

Dynatec Contr., Inc. v Burlington Ins. Co.
2019 NY Slip Op 30130(U)
January 7, 2019
Supreme Court, New York County
Docket Number: 655241/17
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

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DYNATEC CONTRACTING, INC. and 653 TENTH
AVENUE, LLC,

Plaintiffs,

Index No. 655241/17

Motion Sequence No.:
001

- against -

THE BURLINGTON INSURANCE COMPANY and
ROCK SCAFFOLDING CORP.,

Defendants.
-----x

HON. DORIS LING-COHAN, J.S.C.:

Plaintiffs Dynatec Contracting, Inc. ("Dynatec") and 653 Tenth Avenue, LLC ("653 Tenth Avenue") move, pursuant to CPLR 3212, for partial summary judgment adjudging and declaring that defendants The Burlington Insurance Company s/h/a Burlington Insurance Company ("Burlington") and Rock Scaffolding Corp. ("Rock Scaffolding") are obligated to defend plaintiffs as additional insureds in an underlying personal injury action entitled *Perez v Dynatec Contracting Inc.*, Sup Ct, Bronx County, index No. 21813/14 (the "underlying action"). Alternatively, plaintiffs seek judgment against Rock Scaffolding for breach of its contractual obligation to obtain insurance naming plaintiffs as additional insureds, and a hearing to determine the amount that defendants must reimburse plaintiffs for the defense costs in the underlying action, to date, with statutory interest.

Burlington cross-moves for summary judgment dismissing the Complaint against it, and a declaration that it is not obligated to defend or indemnify plaintiffs in the underlying action.

BACKGROUND

Plaintiffs commenced this declaratory judgment action against Burlington and its named insured, Rock Scaffolding, seeking a declaration that Burlington is obligated to defend and indemnify plaintiffs in the underlying action. The following facts are gleaned from the submission of the parties.

In September 2011, by written Agreement for Construction Services (the "Contract"), 653 Tenth Avenue, as owner, hired Dynatec, as general contractor, for a construction project at 653 Tenth Avenue, New York, New York (the "Project") (NYSCEF Doc. No. 12). The Contract required Dynatec to provide general contracting services "in connection with the New Residential Project - Residential Units and One Ground Floor Commercial Unit at 653 Tenth Avenue, New York, New York" (*id.*).

Dynatec retained NY Renaissance Corp. ("NY Renaissance") as a subcontractor to install exterior windows and panels.

On February 16, 2012, Dynatec also entered into a written Standard Form Agreement Between Contractor and Subcontractor (the "Subcontract") with Rock Scaffolding to build the scaffolding at the Project (Not of Mot, Exh D; NYSCEF Doc. No. 14). Paragraph 1.2 of the Subcontract states that the general conditions of AIA Document A201 apply to the Subcontract, except to the extent that a conflict exists with the Subcontract documents (*id.*). In addition, paragraph 2.1 states that to the extent that the AIA Document A201 conditions apply, then "[Dynatec] shall assume

toward [Rock Scaffolding] all obligations and responsibilities that [653 Tenth Avenue], under such documents, assumes toward [Dynatec], and [Rock Scaffolding] shall assume toward [Dynatec] all obligations and responsibilities which [Dynatec], under such documents, assumes toward [653 Tenth Avenue]" (*id.*).

Section 11.1.4 of the AIA Document A201 states:

"To the fullest extent permitted by law, [Dynatec] shall cause the commercial liability coverage required by the Contract Documents to include (1) [653 Tenth Avenue] ... and any other party requested by [653 Tenth Avenue] as additional insureds for claims caused in whole or in part by [Dynatec's] negligent acts or omissions during [Dynatec's] operations; and (2) [653 Tenth Avenue] ... and any other party requested by [653 Tenth Avenue] as additional insureds for claims caused in whole or in part by [Dynatec's] negligent acts or omissions during [Dynatec's] completed operations"

(*id.*).

Article 13 of the Subcontract, entitled Insurance and Bonds, requires Rock Scaffolding to procure insurance as set forth in Rider H (*id.*). Rider H, entitled Insurance Requirements, requires Rock Scaffolding to maintain Comprehensive General Liability insurance covering Bodily Injury and Property Damage with a combined single limit of not less than \$1,000,000.00 per person [and] \$4,000,000.00 per accident (*id.*). Paragraph C(4) of Rider H states that "Dynatec ... shall be named on [Rock Scaffolding's] liability policy as additional insured on the Certificate of Insurance" (*id.*). Paragraph C(5) states that

"[t]he Certificate of Insurance must show the inclusion of the attached hold harmless clause for the benefit of the additional insured and Dynatec Contracting, Inc." (*id.*).

The submissions include a copy of the general liability insurance policy (the "Burlington Policy"), Policy No. 356BW22609, issued by Burlington to Rock Scaffolding, effective May 24, 2012 to May 24, 2013, with a \$1,000,000.00 per occurrence limit of liability (Not of Mot, Exh P; NYSCEF Doc. No. 26)). The "Insuring Agreement" in the policy states, in part:

"We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply ..."

(*id.*).

The submissions also include a copy of a Certificate of Liability Insurance, dated May 24, 2014, that Rock Scaffolding provided to Dynatec, listing, among other things, a policy from Burlington with limits of \$1,000,000.00 per occurrence, and an excess policy from Mt. Hawley Insurance Company ("Mt. Hawley") with limits of \$5,000,000.00 per occurrence (Not of Mot, Exh E; NYSCEF Doc. No. 15).

The Underlying Action

The plaintiff in the underlying action sought to recover damages from Dynatec and 653 Tenth Avenue for personal injuries he allegedly sustained on April 23, 2013, when he tripped over an uneven plank on a five-story exterior scaffolding installed by Rock Scaffolding, while working for NY Renaissance on the Project. On his Worker's Compensation Claim Form, dated June 3, 2013, the plaintiff states that he "tripped over materials that [were] not supposed to be there, while [he] was guiding the panel;" that the incident occurred on the scaffolding on 26th Street and 10th Avenue "on the 5th floor;" and that he suffered head and neck injuries as a result of the incident (Not of Mot, Exh G).

At an examination before trial ("EBT") held on July 26, 2016, the plaintiff testified that before the incident, he had walked up five levels of an exterior staircase; that he had been guiding panels on a lift outside the building, using scaffolding attached to the exterior of the building; and that the scaffolding was 10 to 15 feet high per level (Transcript, Not of Mot, Exh J, pp. 26, 29). He also testified that he was injured while trying to grab a panel to prevent it from hitting the building, when he hit his foot on an uneven plank on the scaffolding (*id.*, pp. 43-45).

The Complaint in the underlying action alleges causes of action against 653 Tenth Avenue and Dynatec for negligence (first

cause of action); violation fo Labor Law §200 (second cause of action); and violation of Labor Law §241(6) and §23-1.7 of the New York State Industrial Code (third cause of action) (Amended Complaint, Not of Mot, Exh H).

Dynatec and 653 Tenth Avenue impleaded NY Renaissance (Third-Party Complaint, Not of Mot, Exh I), and Rock Scaffolding (Second Third-Party Complaint, Not of Mot, Exh K) seeking contribution, contractual indemnification, or common law indemnification.

Colony Insurance Company ("Colony"), the general liability insurer of Dynatec, undertook the defense of Dynatec in the underlying action. By letter dated April 26, 2017, Colony tendered the claim on behalf of Dynatec and 653 Tenth Avenue to Rock Scaffolding and its insurers, Burlington and Mt. Hawley, as additional insureds under the Burlington Policy, based on the Subcontract and EBT testimony of the plaintiff in the underlying action that the incident was caused by a board that was improperly placed on the scaffolding on which he had been working (Letter, Not of Mot, Exh L).

Burlington responded, by letter dated May 26, 2017, denying coverage, stating:

"There is no indication that Dynatec, or 653 for that matter, qualify as either named insureds or additional insureds on the policy. Although you have provided us with a copy of a Certificate of Liability Insurance along with your tender, that form specifically reflects, in the top right corner, that 'the certificate is issued as a

matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below'. Moreover, that document was not issued by [Burlington] or an agent of [Burlington] nor does it reference a [Burlington] number. Consequently that document does not bind coverage under the [Burlington] policy"

(Letter, Not of Mot, Exh M). Burlington also asserted that the Subcontract was not fully executed (*id.*). Burlington further stated:

"[T]he contract reflects within Rider H Insurance Requirements, paragraph C, subsection 4., "Dynatec Contracting Inc. and all entities listed below, and their representatives, shall be named on the subcontractor's liability policy as additional insured on the Certificate of Insurance". First, no parties are listed below those provisions so there is no requirement that 653 be named on the Certificate of Insurance. Second, the contract only calls for Dynatec to be named on the Certificate of Insurance, not the subcontractor's policy. Consequently, it was not a condition of the unexecuted contract that any party actually be named as an additional insured. Even if that was the intent, based on a review of the policy terms pertaining to additional insured status, Dynatec, nor any other party involved, has satisfied the terms of those forms. Therefore, we respectfully deny your tender relative to additional insured status"

(*id.*). In addition, Burlington disclaimed coverage based on untimely notice of the occurrence (*id.*).

Three months later, on August 28, 2017, Burlington sent a supplemental letter to Colony disclaiming coverage for plaintiffs

based on the Exclusion - Designated Operations provision in its policy that limits coverage to work done by Rock Scaffolding or on its behalf up to three stories (Letter, Not of Mot, Exh N).

Declaratory Judgment Action

Dynatec and 653 Tenth Avenue commenced this action against Burlington and Rock Scaffolding seeking a declaration that Burlington is obligated to defend and indemnify them in the underlying action (first and second causes of action), or, in the alternative, a declaration that Rock Scaffolding is liable to plaintiffs for the costs and damages incurred by plaintiffs in the underlying action based on Rock Scaffolding's breach of its contractual obligation to procure insurance naming plaintiffs as additional insureds (third and fourth causes of action) (Complaint, Not of Mot, Exh C; NYSCEF Doc. No. 13).

Burlington answered, generally denying the allegations in the Complaint; asserting numerous affirmative defenses; alleging a counterclaim against plaintiffs for a declaration of the rights and obligations of the parties; and alleging a cross claim against Rock Scaffolding based on the Exclusion - Designated Operations provision in its policy (Answer, Not of Mot, Exh O; NYSCEF Doc. No. 25).

Plaintiffs answered Burlington's counterclaim, denying the allegations therein, and incorporating by reference the allegations in the Complaint (NYSCEF Doc. No. 5).

Plaintiffs and Burlington now advance competing requests for summary judgment.

DISCUSSION

It is well settled that 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 (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, 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 (*Zuckerman v City of New York*, *supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, plaintiffs seek summary judgment declaring that Burlington is obligated to defend them in the underlying action, as additional insured under the Burlington Policy. Plaintiffs acknowledge that the issue of whether Burlington owes indemnity coverage will turn on whether there is an actual finding that the scaffolding constructed by Rock Scaffolding caused or contributed to the accident, and that the issue must be deferred until the underlying case is resolved. Thus, they seek summary judgment

solely on the issue of Burlington's obligation to defend them in the underlying action.

Plaintiffs argue that the express language of the Subcontract and the Burlington Policy, as well as the allegations of negligence against them and Rock Scaffolding in the underlying pleadings, require Burlington to defend them in the underlying action. Alternatively, plaintiffs assert that Rock Scaffolding is liable to plaintiffs for the costs and damages incurred by plaintiffs in the underlying action based on Rock Scaffolding's breach of its contractual obligation to procure insurance naming plaintiffs as additional insureds.

Burlington sharply disputes any obligation to defend or indemnify plaintiffs in the underlying action. In particular, Burlington maintains that the unsigned, undated, and unsworn Subcontract does not grant plaintiffs additional insured status. Burlington also asserts that even if coverage existed for plaintiffs under the Burlington Policy, the Work-Height Exclusion bars coverage in the underlying action.

Contrary to defendants' assertion, the submissions include a fully executed copy of the Subcontract (Not of Mot, Exh D). Furthermore, the obligation of Rock Scaffolding to procure comprehensive general liability coverage for Dynatec and 653 Third Avenue cannot be disputed. Specifically, the Subcontract clearly requires Rock Scaffolding to procure insurance naming Dynatec as an additional insured. In addition, the Subcontract

expressly states that it is subject to the General Conditions of AIA Document A201, which requires additional insurance coverage for 653 Tenth Avenue.

The Additional Insured Endorsement of the Burlington Policy, entitled Automatic Additional Insured By Written Contract, Written Agreement or Permit, states that an additional insured includes "any person(s) or organization(s) with whom you agreed, because of written contract, written agreement or permit, to provide insurance such as is afforded under this Coverage Part, but only 1: With respect to liability for 'bodily injury...caused by 'your work'" (NYSCEF Doc. No. 26). In addition, the Other Insured Endorsement states that coverage afforded to additional insured shall be primary, but "only if such claim, loss or liability is determined to be due solely to [Rock Scaffolding's] negligence" (*id.*).

Where an insurance policy includes the insurer's promise to defend the insured against specified claims, as well as to indemnify for actual liability, the insurer's duty to furnish a defense is broader than its obligation to indemnify (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 648 [1993]). An insurer's duty to defend is "derived from the allegations in the complaint and the terms of the policy" (*Holman v TransAmerica Ins. Co.*, 81 NY2d 1026, 1028 [1993]).

The duty to defend is extremely broad and an insurer will be called upon to provide a defense whenever the allegations in a

complaint against the insured suggest a possibility of coverage (*Continental Cas. Co. v Rapid-American Corp., supra*). The duty is not contingent on the insurer's ultimate duty to indemnify should the insured be found liable, nor is it material that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions *Ruder & Finn Inc. v Seaboard Sur. Co.*, 52 NY2d 663, 669-670 [1981]). Rather, if, liberally construed, the allegations in the complaint fit within the embrace of the policy, the insurer must come forward to defend the insured (*id.*).

The pleadings in the underlying action allege, among other things, negligence against plaintiffs and Rock Scaffolding based on a trip and fall incident on an uneven plank on scaffolding installed by Rock Scaffolding. The plaintiff in the underlying action alleges that he sustained bodily injury while working for NY Renaissance on the Project owned by 653 Tenth Avenue, on which Dynatec was performing work as general contractor and Rock Scaffolding was performing work as the scaffolding subcontractor. Liberally construed, the allegations in the pleading of bodily injury caused by plaintiffs' and Rock Scaffolding's work suggest a possibility of coverage for plaintiffs as additional insureds under the Burlington Policy. Thus, plaintiffs have met their burden of establishing entitlement to judgment as a matter of law

declaring that Burlington is obligated to defend them in the underlying action.

Burlington fails to raise any triable issue of fact. The assertion that the Work-Height Exclusion in the Burlington Policy relieves Burlington of any obligation to defend plaintiffs in the underlying action is unavailing.

It is undisputed that the alleged incident occurred at an elevation of five stories. Furthermore, the Work-Height Exclusion in the Burlington Policy undeniably bars coverage for "[a]ny and all work done by you or on your behalf that exceeds(3) stories" (NYSCEF Doc. No. 26). However, Insurance Law §3420(d) requires written notice of a disclaimer to be given "as soon as is reasonably possible" after the insurer learns of the grounds for disclaimer of liability. The "[f]ailure to raise a ground for disclaimer 'as soon as is reasonably possible' precludes the insurer from later asserting it as a defense" (*Roman Catholic Diocese of Brooklyn v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 NY3d 139, 146-147 [2013][internal citations omitted]).

Burlington's assertion that the delay in disclaiming based on the Work-Height Exclusion was due to its desire to conduct further investigations was not reasonable as a matter of law, as the basis alleged for the disclaimer was available on the face of the underlying amended Complaint (see *Uptown Whole Foods v Liberty Mut. Fire Ins. Co.*, 302 AD2d 592 [2d Dept 2003]).

The assertion that timely disclaimer under Insurance Law §3420(d) was unnecessary in this case because of the Work-Height Exclusion also lacks merit. Disclaimer pursuant to §3420(d) is unnecessary when a claim falls outside the scope of the policy's coverage portion (*Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188 [2000]). "Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed" (*id.*). By contrast, disclaimer pursuant to §3420(d) is necessary when the denial of coverage is based on a policy exclusion. "Failure to comply with section 3420(d) precludes denial of coverage based on a policy exclusion" (*id.*).

Here, the claim in the underlying action for bodily injury while doing work falls within the Burlington Policy's insuring agreement and additional insured endorsement. As such, disclaimer pursuant to §3420(d) is necessary since the denial of coverage is based on the Work-Height Exclusion.

The assertion that coverage under the Burlington Policy may be excess to plaintiffs' own insurance is simply insufficient to defeat summary judgment declaring that Burlington is obligated to defend plaintiffs in the underlying action.

Accordingly it is


ORDERED that plaintiffs' summary judgment motion is granted to the extent that it is

ORDERED and ADJUDGED that defendant The Burlington Insurance Company is obligated to defend plaintiffs as additional insured in the underlying personal injury action entitled *Perez v Dynatec Contracting Inc.*, Sup Ct, Bronx County, Index No. 21813/14 and related third-party actions, and the motion is otherwise denied; and it is further

ORDERED that the cross motion for summary judgment is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry.

Dated: January 7, 2019



Supreme
JUDGE OF ~~THE~~ COURT
NEW YORK COUNTY

Doris Ling-Cohan, J. S. C.

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