hereby

ADJUDGED AND DECLARED that National Casualty Company is obligated defend the City of New York as an added insured in (1) *Dianna Lindsey v City of New York, et. al.*, Index 1465/11; (2) *James Gimblet v City of New York, et. al.*, Index 16124/11; and (3) *Ana Lopez v City of New York, et. al.*, Index 20438/11; and it is further

ORDERED that National Casualty Company's cross-motion for partial summary judgment dismissing the complaint against it is denied; and it is further

ORDERED that a court referee shall determine the amount due the City of New York payable by National Casualty Company in the defense of the above three underlying personal injury actions in Supreme Court, Kings County.

This constitutes the decision and order of the court.

Dated: May 2, 2014



Margaret A. Chan, J.S.C.