SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 34

ASPEN AMERICAN INSURANCE COMPANY A/S/O 56 WEST 11 REALTY LLC,

Plaintiff,

Index No.: 651273/2018
Motion Sequence No.: 001

- against -

DECISION/ORDER

ARCH SPECIALTY INSURANCE COMPANY AND UTICA FIRST INSURANCE COMPANY,

Defendants.

ST. GEORGE, CARMEN VICTORIA, J.S.C.:

Currently, co-defendant Arch Specialty Insurance Company (Arch) brings a pre-answer motion to dismiss plaintiff's claims against it. Both plaintiff Aspen American Insurance Company (Aspen) and co-defendant Utica First Insurance Company (Utica) oppose the motion. For the reasons below, the Court denies the motion.

This is a declaratory judgment action in which Aspen seeks reimbursement for $118,929.52, the amount it paid in settlement of a property damage lawsuit which had been instituted against A-Line Construction Corporation (A-Line) and JF Renovation of Queens, Inc. (JF Renovation) (*see* NYSCEF Doc. No. 19 [Stipulation and Consent Judgment]).[1] Aspen was the insurer of the building where the damage occurred. The stipulation and consent judgment, dated

[1] The judgment included damages of $91,150.00 plus interest from September 11, 2014 through the date of the agreement.

January 30, 2018, notes that A-Line assigned its reimbursement rights to Aspen, and that Arch, which insured A-Line, had disclaimed coverage. The complaint in this action asserts that, based on its insurance agreement with A-Line, Arch must reimburse Aspen.

In the current motion, Arch states that documentary evidence establishes that its denial of coverage was valid, and the complaint therefore fails to state a cause of action. According to Arch, this is because the policy which Arch had issued to A-Line (NYSCEF Do. No. 12) contained a Contractor and Subcontractor Exclusion, which stated that the insurance policy did not cover damages "arising out of operations of any 'contractor or subcontractor' working directly or indirectly on [A-Line's] behalf." A-Line had subcontracted with JF Renovation. Because the damages in question resulted from JF Renovation's work, therefore, the exclusion applies.

Arch argues that documentary evidence also establishes that JF Renovations rather than A-Line performed the work. Around 10 months before the consent judgment was signed, in an order dated March 15, 2017, Justice Jennifer G. Schecter, who presided over the matter, granted Aspen's motion for default judgment against JF Renovation, A-Line's subcontractor (*see* NYSCEF Doc. No. 20 [Default Judgment]). Her order states:

> Plaintiff's motion for a default judgment against JF Renovation of Queens, Inc (JF Renovation) is granted. Plaintiff established its loss stemming from work performed on September 11, 2014 by JF Renovation. The motion for a default judgment is granted in favor of plaintiff and against the defendant . . . in the amount of $91,152 with statutory interest from June 16, 2015, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes documentary evidence under CPLR 3211 § (a) (1) (*see Optical Communications Groups, Inc. v Rubin, Fiorella & Friedman, LLP*, 145 AD3d 469, 470 [1st Dept 2016]). Contracts also may be considered under CPLR § 3211 (a) (1) (*see Unicorn Construction Enterprises, Inc. v City of New* York, 166 AD3d 479, 479 [1st Dept 2018]). Arch contends that, collectively, the

default judgment order, the subcontractor agreement, and the exclusion provision in the insurance contract warrant dismissal (*see Madison Equities, LLC v Serbian Orthodox Cathedral of St. Sava*, 144 AD3d 431, 431 [1st Dept 2016]; *150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004]). Furthermore, Arch argues, subcontractor exclusion endorsements have been upheld under New York law (*e.g., U.S. Underwriters Ins. Co. v Landau*, 679 F Supp 2d 330 [EDNY 2010] [under New York law]). Arch also seeks relief under CPLR § 3211 (a) (7), for failure to state a cause of action.

Initially, Utica First, which insured JF Renovation, points out that the complaint states a claim against itself and Arch which is sufficient for the purposes of CPLR § 3211 (a) (7). Therefore, it states, Arch cannot prevail under that statutory provision. The Court agrees, and for this reason considers the motion solely under CPLR § 3211 (a) (1).

However, the motion is denied under CPLR § 3211 (a) (1) as well. As Arch argues, the judicial decision is documentary evidence within the meaning of CPLR § 3211 (a) (7), and "[t]he duty to defend is not triggered . . . when . . . the factual predicate for the claim falls wholly within a policy exclusion" (*Yangtze Realty, LLC v Sirius America Ins. Co.*, 90 AD3d 744, 744-45 [2nd Dept 2011] [citation and internal quotation marks omitted]). Moreover, several of plaintiff and Utica First's arguments lack merit.[2] Nevertheless, the Court is persuaded by the opposing parties' contention that Justice Schecter's order leaves open the question of whether A-Line performed work which caused or contributed to the subject damage. The motion before Justice Schecter was

[2] Several of the parties' arguments are asserted under CPLR § 3212 rather than CPLR § 3211 (a) (1), for example, and therefore lack merit. Utica First's argument that the damage occurred in the elevator and JF Renovations did not perform work on the elevator misconstrues the property damage complaint, which states that the defendants used the elevator to transport construction materials. Utica First's argument that its counterclaims, which in part mention Arch's purported late notice of the claim to Utica First, preclude dismissal, lacks merit because 1) there are no cross claims against Arch, and 2) the counterclaims relate to Utica First's liability to plaintiff, and do not impact Arch's liability to plaintiff.

unopposed and only sought relief against JF Renovation. Accordingly, the court rightly accepted the prima facie case without reaching any substantive challenges, and thus it did not probe further or consider whether A-Line was negligent or contributorily negligent. Thus, plaintiff and Utica first "cannot be precluded from defending the merits of [their] claims" (*Henderson-Jones v City of New York*, 120 AD3d 1123, 1124 [1st Dept 2014]). As Arch concedes, CPLR § 3211 (d) allows courts to deny CPLR § 3211 motions when a non-moving party objects that it lacks the evidence it needs to oppose the motion. Plaintiff and Utica First therefore have the right to proceed with discovery and litigate the case.

For the reasons above, therefore, it is

ORDERED that the motion is denied, and it is further

ORDERED that Aspen shall have 30 days from the date of entry of this order to answer the complaint. Once issue is joined, the parties must contact Justice Alan C. Marin, 646-386-4370, to arrange for a preliminary discovery conference.

Dated: January 23rd, 2019

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.