American Empire Surplus Lines Ins. Co. v Burlington Ins. Co.
2019 NY Slip Op 32221(U)
July 25, 2019
Supreme Court, New York County
Docket Number: 652596/2016
Judge: Melissa A. Crane

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 15

----------X

AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY,

Plaintiff,

-against-

Index No. 652596/2016
Motion Seq. No. 001

BURLINGTON INSURANCE COMPANY,

DECISION/ORDER

Defendant.

----------X

HON. MELISSA A. CRANE, J.:

Plaintiff American Empire Surplus Lines Insurance Company (American Empire or plaintiff) moves for partial summary judgment, pursuant to CPLR 3212, seeking an order declaring that defendant Burlington Insurance Company (Burlington or defendant) is obligated to defend American Empire's insured, non-party Quality Building Construction, LLC (Quality) as an additional insured against an underlying property damage action (*Great N. Ins. Co. A/S/O Michael W. Hard Jr. and Y. Chinita L. Hard v Quality Bldg Constr. LLC*, index No. 161377/2015 [Sup Ct, NY County] [the underlying action]). In addition, plaintiff seeks an order declaring that the coverage afforded to Quality as an additional insured under defendant's policy is primary and non-contributory and that Burlington is liable to reimburse plaintiff for past and accruing costs with interest that it has incurred to defend Quality.[1]

Burlington cross-moves for summary judgment, pursuant to CPLR 3212, seeking a declaration that it does not owe coverage to Quality with respect to the claims asserted in the

[1] Although plaintiff's counsel, in his affirmation (NYSCEF Doc No. 18), styles the motion as one seeking an order declaring that Burlington must defend *and* indemnify Quality in the underlying action, counsel does not set forth an analysis or cite to case law in support of relief with respect to indemnification in his memorandum of law (NYSCEF Doc No. 37). As such, the court deems that plaintiff abandoned that argument in favor of focusing on the theory that Burlington is obligated to assume plaintiff's defense obligations.

underlying action and that it is not obligated to defend or indemnify Quality in connection with the underlying action.

For the reasons stated below, plaintiff's motion is granted and defendant's cross motion is denied.

Background

The complaint in the underlying action alleges that Quality was retained as a contractor to work on the exterior facade of a building 239 Central Park West Corporation owned. The underlying amended complaint further contends that Quality caused plastic spacers and pedestals used for the penthouse terrace to fall down the building's roof drain riser. On October 16, 2014, a clog and rainwater backup resulted in water damage to apartment 8A (the premises) that Michael W. Hard Jr. and Y. Chinita L. Hard, the subrogors in the underlying action, owned. The water backup and resulting damage was allegedly due to the clogged roof drain riser.

According to plaintiff, Quality subcontracted the work to Mega State, Inc. (Mega), pursuant to an agreement executed on or about April 11, 2013 (the subcontract or the agreement). The subcontract provides that Mega must indemnify and hold Quality harmless against claims in connection with Mega's work at the premises, as well as name Quality as an additional insured on a primary, non-contributory basis under Mega's commercial general liability insurance policy (NYSCEF Doc No. 23).

The record shows that Burlington issued a policy bearing no. 356BW27695 to Mega for the period of April 2, 2014 to April 2, 2015 (the Burlington policy). The policy named Quality as additional insured and was in effect at the time the alleged damages were sustained (NYSCEF Doc No. 24 at 33). American Empire issued a commercial general liability insurance policy to

Quality, bearing policy no. 14CG0184093, for the period of June 1, 2014 to June 1, 2015 (the American Empire policy) (NYSCEF Doc No. 22).

American Empire tendered a demand for coverage to Mega and Burlington by letter dated August 14, 2015. American Empire relied on the agreement between Quality and Mega, that it attached to its correspondence (NYSCEF Doc No. 25). Burlington acknowledged receipt of the tender for additional insured status by letter dated August 24, 2015 stating that it had closed its file on February 5, 2015 as a result of Mega's withdrawal of its claim (NYSCEF Doc No. 26). Therein, Burlington stated that it was unable to accept American Empire's demand for defense and indemnification as it proceeded to reopen its file and investigate the matter (*id.*). By letter dated December 16, 2015, plaintiff reiterated its tender of August 14, 2015 and included again a copy of the agreement between Quality and Mega in its correspondence (NYSCEF Doc No. 27).

Burlington wrote to American Empire on January 4, 2016 referring to the additional insured tender regarding its "claim" against Mega and advising of its findings that Mega "is not legally liable for the alleged damages" (NYSCEF Doc No. 28 at 1). As a result, plaintiff commenced this action on or about May 13, 2016 (NYSCEF Doc No. 19, ¶ 15).

On May 26, 2016, Burlington accepted the tender by letter to Quality's defense counsel, agreeing to assume the defense of Quality in the underlying action, and purporting to reserve Burlington's rights as to whether the Burlington policy was primary and on the question of indemnification (NYSCEF Doc No. 30). On June 10, 2016, plaintiff's counsel wrote to Burlington that American Empire would withdraw this action without prejudice and accept Burlington's coverage position subject to several proposed modifications (NYSCEF Doc No. 31).

In an email dated June 29, 2016, Burlington responded to this letter by requesting an extension to discuss American Empire's modifications (NYSCEF Doc No. 55). Ultimately, Burlington rejected American Empire's modifications and offer to dismiss the action without prejudice on July 14, 2016 by filing an answer in the instant action (NYSCEF Doc No. 56). On April 19, 2017 Burlington wrote to American Empire reiterating its coverage position and declining American Empire's proposed modifications (NYSCEF Doc No. 57).

It is uncontested that Quality, not Mega, is a defendant in the underlying action. It is also undisputed that Mega completed its work *prior* to the date of loss. Plaintiff contends that Quality is entitled to additional insured status and coverage under the "Completed Operations Endorsement" to the Burlington policy under which Mega is the primary insured.

According to plaintiff, the policy extends coverage to any contractor with whom Mega has agreed, in a written contract, to add as an additional insured, provided that the written contract is fully executed prior to an "occurrence" (NYSCEF Doc No. 24 at 31 and 44). Plaintiff points out that coverage is limited to liability for '"property damage,' caused, in whole or in part, by 'your work' at the location designated and described in the schedule" (*id.* at 44).

Plaintiff further argues that additional insured coverage is triggered because there is at least a reasonable possibility that the named insured, Mega, was a proximate cause of the underlying property damage. This is because the underlying complaint alleges that Quality caused the property damage, but Quality had subcontracted all of its work out to Mega.

Plaintiff also argues that the coverage to Quality as an additional insured under the Burlington policy is primary and non-contributory. Plaintiff points to the language of the subcontract, providing that Mega shall obtain additional insured coverage for Quality on a "primary non-contributory" basis (NYSCEF Doc No. 23 at 13). It is undisputed that the

Burlington policy provides that the additional insured coverage afforded by its policy "shall be primary insurance" (NYSCEF Doc No. 24 at 31). Further, the American Empire policy's Other Insurance provision states that coverage to Quality is excess over:

> "[a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured"

(NYSCEF Doc No. 22 at 22).

In opposition, defendant argues that the underlying allegations preclude the possibility of coverage. Defendant explains that the underlying complaint states that the property damage was caused by Quality, and, therefore, there can be no determination that Mega "caused in whole or in part" the property damage. In other words, negligence only on the part of the additional insured does not trigger a duty to defend or indemnify. There is no proof or allegation that Mega was negligent. Neither was Mega ever made a party to the underlying action.

In addition, defendant argues that any cause of action against Mega is time barred, pursuant to CPLR 214 (4)'s three-year statute of limitations applicable to property damage. The property damage occurred on October 16, 2014 according to the underlying complaint, and therefore, according to defendant, the bar set in on October 16, 2017. Defendant argues that plaintiff is unlawfully trying to circumvent the statute of limitations by asking the court to rule that the property damage was caused by Mega, not Quality, caused the property damage. Defendant further argues that because the action against Mega is time barred, Burlington has no duty to defend or indemnify as there is no legal or factual basis for an obligation to indemnify its insured under the policy.

Here, according to defendant, plaintiff has advanced no proof that Mega's work caused the damage, sufficient to raise an issue of fact. Defendant argues that Quality's President's

affidavit swearing to the fact that Quality did not perform work because it subcontracted the work to Mega is self-serving and inadmissible (Russell Galindo aff [NYSCEF Doc No. 20]). Defendant qualifies the affidavit as a mere product of litigation and argues that American Empire did not submit any admissible evidentiary proof. In particular, defendant argues that Galindo failed to eliminate material issues of fact about who caused the property damage.

Analysis

A. Additional Insured Status and Nature of Coverage

The court turns first to the question of whether Quality is entitled to additional insured coverage, which requires a two-prong analysis. The court must consider (1) whether Quality qualifies as an additional insured and (2) whether the claim is within the scope of the subject additional insured endorsement.

Again, Burlington's policy includes an amendatory endorsement that provides coverage for "[a]ny person or organization with whom you have agreed, in a written contract, that such person or organization should be added as an additional insured on your policy, provided such written contract is fully executed prior to an 'occurrence' in which coverage is sought under this policy" (NYSCEF Doc No. 24 at 31). The endorsement identifies Quality by name as an additional insured (*id.* at 33). Quality and Mega, executed a written subcontract on or about April 11, 2013 (NYSCEF Doc No. 23), prior to the October 16, 2014 occurrence. Thus, Quality would appear to be an additional insured, under the policy.

Moving on to the second prong, Mega procured the Burlington policy, that provides for coverage of property damage to Quality as additional insured for work performed by Mega, at the project location. An endorsement modifies the "Who is Insured" section:

> "to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for 'bodily injury' or 'property

> damage' caused, in whole or in part, by 'your work' at the location designated and described in the schedule of this endorsement performed for that additional insured and included in the 'products completed operations hazard'"

(NYSCEF Doc No. 24 at 44). (emphasis added)

Quality's president, Galindo, avers in his affidavit that he executed the agreement with Mega on or about April 2013 and swears that "5. As a result of all of the work being subcontracted by Quality to Mega, Quality did not perform any work during the Exterior Façade Project" (NYSCEF Doc No. 58). Mega does not dispute this assertion.

In the seminal case of *Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313 [Ct App 2017], the Court of Appeals clearly held that where an insurance policy contains the language "caused in whole or in part," the coverage is extended to any "injury proximately caused by the named insured" (*Burlington Ins. Co.*, 29 NY3d at 317). Here, the probability that Mega's work caused the property damage remains, because Mega is the entity that actually worked on the project, Quality did not.

Contrary to defendant's assertions, it is irrelevant that Mega was not mentioned or added as third party in the underlying complaint (*City of New York v Wausau Underwriters Ins. Co.*, 145 AD3d 614, 618 [1st Dept 2016], quoting *Fitzpatrick*, 78 NY2d at 64, 69-70). Courts are not limited by the four corners of the complaint to the extent that relying on same would result in an unfair outcome where the insurer had "actual knowledge of facts establishing a reasonable possibility of coverage" (*Indian Harbor Ins. Co. v Alma Tower, LLC*, 165 AD3d 549 [1st Dept 2018], citing *Fitzpatrick*, 78 NY2d at 69 [insurer was bound to defend its insured notwithstanding the fact that complaint did not allege a covered occurrence as the insurer had actual knowledge of facts establishing a reasonable possibility of coverage]).

The record shows that American Empire provided a copy of the subcontract between Mega and Quality and cited relevant provisions of the subcontract in the tender letters it sent Burlington (NYSCEF Doc Nos. 25 and 27) (*compare Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 37-38 [1st Dept 2006]). Thus, Burlington had actual knowledge of facts establishing a reasonable possibility that the claim was within its indemnification policy terms.

The court also finds that the issue of the statute of limitations raised is of no moment (*Fitzpatrick.*, 78 NY2d at 65 [holding that "an insurer may be contractually bound to defend even though it may not ultimately be bound to pay, either because its insured is not factually or legally liable or because the occurrence is later proven to be outside the policy's coverage"]).

Finally, the court notes that the language in the Burlington policy "Amendatory Endorsement" dictates the type of coverage. Here, Burlington's policy with respect to the subject claims is primary and non-contributory:

> "Except as otherwise provided herein, it is agreed that such insurance as is afforded by this policy for the benefit of the person or organization shown in the Schedule, shall be primary insurance. Any other insurance purchased by the Person or Organization named, for the protection of itself against claim, loss, or liability, shall be excess and non-contributory but only:
> a. as respects any claim, loss or liability arising out of "your work" for that Person or Organization, and
> b. only if such claim, loss or liability is determined to be due solely to your negligence"

(NYSCEF Doc No. 24 at 31).

Thus, based on the foregoing, plaintiff has met its burden of showing that there is a reasonable possibility that the Burlington policy covers the loss for which a claim has been made and that the coverage is primary and non-contributory.

B. Effect of Burlington's Reservation of Rights Letter

As is relevant here, in its May 26, 2016 "formal response" to the tender (NYSCEF Doc No. 30 at 1), Burlington declared that: "Burlington is willing to provide and assume the defense to Quality, subject to this reservation of rights on whether our policy is primary and on the question of indemnification" (*id.* at 3). In particular, Burlington stated:

> "Burlington reserves its right to seek reimbursement of any legal fees and expenses paid on behalf of Mega State related to non-covered damages. Burlington further reserves its right to withdraw its defense of this matter should it be determined it has no indemnity obligation. Should Burlington withdraw its defense, or if a court of competent jurisdiction rules no defense obligation existed, Burlington reserves its right to seek recovery of any legal fees and expenses paid in defense of Quality Building Company of NY LLC in this matter"

(*id.*).

In response, American Empire acknowledged Burlington's agreement to extend additional insured status to Quality and provide the defense in the underlying action under a reservation of rights (NYSCEF Doc No. 31). In addition, American Empire agreed to withdraw its pending declaratory judgment action without prejudice against Burlington subject to the following conditions to Burlington's reservation of rights (*id.*):

> "1. With respect to the 'Amendatory Endorsement - Other Insurance Provision' to the Burlington Policy, specifically, the provision 'b. only if such claim, loss or liability is determined to be due solely to [Mega's] negligence,' Burlington will acknowledge that the same is limited in its application to the relationship between Quality and Mega, and does not apply to any other parties, including an entity, which may eventually be named as a defendant in the referenced action.
>
> 2. American Empire objects to any attempt by Burlington to limit the existence of additional insured coverage to situations in which Mega is determined to be solely negligent. As such, Burlington will acknowledge that the negligence of Mega will not affect the existence of additional insured coverage to Quality under the Burlington Policy.
>
> 3. American Empire also objects to Burlington's reservations in seeking reimbursement of any legal fees and expenses as it is inappropriate and not

> provided for in its policy provisions. As such, Burlington will acknowledge that all defense costs incurred by Burlington are not entitled to reimbursement"

(*id.* at 2).

New York permits an insurer to assume the defense of its insured subject to a reservation of rights, thus allowing "the insurer the flexibility of fulfilling its obligation to provide its insured with a defense, while continuing to investigate the claim further" (*Law Offs. of Zachary R. Greenhill P.C. v Liberty Ins. Underwriters, Inc.*, 128 A.D.3d 556, 559 [1st Dept 2015]; *see also 44 Lexington Assoc., LLC v. Liberty Mut. Group, Inc.*, 150 AD3d 463, 464 [1st Dept 2017]).

Reservation of rights letters operate to prevent equitable estoppel and waiver from attaching before determination of the insured's liability is determined (*Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 37-38 [1st Dept 2006] ["The purpose of a reservation of rights is to prevent an insured's detrimental reliance on the defense provided by the insurer. The reservation is a sufficient preventative to reliance even if the insurer later disclaims on a basis different from the ground originally asserted in the reservation of rights"]).

"By reserving its rights, the insurer is not imposing conditions on its defense. The defense remains unqualified; the insurer, by reserving its rights, is merely putting the insured on notice of what the insurer believes are its existing rights under the policy" (Insurance Claims & Disputes: Insured's Refusal to Accept Defense Offered by Insurer - Defense Offered Subject to a Reservation of Rights, 1 INCD § 4:26 [6th ed.]). Notwithstanding the foregoing, the insured has the right to reject the conditions the insurer is seeking to impose, by objecting or requesting separate counsel (*American Guar. & Liab. Ins. Co. v CNA Reins. Co.*, 16 AD3d 154, 155 [1st Dept 2005]). To be sure, "[t]he insurer's reservation affects only the insurer's duty to indemnify, not its duty to defend, and, unlike some nonwaiver agreements, reservation of rights letters do

not require that the insured make any concessions with regard to the insurer's duty to indemnify" (1 INCD § 4:26 [6th ed.]).

In *206-208 Main St. Assoc., Inc. v Arch Ins. Co.*, 106 AD3d 403, 407-408 [1st Dept 2013]), the court held that the insured has the burden on a motion for summary judgment to present evidence showing that it was prejudiced by the insurer's late reservation of rights as a matter of law. The court ruled that the posture of litigation is a relevant factor but determined that the insured had not been prejudiced here as the subject reservation of rights was issued when the underlying litigation was, by the insured's own admission, still in its "early phase" (*id.* at 407). The court further held that the insured had also failed to establish prejudice on the basis that "plaintiff insurer had taken advantage of information defense counsel had communicated to it to form the basis for the eventual disclaimer" (*id.* at 408).

The court notes filed the underlying action on November 5, 2015 and that the parties were still engaged in discovery, on May 26, 2016, the time Burlington issued its reservation of rights letter. Thus, plaintiff has not established that the underlying litigation was in an advanced stage, nor did plaintiff present any evidence sufficient to demonstrate that it was prejudiced by Burlington's alleged late reservation of rights. Thus, this Court will not impose a duty to defend on Burlington merely because of the timing of its reservation of rights letter. Rather, the court finds that defendant is liable to reimburse plaintiff for its defense costs in the underlying property damage action, with interest because of the language of the insurance policies and the sub contract between Quality and Mega (*Indian Harbor Ins. Co.*, 165 AD3d at 549).

Accordingly it is,

ORDERED that the branch of plaintiff's motion for partial summary judgment on its first

and second causes of action seeking declaratory judgment that defendant is obliged to provide a defense to, and provide coverage for plaintiff's insured, non-party Quality Building Construction, LLC (Quality), the defendant in the action of *Great N. Ins. Co. A/S/O Michael W. Hard Jr. and Y. Chinita L. Hard v Quality Bldg Constr. LLC*, index No. 161377/2015 [Sup Ct, NY County], is granted; and it is further

ORDERED that the branch of plaintiff's motion for partial summary judgment on its first and second causes of action seeking declaratory judgment that the coverage afforded to Quality as additional insured is primary and non-contributory is granted; and it further

ORDERED that the motion of plaintiff for partial summary judgment on its third cause of action seeking declaratory judgment that defendant is obliged to reimburse plaintiff for all past and accruing defense costs reasonably incurred in connection with the defense of the aforesaid action pending in New York County, with interest, until Burlington assumes the defense is granted; and it is further

ORDERED that the cross motion of defendant for summary judgment on plaintiff's first and second causes of action seeking declaratory judgment that defendant is not obliged to provide a defense to, and provide coverage for Quality, the defendant in the action of *Great N. Ins. Co. A/S/O Michael W. Hard Jr. and Y. Chinita L. Hard v Quality Bldg Constr. LLC*, index No. 161377/2015 [Sup Ct, NY County], is denied; and it is further

ADJUDGED and DECLARED that defendant Burlington Insurance Company is obliged to provide a defense to, plaintiff's insured, the defendant in the action of *Great N. Ins. Co. A/S/O Michael W. Hard Jr. and Y. Chinita L. Hard v Quality Bldg Constr. LLC*, index No. 161377/2015 [Sup Ct, NY County], and reimburse plaintiff for all past and accruing defense

costs reasonably incurred in connection with the defense of that defendant in the aforesaid action pending in New York County. The Clerk is directed to enter judgment accordingly.

Dated: 7 25 2019

Hon. Melissa A. Crane, JSC