Thyssenkrupp El. Corp. v Zurich Am. Ins. Co.
2020 NY Slip Op 30268(U)
January 6, 2020
Supreme Court, New York County
Docket Number: 653383/2018
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

---X

INDEX NO. 653383/2018

MOTION DATE 04/16/2019

MOTION SEQ. NO. 001

THYSSENKRUPP ELEVATOR CORPORATION,

Plaintiff,

- v -

ZURICH AMERICAN INSURANCE COMPANY,

Defendant.

DECISION + ORDER ON MOTION

---X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for DISMISS.

ORDER

Upon the foregoing documents, it is

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

ADJUDGED and DECLARED that defendant herein is not obligated to provide a defense to, and provide coverage for, plaintiff Thyssenkrupp Elevator Corporation in the actions Garrett, Jr. v 99 Park Ave. Assoc., LP, Index No. 512861/2015, Sup Ct, Kings County, and Berjashevic v Thyssenkrupp El. Corp., Index No. 506821/2018, Sup Ct, Kings County.

DECISION

In this declaratory judgment action arising out of an insurance coverage dispute, defendant Zurich American Insurance

Company moves pre-answer, pursuant to CPLR 3211 (a) (1), (3) and (7), to dismiss the complaint. Plaintiff Thyssenkrupp Elevator Corporation opposes the motion.

BACKGROUND

According to the complaint, on or about October 3, 2013, plaintiff and nonparties 99 Park Avenue Associates, L.P., Eastgate Realty, 99 Park Avenue Management, Inc., 99 Park Avenue Genpar Corp., 99 Park Avenue Genpar LLC, 99 Park Avenue Limpar Corp., and 99 Park Avenue Limpar, LLC (collectively, 99 Park) entered into a five-year service agreement (the Service Agreement) whereby plaintiff agreed to provide maintenance, repair and inspection services for the elevators within the building located at 99 Park Avenue, New York, New York[1] (the Premises) (NY St Cts Elec Filing [NYSCEF] Doc No. 1 [complaint], ¶ 6). A paragraph in the Service Agreement titled "**Other**" states, in part:

> "In consideration of ThyssenKrupp Elevator performing the services herein specified, you expressly agree, to the fullest extent permitted by law, to indemnify, defend, save harmless, discharge, release and forever acquit ThyssenKrupp Elevator Corporation … from and against any and all claims, demands, suits, and proceedings brought against ThyssenKrupp Elevator … [for] personal injury or death that are alleged to have been caused by the Purchaser … in connection with the presence, use, misuse, maintenance, installation, removal, manufacture, design,

[1] The Service Agreement identifies the "purchaser" as "99 Park Ave Associates" (NYSCEF Doc No. 18, affirmation of plaintiff's counsel, exhibit 1 at 6).

> operation or condition of the equipment covered by this agreement, or the associated areas surrounding such equipment. Your duty to indemnify does not apply to the extent that the … personal injury or death is determined to be caused by or resulting from the negligence of ThyssenKrupp Elevator and/or our employees. You recognize that your obligation to ThyssenKrupp Elevator under this clause includes payment of all attorney's fees, court costs, judgments, settlements, interest and any other expenses of litigation arising out of such claims or lawsuits"

(NYSCEF Doc No. 18 at 5).

The insurance provision of the Service Agreement partially reads as follows:

> "You expressly agree to name ThyssenKrupp Elevator Corporation … as additional insureds in your liability and any excess (umbrella) liability insurance policy(ies). Such insurance must insure ThyssenKrupp Elevator Corporation … for those claims and/or losses referenced in the above paragraph, and for claims and/or losses arising from the sole negligence or responsibility of ThyssenKrupp Elevator Corporation …. Such insurance must specify that its coverage is primary and non-contributory"

(id. at 5).

Defendant issued commercial insurance policy no. CPO 9310572-02 to "Eastgate Realty Corp. et al.," including 99 Park, in effect from June 29, 2014 to June 29, 2015[2] (the Policy) (NYSCEF Doc No.

[2] 99 Park Avenue Management, Inc. does not appear on the schedule of named insureds (NYSCEF Doc No. 3 at 6), but in the affirmation in support, defendant's counsel states, "99 Park qualifies as a Named Insured" (NYSCEF Doc No. 11 at 3).

13, affirmation of defendant's counsel, exhibit A at 7 and 11). The Policy carried a $2 million general limit of liability and a $1 million limit for each occurrence (id. at 201). The pertinent part of the Policy's "New York Changes - Commercial General Liability Coverage Form CG Form 01 63 07 11" states:

> "This endorsement modifies insurance provided under the following:
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
> **A.** Paragraph **1. Insuring Agreement** of Section **I - Coverage A Bodily Injury And Property Damage Liability** is replaced by the following:
>
> **1. Insuring Agreement**
>
> **a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages even if the allegations of the 'suit' are groundless, false or fraudulent. However, we will have no duty to defendant the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result. But:
>
> (1) The amount we will pay for damages is limited as described in Section **III** - Limits of Insurance; and
>
> (2) Our right and duty to defend end [sic] when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.
>
> No other obligation or liability to pay sums or perform acts or services is

> covered unless explicitly provided for under Supplementary Payments - Coverages **A** or **B**"

(NYSCEF Doc No. 13 at 225). Section I in the "Commercial General Liability Coverage Form CG 00 01 04 13" (the CGL Coverage Form), discussing coverages, also states, in part:

> "**2. Exclusions**
> 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:
>
> **(1)** That the insured would have in the absence of the contract or agreement; or
> **(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. Solely for the purposes of liability assumed in the 'insured contract', reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of 'bodily injury' or 'property damage', provided:
>
> **(a)** Liability to such party for, or for the cost of, that party's defense has also been assumed in the same 'insured contract'; and
>
> **(b)** Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged"

(*id.* at 207). The definitions section of the "General Liability Supplemental Coverage Endorsement - Real Estate - Enhancement Form U-GL-1504-B CW (04/13)" (the Supplemental Coverage Endorsement Form) provides, in relevant part:

> "**F. Broadened Contractual Liability**
> The 'insured contract' definition under the Definitions Section is replaced by the following:
>
> 'Insured contract' means:
>
> * * *
>
> **e.** An elevator maintenance agreement;
>
> **f.** That part of any other contract or agreement pertaining to your business … under which you assume the tort liability of another party to pay for 'bodily injury'… to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
>
> Paragraph **f.** does not include that part of any contract or agreement:
>
> **(1)** That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
>
> **(a)** Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
>
> **(b)** Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
>
> **(2)** Under which the insured, if an architect, engineer or surveyor, assumes liability for any injury or damage arising out of the insured's rendering or failure to

> render professional services, including those listed in Paragraph **(1)** above and supervisory, inspection, architectural or engineering activities"

(*id.* at 184-185).

Section II, titled "**WHO IS AN INSURED**," of the CGL Coverage Form defines an insured as an individual; a partnership or joint venture; a limited liability company; an "organization other than a partnership, joint venture or limited liability company"; a trust; a volunteer worker; "[a]ny person … or any organization while acting as your real estate manager"; "[a]ny person or organization having temporary custody of your property if you die"; a legal representative in cause of the insured's death; and any newly-acquired or newly-formed organization over which the insured maintains ownership or a majority interest (NYSCEF Doc No. 13 at 214-215). The Policy includes several additional insured endorsements listed in the Supplemental Coverage Endorsement Form for lessees of the Premises (id. at 181); vendors (id. at 182); managers, lessors, or governmental entities 99 Park was required to add as an additional insured under a written contract (id. at 183); mortgagees, assignees or receivers (id. at 234); and specific designated persons or organizations (id. at 235). The subject Policy designated Grand Park Condominium, East 40th Holding Street and Philips International Holding Corp. as additional insureds (id.).

The "Supplementary Payments - Coverages A and B" portion of the Policy (the Supplementary Payments Provision), found in the CGL Coverage Form, states, in part:

> "**2.** If we defend an insured against a 'suit' and an indemnitee of the insured is also named as a party to the 'suit,' we will defend that indemnitee if all of the following conditions are met:
>
> **a.** The 'suit' against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agree that is an 'insured contract';
>
> **b.** This insurance applies to such liability assumed by the insured;
>
> **c.** The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same 'insured contract';
>
> **d.** The allegations in the 'suit' and the information we know about the 'occurrence' are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
>
> **e.** The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such 'suit' and agree that we can assign the same counsel to defend the insured and the indemnitee; and
>
> **f.** The indemnitee:
>
> (1) Agrees in writing to:
>
> (a) Cooperate with us in the investigation, settlement or defense of the 'suit';
>
> (b) Immediately send us copies of any demands, notices, summonses or legal

papers received in connection with the 'suit';

(c) Notify any other insurer whose coverage is available to the indemnitee; and

(d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

(2) Provides us with written authorization to:

(a) Obtain records and other information related to the 'suit'; and

(b) Conduct and control the defense of the indemnitee in such 'suit'.

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph **2.b.(2)** of Section **I** - Coverage **A** - Bodily Injury and Property Damage Liability, such payments will not be deemed to be damages for 'bodily injury' and 'property damage' and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph **f.** above, are no longer met"

(<u>id.</u> at 214).

On October 21, 2015, nonparty Casper Garrett, Jr. commenced a personal injury action against 99 Park and plaintiff, titled Garrett, Jr. v 99 Park Ave. Assoc., LP, Sup Ct, Kings County, Index No. 512861/2015, seeking damages stemming from a May 12, 2015 incident involving an elevator at the Premises (the Garrett Action) (NYSCEF Doc No. 4, complaint, exhibit C, at 7). On July 6, 2016, nonparty Dushe Berjashevic commenced a personal injury action against plaintiff, titled Berjashevic v Thyssenkrupp El. Corp., Sup Ct, NY County, Index No. 155592/2016, seeking damages stemming from the same May 12, 2015 incident at the Premises[3] (the Berjashevic Action) (NYSCEF Doc No. 4 at 1). The complaints in those personal injury actions allege that plaintiff was negligent in its operation, maintenance and control of the elevators at the Premises (id. at 4 and 24-25). Plaintiff alleges that it has tendered its defense in both underlying actions, but defendant has failed to provide it with a defense or indemnity (NYSCEF Doc No. 1, ¶ 24).

Plaintiff commenced this action for a judgment declaring that it is entitled to a defense and indemnity, and that defendant is obligated to hold plaintiff harmless in the underlying personal injury actions. In lieu of answering the complaint, defendant moves for dismissal.

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[3] The Berjashevic Action has been transferred to Supreme Court, Kings County, and now bears Index No. 506821/2018.

DISCUSSION

Dismissal under CPLR 3211 (a) (1) is warranted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]). "[T]he paper's content must be 'essentially undeniable and . . . assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based" (Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 432 [1st Dept 2014] [citation omitted]).

A motion to dismiss under CPLR 3211 (a) (3) concerns a party's legal capacity to sue. The party seeking a declaratory judgment must show that its "personal or property rights will be directly and specifically affected" (Wein v City of New York, 47 AD2d 367, 370 [1st Dept 1975], mod 36 NY2d 610 [1975]).

The court on a CPLR 3211 (a) (7) motion must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (Leon v Martinez, 84 NY2d 83, 87-88 [1994] [citations omitted]). The motion will be denied "if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (Guggenheimer v Ginzburg, 43 NY2d

268, 275 [1977]). Allegations that are ambiguous must be resolved in plaintiff's favor (see JF Capital Advisors, LLC v Lightstone Group, LLC, 25 NY3d 759, 764 [2015]). However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]). "When documentary evidence is submitted by a defendant 'the standard morphs from whether the plaintiff stated a cause of action to whether it has one'" (Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc., 115 AD3d 128, 135 [1st Dept 2014] [internal citation omitted]). If a declaratory judgment action is resolved on the merits, the court should issue a declaration in the defendant's favor instead of dismissing the complaint (see Top On Intl. Group Ltd. v Iconix Brand Group, Inc., 169 AD3d 583, 584 [1st Dept 2019]).

On this motion, defendant argues that there is no coverage because plaintiff does not qualify as a named or additional insured under the Policy. Additionally, even if the Service Agreement qualifies as an "insured contract" as that term is defined in the Policy, coverage would extend only to 99 Park as defendant's named insured. Plaintiff, in opposition, argues the motion should be denied because plaintiff (1) is covered as an indemnitee under the Supplementary Payments Provision, (2) benefits from the insured

contract provision, and (3) is a third-party beneficiary of the Policy.

"[T]he party claiming insurance coverage bears the burden of proving entitlement" (*Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]), by presenting sufficient "proof in evidentiary form" that the party is an insured (Preferred Mut. Ins. Co. v Ryan, 175 AD2d 375, 378 [3d Dept 1991]). Generally, coverage does not extend to a party who is not named, described or referred to as an insured or additional insured on an insurance policy (see Sanabria v American Home Assur. Co., 68 NY2d 866, 868 [1986]; Tribeca Broadway Assoc., 5 AD3d at 200 [stating that a "party that is not named an insured or an additional insured on the face of the policy is not entitled to coverage"]). Moreover, "[t]he four corners of an insurance agreement govern who is covered and the extent of coverage" (Sixty Sutton Corp. v Illinois Union Ins. Co., 34 AD3d 386, 388 [1st Dept 2006], rearg denied 2007 NY App Div LEXIS 2811 [1st Dept 2007]).

Here, defendant has demonstrated that it is entitled to a declaration in its favor. Defendant has established, and plaintiff does not dispute, that plaintiff is neither a named insured nor an additional insured as those terms are defined in the Policy (see Tribeca Broadway Assoc., 5 AD3d at 200; Seavey v James Kendrick Trucking, 4 AD3d 119, 119 [1st Dept 2004]).

Plaintiff's reliance on the Policy's definition of an "insured contract" to infer that it is entitled to a defense and indemnity is misplaced. The Policy refers to an elevator maintenance agreement as an insured contract, and 99 Park was contractually obligated to name plaintiff as an additional insured. However, coverage under the Policy for an insured contract "is limited to the legal obligation of the insured" and "does not by its terms expressly or impliedly covered the legal liability" of a party who is not a named or additional insured (Jefferson v Sinclair Refining Co., 14 AD2d 238, 240 [1st Dept 1961], affd 10 NY2d 422 [1961], stay denied 10 NY2d 1011 [1961]; Tribeca Broadway Assoc., 5 AD3d at 201 [finding that the court cannot create rights and obligations as between an insurer and a party who is not an insured or additional insured]; SL Green Realty Corp. v Burlington Ins. Co., 2017 NY Slip Op 30248[U], *7 [Sup Ct, NY County 2017]). Thus, whether the Service Agreement constitutes an insured contract is immaterial because it applies only to an insured under the Policy.

Plaintiff's assertion that it is a covered indemnitee under the Supplementary Payments Provision is unpersuasive because that provision does not transform plaintiff into an additional insured (see Brooklyn View v PRP, LLC, 159 AD3d 865, 867 [2d Dept 2018]; Hargob Realty Assoc., Inc. v Fireman's Fund Ins. Co., 73 AD3d 856, 858 [2d Dept 2010] [stating that "the supplementary payments

provision did not demonstrate an intent by the defendant insurer to afford the plaintiff coverage solely on the basis that it is an indemnitee of the named insured, in the absence of the plaintiff's addition as 'an insured' … pursuant to the additional insured endorsement"]). Rather, the Supplementary Payments provision states that if an indemnitee of an insured can meet certain conditions outlined in that provision, then defendant shall pay for the indemnitee's attorneys' fees and necessary litigation expenses up to the applicable limit of insurance. In any event, plaintiff did not adequately plead whether it can meet each of the conditions set forth in the Supplementary Payments Provision.

Importantly, one of the conditions that must be met for the provision to apply is the requirement that "no conflict appears to exist between the interests of the insured and the interests of the indemnitee" (NYSCEF Doc No. 13 at 214). There is "no commonality of interest" between an insured and its indemnitee where the indemnitee seeks a declaration that the insured's carrier must defend that indemnitee (United Natl. Ins. Co. v Scottsdale Ins. Co., 2011 WL 839397, *3-4, 2011 US Dist LEXIS 21813, *9-11 [ED NY, Mar. 4, 2011, No. 08-CV-5255 (FB/SMG)], affd 452 Fed Appx 77 [2d Cir 2012]; Hudson Meridian Constr. Group, LLC v Utica Natl. Assur. Co., 2015 NY Slip Op 30677[U], *15 [Sup Ct, NY County 2015] [stating that there was no unity of interest between the insured and its indemnitee who were both "party-adversaries" and where one

sought contractual defense and indemnification against the other]). In the *Garrett* Action, plaintiff asserted cross claims against 99 Park for contribution, indemnification and for breach of contract for 99 Park's failure to procure insurance (NYSCEF Doc No. 26, reply affirmation of defendant's counsel, exhibit 1 at 4-7). In the Berjashevic Action, plaintiff brought a third-party action against 99 Park asserting claims for contribution and indemnification and for breach of contract for 99 Park's failure to procure insurance (NYSCEF Doc No. 27, reply affirmation of defendant's counsel, exhibit 2, ¶¶ 27-39). Thus, contrary to plaintiff's position, a conflict exists between plaintiff and 99 Park in the underlying actions.

Another condition requires that both the insured and the insured's indemnitee are named as parties in the same suit. In the Berjashevic Action, 99 Park was not named as a direct defendant, and, as noted above, plaintiff brought a third-party complaint against 99 Park (see United Natl. Ins. Co., 2011 WL 839397, *3-4, 2011 US Dist LEXIS 21813, * 10 [concluding that there was no commonality of interest between the insured and its indemnitees where the insured was not a named defendant in the underlying personal injury action and the indemnitees brought a third-party complaint seeking a declaration that the insured's insurer must defend the indemnitees]; Longwood Cent. School Dist.

v Commerce & Indus. Ins. Co., 2012 NY Slip Op 31518[U], *8 [Sup Ct, Nassau County 2012]).

Nor has plaintiff demonstrated that it is an intended third-party beneficiary of the Policy. "While it well settled that the identity of a third-party beneficiary need not specifically be set forth in the contract, it must be demonstrated that the parties to the insurance policy intended to insure the interest for which the third-party beneficiary seeks coverage" (State of New York v American Mfrs. Mut. Ins. Co., 188 AD2d 152, 155 [3d Dept 1993] [internal citations omitted]; Stainless, Inc. v Employers Fire Ins. Co., 69 AD2d 27, 33 [1st Dept 1979], affd 49 NY2d 924 [1980] [stating that "[i]n order for a third party to enforce a policy of insurance, it must be demonstrated that the parties intended to insure the interest of him who seeks to recover on the policy"]). Whether a party is an intended beneficiary must be "determined from within the four corners of the policy itself" (Hargob Realty Assoc., Inc., 73 AD3d at 857). The intent must be apparent from the terms of the contract (Sixty Sutton Corp., 34 AD3d at 388). The court may also "look at the surrounding circumstances as well as the agreement" to determine if a party is an intended third-party beneficiary (Aievoli v Farley, 223 AD2d 613, 614 [2d Dept 1996] [internal quotation marks and citation omitted]).

As applied herein, nothing within the four corners of the Policy evinces an intention to provide coverage to plaintiff (see

State of New York, 188 AD2d at 155 [stating that "[w]here the insurance contract does not name, describe, or otherwise refer to the entity or individual seeking the benefit thereof as an insured, there is no obligation to defend or indemnify"]). The Service Agreement obligates 99 Park to add plaintiff as an insured, but "[m]otivation is not … to be confused with the intent, nature and scope of the obligation set forth in the policy" (Jefferson, 14 AD2d at 240). Here, the Policy does not refer to plaintiff, and plaintiff meets none of the definitions of an additional insured under the Policy's various endorsements (see State of New York v Liberty Mut. Ins. Co., 23 AD3d 1084, 1085 [4th Dept 2005]; Bronxville Props. v Friedlander Group, 307 AD2d 245, 247 [2d Dept 2003]). Likewise, the fact that the Policy refers to an unnamed indemnitee is insufficient to establish that 99 Park and defendant intended for the Policy to provide coverage to plaintiff.

1/6/2020
DATE

DEBRA A. JAMES, J.S.C.

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