Greater N.Y. Mut. Ins. Co. v Leading Ins. Servs., Inc.
2017 NY Slip Op 32242(U)
October 17, 2017
Supreme Court, New York County
Docket Number: 157086/12
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

GREATER NEW YORK MUTUAL INSURANCE COMPANY and 184 DYCKMAN STREET, LLC

- v -

LEADING INSURANCE SERVICES, INC.

INDEX NO. 157086/12

MOT. DATE

MOT. SEQ. NO. 002

The following papers were read on this motion to/for sever/join and summary judgment, cross-motion to amend

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 26-42

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 44-57

Replying Affidavits NYSCEF DOC No(s). 58-62

Plaintiffs Greater New York Mutual Insurance Company ("Greater New York") and 184 Dyckman Street, LLC ("184 Dyckman") move for an order: [1] pursuant to CPLR §§ 603 and 1003 seeking the severance of the third-party action in *Rosario v. 184 Dyckman Street, LLC,* Index Number 150467/12 (the "Rosario action") and joining that third-party action with the instant one; [2] amending the caption; [3] and pursuant to CPLR §·3212 for summary judgment declaring that Leading Insurance Services, Inc.'s ("Leading") policy number 5375 provides primary coverage to 184 Dyckman and that Greater New York is entitled to reimbursement for its indemnity payments and expenses in the Rosario action.

Leading opposes the motion for summary judgment and cross-moves for an order granting it leave to amend its answer to assert counterclaims against Greater New York to recoup contribution to the settlement Leading made on 184 Dyckman's behalf in the Rosario action. Plaintiffs oppose the cross-motion.

Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available. The court's decision follows.

In the underlying action, Rosario sought to recover for personal injuries she sustained as a result of a trip and fall which occurred on the sidewalk in front of 186 Dyckman Street, New York, New York (the "premises"), on May 15, 2011. Rosario claimed that 184 Dyckman failed to properly maintain and repair a dangerous condition on the sidewalk at the premises. 184 Dyckman owned the premises and prior to the accident, it leased the premises to Leading's named insured, Best Furniture USA Corp. ("Best Furniture"), pursuant to a written lease agreement dated August 26, 2010.

Pursuant to paragraph 8 of the lease, Best Furniture agreed to maintain commercial general liability insurance ... in favor of 184 Dyckman "against claims for bodily injury occurring in or upon the

Dated: 10/17/17

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☒ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

demised premises and during the term of the lease..." Paragraph 47 of the lease required Best Furniture to procure and maintain insurance for the benefit of 184 Dyckman, to wit, "a comprehensive policy of general liability insurance in which tenant and the landlord are the named insured, for any and all claims arising during the term of this lease for ... any personal injury ... in, upon or about the demised premises; protecting the landlord and the tenant against any liability whatsoever occasioned by accident on or about the demised premises or any appurtenances thereto."

Such insurance was to be "primary over any insurance the owner or manager may have in force or access to" with limits of $3,000,000 per occurrence.

Paragraph 50 of the Rider expressly required Best Furniture to "keep the sidewalk abutting the demised premises clean and free of all debris, ice, snow, etc. and in good condition and state of repair."

On March 17, 2011, 184 Dyckman issued a Three Day Notice to Best Furniture claiming unpaid rent in the amount of $26,210 and directing Best Furniture to pay Dyckman the full amount on or before April 7, 2011 or surrender possession of the premises. 184 Dyckman subsequently commenced a non-payment eviction proceeding against Best Furniture in the Civil Court of the City of New York on April 28, 2011. 184 Dyckman served Best Furniture with process on May 7, 2011. According to the affidavit of service for the petition and notice of petition, service was made by sliding same into/or under the door of the premises because the "store out of business" and the deponent was unable, with due diligence, to find Best Furniture or a person of suitable age and discretion who was willing to accept service.

By letter dated April 2, 2012, Greater New York, 184 Dyckman's general liability insurer, requested that Leading assume 184 Dyckman's defense and indemnity in the Rosario action, pursuant to the parties' responsibilities under the lease. Leading did not respond to the tender. 184 Dyckman subsequently commenced the third-party action in the Rosario action against Best Furniture based upon the lease. This action was thereafter commenced, seeking a declaration that Leading must defend and indemnify 184 Dyckman in the Rosario Action, as well as reimburse Greater New York for its costs, fees and disbursements. Greater New York contends that 184 Dyckman was an additional insured under Leading's insurance with Best Furniture, and that the allegations contained in the Rosario action's complaint triggered Leading's coverage obligations to 184 Dyckman.

On or about April 2016, 184 Dyckman and Rosario resolved the main underlying action for $575,000. Under the terms of a Joint Funding Agreement executed by Greater New York and Leading, each insurer agreed to contributed $287,500 on 184 Dyckman's behalf to fund the settlement. The insurers reserved their right to contest 184 Dyckman's rights to coverage under the Leading policy issued to Best Furniture, so that Greater New York court recoup its contribution to the settlement it made on 184 Dyckman's behalf from Leading, as well as the defense costs it incurred in defending 184 Dyckman, and Leading could recoup its contribution towards the settlement from Greater New York if Dyckman was not entitled to coverage from Leading. Further, Dyckman could still pursue its third-party claims against Best Furniture.

The insurance policies

Leading issued a Businessowners insurance policy bearing policy number 01 BPS 035375 to Best Furniture (the "Leading policy"). The Leading policy, which was effective from December 28, 2010 to May 26, 2011, included coverage parts for commercial general liability. A copy of the Leading policy has been provided to the court.

The Leading policy provides in pertinent part as follows:

A. Coverages

1. Business Liability

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies. We will have the right and the duty to defend the insured against any "suit" seeking those damages even if the allegations of the "suit" are groundless, false or fraudulent. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury", "property damage" or "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Paragraph D – Liability and Medical Expenses Limits of Insurance in Section II – Liability; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements or medical expenses.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Paragraph f. Coverage Extension – Supplementary Payments

b. This insurance applies

(1) to "bodily injury" and "property damages" only if

(a) the "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and

(b) the "bodily injury" or "property damage" occurs during the policy period.

The Leading policy contains an additional insured endorsement that provides in pertinent part as follows:

Name of Person or Organization (Additional Insured):

184 Dyckman Street LLC c/o Delmar Realty Co., Inc.
640 Fiffth Avenue, 3rd Floor
New York, NY 10019

A. The following is added to Paragraph C. Who is an Insured in Section II – Liabiltiy:

3. The person or organization shown in the Schedule is also an insured, but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule.

B. The following exclusions are added to Section II – Liability
This insurance does not apply to:

1. Any "occurrence" that takes place after you cease to b e a tenant in the premises described in the Schedule.

...

M. Additional Insured

This coverage shall be excess with respect to the person or organization included as an additional insured by its provisions; any other insurance that person or organization has shall be primary with respect to this insurance, unless this coverage is required to be primary and not contributory in the contract, agreement or permit referred to above.

The Leading policy contains the following "other insurance" provision:

H. Other Insurance

1. If there is other valid and collectible insurance covering the same loss or damage, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable Limit of Insurance of Section I – Property.

2. Business Liability Coverage is excess over:

a. Any other insurance that insures for direct physical loss or damage; or

...

3. When this insurance is excess, we will have no duty under Business Liability Coverage to defend any claim or "suit" that any other insurer has a duty to defend. 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.

Greater New York issued a Commercial Package Policy to 184 Dyckman bearing policy number 1131M90538 (the "Greater New York policy"). The Greater New York Policy was effective from December 31, 2010 through December 31, 2011. The Greater New York policy was in full force and effect on the date of plaintiff's accident.

The Greater New York policy also contains an "other insurance" clause, which provides as follows:

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 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:

...

(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.

Parties arguments

Plaintiffs argue that they are entitled to summary judgment because "there can be no issue that the Leading policy covers the allegations of the underlying complaint, and that it had a primary obligation of defense and indemnification on behalf of the landlord." They claim that 184 Dyckman was an out-of-possession landlord and that pursuant to the terms of the lease, Best Furniture was responsible for taking care of the sidewalk. Further, plaintiffs maintain that Best Furniture was still in possession of the premises, and therefore it breached the lease by failing to keep the sidewalk in good repair. Further, plaintiffs argue that 184 Dyckman is entitled to primary, non-contributory coverage from the Leading policy.

In turn, Leading argues that the motion is premature since no discovery has been conducted. Leading further contends that the motion should be denied because plaintiffs did not demonstrate that the underlying personal injury action is "causally related to the 'ownership, maintenance or use' of Best Furniture's leasehold." Further, Leading contends that plaintiffs failed to show that the exclusion concerning whether Best Furniture was a tenant at the time of the accident does not apply.

Alternatively, Leading argues that even if plaintiffs have met their burden, Greater New York's recovery is limited to half of its defense and indemnity because the "other insurance" clauses in both policies purport to provide excess coverage where 184 Dyckman has other insurance coverage. Finally, Leading argues that its cross-motion to amend its answer to assert counterclaims against Greater New York to recoup its contribution to the settlement should be granted.

On reply, plaintiffs have submitted the affidavit of David Malanga, a property manager for the managing company for the premise, attesting that Best Furniture was a tenant. Plaintiffs argue that the cross-motion to amend should deny because of delay and the amendment is meritless.

DISCUSSION

At the outset, the motion is granted to the extent that the third-party action in the Rosario action is severed and joined with the within action, since there is no opposition to that request for relief and the court otherwise finds that such relief is appropriate.

The court turns to the motion for summary judgment. On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

It is well established that the party claiming coverage bears the burden of proving entitlement (*National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 570 [1st

Dept 2006]; *Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]). The "well-understood meaning" of "additional insured" is "an entity enjoying the same protection as the named insured" (*Pecker Iron Works of N.Y. v Traveler's Ins. Co.*, 99 NY2d 391, 393 [2003] [internal quotation marks and citation omitted]).

> [A]n insurance company's duty to defend is broader than its duty to indemnify. Indeed, the duty to defend is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage. If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be.

(*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal quotation marks and citations omitted]). An insurer owes a duty to defend as long as "the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered" (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63 [1991]). "[I]f any of the claims against [an] insured arguably arise from covered events, the insurer is required to defend the entire action" (*Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 17 [1st Dept 2009] [internal quotation marks and citations omitted]).

In *Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.* (89 NY2d 621, 634-635 [1997]), the Court of Appeals further clarified the standard for an insurer's duty to defend an insured:

> A court should not attempt to impose the duty to defend on an insurer through a strained, implausible reading of the complaint that is linguistically conceivable but tortured and unreasonable. Moreover, a court may look to judicial admissions in the insured's responsive pleadings in the underlying tort action or other formal submissions in the current or underlying litigation to confirm or clarify the nature of the underlying claims" (internal quotation marks and citation omitted).
>
> An insurer may obtain a declaration absolving it of its duty to defend only when a comparison of the policy and the underlying complaint on its face shows that, as a matter of law, 'there is no possible factual or legal basis on which the insurer might eventually be held to be obligated to indemnify the insured under any provision of the insurance policy'"

(*Greenwich Ins. Co. v City of New York*, 122 AD3d 470, 471 [1st Dept 2014], quoting *Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424 [1985]).

"While the duty to defend is measured against the possibility of a recovery, the duty to pay is determined by the actual basis for the insured's liability to a third person" (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 178 [1997] [internal quotation marks omitted]). "[A]n insurer may be contractually bound to defend even though it may not ultimately be bound to pay, either because its insured is not factually or legally liable or because the occurrence is later proven to be outside the policy's coverage" (*Fitzpatrick*, 78 NY2d at 65).

Here, the court finds that plaintiffs have established that the Leading policy covers the allegations in the Rosario action. The Lease provides that it was the Best Furniture's responsibility to "keep the sidewalk abutting the demised premises clean and free of all debris, ice, snow, etc. and in good condition and state of repair." Further, Best Furniture was required to obtain insurance protecting itself and 184 Dyckman "against any liability whatsoever occasioned by accident on or about the demised premises or any appurtenances thereto." It is undisputed that Rosario tripped and fell on the subject sidewalk due to a defective condition. Therefore, the underlying claim arises out of the "ownership, maintenance or use of that part of the premises" as set forth in the additional insured endorsement (see i.e. *Tower Ins. Co. of New York v. Leading Ins. Group Ins. Co., Ltd.*, 134 AD3d 510 [1st Dept 2015]).

The court rejects Leading's argument that there is a triable issue of fact as to whether Rosario tripped and fell on a portion of the sidewalk used for ingress/egress, insofar as such a distinction and/or limitation on Leading's insurance obligations is not explicitly stated in the additional insured endorsement. Insurance policies are contracts and should be construed according to their plain meaning (*Lend Lease (U.S.) Const. LMB Inc. v. Zurich American Ins. Co.*, 136 AD3d 52 [1st Dept 2015]; see generally *W.W.W. Associates, Inc. v. Giancontieri*, 77 NY2d 157 [1990]).

The court also rejects Leading's claim that there is an issue of fact as to whether Best Insurance was a tenant on the date of Rosario's accident such that the relevant policy exclusion would apply. On this record, there is no dispute that 184 Dyckman did not recover possession of the premises until July 18, 2011, which was after Rosario's accident. That the store which Best Furniture was operating was closed or out-of-business on the date that 184 Dyckman attempted to serve Best Furniture process in the commercial landlord/tenant nonpayment proceeding is of no moment, since it is undisputed that Best Furniture, Leading's insured, still retained possession of the premises on the date of the accident. Further, assuming *arguendo* that the premises were indeed abandoned, abandonment of the premises did not sever the landlord/tenant relationship.

As for whether commencement of the nonpayment proceeding itself could sever the tenancy, Leading cites not law in support of such a contention. In any event, such an argument fails because the commencement of a nonpayment proceeding seeking rent due and a final order of eviction is premised on a breach of the underlying lease and is used to remove a tenant from possession (RPAPL § 711[2]). Breach of a lease by failing to pay rent does not automatically sever a tenancy by operation of law.

Next, the court considers whether the Leading policy is primary and finds that it is. "In determining priority of coverage among different insurers covering the same risk, a court must consider the intended purpose of each policy as evidenced by both its stated coverage and the premium paid for it, as well as the wording of its provision concerning excess insurance" (*Indemnity Ins. Co. of North America v. St. Paul Mercury Ins. Co.*, 74 AD3d 21 [1st Dept 2010 quoting *Tishman Constr. Corp. of N.Y. v. Great Am. Ins. Co.*, 53 AD3d 416 [1st Dept 2008]).

The Leading policy, as plaintiffs correctly point out, contains a provision making it primary if "coverage is required to be primary and not contributory in the [lease]." Meanwhile, the lease required Best Furniture to obtain insurance naming 184 Dyckman as an additional insured which would be primary over 184 Dyckman's insurance. Further, the Greater New York policy by its own terms is excess where its insured is named as an additional insured on another policy. The term additional insured means an entity enjoying the same protection as the named insured (*Pecker Iron Works of New York, Inc. v. Traveler's Ins. Co.*, 99 NY2d 391, 393 [2003]; see also *Sport Rock Intern., Inc. v. American Cas. Co. of Reading, PA*, 65 AD3d 12 [1st Dept 2009] quoting *BP A.C. Corp. v. One Beacon Ins. Group*, 8 NY3d 708, 714–715 [2007]).

Here, since the policies can be harmoniously read together and do not provide the same level of coverage, the "other insurance" clauses do not come into play (*Pecker*, *supra*). Relatedly, the court rejects Leading's argument that its coverage is pro rata because the "other insurance" provisions are identical. Therefore, Leading's cross-motion to amend its answer to assert a counterclaim for contribution is denied since the proposed counterclaim is meritless.

Based upon the foregoing, plaintiffs' motion is granted in its entirety.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiffs' motion is granted in its entirety; and it is further

ORDERED that the third-party action in *Rosario v. 184 Dyckman Street, LLC,* Index Number 150467/12 (the "Rosario action") is severed and joined with the instant action; and it is further

ORDERED that the clerk is directed to amend the caption so that it now reads:

X----------X
GREATER NEW YORK MUTUAL INSURANCE COMPANY and 184 DYCKMAN STREET, LLC, Index Number 157086/12

Plaintiffs,

-against-

LEADING INSURANCE SERVICES, INC.,

Defendant.
X----------X
184 DYCKMAN STREET, LLC,

Third-Party Plaintiff,

-against-

BEST FURNITURE USA CORP.

Third-Party Defendant.
X----------X

And it is further

ADJUDGED and DECLARED that Leading Insurance Services, Inc.'s policy number 5375 provides primary coverage to 184 Dyckman and that Greater New York is entitled to reimbursement for its indemnity payments and expenses in the Rosario action; and it is further

ORDERED that the cross-motion to amend is denied; and it is further

ORDERED that plaintiffs' counsel is directed to serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the severance/joining and amended caption; and it is further

ORDERED that the parties are directed to appear for a status conference on November 28, 2017 at 9:30 am at 80 Centre Street, Room 278.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 10/17/17
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.