

ZDG, LLC v PC Structures of NY LLC

2020 NY Slip Op 30495(U)

February 14, 2020

Supreme Court, New York County

Docket Number: 654894/2018

Judge: Francis A. Kahn III

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 14

Justice

-----X

ZDG, LLC,

Plaintiff,

- v -

PC STRUCTURES OF NY LLC, SCOTTSDALE
INSURANCE COMPANY, STAR SURPLUS LINES
INSURANCE COMPANY, NAVIGATORS SPECIALTY
INSURANCE COMPANY

Defendant.

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INDEX NO. 654894/2018

MOTION DATE 10/08/2019

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, the motion and cross-motions are determined as follows:

This action originates in the construction of a 45-story building at 310 West 40th Street, New York. Plaintiff, ZDG, LLC, was engaged by the owner of the site to be the construction manager on the project. Plaintiff contracted with Defendant PC Structures of NY, LLC ("PCS") to perform concrete superstructure work at the project. PCS sub-contracted with non-party Paramount Builders Group, LLC ("PBG") to perform certain portions of its required concrete work.

Under its contract, PCS was mandated to obtain, among other things, a general liability policy of insurance which Defendant Scottdale Insurance Company ("Scottdale") issued to PCS. The policy in dispute is titled as a commercial general liability policy (No. NCS0000655) which lists PCS as the primary insured and contains an endorsement listing ZDG as an additional insured.

On October 3, 2015, while the disputed policy was in effect, PBG was pouring concrete into forms which were intended to create the walls of the fifth and sixth floors of the structure. The parties do not dispute that the forms failed, and cured concrete invaded the space between structure being constructed and the neighboring building located at 314 West 40th Street, New York, New York ("314 West"). The invading concrete caused appreciable damage to the wall at 314 West which was first observed in an interior stairwell of that building.

As a result of the failure of the forms, ZDG was required to immediately remediate the damage which included retaining additional contractors, removing the offending concrete and repairing the damage to 314 West's structure. This work was apparently completed in April 2016 and on or about September 6, 2016, Scottsdale obtained a purported release from the owner of 314 West for the losses it sustained.

Plaintiff commenced this action to recover for costs it incurred as a result of the concrete mishap and pleads four causes of action: [1] declaratory judgment against Scottsdale, Star and Navigators, [2] breach of contract against Scottsdale, [3] declaratory judgment against PCS, and [4] breach of contract against PCS. As damages that are allegedly covered by the Scottsdale policy and/or paid by the other Defendants Plaintiff claims: property damage and repairs to 314 West's structure as well as damages incurred by Plaintiff due to PCS's concrete work "which included the need to quickly remediate the defective Concrete Work in order to alleviate the concrete pressure on the 314 Building, which included the need to repair and remediate the defective Concrete Work, hire a replacement contractor to provide the work to the Project as required under the PCS Subcontract, other extra costs in connection with the Project, and delay damages" (see Plaintiff's complaint, paragraph 33, NYCEF Doc. No. 5).

Now, Defendant Scottsdale moves, post-answer, to dismiss Plaintiff's complaint, without specifying in the notice of motion whether it is moving pursuant to CPLR §3211 or §3212. Defendant Navigators cross-moves pursuant to CPLR §3212 for summary judgment dismissing Plaintiff's complaint. Defendant PCS cross-moves, also post-answer without specifying its procedural basis, to dismiss Plaintiff's complaint. As it appears all the parties have treated the motions as ones for summary judgment, the court will as well (see generally CPLR §3211[c]).

Defendant Scottsdale's motion seeks dismissal of Plaintiff's complaint and a "judicial determination that: (1) the Scottsdale Policy does not cover the '314 Claim' and the 'Concrete Work Damages' as alleged in plaintiff's complaint; (2) Scottsdale is not responsible for paying the '314 Claim', and the 'Concrete Work Repair Damages', plus interest, to plaintiff; and (3) that Scottsdale is not responsible to pay plaintiff's attorneys' fees and costs expended by plaintiff with regard to the '314 Claim' and the 'Concrete Work Repair Damages', including all costs and attorneys' fees in this action".

In a declaratory judgment action, the court may render a "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" (CPLR §3001). "The 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" (*James v Alderton Dock Yards*, 256 NY 298, 305 [1931]; see Siegel, NY Prac §436, at 738 [4th ed]).

The proponent of a summary judgment motion must show *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact on a particular issue (see *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The evidence submitted by the movant must be viewed in the light most favorable to the non-movant (see *Jacobsen v N.Y. City Health & Hosps. Corp.*, 22 NY3d 824 [2014]; see also *Torres v Jones*, 26 NY3d 742 [2016]; *Andre v Pomeroy*, 35 NY2d

361 [1974]). Once the movant makes a *prima facie* showing, the burden shifts to the party opposing the motion to produce evidentiary proof sufficient to establish the existence of triable issues of fact warranting denial of the motion (*see Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, supra*).

