

Zurich Am. Ins. Co. v Liberty Mut. Fire Ins. Co.
2018 NY Slip Op 32037(U)
August 15, 2018
Supreme Court, New York County
Docket Number: 160188/2014
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ZURICH AMERICAN INSURANCE

COMPANY, STAHL REAL ESTATE

Index No. 160188/2014

COMPANY, 277 PARK AVENUE, LLC, and

CASSIDY TURLEY NEW YORK, INC.,

Plaintiffs,

DECISION & ORDER

against

LIBERTY MUTUAL FIRE INSURANCE

COMPANY, JPMORGAN CHASE BANK, NA

and BRIAN GRAY,

Defendants.

Anthony Cannataro, J.:

In this action plaintiffs Zurich American Insurance Company (Zurich) and Stahl Real Estate Company, 277 Park Avenue, LLC, and Cassidy Turley New York Inc. (collectively, the Landlord Entities), seek a declaratory judgment that defendants Liberty Mutual Fire Insurance Company (Liberty Mutual) and JPMorgan Chase Bank (Chase) are obligated to defend and indemnify them in an underlying personal injury action, *Brian Gray v Stanley Stahl et al.* (index No. 110738/2011). The Landlord Entities seek a further declaratory judgment that they are additional insureds under the insurance policy Liberty Mutual issued to Chase, and that Chase and Liberty Mutual are obligated to reimburse Zurich, the Landlord Entities' insurer, for any expenses incurred in the defense of the Landlord Entities in the underlying action.

Factual and Procedural History

Chase, a commercial tenant of the building located at 277 Park Avenue in Manhattan, hired New Jersey Installations, Ltd. to renovate its leased space. On February 22, 2011, Brian Gray, an employee of New Jersey Installations Ltd, was allegedly

injured while exiting through the loading dock of the building when he tripped in a hole in the concrete floor on his way to get coffee.

Gray sued the Landlord Entities and Chase alleging that the accident occurred as a result of their negligence. The Landlord Entities attempted to tender the defense and indemnification of the Landlord Entities in the underlying action to Chase, and Chase's insurer, Liberty Mutual. Chase and Liberty Mutual both disclaimed coverage. Consequently, to date, Zurich has been defending the Landlord Entities in the underlying action. On April 4, 2017, Zurich and the Landlord Entities commenced the instant declaratory judgment action and now move for summary judgment.

Legal Analysis

Summary judgment may be granted upon a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact (CPLR 3212[b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). When there are no triable material issues of fact, it is incumbent upon a court, in the interests of judicial economy, to grant summary judgment (*Andre v Pomeroy*, 35 NY2d 557 [1980]).

On a motion for summary judgment, the movant carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez*, 68 NY2d at 324). Once the movant meets its initial burden, the burden shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court must view the evidence in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn (*Benjamin v City of New York*, 55 Misc 3d 1217[A], 2017 NY Slip Op 50619[U] [Sup Ct, NY County 2017]). Summary judgment "is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Andre*, 35 NY2d at 363).

New York courts have long held that an insurer's duty to defend its insured is

broader than its duty to indemnify and arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640 [1993]; *Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257 [2011] [the insurer's duty to defend is liberally construed and is broader than the duty to indemnify, in order to ensure adequate defense of the insured, without regard to the insured's ultimate likelihood of prevailing on the merits of a claim]; *Regal Const. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34 [2010] [an insurer's duty to defend its insured is exceedingly broad]).

The allegations of a complaint will trigger an insurer's duty to defend as long as they raise a theory of liability within the scope of the policy's coverage (*Zurich-Am. Ins. Cos v Atl. Mut. Ins. Cos.*, 139 AD2d 379, 384–85 [1988], *affd* 74 NY2d 621 [1989]); *Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663 [1981] [“the question is not whether the complaint can withstand a motion to dismiss for failure to state a cause of action....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”] [citations omitted]). Where the policy provisions are at least ambiguous as to whether the claims against the insured are covered, the duty to defend the insured is triggered (*see Charles F. Evans Co., Inc. v Zurich Ins. Co.*, 95 NY2d 779 [2000]; *International Couriers Corp. v North River Ins. Co.*, 44 AD3d 568 [1st Dept 2007]). Any doubt as to whether the insurer has a duty to defend is resolved in favor of the insured (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640 [1993]; *Brook Shopping Ctr., Inc. v Liberty Mut. Ins. Co.*, 80 AD2d 292 [1st Dept 1981]). If any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action (*Salt Const. Corp. v Farm Family Cas. Ins. Co.*, 120 AD3d 568 [2014] citing *Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61 [1991]).

The Court first addresses the branches of plaintiffs' motion which seek a declaration that defendants have a duty to defend plaintiffs in the underlying action and

that the Landlord Entities are additional insureds under the insurance policy Liberty Mutual issued to Chase. Article 41.1(A) of Chase's lease agreement with the Landlord Entities contains a provision which requires Chase to defend and indemnify the Landlord Entities under certain circumstances. It provides:

Tenant shall indemnify and save the Indemnitees harmless from and against...(c) all claims against the Indemnitees arising from any accident, injury or damage occurring outside of the Premises but anywhere within or about the Real Property, where such accident, injury or damage results or is claimed to have resulted from an act, omission or negligence of Tenant or Tenant's contractors, licensees, agents, servants, employees, invitees, or visitors....This indemnity and hold harmless agreement shall include indemnity from and against any and all liability, fines, suits demands, costs and expenses of any kind or nature (including, without limitation, reasonable attorneys' fees and disbursements) incurred in or in connection with any such claim or proceeding brought thereon, and the defense thereof, but shall be limited to the extent any insurance proceeds collectable by Landlord or such injured party with respect to such damage or injury are insufficient to satisfy same.

Article 41.1(A) requires Chase to indemnify the Landlord Entities for bodily injury claims arising from an accident anywhere in the building in question where it is alleged that the injury occurred during the term of the lease and was the result of the negligence of Chase or any of its contractors.

Defendants argue that this Court must deny the instant motion because Mr. Gray's alleged injuries could only be attributed to plaintiffs' negligence, as they alone had control of and were responsible for the maintenance and repair of the loading dock where Mr. Gray alleges to have sustained injuries. Defendants' argument notwithstanding, the issue of whose, if anyone's, negligence proximately caused Mr. Gray's injuries is not presently before the Court on this motion. Instead, this Court need only determine whether the contractual provision governing defendants' obligation to defend and indemnify plaintiffs has been triggered. Here, the qualifying conditions of article 41.1(A)

have been met, as Chase is named as a defendant in the underlying action and the complaint therein alleges that Chase was a negligent party. As such, Chase's duty to defend the Landlord Entities in the underlying action has been triggered, irrespective of whether the allegations are true or whether, on the basis of these allegations, liability will ever be established.

Even though Chase has a duty to defend in the underlying action, Liberty Mutual argues that it does not have a duty to defend or indemnify the Landlord Entities because they are not named as an additional insured in Liberty Mutual's insurance agreement with Chase. However, Liberty Mutual's policy agreement with Chase, which was in effect at the time of the accident, contains a Contractual Liability Exclusion provision which provides coverage for liability assumed by Chase, as well as coverage for the defense of any lawsuit brought against an indemnitee of Chase. In relevant part, the provision states:

2. We will defend any claim made or "suit" brought against the indemnitee under an "insured contract" which you are required to defend by the specific terms of such "insured contract", but only to the same extent and on the same terms that we would defend if the indemnitee were the insured under the policy and then only if all of the following conditions are satisfied:

- (a) The claim or "suit" seeks damages for which the indemnitee is legally entitled to indemnification under the "Insured Contract",
- (b) The policy covers such damages, and
- (c) The applicable Limit of Insurance with respect to such damages has not been exhausted by payment of judgments or settlements.

The term "Insured Contract" is defined in the agreement as including "a contract for a lease of premises." Liberty Mutual's policy agreement with Chase also contains a Blanket Additional Insured Endorsement provision which provides additional insured coverage for any entity for which Chase has agreed, in writing, to provide liability insurance. The

provision states in relevant part:

SECTION II – WHO IS AN INSURED is amended to include as an insured any person or organization for whom you have agreed in writing to provide liability insurance. But:

The insurance provided by this amendment:

* * *

2. Applies only to “bodily injury” or “property damage” arising out of (a) “your work” or (b) premises or other property owned by or rented to you.

In the “definitions” section of the Commercial General Liability form, “your work” is defined in pertinent part as “work performed by you or on your behalf.”

A plain reading of these two provisions indicates that Liberty Mutual agreed to handle the defense of any lawsuit involving bodily injury which Chase has a contractual duty to defend. Chase has such a duty in the underlying action. As such, although the Landlord Entities are not specifically named as additional insureds in Liberty Mutual’s policy agreement with Chase, the Landlord Entities are nonetheless additional insureds pursuant to the Blanket Additional Insured Endorsement provision of the policy agreement, and Liberty Mutual has a duty to defend them in the underlying action.

The Court next turns to the branch of plaintiffs’ motion which seeks a declaration that defendants have a duty to indemnify the Landlord entities in the underlying action. Unlike the duty to defend, the duty to indemnify requires a determination of liability (*Greenwich Ins. Co. v City of New York*, 122 AD3d 470 [1st Dept 2014]). Whether Chase, and by extension Liberty Mutual, will be required to provide indemnification to plaintiffs hinges on issues as yet undecided in the underlying action. If one or more of the Landlord Entities are found legally responsible for the alleged accident and injuries to plaintiff in the underlying action, then requiring Chase and/or Liberty Mutual to indemnify the plaintiffs would subvert the intention of General Obligations Law § 5-322.1. For this reason, a property owner seeking contractual indemnification must demonstrate that it

is free from negligence inasmuch as it is precluded from being indemnified for its own wrongdoing (*see Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772 [2010]). As such, the Court cannot at this juncture make a finding as to whether defendants are obligated to indemnify the Landlord Entities in the underlying action.

Finally, a liability insurer's unjustified refusal to defend a named insured results in an obligation to pay the insured all of the reasonable and necessary expenses incurred by that insured in conducting the defense of the underlying action (*Doyle v Allstate Ins. Co.*, 1 NY2d 439 [1956]; *ACP Servs. Corp. v St. Paul Fire and Mar. Ins. Co.*, 224 AD2d 961 [4th Dept 1996]; *Padavan v Clemente*, 43 AD2d 729 [2d Dept 1973]). Accordingly, defendants are required to reimburse Zurich for all legal costs incurred by Zurich in defending the underlying action.

Accordingly, it is

ORDERED that the plaintiffs' motion for summary judgment is granted only to the extent of granting the branches of their motion which seeks a declaration that plaintiffs 277 Park Avenue, LLC and Cassidy Turley New York, Inc. are additional insureds under the insurance policy Liberty Mutual issued to Chase and that Chase and Liberty Mutual have an obligation to defend 277 Park Avenue, LLC and Cassidy Turley New York, Inc. against all claims asserted against them in the underlying action, *Brian Gray v Stanley Stahl et al.* (index No. 110738/2011), and it is further

ADJUDGED AND DECLARED that 277 Park Avenue, LLC and Cassidy Turley New York, Inc. are additional insureds under the insurance policy Liberty Mutual issued to Chase, that defendants Liberty Mutual and Chase are to defend 277 Park Avenue, LLC and Cassidy Turley New York, Inc. against all claims asserted against them in the underlying action, and that Liberty Mutual is obligated to reimburse Zurich American Insurance Company for all costs and expenses that it has incurred in its defense of that action; and it is further

ORDERED that the branch of the motion seeking summary judgment declaring that defendants are obligated to indemnify 277 Park Avenue, LLC and Cassidy Turley New York, Inc. in the underlying action is denied and counsel are directed to appear for a status conference in Room 490, 111 Centre Street on September 5, 2018 at 2:15PM.

Dated: 8/13/18

ENTER:

A handwritten signature in black ink, appearing to read 'Anthony Cannataro', written over a horizontal line.

Anthony Cannataro, JSC