Supreme Court of the State of New York
County of Kings

Part 91

GEM-QUALITY CORPORATION,

Plaintiff,

against

COLONY INSURANCE COMPANY, COLONY SPECIALTY INSURANCE COMPANY, PELEUS INSURANCE COMPANY, AND CENTAUR INSURANCE SERVICES, INC.,

Defendants.

Index Number 523039/2018
SEQ# 001

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	
Other	

Upon review of the foregoing papers, the motion by defendants Peleus Insurance Company, formerly known as Colony Insurance Company ("Peleus"), Colony Insurance Company, and Colony Specialty Insurance (collectively, the "insurer defendants") to dismiss plaintiff Gem-Quality Corporation's ("Gem-Quality") causes of action against them, is decided as follows:

As alleged in the amended verified complaint, Gem-Quality, a construction company, contracted with the New York City Housing Authority ("NYCHA") to perform construction work at a NYCHA housing development. Gem-Quality's contract with NYCHA was an "insured contract," which required Gem-Quality to assume any tort liability of NYCHA for injury to a Gem-Quality employee. Mark Stuto, a Gem-Quality employee, sustained injuries while working at the housing development and sued NYCHA, which demanded that Gem-Quality defend and indemnify it pursuant to the insured contract. Gem-Quality then sought coverage under a commercial general liability insurance policy it had purchased from defendant Peleus. Peleus

denied coverage, however, stating that its policy excluded any coverage for employee injuries. Gem-Quality then commenced this action seeking a declaratory judgment that the insurer defendants[1] defend and indemnify it, as well as NYCHA, in relation to any claims stemming from Mr. Stuto's injury.

The amended verified complaint asserts nine causes of action. Five are against the insurer defendants , contending that they breached their contract, that they are obligated to defend and indemnify Gem-Quality in the Stuto matter and reimburse it for legal expenses, and that they are obligated to defend and indemnify NYCHA. Each of these causes of action is based on the Peleus policy's alleged obligation to provide coverage to an injured Gem-Quality employee pursuant to an insured contract.

Peleus moves to dismiss Gem-Quality's causes of actions pursuant to CPLR § 3211(a)(1) on the basis that the policy does not cover injury to Gem-Quality's employees. In order to succeed in dismissing a claim under § 3211(a)(1), the "documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Hoeg Corp. v Peebles Corp.*, 153 AD3d 607, 608 [2d Dept 2017], quoting *Teitler v Max J. Pollack & Sons*, 288 AD2d 302, 302 [2d Dept 2001]).

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[1] The amended verified complaint alleges that only Peleus issued the policy and denied coverage. However, Gem-Quality treats Peleus, Colony Insurance Company, and Colony Specialty Insurance as a single group of "insurer defendants" throughout the complaint and asserts claims against them as a single unit. In the moving affidavit of the insurer defendants' counsel, Jonathan Harwood, Mr. Harwood claims that Colony Insurance Company and Colony Specialty Insurance have nothing to do with the subject policy. However, he makes no argument for their dismissal on that basis. Likewise, Gem-Quality does not explain the involvement of Colony Insurance Company and Colony Specialty Insurance. As both Gem-Quality and the insurer defendants seem content to treat the insurer defendants as a single unit, the court will be guided as such.

Where an insurance policy unambiguously excludes the type of coverage sought by the plaintiff, the Second Department will dismiss the claim (*Soho Plaza Corp. v Birnbaum*, 108 AD3d 518, 519 [2d Dept 2013]).

In this case, both Gem-Quality and the insurer defendants base their arguments exclusively on the same documentary evidence – the Peleus policy. For the purposes of this motion, the only dispute is whether the policy provides coverage for employee injury liability under an insured contract. This dispute involves the interplay between a policy provision which excepts insured contracts from an exclusion of coverage (the "exclusion-exception"), and an endorsement which either replaces or adds to this exclusion-exception.

The exclusion-exception for insured contracts is found in a section of the policy titled "SECTION I - COVERAGES, COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions", which contains two relevant subsections. These subsections provide, in pertinent part (with emphasis added):

> This insurance does not apply to:
>
> * * *
>
> b. Contractual Liability
>
> "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**:
>
> * * *
>
> (2) **Assumed in a contract or agreement that is an "insured contract"**, provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement . . . .
>
> e. Employer's Liability

"Bodily injury" to

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract."

In addition, in Section V - Definitions, the policy defines "insured contract". This definition was modified by a later endorsement, which states that the definition in the policy "is replaced by" the definition in the endorsement, which states, among other things:

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or by those acting on your behalf . . . .

Thus, based only on these provisions, there is coverage for Gem-Quality based on an insured contract. However, the policy contains an endorsement that states as follows, in pertinent part:

EXCLUSION - DESIGNATED ONGOING OPERATIONS AND PRODUCTS-COMPLETED OPERATIONS HAZARD

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description of Designated Operation(s):

1. "Your Work" involving snow or ice removal.

2. All work, activities, or operations performed by the named insured's employee or laborer, whether day laborer or temporary worker or part-time or full time worker. This does not pertain to work or activities subcontracted out to others or work performed by the named insured's employee or laborer when work performed is in a supervisory capacity.

3. All work, activities, or operations involving installation, service or repair of playgrounds or playground equipment.

4. All supervisory work, activities, or operations performed by the named insured's employee or laborer, whether day laborer or temporary worker or part-time or fulltime [sic] worker on the exterior of any building or structure where the named insured's employee's or laborer's foot is elevated by more than nine feet above the "base" of a ladder or scaffolding or other lifting device. For the purpose of ths exclusion, "base" is defines as the bottom or lowest point at which the ladder or scaffolding or other lifting device rests or is supported.

Specified Location (If Applicable):

SECTION I- COVERAGES, COVERAGE A- BODILY INJURY AND PROPERTY DAMAGE LIABILITY 2. Exclusions and COVERAGE B- PERSONAL AND ADVERTISING INJURY LIABILITY, 2. Exclusions are amended and the following is added:

This insurance does not apply to "bodily injury" or "property damage" or "personal and advertising injury" arising out of the operations described in the SCHEDULE above.

The first issue is whether the endorsement language only adds to, or if its replaces, the language in the original policy. An insurance policy is construed by giving the plain meaning to its text (*Catucci v Greenwich Ins. Co.*, 37 AD3d 513, 514 [2d Dept 2007]). Here, the endorsement states "SECTION I - COVERAGES, COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions, and COVERAGE B - PERSONAL AND

ADVERTISING INJURY LIABILITY, 2. Exclusions ***are amended and the following is added***" (emphasis added). Conversely, the endorsement that changed the definition of "insured contract" states that the definition in the policy "is ***replaced by***" (emphasis added) the definition in the endorsement. Thus, the text in the endorsement is added to, but does not replace, any of the text in the original policy.

Next, the court must construe the language, as amended, to determine if coverage exists. Gem-Quality argues that, because the endorsement adds to, but does not replace, the text of the "Exclusions" section, subsections 2(b)(2) and 2(e), quoted above, remain in effect. Gem-Quality further argues that, because both of these subsections contain the exclusion-exception for insured contracts, Mr. Stuto's bodily injury claim is not excluded. Alternatively, Gem-Quality argues that the new endorsement language conflicts with subsections 2(b)(2) and 2(e) and creates an unresolvable ambiguity in coverage. Gem-Quality contends that such ambiguity must be construed in its favor (*see Garson Mgt. Co., LLC v Travelers Indem. Co.*, 300 AD2d 538, 539 [2d Dept 2002] ["An exclusion from coverage 'must be specific and clear in order to be enforced' and an ambiguity in an exclusionary clause must be construed most strongly against the insurer"] [internal citations omitted]).

In these circumstances, however, Gem-Quality is incorrect. The rule is well-settled that any such conflicts do not create an ambiguity because, if any single exclusion in the policy applies, coverage is denied (*Garson Mgt.*, 300 AD2d at 539-40 [granting the defendant summary judgment where the plaintiff argued unsuccessfully that an exception within an exclusion granted coverage, or at least created ambiguity, when read in conjunction with a separate exclusion plainly denying that coverage)]; *see also Catucci*, 37 AD3d at 514).

That rule is directly applicable to this case. The endorsement clearly and unambiguously states that "the insurance does not apply to 'bodily injury' . . . arising out of the operations described in the schedule above," where "schedule above" broadly includes "all work . . . performed by the named insured's employees" including part-time and full-time employees. There is no "insured contract" exception in this exclusion. Indeed, it appears that the policy now broadly excludes four classes of people, including employees of the insured. Because Mr. Stuto was an employee of the insured who suffered bodily injury while working, the exclusion in the endorsement flatly denies coverage for claims based on his injury, without exception.

The insurer defendants correctly argue that this case is similar to *Monteleone v Crow Constr. Co.* (242 AD2d 135 [1st Dept 1998]). In *Monteleone*, the employee of a roofer was injured and he sued the construction manager and general contractor of the project. The general contractor brought a third-party claim against the roofer for indemnification. The roofer sought coverage from its insurer, who denied coverage. The roofer then brought a second third-party action against the insurer for a declaration of coverage. The insurance company argued that, while the original policy provided an exception to the exclusion of coverage of "insured contracts", like the one in this case, a subsequent endorsement replaced this exclusion. The endorsement did not contain an exception for insured contracts. The roofer argued that, notwithstanding the change made by the endorsement, the roofer could be covered under a different section of the policy (*Monteleone*, 242 AD2d at 135-39).

The court held that the possibility of coverage under one section and exclusion of coverage under a different section did not create any ambiguity or inconsistency (*id.* at 140-41). Rather, the court held that "if any one exclusion applies there can be no coverage since no one

exclusion can be regarded as inconsistent with another" (*id.* at 141). Consequently, the court held that the roofer was not entitled to coverage for that accident (*id.* at 141-42). Like the insured in *Monteleone*, Gem-Quality seeks coverage under a different policy provision, namely subsections 2(b)(2) and (2)(e) of the original policy. However, coverage is already excluded under the endorsement language, and so Gem-Quality cannot seek coverage under a different policy provision (*Garson Mgt.*, 300 AD2d at 539-40).

For the foregoing reasons, the insurer defendants' motion to dismiss is granted. Plaintiff's claims against Centaur Insurance Services, Inc., which are not a subject of this motion, are not dismissed.

This constitutes the decision and order of the court.

August 20, 2019
DATE

DEVIN P. COHEN
Justice of the Supreme Court