

**American States Ins. Co. v Graphic Arts Mut. Ins.
Co.**

2020 NY Slip Op 30083(U)

January 6, 2020

Supreme Court, New York County

Docket Number: 651372/2018

Judge: Debra A. James

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
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

INDEX NO. 651372/2018

AMERICAN STATES INSURANCE COMPANY, GENERAL
INSURANCE COMPANY OF AMERICA,

MOTION DATE 10/16/2018

Plaintiff,

MOTION SEQ. NO. 002

- v -

GRAPHIC ARTS MUTUAL INSURANCE COMPANY, NOVA
CASUALTY COMPANY, PRAETORIAN INSURANCE
COMPANY, and NAVIGATORS INSURANCE COMPANY,
improperly sued as NAVIGATOR INSURANCE COMPANY,

DECISION + ORDER ON
MOTION

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27,
28, 29, 30, 31, 33, 34, 35, 36, 91

were read on this motion to/for

DISMISS

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendant Navigator for judgment
in its favor on the complaint is granted, and a declaratory
judgment shall be rendered in favor of such defendant; and it is
further

ORDERED that the complaint against such defendant shall be
severed, the Clerk shall enter judgment on such complaint in favor
of such defendant, as indicated, and the action against the
remaining defendants shall continue; and it is further

ADJUDGED and DECLARED that as to the complaint against
defendant Navigator Insurance Company, such defendant is not

obligated to provide a defense to, and provide coverage for, non-party New York Ready Mix, Inc., plaintiffs' insured, in the action entitled County of Nassau v Commercial Concrete Corp., Index No. 608267/2016, Sup Ct, Nassau County; and it is further

ORDERED that the remaining parties are directed to appear for a preliminary conference in IAS Part 59, Room 331, 60 Centre Street, on March 10, 2020, 9:30 AM.

DECISION

In this declaratory judgment action, plaintiffs American States Insurance Company (ASI) and General Insurance Company of America (General) seek a declaration that defendants have a duty to defend and indemnify plaintiffs' insured, New York Ready Mix, Inc. (Ready Mix), a third-party defendant in County of Nassau v Commercial Concrete, Corp. and Town of N. Hempstead (Index No. 608267/16), a property damage action pending in Supreme Court, Nassau County (underlying action).

Defendant Navigators Insurance Company, s/h/a as Navigator Insurance Company (Navigators), moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the instant complaint as against it.

Background

The County of Nassau (County) commenced the underlying action in October 2016, alleging that Commercial Concrete Corp. (Commercial Concrete), in the process of washing out its concrete mixing trucks on or near its facility, created a

mixture of concrete and water (concrete slurry), which flowed into a nearby street and, through catch basins owned and maintained by the Town of North Hempstead (Town), entered a pipe that is part of the County's water drainage system. County claims that, as a result of Commercial Concrete's illegal dumping activities over a period of time, solid concrete deposits formed in County's drainage pipe and created a blockage that, in August 2015, led to flooding conditions in the area. According to County, an emergency project to clear the blockage began in September 2015 and was completed in or about March 2016. County seeks damages of more than \$4,800,000 for costs and fees related to the remediation of the blockage, as well as injunctive relief to prevent similar future events. County also alleges that it will incur additional damages for a second phase of rehabilitation work to be done on the drainage system in the future.

Navigators issued a commercial automobile liability insurance policy to Commercial Concrete, effective September 30, 2016 through September 30, 2017 (the Navigators Policy), which applied to various vehicles owned by Commercial Concrete and provided, under Section II - Covered Autos Liability Coverage:

"We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'

We will also pay all sums an 'insured' legally must pay as a 'covered pollution cost or expense' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of covered 'autos.' However, we will only pay for the 'covered pollution cost or expense' if there is 'bodily injury' or 'property damage' to which this insurance applies that is caused by the same 'accident.'

We have the right and duty to defend any 'insured' against a 'suit' asking for such damages or a 'covered pollution cost or expense.' However, we have no duty to defend any 'insured' against a 'suit' seeking damages for 'bodily injury' or 'property damage' or a 'covered pollution cost or expense' to which this insurance does not apply."

Under the Navigators Policy, Navigators "cover[s] 'accidents' and 'losses' occurring . . . [d]uring the policy period shown in the Declarations." Navigators Policy, Sec. IV.B [7] [a)). The policy period shown in the Declarations is from September 30, 2016 to September 30, 2017. As defined in the policy, "'[a]ccident' includes continuous or repeated exposure to the same conditions resulting in 'bodily injury' or 'property damage.'" Id., Sec. V (A). "'Loss' means direct and accidental loss or damage." Id., Sec. V (J). "'Insureds' under the policy include the named insured and "[a]nyone else while using with your permission a covered 'auto' you own, hire or borrow." Id., Sec. II.A (1).

In the underlying action, Commercial Concrete brought a third-party action against Ready Mix, alleging any damages sustained by the County were caused by the negligence of Ready

Mix, and seeking indemnification and/or contribution and defense costs. County subsequently moved to amend its complaint to add Ready Mix as a direct defendant, which motion was pending when the instant motion was submitted. ASI and General tendered the defense of Ready Mix to Navigators in January 2018, and Navigators responded by stating its position that no coverage was available to Ready Mix in the underlying action. Plaintiffs then brought this declaratory judgment action, and the instant motion ensued.

Navigators contends that the Navigators Policy and the complaint in the underlying action demonstrate that it is not obligated to defend or indemnify Ready Mix in the underlying action, without regard to whether Ready Mix qualifies as an insured under the Navigators Policy, because there was no accident or loss occurring during the policy period, as the accident occurred on or before August 2015, and all damages claimed by County occurred by March 2016, when repair work was completed. In opposition, plaintiffs argue that the Navigators policy applies to cover Ready Mix because County alleged in the complaint that it continued to spend money to remediate the blockage and it will incur future damages for a second phase of remediation to be undertaken in the future.

Discussion

On a CPLR 3211 (a) (7) motion to dismiss, the court generally "must 'accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.'" Kolchins v Evolution Mkts., Inc., 31 NY3d 100, 105-106 (2018), quoting Leon v Martinez, 84 NY2d 83, 87 (1994); see Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 178 (2011). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 (2002), quoting Polonetsky v Better Homes Depot, Inc., 97 NY2d 46, 54 (2001). However, "'bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence' are not presumed to be true and accorded every favorable inference." Biondi v Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dept 1999) (citation omitted), affd 94 NY2d 659 (2000); see Myers v Schneiderman, 30 NY3d 1, 11 (2017); Simkin v Blank, 19 NY3d 46, 52 (2012).

As stated by the First Department in Lep Transport, Inc. v Weather Gay Intern, Inc., 38 AD2d 802 (1972), with respect to motions to dismiss in actions that seek a determination of

respective rights of the parties, such as the herein action seeking a determination of rights to insurance coverage:

“[W]e have repeatedly held that in an action for a declaratory judgment the complaint should not be dismissed if a proper case is made out for a declaration of rights. Special Term should have made a declaration of the rights of the parties as to the subject matters of the litigation, as indicated above”.

With respect to the insurance claims at issue, “[t]he duty to defend . . . is derived from the allegations of the complaint and the terms of the policy. If the complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend.” Technicon Elecs. Corp. v American Home Assur. Co., 74 NY2d 66, 73 (1989); see Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc., 16 NY3d 257, 264 (2011); Worth Const. Co. v Admiral Ins. Co., 10 NY3d 411, 415 (2008); BP A.C. Corp. v One Beacon Ins. Group, 8 NY3d 708, 714 (2007). “[A]n insurer’s duty to defend is exceedingly broad . . . [and] ‘[i]f, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be.’” Colon v Aetna Life & Cas. Ins. Co., 66 NY2d 6, 8-9 (1985) (citation omitted); see BP A.C. Corp., 8 NY3d at 714; Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131, 137 (2006).

"However, an insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision." Allstate Ins. Co. v Zuk, 78 NY2d 41, 45 (1991) (citation omitted); see Servidone Constr. Corp. v Security Ins. Co., 64 NY2d 419, 424 (1985); Cumberland Farms, Inc. v Tower Group, Inc., 137 AD3d 1068, 1070 (2d Dept 2016). "Generally, it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage." Consolidated Edison Co. of N.Y. v Allstate Ins. Co., 98 NY2d 208, 218 (2002); see Northville Indus. Corp. v National Union Fire Ins. Co., 89 NY2d 621, 634 (1997); Technicon Elec. Corp., 74 NY2d at 73-74.

The issue on this motion is whether there was coverage, that is, whether the underlying complaint sufficiently alleges that there was an accident or loss during the policy period, from September 2016 to September 2017.

"In determining a dispute over insurance coverage, we first look to the language of the policy.'" Lend Lease (US) Constr. LMB Inc. v Zurich Am. Ins. Co., 28 NY3d 675, 681 351 351(2017), quoting Consolidated Edison Co. of N.Y., 98 NY2d at 221; see Hansard v Federal Ins. Co., 147 AD3d 734, 736 (2d Dept 2017). "As with the construction of contracts generally,

'unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court.'" Vigilant Ins. Co. v Bear Stearns Cos., Inc., 10 NY3d 170, 177 (2008), quoting White v Continental Cas. Co., 9 NY3d 264, 267 (2007); see Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Marine Ins. Co., 31 NY3d 131, 135 (2018); Burlington Ins. Co. v NYC Tr. Auth., 29 NY3d 313, 321 (2017). Courts further "construe the policy in a way that 'affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect.'" Consolidated Edison Co. of N.Y., 98 NY2d at 221-222, quoting Hooper Assoc. v AGS Computers, 74 NY2d 487, 493 (1989).

Contrary to plaintiffs' argument that the underlying action "is not clear when the damaging conduct occurred", the complaint alleges that the "accident" - the clogged drain and subsequent flooding - occurred in August 2015, well before the effective date of the policy. The specifically identified damages claimed by the County, about \$4.8 million for remediation work completed in March 2016, also do not suggest any reasonable possibility that property damage occurred during the policy period.

Although the complaint alleges that County will incur additional damages for future remediation work, it does not

allege what work will be required or when such work will occur. Notably, as of February 2018, as County asserted in its motion to amend the complaint to add Ready Mix as a defendant, the alleged "Phase II" remediation work still had not commenced. Thus, there are no allegations of additional damages occurring during the policy period. Also, contrary to plaintiffs' apparent argument that County's request for injunctive relief demonstrates that damage continues, there are no allegations that the alleged illegal dumping has continued; the injunctive relief was requested to avoid any future reoccurrence. Thus, defendant Navigators is entitled to a declaratory judgment in its favor.

1/6/2020

DATE

Debra A. James
 DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE