

<b>Technology Ins. Co. v Covington Specialty Ins. Co.</b>
2018 NY Slip Op 32245(U)
September 10, 2018
Supreme Court, New York County
Docket Number: 159161/17
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE
Justice

PART 12

-----X

TECHNOLOGY INSURANCE COMPANY,
Plaintiff,

INDEX NO. 159161/17

MOTION DATE

- v -

MOTION SEQ. NO. 1

COVINGTON SPECIALTY INSURANCE
COMPANY, et al.,
Defendants.

DECISION AND ORDER

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By notice of motion, defendant Covington Specialty Insurance Company moves pursuant to CPLR 3211(a)(7) for an order dismissing the complaint or, alternatively, pursuant to CPLR 2201 for an order staying the action pending a determination in the underlying proceeding. Plaintiff opposes and by notice of cross motion, moves for leave to amend its complaint, and upon amendment, granting it a declaratory judgment. Covington opposes the cross motion.

I. PROCEDURAL BACKGROUND

The underlying action involves an accident that is alleged to have occurred in front of premises located at 8305 Third Avenue in Brooklyn owned by Spiros Nakos and Hrissi Nakos (landlords). The landlords leased a portion of the building to defendant Candela Restaurant Corp. d/b/a Red Oak Restaurant. (NYSCEF 1).

The lease obligates Candela to keep the sidewalks and curbs free of snow and ice, and to procure a comprehensive liability insurance policy covering "the demised premises and the entire building and property in which it forms a part of" and naming the landlords as the insured party. Candela also agrees to indemnify the landlords from liabilities incurred as a result of any breach by it of any covenant or condition of the lease. (NYSCEF 20).

It is alleged that on February 4, 2014, Alawad Abdelsalam slipped and fell on ice on the ground floor of the premises and sustained personal injuries. Abdelsalam has commenced a lawsuit against Candela and the landlords in Kings County Supreme Court. The landlords cross claimed for contribution and indemnity from Candela. (NYSCEF 21).

Plaintiff assumed the obligations of the landlords' previous insurance policy and is defending the landlords in the underlying action. (NYSCEF 1). Candela obtained an insurance policy from Covington which provides coverage to Spiros Nakos as an additional insured "but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you." (NYSCEF 22).

In this action, plaintiff seeks a judgment declaring that Covington has a duty to defend and indemnify the landlords in the Kings County action, which would allow plaintiff to withdraw from their defense. (NYSCEF 1).

## II. CROSS MOTION TO AMEND

Plaintiff seeks to amend its complaint to add the landlords as additional plaintiffs, and to assert an equitable contribution claim against defendants, observing that its insurance coverage is excess to Covington's primary coverage. (NYSCEF 35).

Covington does not oppose the amendment to the extent that Spiros Nakos seeks a declaratory judgment, but opposes the remainder of the amendment, arguing that plaintiffs' claim for an equitable contribution does not lie and/or is premature. Covington also observes that there is no basis for adding Hrisi Nakos as a plaintiff as she is not listed in the policy as an insured or additional insured. (NYSCEF 48).

An insurer and an additional insured may bring an action for a declaratory judgment against another insurer to determine the scope of each insurer's duties. (*Lang v Hanover Ins. Co.*, 3 NY3d 350 [2004]). Moreover, an excess insurer may seek equitable contribution from a primary insurer in a declaratory judgment action. (*See Admiral Ins. Co. v Am. Empire Surplus Lines Ins. Co.*, 96 AD3d 585 [1<sup>st</sup> Dept 2012] [declaring that excess insurer entitled to equitable contribution against primary insurer]). Plaintiff thus demonstrates that the proposed addition of an equitable contribution claim has merit. The determination of whether Covington's policy covers the underlying accident has no impact on whether plaintiff's amended complaint has merit.

However, while Hrisi Nakos was a party to the lease between the landlords and Candela, and although Candela was required to name her as an additional insured, it is undisputed that she was not named as an additional insured in the policy, and plaintiff offers no authority for the proposition that a party that should have been named as an additional insured, but was not named, has standing under the policy to sue the insurer.

Plaintiff's motion for leave to amend is thus granted to the extent of adding Spiros Nakos as a plaintiff and including a claim for equitable contribution. I decline to award sanctions to Covington.

### III. MOTION TO DISMISS OR STAY AND CROSS MOTION FOR SUMMARY JUDGMENT

A declaration as to Covington's alleged duty to indemnify plaintiff must await a determination in the underlying action. (*See Axis Surplus Ins. Co. v GTJ Co., Inc.*, 139 AD3d 604 [1<sup>st</sup> Dept 2016] [insurer's argument that accident was not within its insured's area of responsibility could not be resolved on motion seeking declaratory relief, but would be determined after resolution of underlying action]; *Ocean Gardens Nursing Facility, Inc. v Travelers Cos., Inc.*, 91 AD3d 734 [2d Dept 2012] [as insurer sought declaration of other insurer's duty to indemnify it, and as liability in underlying action had yet to be determined, it was premature for court to issue declaratory judgment]).

However, plaintiff also asserts that Covington has a duty to defend the landlords in the underlying action which does not depend on a determination of liability. (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1 [1<sup>st</sup> Dept 2011] ["the duty to provide a defense may arise before indemnification has been decided"]; *see also Axis Surplus Ins. Co.*, 139 AD3d at 604-605 [while indemnification claim had to be determined after resolution of underlying action, declaration granted as to insurer's duty to defend]).

Covington does not dispute that it owes plaintiff a duty to defend it in the underlying action. Consistent with that duty, Covington is obligated to reimburse plaintiff for the costs it has incurred to date in the underlying action. (*See Pinon v 99 Lynn Ave., LLC*, 124 AD3d 746 [2d Dept 2015] [insurer had duty to defend additional insured in underlying action and to reimburse it for past defense costs]).

The amount of the costs to be reimbursed must be decided at a hearing. (*Serio v Pub. Svce. Mut. Ins. Co.*, 7 AD3d 277 [1<sup>st</sup> Dept 2004] [as insurer had duty to defend, it had to reimburse insureds for past legal costs, and trial court properly referred matter for hearing to determine extent of costs]).

### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Covington Specialty Insurance Company's motion to dismiss is denied; it is further

ORDERED, that plaintiff's cross motion for leave to amend is denied as to adding Hrissi Nakos as a plaintiff and is otherwise granted; it is further

ORDERED, that plaintiff serve and file its amended complaint in conformity with this decision within 30 days of the date of this order; it is further

ORDERED, that plaintiff's motion for summary judgment is denied on its claims for equitable contribution and indemnity, but granted on its claim for a defense; it is further

ORDERED and ADJUDGED, that defendant Covington Specialty Insurance Company had and has a duty to defend plaintiff Spiros Nakos in the underlying action pending in Kings County Supreme Court (*Abdelsalam v Nakos*, Index No. 50226/15); it is further

ORDERED, that the issue of the amount of costs and expenses, including reasonable attorney's fees, that plaintiff incurred in defending Nakos in the underlying action is referred to a special referee for determination; it is further

ORDERED, that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose

- (1) the issue of the amount of costs and expenses, including reasonable attorney's fees, that plaintiff incurred in defending Nakos in the underlying action;

it is further

ORDERED, that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR unless otherwise indicated below; it is further

ORDERED, that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) for placement at the earliest possible date upon the calendar of the Special Referees Part (SRP), which, in accordance with the Rules of the Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; it is further

ORDERED, that counsel shall immediately consult one another and counsel for plaintiffs shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; it is further

ORDERED, that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referee Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that part; it is further

ORDERED, that except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issue specific above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; it is further

ORDERED, that counsel shall file memoranda or other documents directed to the assigned Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers

and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED, that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

9/10/2018

DATE

BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

DO NOT POST

FIDUCIARY APPOINTMENT

REFERENCE