Sparta Ins. Co. v Catlin Specialty Ins. Co.
2017 NY Slip Op 30899(U)
May 3, 2017
Supreme Court, New York County
Docket Number: 156234/2015
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 7

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SPARTA INSURANCE COMPANY,

Plaintiff,

-against-

CATLIN SPECIALTY INSURANCE COMPANY and/or its affiliate or successor issuing policy number 100001461-06, LIBERTY INSURANCE UNDERWRITERS, INC., CUSTOM COMMERCIAL CONSTRUCTION CORP., MERCHANTS MUTUAL INSURANCE COMPANY, CASTLE CERAMIC DESIGN, INC., RSUI INDEMNITY COMPANY, "ABC INSURANCE COMPANY," being a fictitious name referring to the excess liability insurer of defendant Castle Ceramic Design, Inc., if any, presently unknown to plaintiff, HUSEYIN ERKAN and EMINE ERKAN,

Defendants.

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Index No.
156234/2015
DECISION/ORDER

Gerald Lebovits, J.:

Plaintiff, Sparta Insurance Company (Sparta), moves under CPLR 3212 for summary judgment in its favor, declaring coverage for McDonald's Corporation (McCorp) and McDonald's USA, LLC (McUSA) under a policy issued by defendant Catlin Specialty Insurance Company (Catlin) and declaring that the Catlin policy must be exhausted before the Sparta-issued policy with respect to an accident involving Huseyin Erkan.

Catlin cross-moves under CPLR 3212 for summary judgment and declaring that itself and Sparta each must provide additional insurance to their mutual additional insured on a co-primary basis.

FACTUAL ALLEGATIONS

Erkan sued McCorp and McUSA (collectively McDonalds) in *Huseyin Erkan and Emine Erkan v McDonald's Corporation, McDonald's USA, LLC and Custom Commercial Construction Corp.*, Index No.: 151961/2014, and *McDonald's Corporation and McDonald's USA LLC v Castle Ceramic Design, Inc.*, Third-Party Index No. 595191/2015.

Erkan allegedly suffered personal injuries on July 23, 2013, while working for Castle Ceramic Design, Inc. (Castle), at a construction site owned by McDonalds. Erkan maintains that he was installing tile on the exterior of a McDonald's restaurant at 80-03 Queens Boulevard, Queens, New York, when he fell trying to transfer from a ladder to a scaffold. Castle was a subcontractor for Custom Commercial Construction Corp. (Custom), a general contractor at the

project for McDonalds.

In its complaint, Sparta, an insurance company, maintains that at the time of Erkan's accident, Custom was bound to McDonalds under a written contract entitled the "Master Construction Contract," dated January 1, 2012. Sparta alleges that the contract requires Custom to indemnify and hold McDonalds and others harmless and to procure liability insurance coverage for McDonalds' benefit. Sparta maintains that Liberty Insurance Underwriters, Inc., is the excess liability insurer of Custom with respect to the Erkan lawsuit.

Catlin, a commercial general-liability insurer, entered into an insurance policy with Custom in which McDonalds was to be covered as an additional insured. The policy Catlin issued to Custom was for the period of July 4, 2013, to July 4, 2014. Catlin maintains that, as set forth in its October 9, 2015, coverage position letter, it acknowledged that McDonalds is an additional insured with respect to liability caused by Custom's acts or omissions or the acts or omissions of others acting on Custom's behalf pursuant to the endorsement titled "ADDITIONAL INSURED- OWNERS, LESSEES OR CONTRACTORS - SCHEDULED PERSON OR ORGANIZATION." Catlin maintains that the underlying pleadings were sufficient to implicate a defense obligation on Catlin's part. Catlin further maintains that for the purposes of this motion, Catlin does not dispute that it owes a primary-defense obligation to McDonalds.

Sparta entered into an insurance agreement with J.C.D. Foods, Inc. (JCD), the franchisee of the subject McDonalds' restaurant, under policy number 091CP04015. Catlin maintains that JCD's franchise agreement with McDonalds required JCD to make McDonalds an additional insured under the Sparta policy. Catlin assumes, for this motion, that McDonalds qualifies as an additional insured under sub-paragraphs 1 or 2 of Sparta's blanket additional insured endorsement.

DISCUSSION

On a summary-judgment motion, the movant "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. . . ." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once the movant has made that showing, 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).

Sparta argues that it was the parties' intent that Custom, as the contractor, would obtain insurance that would cover McDonalds; that Catlin covers Custom, its first named policyholder for the underlying lawsuit, and also McDonalds as additional insureds; that the underlying lawsuit alleges a covered claim and occurrence under the insurance policies of both Sparta and Catlin; and that McDonalds is insured for this potential liability under both the Sparta and Catlin policies.

Sparta argues that the only material dispute between Sparta and Catlin is the

determination of which of the two insurance policies should pay first. Sparta contends that policies such as Catlin's are required to pay first, and in priority to Sparta's, because of the parties' clear intention, as set forth in the language of the insurance policies themselves. Sparta also maintains that a contractor's policy should pay in priority to an owner's policy.

Sparta argues that its policy 019CP04015, which was effective March 1, 2013, was written on a standard form used by the insurance industry. It provides in part:

> **4. Other Insurance**
>
> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:
>
> **a. Primary Insurance**
>
> This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below.
>
> **b. Excess Insurance**
>
> **(1)** This insurance is excess over:
>
> **(a)** Any of the other insurance, whether primary, excess, contingent or on any other basis:
> **(i)** That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work;"
> **(ii)** That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
> **(iii)** That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
> **(iv)** If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section **I** - Coverage A - Bodily Injury And Property

Damage Liability.

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.

(2) When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

(3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(b) The total of all deductible and self-insured amounts under all that other insurance.

(4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by

limits. Under this method, each Insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

Trezise Aff., exhibit 1.

Sparta maintains that Catlin's policy is written on exactly the same standard form and contains the same terms. Sparta argues, however, that Catlin's policy contains special terms that make its policy primary to Sparta's policy. Sparta contends that Catlin's policy includes a proprietary, non-standard, and "primary noncontributory endorsement" in its policy that provides:

"**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**
PRIMARY NON CONTRIBUTORY ENDORSEMENT

This Endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

In consideration of the premium charged, it is hereby understood and agreed that the following changes are made a part of this policy:

It is agreed and understood that such insurance as is provided to the person or organization named below and on the Additional Insured Endorsement attached to this policy, shall be considered primary to such person or organization as respects any claim, loss, or liability caused, in whole or in part, by "your work", and any other insurance maintained by this Additional Insured shall be excess and non-contributory of the insurance provided by this policy.

This Endorsement applies only with respect to liability for "bodily injury", "property damage" or "personal and advertising 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 work" for the additional insured(s).

Schedule:
Blanket per executed written contract prior to a loss.

All other terms, conditions and exclusions remain unchanged."

Trezie Aff., exhibit 1.

Sparta contends that Catlin's policy explicitly provides that McDonalds' own policies will be excess and non-contributing but that nothing in the policy creates a contrary exclusion as to the policies that McDonalds' other contractors maintain for the benefit of McDonalds. Sparta maintains that by expressly stating in Catlin's policy that McDonalds' own policies would be non-contributing implies that McDonalds' additional policies are also non-contributing. Sparta argues that this endorsement is ambiguous because of the use of the word "any" and the word "and," as opposed to the use of the disjunctive word "but."

Sparta contends that because its policy does not have this endorsement, Catlin's policy is not identical to Sparta's policy and renders Catlin's policy "super primary." Sparta maintains that the authors of Catlin's policy may not delineate their own policy's meaning and that the endorsement is intended to broaden the policy. Sparta argues that without this interpretation, no reason would exist to include the endorsement.

Sparta also argues that Catlin's pleadings, blanket denials, and blanket defenses failed to put it and other parties on fair notice that Sparta owed payment for half the loss. Sparta maintains that Catlin severely prejudiced the other parties by failing properly to plead its position.

In support of its motion, Sparta submits an affidavit dated June 2, 2016, from Thomas M. Trezise, a senior vice president and claims counsel employed by Catalina U.S. Insurance Services, LLC, a member of Catalina Holdings (Bermuda) Ltd. Group, of which Sparta is a wholly owned subsidiary insurance company. Trezise states that Sparta's claim file of Erkan's underlying liability claim was assigned to him. Trezise maintains that at the time of the subject accident, Erkan was employed by defendant Castle, that Castle was a subcontractor of Custom, and that Custom had been retained to perform work at a McDonalds restaurant.

Trezise maintains that Sparta provided liability insurance for McDonalds, the owners of the alleged premises where the accident took place. He states that it is Sparta's position that other insurance is also available to McDonalds as additional insureds under the Catlin and Liberty policies. Trezise maintains that both Custom and Castle have not answered the complaint. Trezise concludes that summary judgment should be granted in plaintiff's favor and against defendants declaring coverage for McDonalds under the policy issued by Catlin and declaring that the Catlin policy must be exhausted before the one issued to Sparta.

Catlin cross-moves for partial summary judgment for a declaration that Sparta and Catlin must provide insurance on a co-primary basis. Catlin contends that although the primary and non-contributory endorsement provides that "any other insurance maintained by the Additional

Insured shall be excess and non-contributory of the insurance provided by the policy," the Sparta policy does not qualify as insurance "maintained" by McDonalds. Catlin contends that Sparta's named insured is not a McDonalds entity but a franchisee known as JCD, which is not a party to the underlying action.

Catlin argues that to the extent that any provision of the Catlin and Sparta policies' other insurance provisions purports to render either of them primary, the provisions are mutually repugnant and cancel each other out, resulting in each policy's having a primary insurance policy. *Federal Ins. Co. v Empire Mut. Ins. Co.*, 181 AD2d 568, 569 (1st Dept 1992) ("[W]here different insurers provide coverage for the same interest and against the same risk, concurrent coverage exists. Further, where two excess policies purport to be excess to each other, the excess coverage clauses cancel each other out, and render each policy primary. The liability of each insurer is measured in proportion to its undertaking, so that each makes a pro rata contribution." [citations omitted]).

Catlin argues that no evidence exists that McDonalds procured the Sparta policy, because the Sparta policy was issued to JCD as the named insured and because no dispute arises that McDonalds is an additional insured thereunder. Catlin also argues that although it has acknowledged a duty to defend under a reservation of rights, any issue of late notice, prejudice, and waiver as discussed in Michael L. Stonberg's affirmation is unripe for adjudication absent disclosure.

Where a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to determine without resort to extrinsic evidence. *See West, Weir & Bartel v Carter Paint Co.*, 25 NY2d 535, 540 (1969). Interpreting an insurance contract is done "by the same general rules that govern the construction of any written contract and enforced in accordance with the intent of the parties as expressed in the language employed in the policy." *Throgs Neck Bagels, Inc v GA Ins. Co.*, 241 AD2d 66, 69 (1st Dept 1998). When a contract's meaning "is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented which cannot be resolved on a motion for summary judgment." *Eden Music Corp. v Times Sq. Music Publs.*, 127 AD2d 161, 164 (1st Dept 1987).

The First Department has found that the words "insurance maintained by" refer to insurance actually procured by a party rather than insurance in which a party is an additional insured. *Matter of East 51st St. Crane Collapse Litig.*, 103 AD3d 401, 404-405 (1st Dept 2013) ("A reasonable business person would understand the term 'insurance maintained by' to refer to insurance actually procured by East 51st Street [the Illinois Union policy], rather than afforded it as an additional insured").

Here, Sparta does not contend that McDonalds paid the Sparta policy premium. Nor does Sparta identify any other provision that would render the Sparta policy as excess insurance. Therefore, following First Department precedent and in examining the contract's terms, McDonalds was not the party that "maintained" the insurance. As such, the endorsement requiring other insurance "maintained" by McDonalds to be excess and non-contributory of the

insurance provided by this policy is inapplicable. Furthermore, while Sparta submits an affidavit from Trezise, Trezise makes a conclusory statement that Catlin's policy should be considered "super primary."

Finally, both the Catlin and Sparta policies include identical sections entitled "Method Of Sharing" that discuss contribution by equal shares. The sections provide that "each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first" and that "[i]f any of the other insurance does not permit contribution by equal shares, we will contribute by limits." Both policies use the same language regarding the applicable sharing policy. And the primary noncontributory endorsement would not apply. Thus, the parties must follow the method of sharing as specified in the agreements.

Accordingly, it is

ORDERED that Sparta Insurance Company's motion for summary judgment declaring that the Catlin policy must be exhausted before the policy issued by Sparta is denied; and it is further

ORDERED that Catlin Specialty Insurance Company's cross-motion for summary judgment is granted; and it is further

ADJUDGED and DECLARED that Catlin Specialty Insurance Company and Sparta Insurance Company each must provide additional insurance pursuant to the insurance agreements on a co-primary basis; and it is further

ORDERED that the parties appear for a preliminary conference on July 19, 2017, at 11:00 a.m. in Part 7, room 1127A, at 111 Centre Street.

Dated: May 3, 2017

J.S.C.

HON. GERALD LEBOVITS
J.S.C.