

Lexington Bldg. Co., LLC v Greenwich Ins. Co.

2015 NY Slip Op 30134(U)

January 28, 2015

Supreme Court, New York County

Docket Number: 651505/12

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

LEXINGTON BUILDING CO., LLC,
WINTER MANAGEMENT CORP., and
ZURICH AMERICAN INSURANCE COMPANY,

Plaintiffs,

-against-

GREENWICH INSURANCE COMPANY,
LIBERTY MUTUAL INSURANCE COMPANY,
and HARVARD MAINTENANCE, INC.,

Defendants.

INDEX NO. 651505/12
MOTION DATE 01-14-2015
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion to/for summary judgment :

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits cross motion
Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, 1 - 3, 4 - 6, 7 - 8

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that defendant LIBERTY MUTUAL INSURANCE COMPANY's motion for summary judgment in this declaratory judgment action, is granted only as to the declaratory relief sought. The remainder of the relief sought in the motion, is denied.

Helen Marek brought the underlying personal injury action seeking damages for injuries she alleges were sustained on July 2, 2007, while she was working as a cleaning person. The underlying personal injury action commenced in Supreme Court, New York County, under Index #114628/2008, alleges that raised plywood near the elevator bank on the second floor of 730 Fifth Avenue, Manhattan, New York, caused Helen Marek to trip and fall. It is also alleged the plywood was placed by an employee of Transel Elevator & Electric, Inc., which was retained to perform elevator modernization. On November 8, 2011, the parties entered into a stipulation of discontinuance of the third-party claims asserted in the underlying personal injury action against Harvard Maintenance, Inc.. The personal injury action is scheduled for trial on January 28, 2015.

Harvard Maintenance, Inc. (hereinafter referred to individually as "Harvard") was Helen Marek's employer on the date of the accident. Liberty Mutual Insurance Company (hereinafter referred individually to as "LMIC") is Harvard's insurer. Greenwich Insurance Company (hereinafter referred to individually as "Greenwich") is the insurer for Transel Elevator & Electric, Inc.. Lexington Building Co., LLC (hereinafter referred to individually as "Lexington") is the owner of 730 Fifth Avenue, Manhattan, New York and Winter Management Corp. (hereinafter referred to individually as "Winter") was the property manager. Zurich American Insurance Company (hereinafter referred to individually as "Zurich") is Lexington and Winter's insurer.

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

On May 3, 2012, plaintiffs brought this declaratory judgment action seeking defense and indemnification from the defendants. The complaint alleges that contractually Transel Elevator & Electric, Inc. and Harvard were required to name Lexington and Winter as additional insureds on both the Greenwich and LMIC policies. Plaintiffs allege that LMIC's failure to provide Lexington and Winter with a defense and indemnification in the underlying personal injury action is a breach of contract. It is alleged that Harvard's failure to obtain insurance coverage on behalf of Winter and Lexington results in direct liability for breach of contract (Mot. Exh. 8).

LMIC's motion seeks summary judgment and an Order, (1) determining and declaring that LMIC owes no duty to defend Lexington or Winter in the underlying personal injury action; (2) determining and declaring that LMIC's coverage for Lexington and/or Winter for the underlying personal injury action is excess over Zurich's coverage; (3) determining and declaring that any coverage owed by LMIC to Lexington and/or Winter is excess over any coverage owed by Greenwich; and (4) to obtain costs and disbursements of this action.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996] and Alvarez v. Prospect Hospital, 68 N.Y. 2d 320, 501 N.E. 2d 572, 508 N.Y.S. 2d 923 [1986]). Once the moving party has satisfied these standards, the burden shifts to the opponent to produce contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645, 569 N.Y.S. 2d 337 [1999]).

Plaintiffs oppose the motion contending that discovery is needed in the form of complete, unredacted and certified copies of the contracts which have not been exchanged by LMIC, Greenwich premiums and the amount of self-insured retention used up by Harvard Maintenance. Summary judgment cannot be avoided by a claim that discovery is needed unless an evidentiary basis is provided establishing that the discovery sought will produce relevant evidence (Lee v. Ana Development Corp., 83 A.D. 3d 545, 921 N.Y.S. 2d 232 [N.Y.A.D. 1st Dept., 2011] and Cioe v. Petrocelli Electric Co., Inc., 33 A.D. 3d 377, 823 N.Y.S. 2d 359 [N.Y.A.D. 1st Dept., 2006]). Plaintiffs have not stated a basis to avoid summary judgment derived from outstanding discovery. LMIC provided a complete, and certified copy of their insurance policy and have corrected any defects in the reply papers. Plaintiffs have not stated an evidentiary basis for the remainder of the discovery sought to avoid a determination.

On November 20, 1992, Harvard as "contractor" entered into an agreement to provide maintenance services with Winter as "customer." The agreement at paragraph 6, titled "Insurance Coverage," states,

"Contractor will carry complete insurance coverage, liability for injuries or death arising out of any one accident, property damage (\$1,000,000 combined per occurrence), and Workmen's Compensation insurance protecting Customer, agent and contractor. All employees are covered by a janitorial surety bond. A certificate of this coverage will be furnished to the customer upon request." (Mot. Exh. 17).

LMIC contends that the contract between Winter and Harvard does not specifically state that Winter and Lexington be named as additional insureds on its policies, and that Lexington was never a party to the November 20, 1992 contract.

LMIC argues that the certificate of insurance naming Winter and Lexington as additional insureds on a general liability policy is not proof of coverage or enforceable.

Plaintiffs contend that paragraph 6 of the contract, although not naming them specifically, included references to both Winter and Lexington as additional insureds. Plaintiffs claim that the certificate of insurance identifies Winter and Lexington as additional insureds on General Liability Policy EB1-121-092831-036, with Bodily Injury and Property Damage coverage in the amount of \$1,000,000.00 per occurrence. They argue that the LMIC policy number EB1-121-092831-036 although titled as "excess" is really a primary general liability policy that was mislabeled. According to the plaintiffs a defense and indemnity should be provided as described in the certificate of insurance and pursuant to verbal assurances provided by Harvard.

A party that is not named as an additional insured on the face of a policy is not entitled to coverage. A certificate of insurance that includes a disclaimer that it is for information purposes only and that it does not "amend, extend or alter the coverage afforded" by the policy and does not confer additional insured status, regardless of assurances provided of that status (Alib, Inc. v. Atlantic Cas. Ins. Co., 52 A.D. 3d 419, 861 N.Y.S. 2d 28 [1st Dept., 2008] and Moleon v. Kreisler Borg Florman Gen. Const. Co, 304 A.D. 2d 337, 758 N.Y.S. 2d 621 [1st Dept., 2003]).

The certificate of insurance that names Lexington and Winter as additional insureds on a general liability policy has a disclaimer that clearly states, "This certificate is issued as a matter of information only and confers no rights upon you the certificate holder. This certificate is not an insurance policy and does not amend, extend, or alter the coverage afforded by the policies listed below "(Mot. Exh. 18). Plaintiffs have not raised an issue of fact derived from their reliance on the certificate of insurance.

LMIC contends that policy number EB1-121-092831-036, is clearly stated as, and was intended to be, an excess general commercial liability policy, for sums in excess of the self-insured amount of \$150,000.00 and only if there was no other insurance to be applied (Mot. Exh. 6). Policy number TH2-621-092831-056, according to LMIC, was issued by an affiliate, Liberty Mutual Fire Insurance Company, which is not a party to this action. LMIC also argues that policy number TH2-621-092831-056, is an umbrella excess policy, which is only to be applied in excess of the "retained limit," and does not apply until all amounts applicable or payable under other insurance policies, have been utilized and completely depleted (Mot. Exh. 7).

In determining coverage, the Court looks to the language of the policies. The carrier of a primary policy has the duty to provide a defense and indemnification to its insured. A carrier whose policy is excess and includes language related to "other insurance," does not have any obligation to provide a defense. The Court cannot rewrite language of an insurance policy to provide a coverage different from what exists in the policy (Fieldson Property Owners Ass'n Inc. v. Hermitage Ins. Co., Inc., 16 N.Y. 3d 257, 945 N.E. 2d 1013, 920 N.Y.S. 2d 763 [2011]).

LMIC's Policy Number EB1-121-092831-036, states that it is a General Liability Excess Policy providing \$1,000,000.00 for Harvard, with a self-insured limit of \$150,000.00. The Declaration page for the policy at Item 4., states that coverage will only be provided in excess of the self-insured amount (Mot. Exh. 6, page LM 1031). The policy defines self-insured as either no "other insurance" or "other insurance" less than the \$150,000.00 stated on the Declaration page in item4 (Mot. Exh. 6, page LM 1031). There is also a provision stating, "We WILL NOT have a

duty to defend or investigate any claim or 'suit' seeking damages to which this policy may apply" (Mot. Exh. 6, page LM 1095). The policy issued by Liberty Mutual Fire Insurance Company number TH2-621-092831-056, states that it is an umbrella excess policy and includes a provision for coverage after the excess is depleted. It also states that no defense will be provided, instead stating that any expenses paid by the insured (Harvard) will be reimbursed as a pro rata share (Mot. Exh. 7, pages, 1118-1119, 1126, 1179).

Zurich's policy for Lexington and Winter is a primary policy, which has an obligation to provide a defense (Mot. Exh. 14). The Greenwich policy is also a primary policy applicable to Transel Elevator & Electric, Inc. To the extent it is determined that Lexington and Winter are additional insureds under the LMIC and Liberty Mutual Fire Insurance Company policies, they would only be entitled to excess coverage, upon depletion of Zurich's and Greenwich's policy limits.

LMIC has established a prima facie basis to obtain summary judgment, regardless of whether Lexington and Winter are additional insureds on its policies. The coverage provided by LMIC's Policy Number EB1-121-092831-036 is only excess over a self-insured amount of \$150,000.00 or any other primary policy, there is no duty to defend. Zurich and Greenwich's policies are primary and must be depleted under the LMIC policies before the excess coverage is applied. Plaintiffs have not raised an issue of fact derived from their arguments seeking a pro rata application of LMIC policy number EB1-121-092831-036 and deeming Liberty Mutual Fire Insurance Company policy number TH2-621-092831-056 as the only true excess. Greenwich did not oppose the relief sought in this motion as to its coverage. LMIC has not stated arguments in support of or a basis to obtain costs and disbursements related to this action.

Accordingly, it is ORDERED that LIBERTY MUTUAL INSURANCE COMPANY's motion for summary judgment, is granted only as to the declaratory relief, and it is further,

ORDERED that plaintiffs' causes of action asserted against LIBERTY MUTUAL INSURANCE COMPANY in this declaratory judgment action are severed and dismissed, and it is further,

ORDERED, ADJUDGED and DECLARED that LIBERTY MUTUAL INSURANCE COMPANY is not required to provide primary coverage, indemnify or provide a defense to LEXINGTON BUILDING CO., LLC, and WINTER MANAGEMENT CORP., in the underlying personal injury action brought in Supreme Court, New York County, filed under Index #114628/2008, and it is further,

ORDERED, ADJUDGED and DECLARED, that LIBERTY MUTUAL INSURANCE COMPANY's coverage for LEXINGTON BUILDING CO., LLC, and WINTER MANAGEMENT CORP., for the underlying personal injury action is excess over ZURICH AMERICAN INSURANCE COMPANY's coverage, and it is further,

ORDERED, ADJUDGED and DECLARED, that any coverage owed by LIBERTY MUTUAL INSURANCE COMPANY to LEXINGTON BUILDING CO., LLC and WINTER MANAGEMENT CORP., is excess over any coverage owed by GREENWICH INSURANCE COMPANY, and it is further,

ORDERED, that LIBERTY MUTUAL INSURANCE COMPANY's counsel shall within thirty (30) days of the date of this Order, serve a copy of this Order with Notice of Entry upon the remaining parties, upon the Intake Clerk for Trial Support

located in the General Clerk's Office (Room 119), and the County Clerk (Room 141B), and it is further,

ORDERED, that upon receipt of this Order the Clerk of the Court shall amend the caption to read as follows:

LEXINGTON BUILDING CO., LLC, WINTER MANAGEMENT CORP.,
and ZURICH AMERICAN INSURANCE COMPANY,

Plaintiffs,

-against-

GREENWICH INSURANCE COMPANY and
HARVARD MAINTENANCE, INC.,

Defendants.

and it is further,

ORDERED, that the remainder of the relief sought for costs and disbursements, is denied, and it is further,

ORDERED, that the Clerk of Court shall enter judgment accordingly, and it is further,

ORDERED, that the remaining parties shall appear for a Status Conference on March 4, 2015 at 9:30 a.m., in IAS Part 13, Room 210, at 71 Thomas Street, New York, New York.

ENTER:

MANUEL J. MENDEZ
J.S.C.



MANUEL J. MENDEZ,

J.S.C.

Dated: January 28, 2015

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE