Bovis Lend Lease LMB, Inc. v Aon Risk Servs. Northeast, Inc.
2014 NY Slip Op 32514(U)
September 26, 2014
Supreme Court, New York County
Docket Number: 153865/13
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

BOVIS LEND LEASE LMB, INC., now known as LEND LEASE (US) CONSTRUCTION LMB INC.,

Plaintiff,

- v -

AON RISK SERVICES NORTHEAST, INC., f/k/a AON RISK SERVICES OF NEW YORK, INC.,

Defendant.

Index No.: 153865/13

Motion Date: 01/17/14

Motion Seq. No.: 01

The following papers, numbered 1 to 4 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits	No(s).	1, 2
Answering Affidavits - Exhibits	No(s).	3, 4
Replying Affidavits - Exhibits	No(s).	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers,

In this case involving a dispute regarding insurance coverage for an accident which took place at a construction site, defendant Aon Risk Services Northeast, Inc., formerly known as Aon Risk Services of New York, Inc., moves, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint of Lend Lease (US) Construction LMB, Inc., formerly known as Bovis Lend Lease LMB, Inc.

Non parties WB IMCO Lexington Lessee, LLC and WB IMICO

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Lexington Fee, LLC (collectively known as "Extell"), retained plaintiff to serve as the construction manager for a building project known as "The Lucinda" complex, which is located at 1269 Lexington Avenue, New York, New York. As part of the construction agreement entered into with plaintiff, Extell agreed to obtain workers compensation and general liability insurance covering plaintiff.

Extell secured general liability coverage for the project through Liberty Mutual Fire Insurance Company (Liberty Mutual). Liberty Mutual issued the commercial general liability insurance policy, which was effective from May 15, 2007 to May 1, 2010, and covered the construction project with a per occurrence limit of two million dollars. Plaintiff was added as a named insured, and the policy includes an endorsement entitled "Wrap-Up Insurance Program-Amendment of Coverage," which requires Liberty Mutual to provide general liability insurance for plaintiff pursuant to the construction manager agreement between Extell and plaintiff. The "Wrap-Up" endorsement, which identifies defendant as the "Wrap-Up Administrator," provides that the policy shall apply to personal injuries directly from operations which are within the scope of the designated project and performed by a contractor directly or indirectly on behalf of the first named insured at a project site.

The policy is part of an "owner controlled insurance program" (OCIP). Defendant defines an OCIP as a "mechanism frequently employed in the construction industry to provide insurance coverage to the owner, general contractor/construction manager, and subcontractors at a project under a single comprehensive program. OCIP coverages commonly include workers' compensation, commercial general liability, and excess liability." An OCIP insurance manual (the OCIP Manual) was created for the project which designates defendant as the OCIP's administrator and plaintiff as the construction manager.

On June 14, 2010, Emanuel Nyarkoh a/k/a Edmond Asare (Asare) was allegedly injured while working at 115 East 85th Street, New York, New York. On June 17, 2010, Asare filed a complaint in the Supreme Court, Bronx County, against plaintiff, IMICO, Extell Development Company, Superior Scaffolding Services, and Schimenti Construction, Co.

On July 20, 2010, Theodoros Xenakis (Xenakis), plaintiff's director of claims, notified defendant by email of Asare's lawsuit and instructed defendant to assign defense counsel to represent plaintiff. Xenakis maintains that on August 5, 2010, he again provided notice of the underlying action to defendant via email. Xenakis alleges that defendant notified plaintiff that coverage did not apply to Asare's accident and that the

denial of coverage was because the policy expired before Asare's accident.

Plaintiff argues that, on February 27, 2012, it discovered that defendant had incorrectly concluded that Liberty Mutual's policy did not cover the claim made by Asare. Plaintiff contacted Liberty Mutual and requested that Liberty Mutual assume the defense and indemnity for Asare's lawsuit. Liberty Mutual denied plaintiff's request and disclaimed any obligation to defend or indemnify plaintiff under the policy due to late notice.

Plaintiff filed a declaratory judgment action seeking coverage against Liberty Mutual in the United States District Court, Southern District of New York. On April 29, 2013, plaintiff filed a complaint against defendant in this court, alleging causes of action for negligence and breach of contract.

Defendant argues that plaintiff's complaint must be dismissed, pursuant to CPLR 3211 (a) (1) and (a) (7). The Court of Appeals has held that a motion to dismiss "must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 (2002) (citations and internal quotations omitted). "[T]he pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as

true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Leon v Martinez, 84 NY2d 83, 87-88 (1994) (citations omitted). Pursuant to CPLR 3211 (a) (1), a motion to dismiss should be granted when the documentary evidence establishes a defense to the asserted claims. See Foster v Kovner, 44 AD3d 23, 28 (1st Dept 2007) (holding that in a motion made pursuant to CPLR 3211 (a) (1), "documentary evidence must resolve all factual issues and dispose of the plaintiff's claim as a matter of law").

The Appellate Division, First Department, has held that the elements for a cause of action for breach of contract are the existence of a contract, performance, a breach by defendant, and resulting damages. Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 (1st Dept 2010). Here, plaintiff alleges in its complaint that defendant failed to promptly communicate plaintiff's notice of occurrence and underlying suit to Liberty Mutual, breaching express and implied agreements. Plaintiff maintains that, as a direct and proximate result of the breach, Liberty Mutual disclaimed coverage to plaintiff, causing it to suffer damages.

Defendant contends that a breach of contract did not occur because plaintiff fails to allege the existence of a broker-client relationship between plaintiff and defendant; that

defendant owed its duty of care to the named insured on the policy and not to an additional insured, such as plaintiff; and that there was no privity of contract between plaintiff and defendant. See Arredondo v City of New York, 6 AD3d 328, 329 (1st Dept 2004) (holding that "the duty of an insurance broker runs to its customer and not to any additional insureds since there is no privity of contract for the imposition of liability"). Defendant also argues that the complaint, the construction management agreement, the policy, and the OCIP Manual, are clear that the owner was responsible for procuring an OCIP for the project and that defendant was hired to administer the OCIP, and not to provide notice of any incidents.

Here, based upon the allegations in the complaint as well as exhibits which plaintiff submits, the court declines to dismiss the cause of action for breach of contract. Plaintiff has successfully alleged, for the purposes of this motion, that based upon the policy and the OCIP Manual, a relation of contractual privity may have existed between itself and defendant. There are also questions of fact as to whether the policy and the OCIP Manual, which was created to elaborate on and define the relationship of the insured parties to the policy, created contractual privity between the parties.

The policy describes defendant as the "Wrap-Up Administrator" of the policy. However, there has yet to be an

exploration of the nature and scope of the OCIP Manual, in conjunction with the policy, in light of the obligations created on defendant's part, as "Wrap-Up Administrator" of the policy. The OCIP Manual twice identifies defendant as the party which claims are to made under the policy. For example, section 2 of the OCIP's manual, includes a section entitled "Claims Reporting," lists "General Liability c/o Aon Risk Services," and includes the contact information of defendant. Section 7 of the manual, which is entitled "Claim Procedures" includes a subsection entitled "Liability Claims." It states that the construction manager and/or subcontractors must "[i]mmediately send all subsequent inquiries or correspondence about an insured loss or claim, including a summons or other legal documents, to the OCIP Administrator and Construction Manager."

Section 7 of the manual also lists defendant as the "OCIP Administration Team" and includes the names of several employees of defendant who serve as the OCIP's program manager, administrator, vice-president for claims, and safety director. Therefore, there are sufficient allegations presented by plaintiff to claim, at this time, that defendant took upon itself the obligations to pass on notices of claim to Liberty.

The possibility of establishing privity of contract between plaintiff and defendant is also bolstered by the evidence of the course of dealing between the parties. Plaintiff submits an

affidavit from Xenakis which questions whether defendant had a duty to provide notice to Liberty Mutual, and whether a special relationship existed, through a course of dealing with defendant, in which defendant regularly had acted on behalf of plaintiff. In his affidavit, Xenakis includes a listing of sixteen other claims which he alleges plaintiff submitted to defendant for coverage under the Liberty Mutual policy. Xenakis states that plaintiff was "always under the impression that Aon was Lend Lease's representative in connection with the OCIP for all relevant purposes and that Aon was obligated to provide notice of claims falling under the OCIP to participating insurers, including Liberty." Xenakis states that defendant never objected in the past to forwarding notice of the claims to Liberty Mutual, never stated that it was plaintiff's responsibility to provide notice, and never refused to comply with plaintiff's instructions to forward claims to Liberty Mutual.

While defendant flatly states that the OCIP Manual has no bearing on a contractual relationship with plaintiff, a non client, plaintiff was involved in the negotiation of the OCIP, and there are allegations that plaintiff's suggestions became part of the OCIP Manual. There are also provisions directly addressed to contractors, such as plaintiff. For example, section D of the OCIP Manual recognizes that the insurance in the policy was to be obtained "for the benefit" of the subject

contractors. Therefore, because plaintiff has set forth allegations of a breach of contract and presents testimony and exhibits which question whether a breach of contract took place, the court declines to dismiss this cause of action.

With regard to plaintiff's cause of action for negligence, the Court of Appeals has held that "[i]t is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff. In the absence of duty, there is no breach and without a breach there is no liability." Pulka v Edelman, 40 NY2d 781, 782 (1976) (citations omitted). Here, based upon the four corners of the complaint, as well as the factual allegations presented, plaintiff sets forth a cause of action for negligence. Plaintiff argues that defendant owed it a duty to administer the terms of the policy, that defendant was to exercise a reasonable degree of care in communicating plaintiff's notice of the occurrence and underlying suit to Liberty Mutual, and that defendant owed plaintiff a reasonable degree of care in protecting and preserving plaintiff's entitlement to coverage under the policy.

Although defendant maintains that its duty was to its client Extell who secured general liability coverage for the project, and that there was no special relationship between itself and plaintiff which would suggest that it owed plaintiff a duty, it remains unclear from the record, as discussed above, what type of

relationship existed, and what duties, if any, were owed by defendant to plaintiff. See Abetta Boiler & Welding Serv., Inc. v American Intl. Specialty Line Ins. Co., 76 AD3d 412, 413 (1st Dept 2010) (holding that a special relationship existed that imposed a reasonable degree of care regarding notifying insurers of claims).

Accordingly, it is

ORDERED that defendant Aon Risk Services Northeast, Inc.'s, formerly known as Aon Risk Services of New York, Inc., motion to dismiss plaintiff Bovis Lend Lease LMB, Inc., now known as Lend Lease (US) Construction LMB, Inc.'s complaint, is denied; and it is further

ORDERED that a preliminary conference will be scheduled for all parties to appear on October 21, 2014, at 9:30 a.m., 71 Thomas Street, Room 103, New York, New York.

This is the decision and order of the court.

Dated: September 26, 2014 ENTER:

DEBRA A. JAMES J.S.C.