

Liberty Ins. Underwriters Inc. v Scottsdale Ins. Co.

2019 NY Slip Op 30205(U)

January 22, 2019

Supreme Court, New York County

Docket Number: 651406/2016

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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LIBERTY INSURANCE UNDERWRITERS INC.,

Plaintiff,

- v -

INDEX NO. 651406/2016

MOTION DATE 12/11/2018

MOTION SEQ. NO. 001

SCOTTSDALE INSURANCE COMPANY, FIRST MERCURY
INSURANCE COMPANY, ENDURANCE AMERICAN SPECIALTY
INSURANCE COMPANY, STARR INDEMNITY & LIABILITY
COMPANY, OLD REPUBLIC GENERAL INSURANCE
CORPORATION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 85, 92, 93, 94, 95, 96, 97, 98, 104

were read on this motion to/for

DISMISS

The motion by defendant Starr Indemnity & Liability Company ("Starr") to dismiss the Amended Complaint is denied.

Background

Plaintiff, Liberty Insurance Underwriters Inc. ("Liberty"), seeks *inter alia* a declaratory judgment that Starr is obligated to provide indemnity and defense to 23 High Line LLC ("23 High Line") and T.G. Nickel & Associates, LLC ("T.G. Nickel") as additional insureds pursuant to an insurance policy Starr issued to Stonebridge, Inc. ("Stonebridge"). The insurance policy issued to Stonebridge by Starr relates to an underlying property damage action against T.G. Nickel and 23 High Line. Liberty issued a commercial general liability insurance policy to T.G. Nickel and 23 High Line.

The Underlying Action:

The underlying action pending in New York Supreme Court concerns alleged damage done to a building due to construction that took place at an adjacent building. The plaintiffs in the underlying action are 519 West 23rd Street Condominiums ("519 West") and High Line Park, LLC ("High Line"). 23 High Line and T.G. Nickel are defendants in that action. Plaintiff 519 West owns the property located at 519 West 23rd Street in Manhattan. Defendant 23 High Line owns the adjacent property located at 515 West 23rd Street. The properties are contiguous. 23 High Line contracted with T.G. Nickel, a construction company, to perform construction work on the 515 property. T.G. Nickel then retained Stonebridge to provide labor and equipment for the completion of structural steel work on the 515 property.

Plaintiffs allege that as a result of the construction work on defendant's property, the plaintiffs' property suffered physical and structural damage. Specifically, the plaintiffs allege that the removal of a protective scaffolding surrounding the 519 premises and the installation of an Exterior Insulation Finishing System ("EIFS") on the 515 premises caused damage to plaintiff's property.

The Declaratory Judgment Action

In the declaratory judgment action, Liberty requests a declaration that Starr must provide insurance coverage to High Line and T.G. Nickel as additional insureds pursuant to a policy issued by Starr to Stonebridge. Starr moves to dismiss, claiming that the Starr policy does not provide coverage to T.G. Nickel and High Line.

Discussion

“On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]).

A motion to dismiss based on documentary evidence “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

“A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration” (*Staver Co. v Skrobisch*) 533 NY2d 967, 967 [2d 1988].

Appendix to Contract

Starr states it cannot be obligated to provide insurance coverage to 23 High Line and T.G. Nickel because the contract entered into between T.G. Nickel and Stonebridge should have contained an appendix in which additional insureds are named. Starr claims that this appendix was never provided. However, Starr withdrew this argument.

Contractual Privity Requirement

Starr alleges that it is not required to indemnify 23 High Line because there is no direct contract between Stonebridge and 23 High Line, and pursuant to Starr Policy's Additional Insured Endorsement, contractual privity is required for an additional insured to receive coverage. Plaintiff, however, does not contest that there is no contractual privity between Stonebridge and 23 High Line. Rather, plaintiff contests Starr's claim on the basis of a second additional insured endorsement entitled Additional Insured-Owners, Lessee or Contractors-Completed Operations Endorsement ("Completed Operations Endorsement"). Plaintiff alleges that the Completed Operations Endorsement does not limit additional insured coverage to those parties in direct contractual privity. The Completed Operations Endorsement excludes insurance coverage for work that has not yet been completed or abandoned. This provision, plaintiff alleges, is applicable to the facts at hand.

In most construction projects, like the one here, the owner hires a general contractor who then hires subcontractors to perform certain tasks. Often, the general contractor will require the subcontractor to include both the owner and the general contractor as additional insureds. While the property owner may not be in contractual privity with the subcontractor (in other words, the owner has no contract with the subcontractor), that does not negate the subcontractor's duty to provide insurance coverage to the owner as an additional insured in applicable situations. Here, plaintiff has stated a cause of action for declaratory judgment because Starr's insurance policy has a provision entitled "Additional Insured - Owners, Lessees or Contractors - Automatic Status When Required in Construction Agreement with You" which states that an insured is "[a]ny person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an

additional insured on your policy” (NYSCEF Doc. No. 63 at 55). Because plaintiff alleges that Stonebridge was required to provide coverage for T.G. Nickel and 23 High Line pursuant to Stonebridge’s subcontract, plaintiff has sufficiently stated a cause of action.

EIFS Exclusion

Starr claims it does not have an obligation to indemnify 23 High Line and T.G. Nickel because any alleged damage to the 519 premises falls under the scope of Starr’s exclusion for work done pertaining to Exterior Insulation and Finish Systems (“EIFS exclusion”). Plaintiff claims that this exclusion does not apply because the damage to the 519 property did not arise from EIFS work.

The EIFS provision in Starr’s insurance policy excludes coverage for the following:

“ ‘Bodily injury’, ‘property damage’ or ‘personal and advertising injury’ arising out of, caused by or attributable to whether in whole or in part, the following: 1. The design, manufacture, construction, fabrication, preparation, distribution and sale, installation, application, maintenance or repair, including remodeling, service, correction or replacement, of any ‘exterior insulation and finish system’ or any part thereof, or any substantially similar system or any part thereof.”

NYSCEF Doc. No. 71

Plaintiff alleges that the EIFS exclusion does not apply based on the facts of this case because the exclusion applies to property damage to a building caused by the installation or application of EIFS to *that* building and here, there was no EIFS instillation or application to the 519 property. Furthermore, plaintiff claims that at a minimum, issues of fact remain as to the timing and type of damage done to the 519 premises and the extent to which the damage was a result of non-EIFS work.

Starr’s motion to dismiss is denied because there are issues of fact about whether the damages arose from EIFS work. On a motion to dismiss, plaintiff need only allege that this


exclusion is inapplicable. Discovery may shed light on what work caused the alleged property damages, but the Court cannot dismiss on this basis at this early stage of the litigation.

Accordingly, it is hereby

ORDERED that the defendant Starr's motion to dismiss the Amended Complaint is denied.

The parties are directed to appear for the already-scheduled conference on March 12, 2019 at 2:15 p.m.

1.22.19
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	(NON-FINAL DISPOSITION)	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE		