

<b>Astoria Energy II LLC v Navigators Ins. Co.</b>
2014 NY Slip Op 32834(U)
October 20, 2014
Supreme Court, New York County
Docket Number: 150322/13
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: Hon. NANCY M. BANNON  
Justice

PART 42

ASTORIA ENERGY II LLC, SNC-LAVALIN  
CONSTRUCTORS, INC. and LIBERTY  
MUTUAL FIRE INSURANCE COMPANY

INDEX NO. 150322/13

- v -

MOTION DATE 3/26/14

NAVIGATORS INSURANCE COMPANY

MOTION SEQ. NO. 001

The following papers were read on this motion for partial summary judgment pursuant to CPLR 3212.

Notice of Motion/ Order to Show Cause – Affirmation – Affidavit(s) – Exhibits – Memorandum of Law-----	No(s). <u>1</u>
Answering Affirmation(s) – Affidavit(s) – Exhibits -----	No(s). <u>2</u>
Replying Affirmation – Affidavit(s) – Exhibits -----	No(s). <u>3</u>

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

In this declaratory judgment action, the plaintiffs move for partial summary judgment in the form of a declaration that the defendant's policy provides primary coverage and that the defendant has a duty to defend the plaintiffs in the two underlying actions. The motion is granted.

Background

On March 5, 2010, plaintiff Astoria Energy II LLC (Astoria Energy) had contracted with EJ Electrical Installation Co. (EJ Electric) to perform electrical work on its power plant construction project at 1710 Steinway Street in Astoria. The contract required EJ Electric to procure a policy of commercial liability insurance naming Astoria Energy, Suez Energy Astoria II, LLC and SNC-Lavalin Constructors, Inc, as additional insured. The contract also provided that this "trade contractor" insurance, EJ Electric being the trade contractor, "shall be primary and non-contributing."

Plaintiff Liberty Mutual Fire Insurance Company (Liberty) had issued a commercial general liability policy to plaintiff, Astoria Energy for the period June 23, 2009 to December 31, 2011. Astoria Energy and SNC-Lavalin are both named insureds under the policy. The Liberty policy provides an excess insurance clause in section 4B stating: "This insurance is excess over: any other primary insurance available to you covering liability for damages arising out of the premises or operations... for which you have been added as an additional insured by attachment of an endorsement."

Defendant Navigators Insurance Company (Navigators) had issued a commercial general liability policy (number CE09CGL06168IV) to EJ Electric for the period of December 31, 2009 to December 31, 2010. The policy provided a section for an "Additional Insured", providing a duty to defend for any claim caused in whole or in part by your work or any acts or omissions. The policy defines "your work" as work or operations performed by you [EJ Electric] or on your behalf.

On August 28, 2010, Bruce Escalera, an employee of EJ Electric, was injured while working the construction site. He and his wife commenced an action in the Supreme Court, Bronx County, entitled *Bruce Escalera and Maria Escalera v SNC-Lavalin Constructors, Inc. and Consolidated Edison Company of New York*, under Index No. 309111/10. Escalera alleged that "he was electrocuted while working in an electrical box shut-down area."

On October 5, 2010, Christopher Bossick, an electrician employed of EJ Electric, was injured at the same construction site. On May 19, 2011, he commenced an action in the Supreme Court, New York County, entitled *Christopher Bossick v Astoria Energy LLC, Astoria Project Partners LLC and SNC-Lavalin Constructors*, under Index No. 105876/11. Bossick alleges that he slipped on crumbling concrete or construction debris on a platform at the site.

In regard to the Escalera action, December 2010, Liberty Mutual tendered the defense of SNC-Lavalin to Navigators, and Navigators accepted but thereafter failed to represent SNC-Lavalin. The same occurred in the Bossick action. After first accepting the defense of Astoria Energy and SNC-Lavalin, Navigators failed to defend them. Navigators asserts that Liberty refused to turn over the defense after claiming a conflict arising from a contractual indemnification claim by Astoria Energy and SNC-Lavalin against EJ Electric.

The plaintiffs, Astoria Energy, SNC-Lavalin and Liberty Mutual commenced the instant action seeking a judgment declaring that defendant Navigators had a duty to defend and indemnify SNC-Lavalin in the Escalera action, and Astoria Energy and SNC-Lavalin in the Bossick action, and that coverage under the Liberty policy in each action was excess coverage over the Navigators policy. The plaintiffs also seek reimbursement for the costs of defending those parties in the underlying actions to date. In now moving for partial summary judgment on the complaint, the plaintiffs seek a judgment declaring that the policy issued by Navigator to EJ Electric provides primary coverage and that the Navigator has a duty to defend Astoria Energy and SNC-Lavalin in the two underlying actions.

#### Discussion

It is well settled that the proponent of a summary judgment motion is entitled to that relief upon a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof in

admissible form to eliminate any material issues of fact. Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See CPLR 3212; Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). The plaintiffs have met their burden by submitting, *inter alia*, the pleadings, copies of Navigator's policy and Liberty Mutual's policy, and the affidavit of Joseph McIntire, a Senior Technical Claims Specialist for Liberty Mutual, as well as a Memorandum of Law. The defendant, which has submitted an affirmation and Memorandum of Law in opposition, has failed to raise any issue of fact requiring a trial.

The applicable rules were explained by the Court of Appeals in Fieldston Property Owners Assoc., Inc. v Hermitage Ins. Co., Inc., 16 NY3d 257, 264-256 (2011):

An insurer's duty to defend is liberally construed and is broader than the duty to indemnify, "in order to ensure [an] adequate...defense of [the] insured", without regard to the insured's ultimate likelihood of prevailing on the merits of a claim (General Motors Acceptance Corp. v Nationwide Ins. Co., 4 NY3d 451, 456 [2005]; see also Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131, 137 [2006]).

As we have explained on multiple occasions, the insurer's duty to defend its insured "arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy" (Fitzpatrick v American Honda Motor Co., 78 NY2d 61, 65 [1991]; see also BP AC Corp. v One Beacon Ins. Group, 8 NY3d 708, 714 [2007]). Moreover, if "any of the claims against the insured arguably arise from the covered events, the insurer is required to defend the entire action" (Town of Massena v Healthcare Underwriters Mut. Ins. Co., 98 NY2d 435, 443 [2002] *quoting* Frontier Insulation Contrs. v Merchants Mut. Ins. Co., 91 NY2d 169, 175 [1997] [emphasis added and brackets omitted]). It is "immaterial that the complaint against the insured asserts additional claims which fall outside the policy's general coverage" (*id.* at 444 [citation, internal quotation marks and brackets omitted]).

In the context of primary and excess insurance, we have explained that a "primary insurer 'has the primary duty to defend on behalf of its insureds'" (General Motors, 4 NY3d at 455, *quoting* General Acc. Fire & Life Assur. Corp. v Piazza, 4 NY2d 659, 669 [1958] [brackets omitted]), and it generally has no "entitlement to contribution from an excess insurer" (*id.* at 456 *quoting* Fireman's Ins. Co. of Washington, D.C. v Federal Ins. Co., 233 AD2d 193 [1<sup>st</sup> Dept. 1996], *lv denied* 90 NY2d 803 [1997]). Although an excess insurance carrier may elect to participate in an insureds' defense to protect its interest, it has "no obligation to do so," (*id.*).

In light of these guidelines, the unambiguous terms of the policies, the contract between Astoria Energy and J Electric and the facts of the two underlying incidents as alleged in the pleadings, it can be concluded that Navigator's policy is the primary policy and that Navigators had a duty to defend the additional insureds in both actions. Indeed, Navigators does not dispute that theirs is the primary policy. Its opposition essentially consists of two arguments: (1) that there is no coverage in the Bossick action because discovery has not yet shown that Bossick's injuries were "caused by acts or omissions" of EJ Electric as required by the Navigator policy terms in regard to "Additional Insureds", and (2) that it should not be liable to cover the costs to date of the particular counsel chosen by plaintiffs in the Escalera action. While one or both of those arguments may ultimately prove meritorious, they do not present issues of fact warranting denial of this motion.

The court notes, however, that, in regard to the first argument, the First Department has recently held, contrary to Navigators' position, that "[t]he phrase 'caused by' 'does not material differ from ... the phrase 'arising out of'" (W&W Glass Sys., Inc. v Admiral Ins. Co., 91 AD3d 530, 531 [1<sup>st</sup> Dept. 2012]). In turn, the phrase 'arising out of' focuses '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 Fire Ins. Co. Of Pittsburgh, PA, 15 NY3d 34, 38 [2010] [internal quotations omitted])." National Fire Ins. Co. of Pittsburgh, PA v Greenwich Ins. Co., 103 AD3d 473, 474 (1<sup>st</sup> Dept. 2013). In regard to Navigators second argument, concerning the Escalera action, it may well be liable for the costs of the defense to date since the existence of conflict of interest between the insured and insurer may entitle to the insured to independent counsel of its own choosing, with reasonable fees to be paid by the insurer. See Public Service Mutual Ins. Co. v Goldfarb, 53 NY2d 392 (1981); In Re Est 51<sup>st</sup> Street Crane Collapse Litigation, 103 AD3d 401 (1<sup>st</sup> Dept. 2013); 69<sup>th</sup> Street & 2<sup>nd</sup> Avenue Garage Assocs., LP v Tigor Title Guarantee Co., 207 AD2d 225 (1<sup>st</sup> Dept. 1995) *lv denied* 87 NY2d 802 (1995).

The defendant's remaining contentions in opposition are without merit.

#### Conclusion

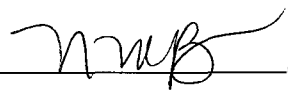
Accordingly, and upon the foregoing papers, it is,

ORDERED that the plaintiffs' motion for partial summary judgment is granted and it is further,

ADJUDGED AND DECLARED that the defendant's policy (No. CE09CGL06168IV) provides primary coverage for the incidents at issue in the underlying actions and the defendant has a duty to

defend its insureds in the two underlying actions, *Bruce Escalera and Maria Escalera v SNC-Lavalin Constructors, Inc. and Consolidated Edison Company of New York*, pending in the Supreme Court, Bronx County ( Index No. 309111/10) and *Christopher Bossick v Astoria Energy LLC, Astoria Project Partners LLC and SNC-Lavalin Constructors*, pending in the Supreme Court, New York County (Index No. 105876/11).

This constitutes the Decision and Order of the court.

  
\_\_\_\_\_, JSC

Dated: 10/20/2014

**HON. NANCY M. BANNON**

- 1. Check one: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER