Greater N.Y. Mut. Ins. Co. v Harleysville Worcester Ins. Co.
2019 NY Slip Op 31871(U)
June 27, 2019
Supreme Court, New York County
Docket Number: 151179/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 151179/2016

GREATER NEW YORK MUTUAL INSURANCE COMPANY, THE INSURANCE COMPANY OF GREATER NEW YORK,

Plaintiff,

MOTION SEQ. NO. 004

- v -

HARLEYSVILLE WORCESTER INSURANCE COMPANY, TOWER INSURANCE COMPANY OF NEW YORK, INC., CASTLEPOINT INSURANCE COMPANY, ALLIED WORLD INSURANCE COMPANY, DONGBU INSURANCE CO., LTD. (U.S. BRANCH), NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

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

In this declaratory judgment action, plaintiffs Greater New York Mutual Insurance Company (GNY) and The Insurance Company of Greater New York (INSCO), move, pursuant to CPLR 3212, for summary judgment in their favor on their first and second causes of action against defendant Harleysville Worcester Insurance Company (Harleysville). For the reasons set forth below, the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND

Nonparty Albert Davydov (Davydov) is the owner of two residential units, the penthouse unit and unit 11B, in a condominium building owned by nonparty the Board of Managers of the Forestal Condominium (Forestal), located at 109-33 71st Road, Forest Hills, New York (the Building) (NY St Cts Electronic Filing [NYSCEF] Doc No. 79, affirmation of plaintiffs' counsel,

exhibit A [complaint], ¶¶ 8 and 17). Nonparty Michael Lago (Lago), an employee of nonparty All Area Property Management, is the managing agent for the Building (*id.*, ¶ 9).

In or about 2015, Davydov commenced an action against Forestal, Lago and others alleging that from August 2004, both units are uninhabitable due to noxious odors, water leaks, and property damage (*Davydov v Board of Managers of the Forestal Condominium, et al.*, Sup Ct, Queens County, index No. 5263/2015) (the Davydov Action) (*id.*, ¶¶ 17-18). According to the amended complaint in the Davydov Action, Davydov seeks (1) damages for breach of the implied warranty of habitability, (2) damages for alleged violations of the Condominium Offering Plan, the Multiple Dwelling Law and the New York City Building Code, (3) the recovery of $160,000 for electricity bills, (4) an order directing Forestal and Lago to undertake remedial work to repair defective elements, deficiencies and omissions in the construction of the Building, (5) an order directing Forestal and Lago to correct the electricity meter for unit 11B and the penthouse unit, (6) damages for the defective elements, deficiencies and omissions in the construction of the Building, (7) the recovery of $276,365.19 in monthly maintenance, and (8) damages for personal injury from toxin-producing mold (NYSCEF Doc No. 81, affirmation of plaintiffs' counsel, exhibit C at 12-16).

Davydov amplified his claims in a verified bill of particulars in which he alleges, in part, that the ventilation system at the Building was not properly constructed and that the Building was not properly maintained (NYSCEF Doc No. 82, affirmation of plaintiffs' counsel, exhibit D at 2).

INSCO issued a commercial general liability policy to Forestal and Lago effective from March 22, 2011 until March 22, 2013, and GNY issued a commercial general liability policy to Forestal and Lago effective from March 22, 2015 until March 22, 2016 (NYSCEF Doc No. 79, ¶ 10). At present, plaintiffs are defending Forestal and Lago in the Davydov Action (*id.*, ¶ 19).

Defendants Tower Insurance Company of New York, Inc. (Tower), Castlepoint Insurance Company (Castlepoint), Allied World Insurance Company (Allied), Donbgu Insurance Co., Ltd. (U.S. Branch), and National Union Insurance Company of Pittsburgh, PA (National) issued commercial general liability policies to Forestal and Lago in effect from 2006 to 2011 and from 2013 to 2015 (*id.*, ¶¶ 12-16). Tower, Castlepoint, Allied and National either denied coverage or failed to respond to plaintiffs' requests for coverage (NYSCEF Doc No. 79, ¶¶ 22-34).

On March 28, 2003, Harleysville issued commercial general liability policy no. BO 6E7934 to Forestal and Lago, in effect from May 30, 2003 to December 22, 2006[1] (the Harleysville Policy) (*id.*, ¶¶ 11; NYSCEF Doc No. 83, affirmation of plaintiffs' counsel, exhibit E at 1). The Harleysville Policy provided a $1 million per occurrence limitation of liability and a $2 million general aggregate limitation of liability (NYSCEF Doc No. 83 at 3). By letter dated August 28, 2015, plaintiffs tendered a request for defense and indemnification for Forestal and Lago in the Davydov Action to Harleysville (NYSCEF No. 79, ¶ 20; NYSCEF Doc No. 96, affirmation of Harleysville's counsel, exhibit F at 1). Harleysville denied coverage by letter dated September 15, 2015, on the grounds that Davydov's claims did not arise out of an "occurrence" as defined in the Harleysville Policy and because Davydov's alleged damages may have occurred outside the period during which the Harleysville Policy was in effect (NYSCEF Doc No. 79, ¶ 21; NYSCEF Doc No. 86, affirmation of plaintiffs' counsel, exhibit H at 5).

Plaintiffs commenced the instant action on February 12, 2016 by filing a summons and complaint seeking a judgment declaring that defendants are obligated to defend and indemnify Forestal and Lago in the Davydov Action and that the exclusions in defendants' respective policies do not bar coverage. Plaintiffs also seek reimbursement for defendants' proportionate share of the

[1] The renewal certificate submitted on plaintiffs' motion indicates that the Harleysville Policy expired on May 30, 2007 (NYSCEF Doc No. 83 at 17-18).

defense costs. All defendants have interposed answers. The claims against Tower and Castlepoint have been severed and stayed (NYSCEF Doc No. 66), and the claims against Allied have been discontinued (NYSCEF Doc No. 89).

THE PARTIES' CONTENTIONS

Plaintiffs argue that Forestal and Lago qualify as insureds under the Harleysville Policy and that Davydov alleges that he suffered both bodily injury and property damage while the Harleysville Policy was in effect. Thus, plaintiffs contend, they are entitled to an order declaring that Harleysville has a duty to defend and indemnify Forestal and Lago and that it must reimburse plaintiffs' defense costs on a pro rata basis.

Harleysville advances three arguments in opposition to the motion. First, Harleysville submits that there is no coverage because the term "occurrence", as used in the Harleysville Policy, refers to an accident or fortuitous event, and that the purported contract breaches and the construction defects that allegedly caused Davydov's damages are not the types of occurrences covered under the Harleysville Policy. Second, Harleysville submits that the motion is premature in the absence of discovery and depositions. Finally, Harleysville argues that plaintiffs failed to meet their prima facie burden on summary judgment.

LEGAL CONCLUSIONS

CPLR 3001 provides, in part, that the "court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." A declaratory judgment action requires an actual controversy (*see Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d

253 [1st Dept 2006], *appeal dismissed* 8 NY3d 956 [2007]). Relief is limited to a declaration of the parties' legal rights based on the facts presented (*see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]).

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

"An insurer's duty to defend is liberally construed and is broader than the duty to indemnify" (*Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264 [2011]). Thus, where there is a dispute over coverage, the court must "first look to the language of the applicable policies" (*id.* [internal quotation marks and citation omitted]). "[W]here the provisions of the policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement" (*Government Empls. Ins. Co. v*

Kligler, 42 NY2d 863, 864 [1977]). Any ambiguities must be resolved in the insured's favor and against the insurer (*id.*).

An insurer must provide a defense when the allegations in the complaint "suggest 'a reasonable possibility of coverage'" (*Rivera v Tribeca White St., LLC*, 170 AD3d 446, 447 [1st Dept 2019], quoting *Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 37 [2010]). So long as the pleadings in the underlying lawsuit allege a covered occurrence, then an insurer has a duty to defend "even if 'facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered'" (*Axis Surplus Ins. Co. v GTJ Co., Inc.*, 139 AD3d 604, 604-605 [1st Dept 2016], quoting *Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63 [1991]). Thus, whereas it is incumbent on an insured to prove its entitlement to coverage (*see Platek v Town of Hamburg*, 24 NY3d 688, 694 [2015] [citations omitted]), an insurer seeking to invoke a policy exclusion as a bar to coverage must demonstrate that "the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision" (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]).

Ordinarily, commercial general liability policies do "not insure against faulty workmanship in the work product itself but rather faulty workmanship in the work product which creates a legal liability by causing bodily injury or property damage to something other than the work product" (*George A. Fuller Co. v United States Fid. & Guar. Co.*, 200 AD2d 255, 259 [1st Dept 1994], *lv denied* 84 NY2d 806 [1994]). Indeed, the "'purpose of a commercial general liability policy . . . is to provide coverage for tort liability for physical damage to others and not for contractual liability of the insured for economic loss because the product . . . is not what the damaged [party]

bargained for'" (*Bonded Concrete, Inc. v Transcontinental Ins. Co.*, 12 AD3d 761, 762 [3d Dept 2004], quoting *Hartford Acc. & Indem. Co. v Reale & Sons*, 228 AD2d 935, 936 [3d Dept 1995]). Thus, "construction defects such as faulty design, fabrication or installation do not constitute 'occurrences' under a commercial general liability insurance policy" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Turner Constr. Co.*, 119 AD3d 103, 105 [1st Dept 2014] [citations omitted]; *see also Eurotech Constr. Corp. v QBE Ins. Corp.*, 137 AD3d 605, 606 [1st Dept 2016] [granting the insurer's motion to dismiss because an allegation that an insured's own work was damaged "does not constitute 'property damage' caused by an 'occurrence' within the meaning of the policy"]; *Baker Residential Ltd. Partnership v Travelers Ins. Co.*, 10 AD3d 586, 586 [1st Dept 2004] [declaring that the defendant insurer had no duty to defend or indemnify where the allegations in the complaint in the underlying action pleaded "a classic faulty workmanship/construction contract dispute"]).

As is relevant here, section II of the Harleysville Policy, titled "**Business Owners Liability Coverage,**" provides that Harleysville "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury,' 'property damage,' 'personal injury' or 'advertising injury' to which this insurance applies" (NYSCEF Doc No. 83 at 39) (emphasis in original). Coverage for "bodily injury" or "property damage" requires (1) that the incident occurred during the policy period and (2) that the incident was caused by an "occurrence" within the "coverage territory" (*id.*). The term "[o]ccurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same harmful conditions" (*id.* at 48). The Harleysville Policy defined "bodily injury" as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time" (*id.* at 46). The phrase "[p]roperty

[d]amage" means "[p]hysical injury to tangible property, including all resulting loss of use of that property; or . . . [l]oss of use of tangible property that is not physically injured" (*id.* at 49).

Importantly, the Harleysville Policy contained a number of exclusions to coverage in subsection B of section II. First, the Harleysville Policy does not apply to:

> "b. 'Bodily injury' or 'property damage' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> (1) Assumed in a contract or agreement that is an 'insured contract'; or
>
> (2) That the insured would have in the absence of the contract or agreement"

(*id.* at 40).

The Harleysville Policy partially defined the phrase "insured contract" to mean:

> "g. That part of any other contract or agreement pertaining to your business under which you assume the tort liability of another to pay for damages because of 'bodily injury' or 'property damage' to a third person or organization, if the contract or agreement is made prior to the of 'bodily injury' or 'property damage.' Tort liability means a liability that would be imposed by law in the absence of any contract or agreement"

(*id.* at 47). Second, the exclusions excepted property damage to "[t]hat particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the 'property damage' arises out of those operations" (*id.* at 40). Additionally, there was no coverage for property damage to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it" (*id.* at 42).

A review of the amended complaint filed in the Davydov Action reveals that Davydov pleaded claims for breach of the implied warranty of habitability and a breach of the Building's

offering plan, among other causes of action, and sought an order directing Forestal and Lago to correct and repair the numerous construction defects listed in an engineer's report. A few of the alleged defects identified in Davydov's amended complaint included claims that the central ventilation shafts for the entire Building terminated in the interior of unit 11B (NYSCEF Doc No. 81, ¶ 17), that backdrafts from the elevator machine room vented into his two units (*id.*, ¶ 21), that the drains installed on the northwest balcony and the southwest terrace did not comport with the specifications set forth in the Building's offering plan (*id.*, ¶¶ 24-25), that the roof fans meant to vent the kitchen and the bathroom in unit 11B depicted in the Building's offering plan were missing (*id.*, ¶ 19), that water dripped or leaked from the ceiling in both units (*id.*, ¶ 15), and that Forestal and Lago refused to remediate four moisture spots on the ceiling in unit 11B (*id.*, ¶ 23). Davydov also asserted in a verified bill of particulars that these conditions forced him to reside elsewhere from August 2004 until October 2008 and from December 2010 until the present (NYSCEF Doc No. 82, ¶¶ 2-4).

These allegations and the first seven causes of action pleaded in Davydov's amended complaint appear to implicate faulty construction, which does not constitute an "occurrence" as the term is used in the Harleysville Policy. Nonetheless, Davydov also complained that these conditions created an environment where toxin-producing molds, identified as aspergillus and penicillium, infested unit 11B, and that testing yielded a positive result for the presence of T-2 toxin trichothecene in Davydov's urine (NYSCEF Doc No. 81, ¶¶ 40-41). In the eighth cause of action, Davydov seeks to recover damages for personal injuries he is alleged to have sustained from the mold infestation (*id.*, ¶¶ 57-59). Thus, the recovery Davydov seeks insofar as it relates to his alleged injuries from toxic mold falls squarely within the damages contemplated in the Harleysville Policy (*see I.J. White Corp. v. Columbia Cas. Co.*, 105 AD3d 531, 532 [1st Dept

2013] [concluding that a third-party's claim for property damage sustained because of an alleged defect in a freezer it had purchased from the insured was "precisely the kind [of damage] that plaintiff's CGL policy contemplated, and therefore, the complaint properly alleges an 'occurrence' within the meaning of the policy"]).

Notwithstanding the foregoing, however, the motion is premature (*see Somereve v Plaza Constr. Corp.*, 31 NY3d 936, 937 [2018]; *50 Gramercy Park N. Owners Corp. v GPH Partners LLC (Sponsor)*, 149 AD3d 635, 635 [1st Dept 2017]), since plaintiffs have not established that Davydov sustained damages within the policy period, which was one of the two grounds cited in Harleysville's disclaimer letter (NYSCEF Doc No. 86 at 5). Davydov's amended complaint does not allege when he first learned of the mold condition or when he first began feeling the effects of the same. Davydov had alleged that unit 11B was inspected for mold on September 3, 2015 and January 15, 2016 (NYSCEF Doc No. 81, ¶¶ 40 and 42) but, notably, Davydov did not reside at the Building during the five years preceding those tests. Moreover, depositions have not taken place (see *Guzman v City of New York*, 171 AD3d 653, 653 [1st Dept 2019] [denying the defendant's motion for summary judgment as premature where depositions had not been held]). Thus, this Court is constrained to deny the motion at this time.

Therefore, in light of the foregoing, it is hereby:

ORDERED, that the motion by plaintiffs Greater New York Mutual Insurance Company and The Insurance Company of Greater New York for summary judgment (motion sequence no. 004) is denied without prejudice to renew the same upon the completion of discovery; and it is further

ORDERED that the parties are directed to appear for a previously scheduled discovery conference on July 30, 2019 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

6/27/2019
DATE

KATHRYN E. FREEDMAN FREED
J.S.C.
JUSTICE OF SUPREME COURT

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