SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 58

MICHAEL CHANEY,
LARISSA KIRSCHNER-CHANEY, and
THINK CONSTRUCTION, LLC,

Plaintiffs,

- against -

JAMES RIVER INSURANCE COMPANY,

Defendant.

Index No.: 655688/2016
Motion Sequence No.: 001
DECISION/ORDER

DAVID B. COHEN, J.S.C.:

I. Background

Plaintiffs Michael Chaney and Larissa Kirschner-Chaney (the Chaneys) own a two-family home at 328 West 23rd Street, in Chelsea. The Chaneys assert that they use the entire building as their residence. Mr. Chaney alleges that the second space is a basement apartment which they use solely for guests and for other personal purposes (NYSCEF Doc. No. 34).

Around July 2012, the Chaneys contracted with plaintiff Think Construction, LLC (Think) for the renovation of the home (NYSCEF Doc. No. 30). Under their agreement, Think was to insure Think and Mr. Chaney. Think obtained a commercial general liability policy from Mt. Hawley Insurance Co. (Mt. Hawley) which satisfied Think's obligation (NYSCEF Doc. No. 24). The effective dates of the Mt. Hawley policy were September 16, 2014 to September 16, 2015 (NYSCEF Doc. No. 16, ¶ 9 [Lewis Aff]).

Think, in turn, subcontracted with Elmhardt Construction Corp. (Elmhardt) in August 2012 (NYSCEF Doc. No. 31 [Elmhardt proposal]). Pursuant to the agreement between Think and Elmhardt, Elmhardt was to supply and install framing, perform insulation work, and do other work

for the project (NYSCEF Doc. No. 29, ¶ 3). Plaintiffs point out that under the policy, additional insured is defined to include persons or organizations with whom Elmhardt has contracted for residential housing projects, if required by contract. The policy covers liability which arises out of Elmhardt's work on the residential projects (NYSCEF Doc. No. 35, p 8).

Additionally, Think and Elmhardt signed two separate agreements which obliged Elmhardt to acquire insurance. As is relevant here, the first agreement, dated August 8, 2012, required Elmhardt to provide insurance which indemnified Think and Mr. Chaney with respect to "any claims or causes of action of whatever nature arising while on or near the project, or while performing contract related work . . ., or by reason of any claim or dispute of any person or entity for damages from any cause directly or indirectly relating to any action or failure to act by [Elmhardt], its representatives, its subcontractors, suppliers, or employees" (NYSCEF Doc. No. 32). This agreement further required Elmhardt to procure comprehensive general liability coverage which named Think and Mr. Chaney as additional insured parties, and which included coverage for personal injury claims (*id.*).

The second agreement, which Think and Elmhardt signed on February 8, 2014, essentially extended the agreement to insure upon the expiration of the original contract term (NYSCEF Doc. No. 33; *see* NYSCEF Doc. No. 35, pp 2-3). James River has pointed out that there are other alterations in the 2014 agreement. The new document added that personal injuries to employees were not excludable, added commercial automobile and commercial umbrella insurance coverage to the requirements, and added that these requirements also applied to Elmhardt's subcontractors (NYSCEF Doc. No. 72, p 9). It further noted that the coverage for Think and Mr. Chaney would be primary. James River also notes that the 2014 agreement requires that Elmhardt provide Think and Mr. Chaney with certificates of insurance (COI) showing they were additional insureds on the

policy, and that in addition Elmhardt was required to insure Think, Mr. Chaney, and "any person or persons having an interest in the pertinent construction work which forms the basis for the contractual relationship between Think and [Elmhardt]" (*id.*, p 10 [quoting NYSCEF Doc. No. 66, p 3]). Pursuant to its agreements with plaintiffs, Elmhardt purchased insurance from defendant James River Insurance Company (NYSCEF Doc. Nos. 11, 41). The COIs, which show that Think and Mr. Chaney were covered, are filed at NYSCEF Doc. No. 18. The COIs for defendant's coverage are dated April 19, 2013 and April 17, 2014, and they list defendant as Insurer A, Merchants Preferred Insurance Company as Insurer B, and Mt. Hawley as Insurer C. The insurance policies are available at NYSCEF Doc. Nos. 11 and 41. James River claims these two clauses contradict each other.

In addition, Elmhardt subcontracted some of its work to High Tech. On October 8, 2014, High Tech employees Alfredo Muller Diaz and Artemio Jiminez Palacios sustained injuries while performing drywall and framing work on a scaffold inside the building. Specifically, according to Diaz and Palacios, two of the four scaffold wheels did not lock properly. When one of the scaffold's wheels broke, the scaffold tipped backwards, and both men fell approximately eight feet to the ground (NYSCEF Doc. No. 22 [*Diaz v Chaney*, Sup Ct, Queens County, August 21, 2017, Cheree A. Buggs, J., index No. 709805/2014] [*Diaz*]). The workers had not been provided with safety harnesses or other devices which may have protected them (*id.*, p 3).

On December 4, 2014, Mt. Hawley, Think's insurer, wrote to defendant, which insured Elmhardt (NYSCEF Doc. No. 42). Mt. Hawley described the October 8 accident and indicated that it arose out of work sub-subcontractor Elmhardt performed on behalf of subcontractor Think. Neither Diaz nor Palacios had filed a claim at that time, but Mt. Hawley stated that, if this changed, Mt. Hawley would tender the defense and indemnity of Think and Mr. Chaney to defendant. On

December 22, 2014, Diaz and Palacios instituted the *Diaz* case in the Queens Supreme Court, naming as defendants the Chaneys, Think, and Elmhardt (NYSCEF Doc. No 19 [complaint]).[1]

In a February 5, 2015 letter, following additional communications between the insurers, defendant denied coverage (NYSCEF Doc. No. 46). Defendant stated that Mr. Chaney and Think were only additional insureds "where the liability arises solely out of Elmhardt's work . . . with respect to residential housing" which "does not include apartments" (*id.*). Defendant wrote that the project at issue did not concern residential housing because the building "was being converted into a two-family house at the time of the accident" (*id.*). The letter also stated that the request for indemnification was premature because indemnification would not apply if the Chaneys or Think were found to be the sole negligent parties.

On October 27, 2016, in response to the denial of tender, the Chaneys and Think commenced this lawsuit (NYSCEF Doc. No. 1 [summons and complaint]). The complaint seeks: (1) a declaration that defendant must defend and indemnify plaintiffs in the underlying action; (2) judgment against defendant for all expenses that plaintiffs have incurred in defending the underlying action; and (3) a declaration that Mt. Hawley's coverage is excess to that of defendant.[2] Currently, plaintiffs move for summary judgment on the complaint in its entirety. Although issue has been joined and discovery has commenced, depositions have been stayed during the pendency of this motion.

II. Motion

Plaintiffs argue that the language of the James River insurance contract mandates that defendant defend and indemnify them in the underlying lawsuit. Specifically, the policy, which

[1] Ms. Kirschner-Chaney was added as a defendant in the amended complaint.
[2] Currently, Mt. Hawley is defending Think and the Chaneys.

was in effect from April 17, 2014 to April 17, 2015, applies to the "'residential housing' projects of the Named Insured," Elmhardt (NYSCEF Doc. No. 41, p JR000658). In the same document, "residential housing" is defined as "a structure or structures, including the land upon which it is situated, designed or intended for occupancy in whole or in part as a residence by any person or persons" (*id.*, p JR000658). The policy excludes apartments and apartment buildings from coverage as residential housing. It defines "apartments" as "one or more rooms of a building used as a dwelling unit separate from others in the building and which are rented from others by those dwelling in them," and an "apartment building" as "a structure containing two or more separate 'apartments'" (*id.*).

According to plaintiffs, defendant improperly argues that because the basement is configured as a liveable unit, the exclusion for apartments and apartment buildings applies. Among other documents, plaintiffs rely on Mr. Chaney's affidavit to support their claim. The Chaney's moved into the renovated home in October 2015. As indicated, Mr. Chaney states that the building constitutes residential housing because he and his wife treat the basement-level apartment as part of their residence, never renting it or using it for any other commercial purpose (NYSCEF Doc. No. ¶ 34). Moreover, plaintiffs state that the accident at issue occurred in the main portion of the residence and therefore the basement space is not relevant.

In further support of their contention that the building where the work occurred was a residential dwelling, plaintiffs point to a decision in the underlying action. In an earlier order, dated August 21, 2017, Justice Cheree A. Buggs found, as is relevant here, that the Chaneys were strictly liable as owners under Labor Law § 240 (1), which places a nondelegable duty to protect workers from elevation-related injuries by, inter alia, providing safety devices (NYSCEF Doc. No. 22, p 3). In the order, the judge granted reargument to the Chaneys on this issue and reversed the

determination because the homeowners' exemption insulates them from liability under Labor Law §§ 240 (1) and 241 (6) (NYSCEF Doc. No. 23, p 2 [*Diaz v Chaney*, Sup Ct, Queens County, January 31, 2018, Cheree A. Buggs, J., index No. 709805/2014]). In reaching this conclusion, the judge relied in large part on the determination that the Chaneys "reside in the townhouse, no business is conducted at the premises and that basement apartment is not rented" (*id.*). The court also found that the Chaneys did not direct or control the work, another necessary finding before the exemption applies (*id.*; *see Bautista v Archdiocese of N. Y.*, 164 AD3d 450, 451 [1st Dept 2018]).

Plaintiffs also state that defendant has the duty not just to defend but to indemnify them in the underlying lawsuit. They note that where additional insureds are covered with respect to injuries "arising out of" the insured's work, coverage is required whenever there is "some causal relationship between the injury and the risk for which coverage is provided" (*Regal Const. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010] [*Regal*]). *Regal*, plaintiffs note, found a duty to indemnify as well as to a duty to defend, notwithstanding that there had been no ruling as to the insured's negligence, because there was irrefutable evidence of the requisite causal relationship (*id.* at 38-39).

Defendant counters that plaintiffs bear the burden of establishing its duty to provide coverage (NYSCEF Doc. No. 72, p 15 [citing, inter alia, *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 218 (2002)]). It further notes that although the duty to defend is broader than the duty to indemnify, if there is no possible scenario in which an insured is liable, then the insurer is not obligated to defend. According to defendant, plaintiffs have not met "their dual burden . . . to initially establish coverage and as movant for summary judgment to show entitlement as a matter of law" (NYSCEF Doc. No. 72, p 16).

In addition, defendant urges that summary judgment is premature because questions of fact exist as to whether: 1) the 2014 agreement was signed and in effect on the accident date – or if, on the other hand, the 2012 agreement governs; 2) Think's work was causally related to the injuries Diaz and Palacios sustained; and 3) the Chaneys were actively involved in the project. Furthermore, it states that because it has not deposed the affiants who submitted the documents in support of plaintiffs' motion, this motion is premature. Defendant states that discovery is also necessary on the issue of whether the building is a residence covered by its policy.

Additionally, defendant notes that the 2012 and 2014 agreements do not name Ms. Kirschner-Chaney as an additional insured, and other documentation identifies Mr. Chaney alone as the building owner. As it is unclear whether Ms. Kirschner-Chaney is insured in the 2014 agreement, as "any person . . . having an interest in the pertinent construction work," defendant contends that discovery is required. Defendant also questions the authenticity of the second agreement and argues that discovery is required on this issue. Defendant states its insured is not liable to insure based on the vicarious or imputed liability of the additional insureds. It alleges that it is not liable to insure for any alleged negligence on Elmhardt's part because Think was responsible for supervision as well as the means and methods of construction (*id.*, p 29). It argues that the findings of the judge in *Diaz v Chaney* are not pertinent here even though the judge found Think to be statutorily liable because the court did not determine whether Think's liability was due to Elmhardt's work.

In reply, plaintiffs argue that defendant's opposition is groundless. They reject defendant's contention that the February 2014 agreement may not be authentic. Defendant relies on immaterial facts, plaintiffs state, such as that the 2012 agreement typed in the parties' names and other details, while the 2014 agreement wrote in this information by hand; that there were new requirements in

the 2014 agreement; and that defendant wrongly states that Elmhardt's principal's signature is different in the 2014 agreement. As these arguments are speculative at best, and they have no supporting evidence, plaintiffs state, defendant's prematurity argument is without basis (NYSCEF Doc. No. 74, p 6 [citing, inter alia, *Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 (1st Dept 2000)]).

Plaintiffs further challenge defendant's contention that there is a dispute as to whether the property has a residential purpose. In support, they submitted affidavits which show that the agreement was for a residential housing project. They state that defendant's only challenge to these statements, that defendant has the right to depose the affiants, lacks merit. Plaintiffs cite *Patino v Drexler* (116 AD3d 534, 534 [1st Dept 2014]), which involved similar facts. There, the defendants submitted affidavits "stating that they purchased the premises solely as a second residence for use by family and guests" and that "they had never used any . . . portion of the premises for a commercial use," and the Court ruled this was sufficient to show that the homeowner exemption applied. For the same reason, the exemption is applicable here, especially as the opposing party does not raise a triable issue regarding the status of the building as a residence. Moreover, plaintiffs point out that the parties in this action have access to the depositions and other discovery that exist in the underlying action, and this further establishes that discovery is unnecessary here. According to plaintiff, both the duty to defend and the duty to indemnify exist here, without resorting to the question of which party or parties are liable for the injuries of the plaintiffs in the underlying litigation. Alternatively, they argue that if the court finds a duty to defend but determines it is premature to decide whether a duty to indemnify exists, defendant has no basis for arguing prematurity.

III. Analysis

"On a summary judgment motion in a case involving an insurance contract or policy, [t]he evidence will be construed in the light most favorable to the one moved against" (*City of New York v Wausau Underwriters Ins. Co.*, 145 AD3d 614, 617 [1st Dept 2016] [citations and internal quotation marks omitted]). A plaintiff may establish the right to summary judgment on the issue of the defendant's duty to defend if the complaint "'suggest[s] a reasonable possibility of coverage'" (*id.* [quoting *DMP Contr. Corp. v Essex Ins. Co.*, 76 AD3d 844, 845 (1st Dept 2010]). Generally, courts do not consider facts from the underlying action, but confine their analyses to the allegations in the complaint (*Paramount Ins. Co. v Federal Ins. Co.*, -- AD3d --, 2019 NY Slip Op 01667 [1st Dept 2019] [*Paramount*]). The duty to indemnify is not so broad and is factually based. "An insurer may obtain a declaration absolving it of its duty to defend only when a comparison of the policy and the underlying complaint on its face shows that, as a matter of law, there is no possible factual or legal basis on which the insurer might eventually be held to be obligated to indemnify the insured under any provision of the insurance policy" (*Greenwich Ins. Co. v City of New York*, 122 AD3d 470, 471 [1st Dept 2014] [*Greenwich*] [citations and internal quotation marks omitted]).

A. Duty to Defend

After careful consideration, the court finds that plaintiff has established defendant's duty to defend Think and Mr. Chaney. The duty to defend is broader than the duty to indemnify, and courts construe the duty liberally (*Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264 [2011]). The duty exists even if there are facts which "indicate that the claim may be meritless or not covered" (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [*Cook*] [citations and internal quotation marks omitted]; *see also BP A. C. Corp. v One*

Beacon Ins. Group, 8 NY3d 708, 714 [2007] [*BP*] [stating that the complaint's merits "are irrelevant"]). There is no question that the complaint in the underlying case alleges negligence against Elmhardt, the Chaneys, and Think (NYSCEF Doc. No. 19 [complaint]).

Plaintiffs' showing, therefore, shifts the burden of proof to defendant. Defendant satisfies its burden with respect to Ms. Kirschner-Chaney. As defendant points out, the 2012 and 2014 agreements expressly state that Elmhardt agreed to defend and indemnify Think and Mr. Chaney (NYSCEF Doc. Nos. 32, 33 [also at NYSCEF Doc. Nos. 65, 66]). They do not mention an obligation with respect to Ms. Kirschner-Chaney. Moreover, the James River policy lists Think and Mr. Chaney as additional insureds (NYSCEF Doc. No. 11 [also at NYSCEF Doc. No. 41]). The tender letter Mt. Hawley sent to defendant on December 4, 2014 also states that plaintiffs sought indemnity on behalf of Think and Mr. Chaney alone (*see* NYSCEF Doc. No. 42). Plaintiffs have not supplied evidence that Elmhardt's duty to defend and indemnify ever included Ms. Kirschner-Chaney. Although Ms. Kirschner-Chaney was added to the underlying lawsuit as a defendant, this does not expand defendant's duty so that it includes her defense. Questions of fact and law remain as to whether defendant must defend Ms. Kirschner-Chaney based on the provision in the 2014 agreement that requires defendant to insure "any person or entities having an interest in the pertinent construction work which forms the basis for the contractual relationship between Think and [Elmhardt]" (NYSCEF Doc. No 66).

Defendant's contention that it has no duty to defend Think and Mr. Chaney lacks merit. Initially, the court notes that defendant overstates plaintiffs' burden of proof. Although plaintiffs must establish a prima facie case, defendant has the burden of showing that either an exclusion clearly applies or "there is no possible factual or legal basis upon which the insurer might be eventually obligated to indemnify its insured" (*Utica First Ins. Co. v Star-Brite Painting &*

Paperhanging, 36 AD3d 794, 796 [2d Dept 2007]). Moreover, this burden is a heavy one (*see Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 93 [1st Dept 2005]). Defendant has not eliminated any legal or factual issues upon which it might be found obliged to indemnify.

Moreover, defendant's argument that the building is not a residential one lacks merit. Defendant bears the burden of proof on this issue (*see Cook*, 7 NY3d at 137; *Leading Ins. Group Ins. Co., Ltd. V Greenwich Ins. Co.*, 44 Misc 3d 435, 442 [Sup Ct, Kings County 2014]). Plaintiffs have submitted Mr. Chaney's affidavit, which states that he and Ms. Kirschner-Chaney reside in the entire building and that they neither rent the basement as an apartment nor intend to do so in the future. Defendant provides no evidence to counter this statement. Defendant merely states that the structure under renovation previously was a house of worship (NYSCEF Doc. No. 72, p 19). This fact has no relevance to the property's current use as a residence. Accordingly, defendant has not refuted plaintiffs' contention that the building is a residential one within the meaning of the policy (*see Patino*, 116 AD3d at 534).

Defendant also states that there are questions as to whether the 2014 agreement is authentic and was in effect at the time of the accident. However, defendant's arguments are conjectural and in conflict with defendant's own admission that it entered into "an additional agreement . . . dated February 8, 2014" (NYSCEF Doc. No. 28, pp 3-4 of 24). Furthermore, there is no support for defendant's suggestion that the 2014 agreement may not have been signed on the date set forth in the document. The fact that the parties filled in the blank spaces in writing rather than by typing[3] does not raise doubts as to the legitimacy of the document. Similarly, the

[3] In the 2012 agreement, the blanks are filled in with type, rather than by hand.

additions and alterations to the agreement in 2014 do not evidence fraud. Defendant's argument concerning vicarious liability is not relevant to its duty to defend.

Defendant also asserts there is an issue of fact as to whether its insured's signature on the 2014 agreement is authentic. "Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature" (*Ulm I Holding Corp. v Antell*, 155 AD3d 585, 585 [1st Dept 2017]). The party challenging the signature may create a factual issue through an expert's opinion or other evidence (*see id.* at 585-86). Here, defendant bases its argument on the theory that its insured's principal's signature is visibly different in the 2012 and 2014 agreements. As plaintiffs state, defendant does not provide the affidavit of its insured, an expert affidavit, or other evidence that lends credence to its claim. Furthermore, like plaintiffs, the court is mystified by defendant's assertion that the two signatures are notably distinct, as they appear to be identical or nearly so. For all these reasons, this challenge lacks merit.

The court further notes that defendant has not challenged that its obligation to defend, if it exists, is primary. In fact, in its letter declining Mt. Hawley's tender, defendant states that the agreement not only "requires Think and Chaney to be named as additional insureds" but also "requires an endorsement providing that Elmhardt's insurance is to be primary" (NYSCEF Doc. No. 28, p 4 of 24).

B. Duty to Indemnify

The duty to indemnify is distinguishable from the duty to defend because "the duty to pay is determined by the actual basis for the insured's liability to a third person and is not measured by the allegations of the pleadings" (*Bovis Lend Lease LMB Inc. v Garito Contr., Inc.*, 65 AD3d 872, 875-76 [1st Dept 2009] [citation and internal quotation marks omitted]). In the underlying action, the trial court held that Elmhardt, which defendant here insured, was an owner under

Labor Law § 240 (1) (NYSCEF Doc. No. 22, pp 4-5). To reach this conclusion, the court first determined that, among other things, Elmhardt was a statutory agent of the owner or general contractor which "had the authority to supervise and control the particular work in which the plaintiff[s were] engaged" when the accident occurred (NYSCEF Doc. No. 22, pp 4-5). This has bearing on the indemnity issue before this court.

However, as defendant argues, and as plaintiffs suggest as an alternative argument, triable issues of fact exist as to whether the accident arose out of Elmhardt's work (*see Lexington Ins. Co. v Steadfast Ins. Co., Inc.*, 168 AD3d 640, 640 [1st Dept 2019]). Several of defendant's requests for discovery relate to these pending issues. "[T]hose issues will be resolved in the liability phase of the underlying negligence actions" (*Greenwich Ins. Co. v City of New York*, 139 AD3d 615, 616 [1st Dept 2016]). Accordingly, the court cannot determine issues relating to indemnification until the liability phase in the *Diaz* action is complete (*see id.*; *Bovis Lend Lease LMB, Inc. v American Alternative Ins. Co.*, 45 AD3d 397, 398 [1st Dept 2007]). Therefore, this matter is stayed until there is a resolution of the underlying action. At that time, any of the parties may move to vacate the stay. Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment as to their first cause of action, which seeks a declaratory judgment that defendant James River is not obliged to provide a defense to, and provide coverage for Think and the Chaneys, who are defendants in the action of *Diaz v Chaney*, index No. 709805/2014, Sup Ct, Queens County, is granted to the extent that the cause of action relates to Think and Mr. Chaney, and a declaratory judgment shall be rendered in their favor; and it is further

ADJUDGED and DECLARED that defendant James River is obliged to provide a defense to, and provide coverage for, Think and Mr. Chaney in the aforesaid action pending in Queens County; and it is further

ORDERED that the portions of the motion seeking summary judgment as to Ms. Kirschner-Chaney and seeking indemnification are denied, and the balance of this action is severed and continued; and it is further

ORDERED that the remainder of the action is stayed pending resolution of the underlying action. Any party may move to vacate the stay once the *Diaz* action has concluded.

Dated: 3-29-2019

ENTER:

DAVID B. COHEN, J.S.C.

HON. DAVID B. COHEN
J.S.C.