American Empire Surplus Lines Ins. Co. v Certain Underwriters at Lloyds of London
2020 NY Slip Op 30451(U)
February 18, 2020
Supreme Court, New York County
Docket Number: 653949/2018
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY,

Plaintiff,

- v -

CERTAIN UNDERWRITERS AT LLOYDS OF LONDON, STATE FARM FIRE AND CASUALTY COMPANY

Defendants.

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INDEX NO. 653949/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 38, 40, 41, 42 were read on this motion to DISMISS.

This is a dispute between two insurance companies concerning their respective obligations to provide insurance coverage for a pending lawsuit. Defendant Lloyd's argues that Plaintiff American Empire does not have standing to seek declaratory relief to resolve the dispute because American Empire is not a party to two of the contracts upon which its claim is based. Lloyd's moves to dismiss American Empire's Complaint solely on that ground.

For the reasons set forth below, Lloyd's' motion is denied. The case involves "an actual controversy between genuine disputants with a stake in the outcome," *Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, 35 A.D.3d 253, 253 (1st Dep't 2006), and is a "real, present and actual controversy" between insurers about an active and pending claim, *Lumbermens Mut. Cas. Co. v. Progressive Cas. Ins. Co.*, 168 A.D.2d 708, 709 (3d Dep't 1990). Accordingly, American Empire has standing to assert its claim for declaratory relief.

BACKGROUND

The Insurers and the Insureds

Plaintiff American Empire Surplus Lines Insurance Company ("American Empire") issued a Commercial General Liability insurance policy (the "American Empire Policy") to Summit Development Corp. ("Summit"), the general contractor on the construction project described below. Defendants Certain Underwriters at Lloyd's of London ("Lloyd's" or the "Underwriters") issued a Commercial General Liability insurance policy (the "Lloyd's Policy") to Everest Scaffolding, Inc. ("Everest"), a subcontractor on that same project.[1]

In a lawsuit captioned *Daniel Horacio Pinales Melo v. 560 Associates Delaware LLC, Newmark Family Properties LLC and Summit Development Corp.*, Index No. 28072/2017E, which is pending in New York Supreme Court, Bronx County (the "Underlying Lawsuit"), an Everest employee named Daniel Melo is seeking damages from Summit and others for injuries he allegedly sustained while performing construction work for Everest at 560 Broadway, New York, New York, 10012 (the "Premises"). American Empire Amended Complaint ("Am. Compl."), ¶7 (NYSCEF Doc. No. 35); *see* Affirmation of John D. McKenna ("McKenna Aff."), Ex. B (NYSCEF Doc. No. 12).

At the time of Mr. Melo's accident, in July 2017, Everest was working as a subcontractor to Summit, which was overseeing the construction project at the Premises. *Id.*, ¶¶11-12. Two other entities – 560 Associates Delaware LLC ("560 Associates") and Newmark Family Properties LLC ("Newmark") – were owners of the building at the Premises. *Id.*, ¶¶9-10.

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[1] Defendant State Farm Fire and Casualty Company ("State Farm") issued an Auto Liability Policy to Everest (the "State Farm Policy"). State Farm filed a Verified Answer in response to American Empire's Amended Complaint on October 29, 2019, *see* NYSCEF Doc. No. 39, and does not join in Lloyd's' motion to dismiss. The State Farm Policy is not at issue on this motion.

According to American Empire, the subcontract between Summit and Everest (the "Subcontract") required Everest to name Summit, along with 560 Associates and Newmark, as "additional insureds" on Everest's Commercial General Liability insurance policy. *Id.*, ¶13.

The Lloyd's Policy provided, in relevant part, that it "shall include as additional Insureds any person or organization to whom the Named Insured has agreed by written contract to provide coverage, but only with respect to operations performed by or on behalf of the Named Insureds and only with respect to occurrences subsequent to the making of such written contract." McKenna Aff., Ex. I (NYSCEF Doc. No. 19).

The American Empire Policy, by contrast, looked at the "additional insured" issue from the opposite direction. The policy provides that American Empire's coverage is "excess over … [a]ny other primary insurance available to [Summit] covering liability for damages arising out of the premises or operations … for which you have been added as an additional insured." McKenna Aff., Ex. H, at 12 (NYSCEF Doc. No. 18). In other words, from American Empire's perspective, the scope of its coverage to Summit depended expressly on whether Summit was an additional insured under another insurer's policy (in this case, Lloyd's).

Reading the Lloyd's Policy together with the Subcontract, and in view of the carve-out in its own policy, American Empire demanded that Lloyd's assume defense and indemnity obligations to Summit (and the building owners) with respect to the Underlying Lawsuit as "additional Insureds" under the Lloyd's Policy. Lloyd's refused. *Id.* ¶21; McKenna Aff., Exs. N, P, S. According to Lloyd's, "the version of the [Sub]contract in Everest's possession contains no such language" requiring Everest to include Summit as additional insured, and "Everest was unaware of the changes Summit made to the [Sub]contract." McKenna Aff., Ex. N. As such,

Lloyd's denied the existence of any "written contract in which by Everest agreed to provide coverage to Summit, and coverage is denied accordingly." *Id.*

Moreover, Lloyd's maintains that even if a contractual obligation did exist between Summit and Everest, "such language does not properly evince an intent of Everest to provide additional insured coverage to Summit under the Policy … and is otherwise ambiguous and unenforceable as written." *Id.* Lloyd's thus "den[ied] any obligation to provide coverage to Summit for the [Underlying Action]," then "continue[d] to deny coverage," and, finally, denied that American Empire even had any "standing whatsoever to assert any claim against Underwriters or challenge their determination as to Everest." McKenna Aff., Exs. N, P, S.

The Instant Action

American Empire initiated this action by filing a Summons and Complaint on August 9, 2018. *See* NYSCEF Doc. No. 1. As amended, the Complaint asserts four causes of action: two against Lloyd's, and two against State Farm.

As to Lloyd's, American Empire first seeks a declaratory judgment that "[p]ursuant to the terms and conditions of the Lloyd's Policy, Lloyd's is under an obligation to defend and indemnify Summit, 560 Associates, and Newmark with respect to the Underlying Lawsuit as additional insureds, but has failed and/or refused to do so," and that "[t]he coverage provided by American Empire is excess to, *inter alia*, … coverage provided to [Summit, 560 Associates, and Newmark] under the Lloyd's Policy." Am. Compl., ¶¶29-30. Second, American Empire seeks a declaration that "Lloyds must reimburse American Empire for any defense costs incurred in connection with the defense of Summit, 560 Associates and Newmark, with interest, until Lloyd's assumes their defense relative to the Underlying Lawsuit." *Id.*, ¶35.

As noted above, Lloyd's moves to dismiss both causes of action against it, solely on the ground that American Empire lacks standing to assert those claims.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); *see Chapman, Spira & Carson, LLC v. Helix BioPharma Corp.*, 115 A.D3.d 526, 527 (1st Dep't 2014). However, "factual allegations … that consist of bare legal conclusions, or that are inherently incredible …, are not entitled to such consideration." *Mamoon v. Do Net Inc.*, 135 A.D.3d 656, 658 (1st Dep't 2016). "Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus." *Landon v. Kroll Lab. Specialists, Inc.*, 22 N.Y.3d 1, 6 (2013), *rearg denied* 22 N.Y.3d 1084 (2014) (internal quotation marks and citation omitted).

Under CPLR 3001, "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." "It is well recognized that with respect to declaratory judgment, the party who seeks same must have a 'standing to sue,'" meaning that "the plaintiff's personal or property rights will be directly and specifically affected." *Wein v. City of New York*, 47 A.D.2d 367, 370 (1st Dep't 1975), *modified on other grounds*, 36 N.Y.2d 610 (1975). "A declaratory judgment action thus requires an actual controversy between genuine disputants with a stake in the outcome, and may not be used as a vehicle for an advisory opinion." *Long Island Lighting,* 35 A.D.3d at 253 (holding that dispute about whether excess insurance coverage was implicated presented justiciable controversy).

"Underlying the policy which sanctions the use of the action is the concept that it will serve some useful purpose to the parties, *e.g.*, to settle controversy and discourage potential litigation." *Krieger v. Krieger*, 25 N.Y.2d 364, 366 (1969), citing *James v. Alderton Dock Yards*, 256 N.Y. 298 (1931) (noting "general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations").

Declaratory relief is a common judicial remedy for resolving disputes between insurers regarding priority of coverage. *See*, *e.g.*, *State Farm Fire & Cas. Co. v. LiMauro*, 65 N.Y.2d 369, 372 (1985) (declaratory judgment determining coverage priority between primary and umbrella insurer); *Lumbermens Mut. Cas. Co. v Allstate Ins. Co.*, 51 N.Y.2d 651, 657 (1980) (declaratory judgment determining coverage priority among excess insurers); *Northbrook Excess & Surplus Ins. Co. v. Chubb Grp. of Ins. Companies*, 113 A.D.2d 319, 320 (1st Dep't 1985) (declaratory judgment determining coverage priority of primary, excess, and umbrella insurance), *aff'd,* 67 N.Y.2d 1015 (1986). In such cases, courts are often required to chart a course between purportedly overlapping or conflicting provisions of two or more insurance policies to which one or the other insurers is not a party. The case law does not support Lloyd's' argument that only an insurer in privity of contract may seek a declaratory judgment with respect to an active dispute regarding priority of insurance coverage.

The Third Department's decision in *Lumbermens* is particularly on point here. That case involved a dispute between insurers regarding their respective liabilities arising from a car accident. Like in this case, the declaratory relief sought by the plaintiff hinged on an insurance agreement to which it was not a party. The question was whether one of the drivers involved in the car accident was insured under the defendant's insurance policy at the time, or if (as the

defendant insurer claimed) the policy had lapsed prior to the accident. *Id.* The plaintiff insured the other driver involved in the accident. *Id.* Although the plaintiff was not in contractual privity with either the defendant or the other driver, its interest in the dispute was nonetheless clear: if the defendant cancelled its policy covering the other driver before the accident occurred, then the plaintiff would be forced to pay uninsured motorist benefits to its own insured. In those circumstances, which are similar to those in this case, the court held that the plaintiff had standing to assert claims for declaratory relief as to the defendant's insurance obligations to its own insured. *Id.* "A real, present and actual controversy exist[ed] between the parties as to whether [the other driver] was an uninsured motorist at the time of the accident," and "plaintiff's property rights w[ould] be directly and specifically affected by the resolution of the issues." *Id.* at 709-710.

Lloyd's' reliance on *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350 (2004) and its progeny is unavailing. In that case, the Court of Appeals grappled with whether an injured party – *not* an insurer – may bring a declaratory judgment action against a tortfeasor's insurance company, under Insurance Law § 3420, before first securing a judgment against the tortfeasor. *Id.* at 352. *Lang* held that obtaining judgment is a jurisdictional prerequisite for the injured party to bring such a suit. And while that holding might stop Mr. Melo (the injured party) from suing American Empire (the alleged tortfeasor's insurer) for a declaratory judgment, it does not prevent American Empire from seeking to clarify its *own* obligations in a pending and active lawsuit. *See also Clarendon Place Corp. v. Landmark Ins. Co.*, 587 N.Y.S.2d 311 (1st Dep't 1992) (analyzing injured parties' standing under Insurance Law § 3420), cited at Aff. in Supp., ¶5; *NAP, Inc. v. Shuttletex, Inc.*, 112 F. Supp. 2d 369, 370 (S.D.N.Y. 2000) (same), cited at Aff.

in Supp., ¶5; *Vargas v. Boston Chicken, Inc.*, 269 F. Supp. 2d 92 (E.D.N.Y. 2003) (same), cited at Aff. in Supp., ¶6.

This Court's decision in *Greater New York Mut. Ins. Co. v. State Nat'l Ins. Co., Inc.*, 66 Misc. 3d 1203(A) (Sup. Ct. N.Y. Cty. Dec. 9, 2019) (Reed, J.) supports that reading of *Lang*. There, an insurance company sought a declaration that another insurance company was required to provide primary, noncontributory defense coverage to two entities in an underlying lawsuit, as "additional insureds" pursuant to a provision in a subcontract. *Id.*, at *4. The plaintiff insurer moved for partial summary judgment declaring that the defendant insurer was obligated to defend the two entities in the underlying lawsuit. *Id.* In opposition, the defendant "argue[d] that [the plaintiff] does not have standing to commence this action pursuant to Insurance Law § 3420," citing *Lang*. *Id.*, at *5. The court rejected that argument, holding that the plaintiff "has standing to commence suit." *Id.* In doing so, the court distinguished *Lang* as "inapposite to this matter," because that case concerned the rights of "an injured party who has sued a tortfeasor," not a dispute among insurers about allocation of risk. *Id.*, citing *Zurich-American Ins. Cos. v. Atlantic Mut. Ins. Cos.*, 139 A.D.2d 379, 387 (1st Dep't 1988) ("If several insurers bind themselves to the same risk and one insurer pays the whole loss, the one so paying has a right of action against his coinsurers for a ratable proportion of the amount paid by him because he has paid a debt which is equally and currently due by the other insurers").

To be sure, a declaratory judgment action "is premature where standing to bring that action is contingent on a future event which is beyond the parties' control and which may never occur." *Vargas*, 269 F. Supp. 2d at 97. But that is not the case here. American Empire's financial interest is not contingent on any future event, nor is the question of Lloyd's' coverage obligation hypothetical. The Underlying Lawsuit is active and ongoing. Defense costs continue

to accrue, and strategic decisions with respect to defending the lawsuit are being made as the case progresses. Moreover, American Empire's coverage obligation to Summit is expressly "excess over … [a]ny other primary insurance available to [Summit] covering liability for damages arising out of the premises or operations … for which [Summit has] been added as an additional insured," thus giving American Empire a direct and substantial interest in resolving that question.

In sum, this is a ripe dispute that directly impacts American Empire's present coverage obligations. Thus, American Empire has standing to assert a claim for declaratory relief.

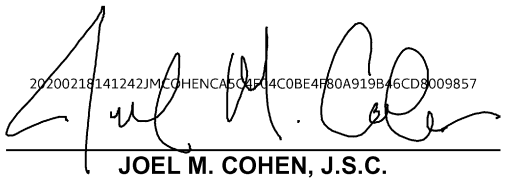
* * * *

Accordingly, it is

ORDERED that Lloyd's' motion to dismiss is Denied; and it is further

ORDERED that the parties are to appear for a preliminary conference on March 3, 2020, at 10 a.m.

This constitutes the Decision and Order of the Court.



2/18/2020
DATE

JOEL M. COHEN, J.S.C.

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