SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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CONTINENTAL INSURANCE COMPANY,

Plaintiff,

-against-

Index No.158395/2013
Subm. Date: 4/26/2014
Motion Seq.:001
DECISION AND ORDER

GREENWICH INSURANCE COMPANY and LIBERTY CONTRACTING CORP.,

Defendants.

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Ellen M.Coin, A.S.C.J.:

In this declaratory judgment action, defendant Greenwich Insurance Company (Greenwich) moves, pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (7), to dismiss the complaint on the ground that plaintiff Continental Insurance Company's (Continental) subrogor, Americon Contracting Corp. (Americon), is not entitled to coverage, either as an additional insured or for contractual liability, under the subject Greenwich policy. Continental cross-moves, pursuant to CPLR 3212 and 3025 (a).

Background

In connection with an underlying personal injury lawsuit against Americon, Continental commenced this action, seeking a declaration that Americon is entitled to both additional insured and contractual liability coverage from Greenwich, the insurer for defendant Liberty Contracting Corp. (Liberty). This claim is made pursuant to the Greenwich insurance policy issued to Liberty, bearing policy number ESG 0023401-04, for the period of

June 20, 2011 through June 20, 2012 (the Policy).

In the underlying lawsuit, *Juan Mendez v Bank of America, N.A.*, pending in the New York State Supreme Court, Index No. 152189/2012, it is alleged that on March 21, 2012, Juan Mendez, an employee of Liberty, was injured working on a construction project. Americon, a defendant in that lawsuit, was the general contractor on that project, and Liberty was a subcontractor. Americon and Liberty had a contract, pursuant to which Liberty was to perform work for Americon, and was to procure insurance on behalf of Americon. This agreement is memorialized in a March 28, 2012 purchase order (the Purchase Order), signed by Liberty on April 9, 2012.

In this action, Continental's complaint sets forth three causes of action. The first alleges that Americon was an additional insured on the Policy, and is, therefore, entitled to defense and indemnification from Greenwich. The second cause of action likewise seeks defense and indemnification from Greenwich on a theory of contractual indemnification. The third cause of action alleges a failure to procure insurance as against Liberty. On June 20, 2012, Americon commenced a third-party action against Liberty, seeking common-law and contractual indemnity for any amounts that Americon is found liable to pay in connection with the underlying lawsuit.

On its motion, Greenwich argues that Americon does not qualify as an additional insured on the policy. This is so, according to Greenwich, because pursuant to the declarations page of the Policy, only Liberty qualifies as the named insured on the Greenwich Policy, and the policy has no endorsements or provisions amending the definition of named insured or insured to include Americon. Moreover, Greenwich argues, although the policy contains several additional insured endorsements, they each state that additional insurance will be provided where the named insured, Liberty, agreed in a contract to provide such coverage.

The additional insured endorsements each provide:

> "ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU
> A. Section II - Who Is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for 'bodily injury', 'property damage' or 'personal and advertising injury' caused, in whole or in part, by . . . ."

(Affidavit of Michael Barnaba, dated December 5, 2013, Exhibit B, CG 20330704).

* * *

> "ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - SCHEDULED PERSON OR ORGANIZATION
> This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Additional Insured Person(s) Or Organization(s)	Location(s) of Covered Operations
AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU	

A. Section II - Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for 'bodily injury,' 'property damage' or 'personal and advertising injury' caused, in whole or in part, by . . . ."

(*id.*).

* * *

"ADDITIONAL INSURED - DESIGNATED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
SCHEDULE
Name of Additional Insured Person(s) Or Organization(s)
AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU . . . "

(*id.*).

Thus, Greenwich argues, the additional insured endorsements contained in the Greenwich policy require additional insured coverage to be provided only when the named insured, here Liberty, agreed to procure such coverage in an agreement, and that the only "agreement" here was the Purchase Order, which was entered into after the alleged injury. The injury occurred on

March 21, 2012, and the Purchase Order was dated March 28, 2012, and was executed by Liberty on April 9, 2012.

Greenwich argues further that Continental's complaint must be dismissed, because neither Continental nor Americon can commence a declaratory judgment action against Greenwich prior to the issuance of a judgment against Americon.[1]

In opposition, Continental argues that although the Purchase Order is dated March 28, 2012, and was signed by Liberty's president, Frank Cali, on April 9, 2012, it "memorializes a contract and understanding between Liberty and Americon that pre-dated the alleged March 21, 2012 accident."

