388 Realty Owner LLC v Amtrust Intl. Underwriters Ltd.
2018 NY Slip Op 32888(U)
November 8, 2018
Supreme Court, New York County
Docket Number: 651944/2017
Judge: Debra A. James

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART IAS MOTION 59EFM**

Justice

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388 REALTY OWNER LLC, CITIGROUP, INC., CITICORP TECHNOLOGY, INC., SL GREEN REALTY CORP., TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Plaintiffs,

- v -

AMTRUST INTERNATIONAL UNDERWRITERS LIMITED,

Defendant.

INDEX NO. 651944/2017

MOTION DATE 01/30/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for JUDGMENT - SUMMARY.

ORDER

Upon the foregoing documents and further deliberation following oral argument, the ruling on the record is vacated, and it is

ORDERED that the motion (sequence number 001) of defendant seeking an order granting it summary judgment and declaring that it has no duty to defend and indemnify plaintiffs in the underlying action is denied; and it is further

ORDERED that the cross motion of plaintiffs for an order granting summary judgment in their favor is granted only to the extent of requiring defendant to defend plaintiffs in the

underlying action, with the indemnity issue reserved for later determination; and it is further

ORDERED that counsel for the parties are directed to appear for a status conference in Room 331, 60 Center Street, New York, New York, on December 4, 2018, at 11:00 AM.

DECISION

In the motion and the cross motion, both sides seek summary judgment in their respective favors.

The legal standards for determining a summary judgment motion are well established. Specifically, in considering a summary judgment motion, pursuant to CPLR 3212, the Court of Appeals has noted, in Alvarez v Prospect Hosp.:

> "As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [citations omitted]" (68 NY2d 320, 324 [1986]). The movant must tender sufficient evidence to show the absence of any disputed material issues of fact to warrant the court, as a matter of law, in directing summary judgment (Gammons v City of New York, 24 NY3d 562, 569 [2014]).

The courts scrutinize summary judgment motions, as well as the facts and circumstances of each case, to determine whether the requested relief may be granted, because entry of summary

judgment "deprives the litigant of his [or her] day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (Andre v Pomeroy, 35 NY2d 361, 364 [1974]). Further, in weighing a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion" (Martin v Briggs, 235 AD2d 192, 196 [1st Dept 1997]). Moreover, it has been held that bare allegations or conclusory assertions in pleadings are insufficient to create genuine issues of fact necessary to defeat a summary judgment motion (Zuckerman v City of New York, 49 NY2d 557 [1980]; Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 [1978]).

Discussion

In support of its motion, defendant AmTrust argues, in essence, that pursuant to the Master Trade Contract between Tishman and W5 (Subcontract), a provision relieving W5 of its duty to procure liability insurance to include Tishman and other plaintiffs as additional insureds is waived, if an Owner Controlled Insurance Program (OCIP), an insurance program that provides coverage to the Owner (i.e. Citigroup) and certain enrolled contractors, is implemented. AmTrust also argues that, because the OCIP was implemented for the Project pursuant to the Final Construction Management Agreement between Citigroup, as the net lessee and Owner of the building, and Tishman, as

general contractor and construction manager of the Project (Prime Contract), W5 was "not contractually obligated to procure any insurance for the Project, let alone to include any party as additional insured on any such insurance," thus entitling AmTrust to summary judgment declaring that it has no duty to defend and indemnify plaintiffs in the Underlying Action.

Although AmTrust's argument has facial appeal, an analysis into the relevant provisions of the documents and exhibits related to the Prime Contract and the Subcontract raises significant issues that undermine such an argument. For example, pursuant to the Prime Contract, section 10.1 therein provides, in part, that the insurance for the Project is to be provided through a "wrap up" insurance program called OCIP, and that Owner elected to provide an OCIP by which insurance coverage for "Owner, Construction Manager, and such Subcontractors as become Enrolled Parties". In turn, section 10.1.2 provides, in part, that "Construction Manager shall provide each Enrolled Party the OCIP Manual", "subject to modification-update as provided by Owner, which includes a summary of the OCIP insurance coverage". Section 10.2 then defines those parties eligible to be enrolled in the OCIP, who have submitted all enrollment information as required by the OCIP Manual and have been accepted into the OCIP, as the "Enrolled Parties". Therefore, pursuant to the Prime Contract,

only the Enrolled Parties are covered under the Owner implemented OCIP.

With respect to the Subcontract between Tishman and W5, section 7 therein provides, in part, that "the Contractor [W5] shall indemnify, defend, and hold harmless the Owner [Citigroup], Construction Manager [Tishman], and such other Indemnitees as may be defined by the applicable Task Order". Section 8 provides, in part, that "Contractor and each of Contractor's subcontractors [Calvin] shall, at its own expense, maintain the insurance coverage and limits of liability stated in the attached Insurance Rider," and if there is a "conflict between the Insurance Rider and the specific insurance requirements identified in a Task Order, the provision that imposes the greater obligation on the Contractor shall apply". In turn, page one of the Insurance Rider provides that "prior to commencement of any work . . . and until all obligations under this contract are fulfilled, the Contractor [W5] and each and every Subcontractor of the Contractor [Calvin] shall, at its sole expense, maintain the following insurance on its own behalf, and furnish to the Owner [Citigroup] and/or Construction Manager [Tishman], certificates of insurance evidencing same." The Insurance Rider, in page 2, provides that the insurance certificates furnished must reflect the inclusion of, among other entities, Citigroup and Tishman, and "all other

indemnitees named in the Contract as Additional Insureds." Thus, pursuant to the Subcontract and the Insurance Rider, W5 (and Calvin by extension) was contractually required to provide insurance certificates reflecting, among others, Citigroup and Tishman, as additional insureds. Section 8 of the Subcontract also provides that, if the Task Order, attached as Exhibit 1 thereto, involves a project for which an OCIP is implemented, "then the parties shall comply with that insurance program." In turn, section 3 of Rider A to the Task Order (entitled Description of Work) provides that "if the owner implements an OCIP program for the project . . . contractor shall immediately enroll in the OCIP but not later than the first date of entry in the Site."

As an integral document to the Prime Contract and the Subcontract, the OCIP Manual states, in section 1.2, that "[c]ertain work is excluded from the OCIP. Entities performing such [work] are responsible for procuring and maintaining their own insurance and must provide the necessary documentation" (OCIP Manual at 6). The Manual also specifies that "any person or entity responsible for performing demolition and/or blasting work at the Project Site" is not eligible to enroll in the OCIP. Accordingly, pursuant to the OCIP Manual, W5 and its subcontractor Calvin (entities that perform demolition work) are not eligible for enrollment in the OCIP and are responsible for

procuring and maintaining their own insurance. It is undisputed that, in connection with performing demolition work for the Project, W5 (and Calvin by extension) procured and maintained the AmTrust Policy.

Despite the foregoing, AmTrust points to the following provision in Rider A (Description of Work) that is annexed to Exhibit 1 (Task Order) of the Subcontract to support its motion. Specifically, under the subheading "Contract Alternates" on page 15 of Rider A, the short provision (Contract Alternates Provision) states: "In the event that an OCIP is implemented for the project, the Contractor is not required to provide insurance." AmTrust argues that, because an OCIP was implemented for the Project and the Contract Alternates Provision is unambiguous, extrinsic evidence of the parties' intent and understanding of the contractual terms is irrelevant. AmTrust's argument is unpersuasive. As discussed, it is undisputed that, pursuant to the OCIP Manual, AmTrust's insureds, W5 and Calvin, are not eligible to enroll in the OCIP and are required to procure their own insurance. Also, under the Prime Contract, Subcontract and Insurance Rider, W5 and Calvin are required to maintain, at their own expense, insurance coverage for themselves and to name Citigroup, Tishman and other plaintiffs as additional insureds. Therefore, even if the Contract Alternates Provision is unambiguous, as argued by

AmTrust, it conflicts with other applicable provisions of the governing documents.

Notably, the paragraph preceding the Contract Alternates Provision states, in relevant part: "At the Owner's option in accordance with the article entitled 'Changes in Contract Time and Contract Price' of the Contract, the following Alternates shall be used for all additions and/or deletions to the Scope of Work and shall be inclusive of . . . material, labor, trucking, overhead . . . applicable taxes, applicable insurances, permits . . . ." The Contract Alternates Provision is followed by this notation: "DEDUCT $0.00."

Apparently realizing the rather convoluted and complicated language that precedes the Contract Alternates Provision, plaintiffs submitted affidavits of Edward McCellan, attorney in fact for plaintiffs other than Tishman, and John Feury, a Tishman vice president. The Feury affidavit explains that the Contract Alternates Provision "is only triggered at the option of the owner and shall be used for additions and/or deletions to the scope of work. The owner never exercised such option and the demolition work being performed was not added to or deleted from at any time. Therefore, the language under contract alternates do not apply to this matter". While Feury's explanation provides guidance toward interpretation, it does not fully clarify or address why the Owner-triggered option of

addition and/or deletion to the scope of work (i.e. demolition) includes terms such as "applicable taxes" and "applicable insurance," which are seemingly unrelated to the physical work of demolition. In such regard, Feury's explanation lacks sufficient clarity and thoroughness, and militates against plaintiffs' cross motion for summary judgment.

As an alternate, AmTrust argues that, even if plaintiffs' interpretation of the Contract Alternates Provision is "somehow reasonable," since AmTrust's own interpretation is "itself reasonable," the Contract Alternates Provision "would merely be ambiguous in that regard". AmTrust also argues that because plaintiffs failed to submit "extrinsic evidence that both Tishman and W5 understood the Subcontract to require W5 to include plaintiffs as additional insureds on the AmTrust Policy," and the rule of contract interpretation requires any contractual ambiguity be construed against the drafter, AmTrust's interpretation should be favored and summary judgment in AmTrust's favor should be granted.

AmTrust's argument is unavailing. As discussed above, entry of summary judgment is a drastic remedy that should only be granted when there is no doubt as to the absence of triable issues, and it requires the movant to tender sufficient evidence to show the absence of disputed material issues of fact to warrant the court, as a matter of law, in directing summary

judgment (Gammons, 24 NY3d at 569). Here, the Contract Alternates Provision contradicts applicable provisions of the Subcontract and other governing documents. AmTrust's reliance on the Contract Alternates Provision is thus misplaced because it does not override the conflicting provisions. Indeed, the Subcontract states that, if there is a conflict between the Insurance Rider and the Task Order, the provision imposing the "greater obligation on the Contractor [W5] shall apply." As AmTrust has not demonstrated the absence of disputed material issues of fact, summary judgment cannot be entered in its favor. Moreover, the fact that W5 actually procured the AmTrust Policy, despite its position that the Contract Alternates Provision (which is deeply embedded within a rider to the Task Order) relieves it of the contractual duty to buy insurance coverage for itself and the additional insureds (as argued by AmTrust), may palpably serve as "extrinsic evidence" to show that W5 understood its contractual duty.

Finally, AmTrust argues that, even if plaintiffs qualify as additional insureds, they have not established that AmTrust has a duty to indemnify them in the Underlying Action. Specifically, AmTrust takes the position that, to trigger a duty to indemnify, the additional insured must establish that the negligence or other acts or omission of the named insured caused the subject injury (citing Burlington Ins. Co. v NYC Trans.

Auth., 29 NY3d 313, 323 [2017]). AmTrust further argues that, because the issue of whether W5 or Calvin was negligent has not been resolved in the Underlying Action, it would be improper and premature for this court, if plaintiffs qualify as additional insureds, to determine whether they are entitled to be indemnified under the AmTrust Policy.

AmTrust's argument is unpersuasive. The issue in Burlington was whether the defendants there, as purported additional insureds, were entitled to be indemnified by the insurer where the policy stated, in relevant part, that an entity would be "an additional insured only with respect to liability for 'bodily injury' . . . caused, in whole or in part, by [the named insured's] acts or omissions" (Burlington, 29 NY3d at 321). The Court of Appeals held that such policy language "confirms that coverage for additional insureds is limited to situations where the [named] insured is the proximate cause of the injury," and discredited the defendants' argument that they should be covered as additional insureds regardless of their negligence, so long as the named insured was also negligent (id. at 323). The AmTrust Policy, however, states in relevant part: "It is agreed that such insurance as is afforded by this policy for the benefit of the additional insured shown shall be primary insurance . . . provided however that this insurance will not apply to any claim loss or liability which is determined to be

solely the result of the additional insured's negligence or solely the additional insured's responsibility". As the facts in Burlington are distinctly different, the holding of the Court of Appeals reached in that case is inapplicable here.

Moreover, the third-party complaints filed by plaintiffs in the Underlying Action allege, among other things, that if Valdivia sustained injuries or damages at the Project site, they were due to the negligence and carelessness of the third-party defendants, W5 and Calvin, and their agents or employees. The allegation is sufficient to withstand a challenge that plaintiffs failed to assert their claim, as purported additional insureds, is within the embrace of the AmTrust Policy. More importantly, as pointed out by plaintiffs in their opposition brief, an insurer's duty to defend is broader than its duty to indemnify (Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131 [2006]). Yet, AmTrust failed to address or oppose the duty to defend issue in its reply brief. Thus, AmTrust is required to defend plaintiffs in the Underlying Action, when the allegations in the third-party complaints suggest a reasonable possibility of coverage. The ultimate issue regarding plaintiffs' entitlement to indemnity, and the amount thereof, may be determined upon resolution of the Underlying Action.

In respect to plaintiffs' cross motion seeking summary judgment in their favor, because a disputed issue arises under

the Contract Alternates Provision regarding whether W5 and Calvin were required to purchase insurance coverage and to name plaintiffs as additional insureds, as discussed above, entry of summary judgment is not warranted at this juncture. However, as discussed, the cross motion is granted to the extent of requiring AmTrust to defend plaintiffs, with the indemnity issue reserved for determination of the Underlying Action.

11/8/2018
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE