Allied World Assur. Co. (U.S.) Inc. v Aspen Specialty Ins. Co.
2019 NY Slip Op 32749(U)
September 11, 2019
Supreme Court, New York County
Docket Number: 655224/2017
Judge: Frank P. Nervo
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
--x
ALLIED WORLD ASSURANCE COMPANY (U.S.)
INC. and M. CARY, INC.,

Plaintiff,

-against-

ASPEN SPECIALTY INSURANCE COMPANY,
MERCHANTS MUTUAL INSURANCE COMPANY,
NATIONAL UNION FIRE INSURANCE COMPANY,
DIMENSIONAL DRYWALL & ACCOUSTICS LLC and
QUALITY CRAFT MARBLE TILE & STONE INC.

Defendants.
--x

DECISION AND ORDER

Index Number

655224/2017

FRANK P. NERVO, J.S.C.

Plaintiff Allied World Assurance Company (U.S.) Inc. (hereinafter "Allied") moves for partial summary judgment, seeking a declaration pursuant to CPLR § 3212 that Aspen Specialty Insurance Company (hereinafter "Aspen") and Merchants Mutual Insurance Company (hereinafter "Merchants") are obligated to provide defense coverage to M. Cary Inc. (hereinafter "M. Cary") as an additional insured on policies issued to subcontractors Dimensional Drywall & Acoustics LLC (hereinafter "Dimensional Drywall") and Quality Craft Marble Tile & Stone Inc. (hereinafter "Quality Craft"). Merchants opposes and cross-moves for summary judgment declaring M. Cary is not an additional insured on the Merchants policy.

This insurance coverage dispute arises from an underlying personal injury action where an employee claimed she was injured as a result of negligent construction work performed at her place of employment. M. Cary was the general contractor and had retained Dimensional Drywall and Quality Craft as subcontractors to perform work in

the area where the employee claimed she had been injured. At the time of the alleged injury, Dimensional Drywall was insured under a policy issued by Aspen, Quality Craft was insured under a policy issued by Merchants, and M. Cary was insured by Allied. Allied[1] tendered to Aspen and Merchants for, inter alia, defense coverage of the underlying action filed against M. Cary. Aspen and Merchants denied coverage, contending that M. Cary's liability was not caused by their respective insureds' work, Dimensional Drywall and Quality Craft. Subsequently, an amended complaint was filed that listed Dimensional Drywall and Quality Craft as direct defendants. Allied tendered the amended complaint to Aspen and Merchants, again seeking defense coverage, but neither responded. As relevant to the instant dispute, the underlying personal injury action was dismissed after trial; however, an appeal remains pending, and thus, movant contends, so does Aspen's and Merchants' duty to defend.[2]

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). "When a plaintiff moves for summary judgment, it is proper for the court to ... deny summary judgment if facts are alleged in opposition to the motion which, if true, constitute a meritorious defense" (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NYD 175 [1982]).

---

[1] Via a third-party administrator, Rockville Risk Management Associates.
[2] Allied avers that the appeal has been recently perfected.

However, a "feigned issue of fact" will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alverez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

Construction of an insurance agreement is subject to the principles of contract interpretation (*Universal Am. Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015]). As such, the interpretation of an insurance contract is a question of law reserved for the Court (*White v. Continental Cas. Co.*, 9 NY3d 264, 267 [2007]; *see also Burlington Ins. Co. v. NYC Tr. Auth.*, 29 NY3d 313, 321 [2017]).

Here, Allied contends that M. Cary's subcontract agreement with Dimensional Drywall and Quality Craft required M. Cary be named as an additional insured, and that such insurance must provide M. Cary with primary coverage. Allied further contends that these insurance policies, issued by Aspen and Merchants, provide for automatic primary coverage to M. Cary as an additional insured when required by written agreement between the primary insured, Dimensional Drywall and Quality Craft, respectively, and M. Cary. As such, Allied contends that Aspen and Merchants owe M. Cary a duty to defend in the underlying the bodily injury action, notwithstanding the *Burlington* decision, because the duty to defend is triggered whenever the allegations of the complaint suggest a reasonable possibility of liability stemming from the primary insured's acts or omissions (discussed *infra*).

Conversely, Merchants contends that because the policy covers only bodily injury "caused in whole, or in part" by Quality Craft, and the Court of Appeals has interpreted such language to require the insured be the proximate cause of the injury giving rise to liability, the duty to defend a bodily injury claim does not apply to M. Cary where the trial court found Quality Craft's construction work was not causally related to the alleged accident (*Burlington Ins. Co.*, 29 NY3d at 321-27).

The Aspen policy, via the "Additional Insured – owners, Lessees or Contractors – Automatic Status When Required in Construction Agreement With You" endorsement, reads, in part:

> A. Section II – Who Is An Insured is amended to include as an additional insured any 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. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" cause, in whole or in party, by:
>
> 1. Your acts or omissions; or
>
> 2. The acts or omissions of those acting on your behalf

(Allied's Exhibit J).

The Merchants policy's "Additional Insureds – By Contract, Agreement or Permit (Including Completed Operations)" endorsement reads, in pertinent part:

> 3. Additional Insureds By Contract, Agreement Or Permit
> a. Any person or organization, when you and such person or organization have agreed in writing in a contract, agreement or permit that executed prior to the "bodily injury", "property damage" or "personal and advertising injury", that such person or organization be added as an additional insured on your policy. Such person or organization is an

> additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in party by:
>
> (1) Your acts or omissions;
>
> (2) The acts or omissions of those acting on your behalf; in performance of "your work" and included in the "Products – Completed Operations hazard"; or
>
> (3) Your acts or omissions or the acts or omissions of those acting on your behalf in connection with premises owned by or rented to you
>
> c. This insurance is primary if that is required by the contract, agreement or permit.

(Allied's Exhibit K).

At issue is the recent Court of Appeals decision in *Burlington Ins. Co. v. NYC Tr. Auth.*, and whether a duty to defend M. Cary as an additional insured was triggered (29 NY3d 313 [2017]). *Burlington Ins. Co.* stands for the proposition that, inter alia, where an insurance policy limits bodily injury coverage to that "caused in whole, or in part" by the primary insured, the additional insured will not benefit for such coverage where the proximate cause of the injury is solely that of the additional insured (*id.* at 321-27). However, where there is a reasonable possibility that the primary insured caused the bodily injury, the First Department has found *Burlington Ins. Co.* inapplicable (*Indian Harbor Ins. Co. v. Alma Tower*, 165 AD3d 549 [1st Dept 2018]). Furthermore, where an insurer has knowledge of the facts establishing a reasonable possibility of coverage, the insurer is obligated to defend its insured in the underlying personal injury action (*id.*; *see also Fitzpatrick v. American Honda Motor Co.*, 78 N.Y.2d 61, 67 [1991]).

Aspen and Merchants had knowledge that a reasonable possibility of coverage existed, as it is undisputed that Allied tendered the amended complaint, listing Dimensional Drywall and Quality Craft as named defendants, to Aspen and Merchants. Consequently, Aspen and Merchants had an obligation to defend their primary and additional insureds, pursuant to their respective policies. That the underlying personal injury action was resolved in favor of M. Cary, Dimensional Drywall, and Quality Craft is of no moment, and does not have any bearing on the insurers duty to defend. To hold otherwise would result in the perverse outcome where insurers are not obligated to bear the cost of an insured's successful defense and may withhold payment of defense costs until their insured is found liable after a failed defense.

Next, the Court, having found the insurers owe M. Cary a duty to defend, must now determine whether the Aspen and Merchants policies provide M. Cary with primary or excess coverage. Aspen's "Primary and Non-contributing Insurance (Third-Party)" endorsement reads, in pertinent part:

> 4. Other Insurance
>
> (a) With respect to the Third Party shown below, the insurance provided by this policy shall be primary and non-contributing insurance. Any and all other valid and collectable insurance available to such Third Party in respect of work performed by you under written contractual agreements with said Third Party for loss covered by this policy, shall in no instance be considered excess over and above the insurance provided by this policy
>
> The Third Party to whim this endorsement applies is:
>
> Absence of a specifically named Third Party above means that the provisions of this endorsement apply "as required by written contractual agreement with any Third Party for you who are performing work."

(Allied's Exhibit J).

Consequently, as the subcontract agreement between Dimensional Drywall and M. Cary required Dimensional Drywall to obtain primary coverage insurance listing M. Cary as an additional insured, the "Primary and Non-contributing Insurance (Third-Party)" endorsement provides that Aspen insurance policy will provide primary coverage as required by that subcontract agreement.

The Merchants "Additional Insureds – By Contract, Agreement or Permit (Including Completed Operations)" endorsement predicates its priority on the primary insured's contract or agreement with the additional insured, if that agreement so specifies (*supra*). Here, the subcontract agreement between M. Cary and Quality Craft specifies "[t]he liability insurance policies shall be endorsed to provide, (a) that Contract and Owner are additional insured, (b) that the insurance afforded to Contractor is primary and any other insurance in force for Contractor will be excess and will not contribute to the primary policies" (Allied's Exhibit S – "Subcontractor Agreement" § 8). Consequently, as the subcontract requires the insurance provide primary coverage to the additional insured, M. Cary, Merchants' coverage is primary to Allied's.

Accordingly, it is

ORDERED that Allied's motion is granted to the extent of declaring Aspen and Merchants are obligated to provide defense coverage to M. Cary for the personal injury action *Nifa Hodzic v. M. Cary, Inc., Dimensional Drywall & Acoustics, LLC and Quality*

Craft Marble Tile & Stone, Index Number 5480/2012 that such coverage is primary to Allied's, that Aspen and Merchants shall share the defense costs evenly; and it is further

ADJUDGED and DECLARED that defendants Aspen Specialty Insurance Company and Merchants Mutual Insurance Company are obliged to provide a defense to plaintiff M. Cary Inc. in the aforesaid action; and it is further

ORDERED that Aspen and Merchants reimburse Allied and M. Cary for fees, costs, and disbursements incurred for the defense of M. Cary in the aforesaid action; and it is further

ORDERED that the balance of this action is severed and continued; and it is further

ORDERED that Merchants' cross-motion is denied in its entirety; and it is further

ORDERED that the parties appear for a status conference on November 1, 2019 at 10:00am in Part 4 (room 327) at 80 Centre Street.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated Sept. 11, 2019

ENTER:

J.S.C.

HON. FRANK P. NERVO
J.S.C.