Continental offers the affidavit of Richard Cucci (Cucci), who describes himself as a principal at Americon, and avers that "Americon retained Liberty as a subcontractor to perform demolition services. As part of the general contracting requirements, Liberty was to obtain coverage for Americon, the general contractor, under its general liability policy, which in this case, was Greenwich" (Affidavit of Richard Cucci, dated January 10, 2014, ¶ 3, Exhibit E to Affirmation of Dean J. Vigliano). Cucci states that this oral agreement "between

[1] This argument is misplaced, because pursuant to Insurance Law 3420(a)(2), it is the injured party who must obtain and enter a judgment against the insured tortfeasor, before it "steps into the shoes of the tortfeasor and can assert any right of the tortfeasor-insured against the insurance company" (*see Lang v Hanover Ins. Co.*, 3 NY3d 350, 355 [2004]). Thus, it is the injured party, a non-party to the policy, who is the subject of this statute, and not the tortfeasor's insurer, who seeks a declaratory judgment, as against another insurer, concerning its rights as a party to the policy (*Lang*, 3 NY3d at 353).

Americon and Liberty was formed on or before February 27, 2012, and work was begun on Liberty's portion of the project on February 27, 2012" (id., ¶ 4) and that "as part of the contract, Liberty agreed to procure additional insurance coverage and contractual indemnification for the benefit of Americon for liabilities" arising out of this work (*id.*, ¶ 5).

Cucci further avers that Americon has had business dealings with Liberty for approximately 15 years, and "in accord" with this "past course of business dealings," Americon understood that it would have coverage under any policies issued to Liberty (*id.*, ¶ 9).

Furthermore, Continental offers a certificate of insurance demonstrating that Americon is a certificate holder to a policy of insurance issued by Greenwich to Liberty. The certificate is dated February 17, 2012, and identifies Liberty as the insured, Americon as the certificate holder, and Greenwich as the insurer. The policy period is identified as June 20, 2011 to June 20, 2012 (Barnaba aff., exhibit C, bates stamp no. 1303900022).

On its cross-motion, Continental seeks, pursuant to CPLR 3212, a declaration that it is entitled to defense and indemnification from Greenwich under the Policy, and argues that the Purchase Order between Liberty and Americon entitles Continental to that coverage.

The court grants Greenwich's motion to dismiss to the extent of dismissing the second cause of action, which seeks contractual indemnification, and denies the motion with respect to the first cause of action. The court denies Continental's cross-motion. There is no submission from Liberty, or any party, with respect to the third cause of action.

Discussion

On a motion to dismiss a claim, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action, "the pleading is to be afforded a liberal construction," the court accepts "the facts as alleged in the complaint as true," and the plaintiffs are accorded "the benefit of every possible favorable inference. . ." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]).

In addressing a motion under CPLR 3211 (a) (7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one'" (*Leon*, 84 NY2d at 88 [citations omitted]).

In order to succeed on a 3211 (a) (1) motion, "the moving party must show that the documentary evidence conclusively refutes plaintiff's . . . allegations" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005][citations omitted]).

In order to establish a breach of contract claim, a plaintiff must establish: (1) the existence of a contract between the plaintiff and defendant; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damages resulting from the breach (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Plaintiff must identify the provisions of the contract that the defendant is alleged to have breached (*see Maldonado v Olympia Mech. Piping & Heating Corp.*, 8 AD3d 348, 350 [2d Dept 2004]).

In its complaint, Continental alleges: "[o]n or about March 2012, plaintiff's named insured Americon entered into a contract with defendant Liberty which was later executed as a purchase order by both Americon and Liberty . . . the contract further obligated Liberty to have plaintiff's insured, Americon included as an additional insured under general liability policy to be purchased by Liberty to protect the plaintiff's insured, Americon" (Complaint, ¶¶ 6, 17).

On its motion, Greenwich argues that Continental is unable to allege a breach of contract claim, because it fails to allege the first element: the existence of any contract or agreement between Liberty and Americon, requiring that Greenwich provide coverage for Americon as an additional insured on the date of the accident.

On this point, Greenwich argues that: the policy lists only Liberty as the named insured; there are no endorsements or provisions adding Americon as an additional insured; and the conditions necessary to add Americon as an insured pursuant to the additional insured endorsements have not been met, i.e., absence of a contract or agreement in writing, or verbal, in place on the date of the accident. Thus, neither Continental nor Americon qualifies as named insured or additional insured on the subject policy.

Specifically, in its motion papers, Greenwich lumps together the three additional insured endorsements to argue that they collectively require an agreement. Greenwich does not parse the language in these endorsements to argue that the agreement had to be in writing. Instead, Greenwich argues: "in each and every one of the Additional Insured Endorsements, Additional Insured coverage will only be provided where the Named Insured (here, Liberty) agreed in a contract or agreement to procure such coverage" (Memorandum of Law in Support of Motion to Dismiss at 8).

Greenwich argues, therefore, that even if an oral agreement were permitted under the Policy, Continental's allegation of an oral agreement is conclusory. On this point, Greenwich argues: the February 17, 2012 certificate of insurance is not proof of Greenwich's coverage of Americon, that Cucci's affidavit is

conclusory, and that the Purchase Order does not expressly incorporate the terms of any oral agreement between Liberty and Continental. Moreover, Greenwich argues that the lack of a paper trail, emails or correspondence, undermines Continental's allegations of the existence of that oral agreement.

According to the Policy's additional insured endorsements, as a condition precedent to coverage for Americon as an additional insured, Liberty must have entered into an agreement with Americon, which required Liberty to procure such coverage for Americon. One of the three additional insured endorsements that are addressed in the motion papers includes the word "writing." It states: "Who is an insured is amended to include as an additional insured any person or organization for whom [Liberty is] performing operations when [Liberty] and such person or organization have agreed in writing in a contract or agreement that the such person or organization be added as an additional insured on [Liberty's] policy." (Barnaba Aff., Exh. B at CG 20330704).

However, the other two additional insured endorsements addressed by the parties on this motion, do not expressly require such agreement to be in writing, in order to entitle Americon to additional insured status. The other two additional insured endorsements ("Additional Insured - Designated Person or Organization" and "Additional Insured - Owners, Lessees or

Contractors - Scheduled Person or Organization") state "who is an insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule . . . ." (*id.* at CG 20100704). The schedule affords persons and organizations immediate status as additional insureds when it is "required in construction agreement with [Liberty]" (*id.*).

"Where the parties dispute the meaning of particular contract clauses, the task of the court is to determine whether such clauses are ambiguous when 'read in the context of the entire agreement.' Accordingly, the intention of the parties to a contract must be ascertained not from one provision but from the entire instrument" *(Richard Feiner & Co., Inc. v Paramount Pictures Corp.*, 95 AD3d 232, 237-238 [1st Dept 2012][citations omitted]).

The parties before the court do not dispute the meaning of the additional insured endorsements. As stated above, Greenwich lumps the three endorsements together to argue that additional insured coverage will be provided when it is set forth in an agreement or contract. Likewise, in its reply, rather than arguing that any oral agreement cannot satisfy the requirement under the endorsement that there be a written agreement, Greenwich argues that Continental's "bare allegations" of an oral agreement fail to establish the existence of such agreement, and further, fail to establish that even if there was an oral

agreement between the parties for work on the project, the agreement did not "contain an additional insurance procurement requirement" (memorandum of law in further support of defendant Greenwich's motion to dismiss at 3). Continental also argues that only one endorsement requires a writing, while the other two simply require an agreement, and therefore the alleged oral agreement satisfies the requirements of the Policy's endorsements.

According to the language of the endorsements, and consistent with the parties' submissions, the court finds that either a written or oral agreement would suffice to provide such coverage in this instance, provided it is in place on the date of the accident. Even if the court were to find that the Policy language creates an ambiguity as to whether the agreement providing additional insured coverage must be in writing, according to longstanding precedent such ambiguities are resolved against the insurer, as drafter of the policy (*see Greaves v Public Serv. Mut. Ins. Co.*, 5 NY2d 120, 125 [1959]). Furthermore, "[c]ourts are obliged to interpret a contract so as to give meaning to all of its terms . . . it should be interpreted to give effect to the parties' reasonable expectations" (*Mionis v Bank Julius Bear & Co.*, 301 AD2d 104, 109 [1st Dept 2002]). Thus, even based upon this principle, the court finds that an oral agreement is sufficient.

Therefore, because in its complaint Continental alleges the existence of such an oral agreement providing for additional insured coverage, which predates the accident and was memorialized by the March 28, 2012 Purchase Order, the Court finds that Continental has alleged the existence of a contract, the first element, on its breach of contract cause of action.

In opposition to the motion, Continental further establishes its allegation of an oral agreement by offering Cucci's affidavit, the certificate of insurance and the fact that work had commenced on the project. Although the certificate of insurance, dated February 17, 2012, which identifies Liberty as the policyholder to the Greenwich policy, with a period of June 20, 2011 to June 20, 2012, and Americon as a certificate holder, does not establish the existence of coverage (*see Insurance Corp. of New York v U.S. Underwriters Ins. Co.*, 11 AD3d 235, 236 [1st Dept 2004] ["the certificate of insurance naming Ginsburg as an additional insured is not, by itself, sufficient to raise a factual issue as to the existence of coverage"), this certificate, along with the commencement of work at the site in February 2012, raise enough questions about Greenwich's coverage of Americon to place the allegations in the complaint beyond mere conclusions.

Likewise, Cucci, in his affidavit, avers that as part of the February 27, 2012 "contract" between Liberty and Americon,

Liberty agreed to procure additional insured coverage on behalf of Americon for "liabilities arising out of Liberty's work for Americon" (Cucci Aff., ¶¶ 4-5).

The Court, therefore, finds that the documents do not definitively dispose of Continental's allegations, and that Continental has stated a cause of action for additional insured coverage.

Continental's second cause of action for contractual indemnification fails. Continental alleges, and argues in its opposition papers, that the "Liberty contract is an 'insured contract'" pursuant to the Policy, and, therefore, affords Americon the right to indemnification from Liberty.

An "insured contract" is defined in the Policy under paragraph 9 of section V - "Definitions." Continental argues that paragraph 9 (f) is applicable hereto. The language of ¶ 9 (f) is as follows:

> "That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement"

(Barnaba Aff., Exhibit A, ¶ 9 [f]).

Yet, Greenwich points out in its motion papers that the Policy contains an exclusion for contractual liability. This

exclusion does not apply where there is an "executed agreement." The relevant Policy language is as follows:

> "Exclusions
> This insurance does not apply to: . . . b. Contractual Liability
> '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.
> This exclusion does not apply to liability for damages:
> . . . (2) Assumed in a contract or agreement that is an 'insured contract', provided the 'bodily injury' or 'property damage' occurs subsequent to the execution of the contract or agreement. . ."

(Barnaba Aff., Exhibit A, CG00011204 at 2).

Because the Purchase Order was executed subsequent to the subject accident, there is no execution of a contract or agreement prior to the accident, and thus the exclusion does apply. For this reason, the Court grants Greenwich's motion as to the second cause of action.

Additionally, the Court denies Continental's cross-motion pursuant to CPLR 3212 for a declaration that Greenwich owes a duty to defend Americon in the underlying lawsuit. The court denies this motion in light of the fact that Greenwich has not filed an answer in this matter; thus, issue has not been joined, and a motion for summary judgment may not be made before joinder of issue (CPLR 3212 [a]); *City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]).

Finally, Continental cross-moves to amend its complaint, pursuant to CPLR 3025(b). According to the notice of cross-

motion, Continental seeks an order pursuant CPLR 3025 (b) "for a declaration that defendant [Greenwich] owes a duty to defend non-party [Americon] in the underlying case . . . and to reimburse Continental for past costs incurred in defending Americon . . ." A request for this relief is already set forth in the original complaint filed in this action. Further, Continental fails to annex a proposed amended complaint to its cross-motion, and Continental does not address this issue anywhere else in its papers, so it is not clear to the Court if Continental is seeking additional and distinct relief. The Court, therefore, denies this motion to amend (*see e.g., Codrington v Wendell Terrace Owners Corp.*, 118 AD3d 844 [2d Dept 2014]).

Accordingly, it is hereby

ORDERED that defendant Greenwich Insurance Company's motion to dismiss is granted to the extent that the second cause of action is dismissed; and it is further

ORDERED that plaintiff Continental Insurance Company's cross-motion is denied; and it is further

ORDERED that the action is continued against defendant Greenwich Insurance Company as to the first cause of action and against defendant Liberty Contracting Corp. with respect to the third cause of action.

Dated: August 7, 2014

ENTER:

Ellen M. Coin, A.J.S.C.