

SL Green Realty Corp. v Burlington Ins. Co.
2017 NY Slip Op 30248(U)
January 27, 2017
Supreme Court, New York County
Docket Number: 150699/2014
Judge: Joan A. Madden
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11**

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SL GREEN REALTY CORP., SLG 810 SEVENTH LESSEE LLC
and ACC CONSTRUCTION CORPORATION,
Plaintiffs,

Index No.: 150699/2014

-against-

BURLINGTON INSURANCE COMPANY, PRECISION
INTERIORS CONSTRUCTION CORP. and FRANK
SECCAFICO,
-----X

Hon. Joan A. Madden, J.:

Defendant Burlington Insurance Company (“Burlington”) moves for an order (i) granting reargument of the court’s decision and order dated January 26, 2016 (“the original decision”), to the extent that the original decision declared that Burlington had an obligation to defend plaintiff SL Green Realty Corp in an action was entitled, *Seccafico v SL Green Realty Corp, ACC Construction Corporation and SLG 810 Lessee LLC*, Index No. 153234/2013 (“the Underlying Action”), and, upon reargument, (ii) declaring that Burlington does not have a duty to defend SL Green or to reimburse it for its defense costs in the Underlying Action (motion seq no. 002). Plaintiffs oppose the motion.

Plaintiffs separately move for a money judgment against Burlington for its defense costs (motion seq no. 003).¹ Burlington opposes the motion.

BACKGROUND

In the Underlying Action, Frank Seccafico (“Seccafico”), who was an employee of defendant Burlington’s named insured, Precision Interiors Construction Corporation (“Precision”), alleged that he sustained injuries on February 17, 2012, when he fell off a ladder

¹Motion sequence nos. 002 and 003 are consolidated for disposition.

while working on a construction project, and seeks damages based on alleged violations of Labor Law §§ 200, 240(1) and 241(6). In the Underlying Action, it was asserted that SL Green and SLG 810 Seventh Lessee, LLC (SLG 810), as owners, (together "SL Green")², hired ACC, as construction manager on a construction project underway at the Premises. ACC hired Seccafico's employer, Precision, to provide and install sheetrock for the Project.

Pursuant to Precision's subcontract with ACC ("the Subcontract"), Precision was to purchase and maintain commercial liability insurance naming, *inter alia*, ACC and SL Green as additional insured. The Subcontract provided that "Contractor (i.e. ACC), Owner (i.e. SL Green) and all other parties who Contractor is required to name as additional insured by any contract, shall be included as insured on the CGL . . . Coverage for the additional insured shall apply as Primary and non-contributing before any other insurance or self-insurance, including any deductible, maintained by, or provided to, the additional insured." *See*, Subcontract, Rider F, art. 13, 1c Thereafter, Precision procured a commercial general liability insurance policy from Burlington, under Policy Number HGL0026517, with effective dates of February 1, 2012 to February 1, 2013 (hereinafter "the Burlington Policy").³

The Burlington Policy's CG Form 20 33 07 04 (the Additional Insured Endorsement) provided, in pertinent part:

²In the original decision, the court granted plaintiffs leave to amend to add SLG 810 as a plaintiff. As SLG 810 and SL Green are both owners, the coverage issues are the same for both of these plaintiffs.

³ On February 7, 2012, two certificates of insurance were issued, evidencing that Precision obtained said insurance from Burlington. ACC was listed as a certificate holder and an additional insured on one of the certificates, and SL Green was listed as a certificate holder and an additional insured on the other. Plaintiffs do not argue that the certificates of insurance provide a basis for finding that SL Green is an insured or additional insured under the policy.

“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’, . . . caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured”

(*emphasis supplied*, plaintiffs’ notice of motion, exhibit N, the Additional Insured Endorsement, CG Form 20 33 07 04.).

In the original decision the court found under the above provision, Burlington owed ACC a defense in the Underlying Action as an additional insured. In contrast, the court found that SL Green was not an additional insured under the provision since it was not in contractual privity with Precision.

However, the court found that Burlington nonetheless owed a duty to defend SL Green pursuant to the exception to the Burlington Policy’s exclusion relating to contractual liability, which provided that Burlington would owe contractual liability coverage to Precision for any indemnity obligations arising from an “insured contract.”⁴ Specifically, the court wrote that:

⁴The Burlington Policy defined an “insured contract” as

- “f. That part of any other contract or agreement pertaining to your [Precision’s] business . . . 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”

(*id.*).

.... pursuant to the Burlington Policy, a contract is an “insured contract” if it requires the named insured (here, Precision) to assume the tort liability of another party. Here, pursuant to the Indemnification Provision contained in the Subcontract, Precision agreed to assume the tort liability of plaintiffs for any personal injuries arising out of Precision’s acts or omissions on the Project and to defend and indemnify plaintiffs.⁵ Thus, the Owners are entitled to a declaration that the Subcontract qualifies as an “insured contract” under the Burlington Policy, and that under such contract, the Owners are entitled to a defense in the Underlying Action⁶ (see *Queens Office Tower Associates v. General Mills Restaurant, Inc.*, 269 AD2d 223 [1st Dept 2000][where owner of property was an “indemnity” under general liability policy purchased by tenant pursuant to a lease provision requiring coverage, owner was “entitled to be defended and indemnified by [insurer] to the same extent and on the same terms as would have obtained had owner been the named insured under the policy”]; see also *Wilson v. Commercial Envelope Manufacturing Co.*, 286 AD2d 731 [2d Dept 2001], *lv dismissed* 98 NY2d 737 [2002]).

⁵Specifically, the Indemnification Provision in the Subcontract states, in pertinent part, as follows:

“To the fullest extent permitted by law, [Precision] shall defend, indemnify and hold harmless Owner [i.e. SL Green], Contractor [i.e. ACC] . . . and employees of any of them . . . from and against all claims, damages, liabilities, losses and expenses, including but not limited to attorneys’ fees, arising out of or in any way connected with the performance or lack of performance of the work under the agreement . . . provided that any such claim, damage, liability, loss or expense is attributable to bodily injury, . . . and caused in whole or in part by any actual or alleged:

- Act or omission of [Precision] or anyone directly or indirectly retained or engaged by it or anyone for whose acts it may be liable: or
- Violation of any statutory duty, regulation . . . by an Indemnitee [i.e. SL Green and ACC] provided that the violation arises out of or is in any way connected with the Subcontractor’s performance or lack of performance under the agreement”

(rider B to Subcontract, ¶ 4.6.1).

⁶As the Underlying Action has settled, the court need not reach whether plaintiffs would be entitled to a declaration as to their rights to indemnification.

The crux of Burlington's argument on this motion to reargue is that contrary to the court's finding, SL Green is not an insured or an additional insured under the Burlington Policy, and therefore is not entitled to coverage, including based on its status as a contractual indemnitee, citing *Tribeca Broadway Assoc. v. Mount Vernon Fire Ins Co*; 5 AD3d 198, 200 [1st Dept 2004]). In addition, Burlington asserts that the court incorrectly relied on *Queens Office Tower Associates v. General Mills Restaurant, Inc.*, and *Wilson v. Commercial Envelope Manufacturing Co.*, since the insurance policies at issue in those cases contained different policy language than the language at issue in the Burlington Policy. In support of this argument, Burlington submits the relevant policies contained in the appellate records in *Queens Office Tower Associates, supra*, and *Wilson, supra*. Burlington also argues that controlling case law holds that a contractual indemnitee, such as SL Green, which is a stranger to the insurance policy does not have standing to bring a claim against an insurer, such as Burlington, citing *Inner City Redevelopment Corp. v. Thysebrupp El. Corp.*, 78 AD3d 613, 613 (1st Dept 2010); *Lang v. Hanover Ins. Co.*, 3 NY3d 350 (2004).

Plaintiffs oppose the motion, asserting that the court correctly interpreted the law and reargument should be denied since the issues raised on the motion could have been previously addressed, and the remainder of the motion is improperly based on new arguments. They also argue that the cases relied on by Burlington do not support its position, and are not controlling here.

DISCUSSION

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the

relevant facts, or misapplied a controlling principle of law (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). However, “[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided.” (*William P. Pahl Equipment Corp. v. Kassis*, 182 AD2d 22, *appeal denied in part dismissed in part* 80 NY2d 1005 [1992]).

Here, for the reasons below, reargument is granted and, upon reargument, the court finds that SL Green is not entitled to a declaration that Burlington is obligated to provide it with a defense in the Underlying Action and/or reimbursement from Burlington of its defense costs.⁷

“[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]; *Tribeca Broadway Assoc. v. Mount Vernon Fire Ins Co*, 5 AD3d at 200). There is no duty to defend when the party asserting coverage is not an insured under the policy (*Linarello v. City University Of New York*, 6 AD3d 192, 195 [1st Dept 2004] *National Gen. Ins. Co. v Hartford Acc. & Indem. Co.*, 196 AD2d 414, 415 [1st Dept 1993]).

Here, SL Green has not met its burden of showing that it is an insured or an additional insured under the Burlington Policy such that it would be entitled to coverage. Furthermore, contrary to the finding in the original decision, the Burlington Policy’s exception to the exclusion for contractual liability for an “insured contract,” does not provide a basis for finding that Burlington owed a duty to defend SL Green as a contractual indemnitee of Precision. Thus,

⁷Contrary to plaintiffs’ position, reargument is properly granted here since Burlington previously opposed plaintiffs’ motion on the ground that insured contract exception did not provide a basis for finding coverage. Moreover, that Burlington cites additional case law for its position on its reargument motion, this fact does not preclude the court from granting reargument based on such law.

while under this exception, the Burlington Policy provided coverage to Precision for any obligation to indemnify and/or defend SL Green (or ACC), it does not provide a basis for requiring Burlington to indemnify or defend SL Green (*see York Restoration Corp. v. Solty's Constr., Inc.* 79 AD3d 861 [2d Dept 2010][reversing trial court finding that prime contractor was entitled to a defense based on the insured's obligation to indemnify and defend prime contractor when, at the time of the accident, the prime contractor was not named as an insured or additional insured under the relevant insurance policy]; *Tribeca Broadway Assoc. v. Mount Vernon Fire Co.*, 5 AD3d 198 [reversing trial court's finding that insurance company had duty to defend plaintiff that was not named as an insured or additional insured under policy where plaintiff was within a class of entities for whom the insured was contractually obligated under an "insured contract" to indemnify]).

Moreover, *Queens Office Tower Associates, supra*, and *Wilson, supra*, on which plaintiffs rely, and which the court cited in its original decision, do not support a contrary conclusion. With respect to *Queens Office Tower Associates, supra*, the language of the policy at issue in that case is distinguishable from the language in the Burlington Policy. Specifically, in finding that a landlord was entitled to be defended and indemnified by the insurer, the First Department in *Queens Office Tower Associates, supra*, relied on a provision in the subject policy under which the insurer "agreed to defend any claim or suit brought against the 'indemnity' under an insured contract 'to the same extent and on the same terms that we would defend if the 'indemnity' were the insured under the policy,'" and further noted that the policy specifically included the lease for the premises at issue (269 AD2d at 224). In contrast, the Burlington Policy contains no provision specifying that the insurer agrees to defend (or to

indemnify) SL Green (or ACC) based on its status as an indemnitee. Instead, the Burlington Policy merely provides that the insurer agrees to defend and indemnify its insured (i.e. Precision) for its obligations to defend and indemnify the general contractor and owners under an “insured contract” (see *United Nat. Ins. Co. v. Scottdale Ins Co*, 2011 WL 839397, * 3 [ED NY 2011], *aff’d* 452 Fed Appx 77 [2d Cir 2012])[rejecting that *Queens Office Tower Associates, supra* supports plaintiff’s position that an “insured contract” coverage provides owners and contractors insurance coverage even if they are not named as additional insureds under the policy]).

As for plaintiffs’ argument that the language relied on by the First Department in *Queens Office Tower Associates, supra*, when compared to the Burlington endorsement, places a greater burden for an indemnitee to obtain coverage than what is needed in the endorsement, such argument is unavailing. The policy in *Queens Office Tower Associates, supra* provides:

2. We (i.e. the insurer) will defend any claim or “suit” brought against the “indemnitee” under an “insured contract” which you [i.e. the insured] is required to defend for the specific terms on the “insured contract,” but only to the same extent and on the same terms that we would defend if the “indemnitee” were an insured under the policy.

In the second clause of the above provision, plaintiffs emphasize that the indemnitee’s coverage is limited to that of the insured under the policy, when there is no such requirement in the Burlington Policy. However, plaintiffs fail to address the first clause under which the insurer specifically agreed to defend the indemnitee and ignore the absence of such a clause in the Burlington Policy.⁸

⁸Plaintiffs also cite to various conditions in regard to the indemnitee’s coverage in the policy at issue in *Queens Office Tower Associates, supra*, and argue that the provisions in the policy were more restrictive than those in the Burlington policy. However, such conditions, which were not mentioned by the First Department, were presumably met since the First

As for *Wilson, supra*, the policy submitted on reargument clarifies that the owner found to be entitled to coverage was an additional insured under the subject policy. Since, as noted above, SL Green is not an additional insured, the holding in *Wilson, supra* does not provide a basis for finding that SL Green is entitled to coverage under the Burlington Policy.

As SL Green is not an insured or additional insured under the Burlington Policy, Burlington is not obligated to defend SL Green in the Underlying Action, or to reimburse it for its defense costs.⁹ Accordingly, the court need not reach Burlington’s additional arguments, including that SL Green lacks standing and/or that the relief requested is premature.

In view of the foregoing, plaintiffs’ motion for a money judgment in their favor based on the original decision’s finding that plaintiffs were entitled to reimbursement for their defense costs in the Underlying Action is denied.

CONCLUSION

In view of the above, it is

ORDERED that Burlington’s motion to reargue (motion seq. no. 002) is granted and, upon reargument, the court denies plaintiffs’ motion for summary judgment as to the issue of Burlington’s obligation to defend SL Green and SLG 810; and it is further

Tower Associates, supra, the Burlington Policy does not contain an agreement by the insurer to defend the owner/indemnitee.

⁹In a footnote in their opposition papers, plaintiffs points out that at the mediation, which was attended by a representative from Burlington, it was agreed that “the resolution of payment for defense costs (as part of the third-party claims for contractual indemnification) would be resolved in the declaratory judgment action (i.e. the instant action).” *Marletta Affirmation in Opposition*, ¶ 21 n. 5; see Settlement Agreement, (indicating that “legal fee issues between defendants and third-party defendants to be resolved in the context of pending Declaratory Judgment Action”). However, such agreement would not create a right to be reimbursed by Burlington for defense costs when none exists.

ORDERED that the final decretal paragraph is vacated insofar as it adjudged and declared that “the Owners (i.e. SL Green and SLG 810) are entitled to reimbursement of all defense costs in the Underlying Action;” and it is further

ADJUDGED AND DECLARED that Burlington does not have a duty to defend SL Green and/or SLG 810 in the Underlying Action, nor does it owe a duty to reimburse these plaintiffs for their defense costs; and it is further

ORDERED that plaintiffs’ motion for a money judgment in their favor based on the original decision’s finding that plaintiffs were entitled to reimbursement for their defense costs in the Underlying Action (motion seq. no. 003) is denied.

DATED: January 27, 2017


HON. JOAN A. MADDEN
J.S.C.