

<b>Structural-Land Mgt., Inc. v Main St. Am. Assur. Co.</b>
2017 NY Slip Op 31804(U)
August 9, 2017
Supreme Court, Queens County
Docket Number: 701154/2017
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

- - - - - x

STRUCTURAL-LAND MANAGEMENT, INC., and  
85-15 QUEENS BLVD. REALTY, LLC,

Plaintiffs,

- against -

MAIN STREET AMERICA ASSURANCE COMPANY,  
and APPD SERVICES, LLC,

Defendants.

Index No.: 701154/2017

Motion Date: 8/7/17

Motion No.: 144

Motion Seq.: 1

- - - - - x

The following electronically filed documents read on this motion by plaintiffs for an Order pursuant to CPLR 3212(e) granting plaintiffs partial summary judgment on their first cause of action:

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Memo. of Law-Exhibits.....	EF 16 - 43
Affirmation in Opposition-Exhibits.....	EF 46 - 50
Memo. of Law in Reply.....	EF 51 - 52

This declaratory judgment action arises out of an alleged water main break occurring on October 23, 2015 at a construction project located at 51-35 Reader Street, Elmhurst, New York 11373.

Plaintiff 85-15 Queens Blvd. Realty, LLC (85-15 Queens) owned the site and contracted with plaintiff Structural-Land Management, Inc. (SLM) to serve as the construction manager/general contractor for the project. SLM contracted with defendant APPD Services, LLC (APPD) to provide shoring work for the project. Defendant Main Street America Assurance Company (MSA) issued a business owners' liability policy under policy number MPU8103N to APPD (the MSA Policy). It is alleged that APPD then further contracted either directly or through a related entity named Peterson Geotechnical Construction, LLC (Peterson) with McKinney Drilling Company, LLC (McKinney) to provide drilling labor and equipment for the project.

While performing drilling work at the project, McKinney allegedly struck a water main, which burst causing substantial flooding on the site and in the neighborhood directly adjacent to the site. The flooding is alleged to have caused damage to the property of 864163 Realty, LLC (864163); the property of Lefferts Discount Store, Inc. (Lefferts); and certain construction equipment leased to Peterson for use on the project. Thereafter, three underlying actions seeking to recover damages arising out of the subject incident were commenced (the Underlying Actions).

On August 4, 2016, Harleysville Preferred Insurance Company (Harleysville) commenced an action against SLM and McKinney. Harleysville alleges it made payment in excess of \$160,000 to 864163 for damages to its property resulting from the incident, pursuant to the terms of its policy issued to 864163, and is therefore subrogated to 864163's rights. SLM answered the complaint, asserted cross-claims, and filed a third-party action against APPD, Peterson, and two companies providing certain professional services for the project, Roguski Land Surveying, P.C. (Roguski) and Tan Architect, P.C. (Tan). In the third-party complaint, SLM asserts claims for contribution, common law and contractual indemnification, and breach of contract. SLM specifically alleges that "any injuries and damages sustained by Harleysville or 864163 were caused in whole or in part by the reason of the wrongful conduct of APPD." Thereafter, McKinney commenced a fourth-party action against APPD, Peterson, Roguski, and Tan. In the fourth-party complaint, McKinney alleges that "any damages sustained by plaintiff were caused in whole or in part by the reason of the wrongful conduct of APPD."

On December 20, 2016, Harleysville Insurance Company of New York (Harleysville NY) commenced an action against SLM, McKinney, Roguski, Tan, the City of New York, Department of Environmental Protection, and 85-15 Queens. Harleysville NY alleges that as a result of the incident, it made payment in excess of \$1.7 million to Peterson and/or the equipment owners for damages to their construction equipment and vehicles resulting from the incident, pursuant to the terms of the insurance policy issued to Peterson, and is therefore subrogated to their rights. SLM and 85-15 Queens impleaded APPD by filing a third-party complaint. The third-party complaint alleges that "any injuries and damages sustained by Plaintiff . . . were caused in whole or in part buy the reason of the wrongful conduct of APPD, and/or one or more of its agents, subsidiaries, or subcontractors for which it is responsible."

On March 24, 2017, Starr Indemnity & Liability Company (Starr) commenced an action against 85-15 Queens, SLM, APPD, Peterson, McKinney, Roguski, Tan, and Structural Engineering

Systems PLLC (SES). Starr alleges that as a result of the incident, it made payment in the amount of \$38,942.39 to Lefferts for damages to its property resulting from the incident, pursuant to the terms of an insurance policy issued to Lefferts, and is therefore subrogated to Lefferts' rights. Starr's complaint alleges that "[s]aid damages were caused wholly and solely by reason of the carelessness, negligence and culpability of . . . APPD Services LLC, Peterson Geotechnical Construction, McKinney Drilling Company LLC."

At the time of the incident, a Subcontract executed by plaintiffs and APPD on April 14, 2015 required APPD to maintain general liability insurance and excess/umbrella liability insurance. Section 13.1 of the Subcontract and the Rider annexed to the Subcontract as Exhibit "E" provide that plaintiffs shall be named additional insureds on a primary and non-contributory basis on APPD's insurance policy. Specifically, Rider E provides that:

"to the fullest extent permitted by law, [APPD] shall indemnify, hold harmless and defend [plaintiffs] . . . from and against all claims, damages, losses and expenses including but not limited to attorneys' fees arising out of or resulting from the work of [APPD] provided any such claim, damage, loss or expense (a) is attributable to . . . injury to or destruction of tangible property . . . and (b) is caused in whole or in part by any act or omission of the subcontractor or anyone directly or indirectly employed by it or anyone for whose acts it may be liable pursuant to the performance of the work."

In accordance with the requirements of the Subcontract, APPD procured the MSA Policy, which provides that MSA "will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" . . . to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages."

By letter dated October 26, 2015, Mt. Hawley Insurance Company (Mt. Hawley), the general liability and excess liability insurer for plaintiffs, demanded that MSA agree to provide additional insured coverage to plaintiffs for all claims arising out of the incident pursuant to the express terms of the MSA Policy. On December 3, 2015, plaintiffs sent a demand letter, demanding that APPD agree to defend and indemnify plaintiffs from and against any and all claims potentially arising out of the subject incident pursuant to the terms of APPD's contract with SLM. By letter dated January 22, 2016, APPD acknowledged receipt

of the demand letter and represented that the letter was forwarded to APPD's liability carriers. On February 3, 2016, MSA denied plaintiffs' request for a defense and indemnification, stating that the incident "did not arise out of [APPD's] acts or omissions" and that "there is no proof that this accident arose out of [APPD's] 'fault or negligence'". Plaintiff sent another demand on April 21, 2016.

Due to MSA's disclaimer and the commencement of the Underlying Actions, plaintiffs commenced this action on January 25, 2017. The complaint seeks: (1) a declaration that MSA must provide a defense for plaintiffs in the Underlying Actions; (2) a declaration that MSA must indemnify plaintiffs with respect to any judgment that may be entered against them in the Underlying Actions; and (3) a declaration that MSA must defend and indemnify plaintiffs in the Underlying Actions pursuant to APPD's contractual defense and indemnification obligations. Defendant APPD joined issue by service of an answer on March 14, 2017. Defendant MSA joined issue by service of an answer on April 28, 2017. Plaintiffs now move for partial summary judgment on the first cause of action seeking a declaration that MSA must provide a defense for plaintiffs in the Underlying Actions.

In opposition, MSA annexes the Contract between 85-15 Queens and SLM covering the piling work for the project. Excluded from the scope of work in the Contract is the "[i]dentifying, locating, protecting, removing and/or relocating of utilities below and above ground within the work area." MSA also annexes the Subcontract between SLM and APPD. The scope of work for the Subcontract does not include an item for the identifying, locating, protecting, removing and/or relocating of utilities by APPD. Based on the submitted contracts, MSA contends that because APPD was never required to locate the subject water main, the damages arising from the rupturing of the water main could not have been caused in whole or in part by APPD or its subcontractor. Thus, plaintiffs are not entitled to additional insured status.

"[A]n insurer's duty to defend is called into play whenever the pleadings allege an act or omission within the policy's coverage" (Fitzpatrick v Am. Honda Motor Co., 78 NY2d 61, 65-66 [1991]). "Even where there exist extrinsic facts suggesting that the claim may ultimately prove meritless or outside the policy's coverage, the insurer cannot avoid its commitment to provide a defense" (Id. at 66). Accordingly, an insurer may not look beyond the complaint's allegations to defeat its obligation to defend (see Id.; Durant v North Country Adirondack Coop. Ins. Co., 24 AD3d 1165 [3d Dept. 2005]).

Here, it is undisputed that the pleadings in each of the Underlying Actions allege that the property damage at issue was caused by APPD or one of APPD's subcontractors. Because MSA is obligated to provide coverage to plaintiffs for any suit alleging damages caused by APPD's acts or omissions and because each of the Underlying Actions allege such property damage, MSA must defend plaintiffs in the Underlying Actions (see BP A.C. Corp. Vv One Beacon Ins. Group, 8 NY3d 708 [2007]). MSA's reference to outside evidence to demonstrate that APPD did not cause the damages arising from the water main break may not be used to avoid its duty to defend and does not raise an issue of fact herein.

Accordingly, for the reasons set forth above, it is hereby

ORDERED, that plaintiffs' motion is granted, and plaintiffs shall have partial summary judgment on the first cause of action; and it is further

ORDERED AND ADJUDGED, that MSA must defend plaintiffs in the Underlying Actions on a primary and non-contributory basis.

Dated: August 9, 2017  
Long Island City, N.Y

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**ROBERT J. MCDONALD**  
**J.S.C.**