

**Yates Restoration Group, LLC v Endurance Am.
Specialty Ins. Co.**

2015 NY Slip Op 31086(U)

June 23, 2015

Supreme Court, New York County

Docket Number: 153219/14

Judge: Ellen M. Coin

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

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YATES RESTORATION GROUP, LLC, 40 FIFTH
AVENUE CORP., and LIBERTY INSURANCE
UNDERWRITERS INC.,

Index No. 153219/14

Plaintiffs,

-against-

ENDURANCE AMERICAN SPECIALTY INSURANCE
COMPANY, BRS CONTRACTING, LLC, and
LUIS MACAS,

Defendants.

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ELLEN M. COIN, J.:

This declaratory judgment action arises from an underlying personal injury action, *Luis Tigre Macas v 40 Fifth Avenue Corp.*, Index No. 155443/2012, Supreme Court, New York County (the underlying action), in which a construction worker, Luis Tigre Macas, alleged that he was caused to fall on a collapsing exterior stairway while carrying brick samples at a construction project located at 40 Fifth Avenue, New York, New York (the project).

Defendant Endurance American Insurance Company (Endurance) moves pursuant to CPLR 3212 for summary judgment declaring that Endurance is not obligated to defend or indemnify the owner of the project, plaintiff 40 Fifth Avenue Corp. (Owner), in the underlying action as an additional insured under the commercial general liability policy Endurance issued to BRS Contracting, LLC

(BRS) as it pertains to bodily injury claims asserted by Macas in the underlying action. Plaintiffs cross-move for summary judgment declaring that defendant Endurance has a duty to provide a defense and indemnification to Owner as an additional insured under the policy.

BACKGROUND

The Underlying Action

On August 2, 2011, Macas, a BRS employee, claims that a stair tread collapsed as he was descending the stairs while carrying brick samples to show to Owner. In the underlying action, Macas asserts causes of action alleging common law negligence and violations of Labor Law §§ 200 and 241(6) against Owner.

The Endurance Policy

Defendant Endurance issued commercial general liability policy no. GLO10003144900 to BRS (the policy), which was in effect on August 2, 2011, the date of the accident. Owner was not a named insured under the policy. However, pursuant to the policy, Owner would qualify as an additional insured if a contract existed between BRS and Owner requiring that Owner be added as an additional insured under the policy (Endurance's notice of motion, Ex D).

Specifically, the policy's Endorsement CG 20 33 10 01, entitled "Additional Insured--Owners, Lessees or Contractors----

Automatic Status When Required In Construction Agreement with

You, states, in pertinent part, as follows:

A. Section II - **Who is An Insured** is amended to include as an insured any...organization for whom you are performing operations when you and such...organization have agreed in writing in a contract or agreement that such...organization be added as an additional insured on your policy.

(Endurance's notice of motion, Endurance policy, Ex. D).

On May 12, 2011, Owner entered into a contract with Yates Restoration Corp., LLC (Yates) for exterior restoration and roof replacement at 40 Fifth Avenue, New York, New York. On June 2, 2011, Yates entered into a subcontract with BRS to perform the work at the project.

The contract between Owner and Yates required Yates and all of its subcontractors to obtain insurance and to name Owner as an additional insured under such policies (Endurance's notice of motion, Ex. E § 20.4).

The contract between Yates and BRS provided as follows:

Contractor [BRS]...at its own expense, in connection with all the items required to be done or furnished by Contractor...[b] shall carry Contractor's comprehensive public liability insurance [to] cover and name as additional insured parties Yates and other parties as listed below, and any other parties required by the contract between Yates and the Owner.

Owner: [left blank]

Agent:

Contractor: Yates Restoration Group, Ltd.

Architect:

(Endurance's notice of motion, Ex. F § 2).

In addition, Schedule A to the Yates-BRS contract provided:

The work to be performed is as follows:

2. The services shall conform to the following documentation, all of which is to be considered a part of this agreement:

A. All general conditions and requirements of the specifications, contract forms, and drawings which YATES [has] signed and which is a part of the YATES [c]ontract with the owner.

(Id.).

The Declaratory Judgment Action

By letter dated September 18, 2012, Owner's carrier tendered its request for defense and indemnification in the underlying action to the claims administrator for Endurance, as BRS's commercial general liability insurer. (Endurance's notice of motion, Ex H).

By letter dated October 12, 2012, Endurance's claims administrator (Rockville Risk Management Associates [Rockville]) denied coverage to Owner. Rockville claimed that in order for Owner to be entitled to additional insured coverage, BRS must have entered into a written contract or agreement that specifically required BRS to name Owner as an additional insured on its policy only with respect to liability arising out of BRS's ongoing operations at the project. Rockville claimed that coverage under the additional insured endorsement was not triggered "because Endurance has not been provided with any proof that Mr. Macas' accident arose out of BRS's ongoing operations for [Owner]." (Endurance's notice of motion, Ex I). Owner's

counsel wrote to Rockville, noting that the accident arose out of BRS's work at the project as "clearly Mr. Macas was employed by BRS at the time of the accident and was actually performing work at the job site when the incident occurred." (Letter of John E. Hannum dated December 27, 2012; Ex J to Endurance's motion).

On April 4, 2014, Yates, Owner and Liberty Insurance Underwriters Inc. Commenced the instant declaratory judgment action against Endurance, seeking a declaration that Endurance is obligated to defend and indemnify Owners against the claims of Macas in the underlying action.¹

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept

¹Plaintiffs discontinued this action without prejudice as against original defendant BRS on June 11, 2014.

2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

In support of its motion seeking a declaration that it does not have an obligation to defend and indemnify Owner in the underlying action, and in opposition to plaintiffs' cross-motion, Endurance argues that Owner does not qualify as an additional insured under the BRS policy, as it did not directly enter into a written contract or agreement with BRS which required that BRS name Owner as an additional insured under BRS's commercial general liability policy.

Plaintiffs argue that the Yates-BRS contract incorporated the terms and obligations of the Yates contract with Owner, and required BRS to procure insurance naming Yates and Owner as additional insureds.

"[T]he party asserting that someone other than a named insured is an insured under the policy bears the initial burden of submitting proof in evidentiary form that the alleged insured is, in fact, an insured within the meaning of the policy" (*Preferred Mut. Ins. Co. v Ryan*, 175 AD2d 375, 378 [3d Dept 1991]; cf. *National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570 [1st Dept 2006]; *Thomson v Power Auth. of State of N.Y.*, 217 AD2d 495, 496 [1st Dept 1995]).

There is no duty to defend when the party asserting coverage is not an insured under the policy (*Seavey v James Kendrick Trucking*, 4 AD3d 119, 119 [1st Dept 2004]; *National Gen. Ins. Co. v Hartford Acc. & Indem. Co.*, 196 AD2d 414, 415 [1st Dept 1993]).

The terms of the additional insurance clause in the BRS policy require that the insured and the organization seeking coverage have agreed in writing that the insured will add the organization as an additional insured. The record contains no such freestanding agreement between BRS and Owner (*City of New York v Nova Cas. Co.*, 104 AD3d 410, 410 [1st Dept 2013]; *AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.*, 102 AD3d 425, 427 [1st Dept 2013]; *Linarello v City Univ. of N.Y.*, 6 AD3d 192, 195 [1st Dept 2004]).

The language in the BRS-Yates subcontract, incorporating by reference "[a]ll general conditions...which [are] a part of the YATES [c]ontract with the owner," is insufficient to establish a written agreement between BRS and Owner as contemplated by the insurance policy (*City of New York v Nova Cas. Co.*, 104 AD3d at 410; *AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.*, 102 AD3d at 427).

CONCLUSION, ORDER AND JUDGMENT

For the foregoing reasons, it is

ORDERED that the motion of defendant Endurance American Specialty Insurance Company (Endurance) for summary judgment

seeking a declaration that it is not obligated to defend or indemnify plaintiff 40 Fifth Avenue Corp. as an additional insured under the commercial general liability policy Endurance issued to BRS Contracting, LLC (the policy), as pertaining to bodily injury claims asserted by Luis Tigre Macas in the underlying action entitled *Luis Tigre Macas v 40 Fifth Avenue Corp.*, Index No. 155443/2012, Supreme Court, New York County (the underlying action) is granted; and it is further

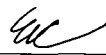
ORDERED that the cross-motion for summary judgment of plaintiffs Yates Restoration Group, LLC, 40 Fifth Avenue Corp., and Liberty Insurance Underwriters Inc., seeking a declaration that Endurance is obligated to defend and indemnify plaintiff 40 Fifth Avenue Corp. as an additional insured under the policy, as pertaining to bodily injury claims asserted by plaintiff Macas in the underlying action, is denied; and it is further

DECLARED AND ADJUDGED that defendant Endurance American Specialty Insurance Company does not have an obligation to defend or indemnify plaintiff 40 Fifth Avenue Corp. as an additional insured under commercial general liability policy no. GLO10003144900, as pertaining to bodily injury claims asserted by Luis Tigre Macas in the action entitled *Luis Tigre Macas v 40 Fifth Avenue Corp.*, Index No. 155443/2012, Supreme Court, New York County.

This constitutes the decision, order and judgment of the Court.

Dated: June 23, 2015

ENTER:



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