As to this action, “before an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case” (*Seaboard Surety Co. v. Gillette Co.*, 64 NY2d 304, 311 [1984]). “Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction” (*id.*). Any ambiguity in an exclusionary clause is construed most strongly against the insurer (*see Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983]). Unambiguous policy provisions, on the contrary, must be accorded their plain and ordinary meaning (*see Sanabria v American Home Assur. Co.*, 68 NY2d 866, 868 [1986]).

Defendant Scottdale posits two arguments to support that it is not required to indemnify Plaintiff for its losses. Relying on section 1[b][1], it contends coverage does not exist under the policy as the property damage at issue did not arise out of an “occurrence”. Also invoked are two exclusions under section 2[j][5] and [6], so-called “business risk exclusions”. Exclusion 2[j][5] applies to damages arising out of work performed by the insureds or their contractors or subcontractors, and exclusion 2[j][6], applies to work that had to be restored, repaired, or replaced because it was incorrectly performed. Scottdale asserts the exclusions bar coverage on the basis that the property damage Plaintiff seeks recovery for arose out of the work of Plaintiff’s subcontractor and since the cost incurred in remediation constituted excluded restoration, repair and replacement of defective work.

Concerning the claim of lack of coverage, “the general rule is that a commercial general liability insurance policy does not afford coverage for breach of contract, but rather for bodily injury and property damage. To hold otherwise would render an insurance carrier a surety for the performance of its insured’s work” (*Structural Bldg. Prods. Corp. v. Business Ins. Agency, Inc.*, 281 AD2d 617, 619 [2nd Dept 2001]). For the failure of the concrete work of PCS and PBG to constitute an “occurrence” the damages sought must result from injury distinct from a plaintiff’s own work product¹(*see National Union Fire Ins. Co. of Pittsburgh, PA v Turner Constr. Co.*, 119 AD3d 103, 106 [1st Dept 2014]; *Bonded Concrete, Inc. v Transcon. Ins. Co.*, 12 AD3d 761 [3rd Dept 2004]; *Baker Residential Ltd. P’ship v Travelers Ins. Co.*, 10 AD3d 586, 587 [1st Dept 2004]; *George A. Fuller Co. v United States Fid. & Guar. Co.*, 200 AD2d 255, 259 [1st Dept 1994]).

By the express terms of exclusions 2[j][5] and [6] and the cases interpreting them, these “business risk exclusions” relied upon by Scottdale operate nearly identically as the above “occurrence” coverage section and exclude claims from coverage seeking recovery when an insured’s own work product “causes damages to the party who contracted for its completion” (*see Zandri Constr. Co. v Firemen’s Ins. Co.*, 81 AD2d 106, 109 [3rd Dept 1981]; *see also Kung v*

¹ As project manager/general contractor, Plaintiff was responsible for the entire project and all work done by all subcontractors on Plaintiff’s behalf (*see Basil Dev. Corp. v Gen. Acc. Ins. Co.*, 89 NY2d 1057 [1997]; *Pavarini Constr. Co. v. Cont’l Ins. Co.*, 304 AD2d 501 [1st Dept 2003]).

Scottsdale Ins. Co., 130 AD3d 878 [2nd Dept 2015]; *Erie Ins. Co. v Radtke*, 126 AD3d 757 [2nd Dept 2015]; *Nash v Baumblit Constr. Corp.*, 72 AD3d 1037 [2nd Dept 2010]; *Softwater by George, Inc. v Dryden Mut. Ins. Co.*, 155 AD2d 869 [4th Dept 1989]).

In its opposition memorandum of law, Plaintiff asserts that in addition to the damages caused to and repairs to the property owned by 314 West, it is “seeking coverage for rectifying, and remedying the cause” of the damage to 314’s property. In reply, Scottsdale does not verily contest coverage for damages to 314 West’s property stating, “the cost of repairing the neighboring property damage may be covered” but does dispute coverage for the cause of said damages.

In practice, application of the policy provisions to the claimed damages is not an all or nothing proposition, and certain damages can be covered and others not depending upon their nature (see *Adler & Neilson Co. v Ins. Co. of N. Am.*, 56 NY2d 540 [1982]). Accepting Plaintiff’s analysis as correct, that the damage to property of another includes its source, to wit the failed work of the insured, would lead to untenable results. If this logic were applied, normally unrecoverable damages incurred through repair, restoration or replacement of an insured’s own defective work product, irrespective of its scope and cost, would become entirely compensable where the defective work causes any injury whatsoever, even nominal damage, to another’s property. Plainly, this is neither provided for under the terms of the policy nor intended by the nature of the coverage obtained. Thus, damages to 314 West’s premises and expenditures by Plaintiff to actually repair 314 West’s premises are within the coverage of the policy². However, any expenditures to rectify, remedy or replace any defective concrete work performed by PBG at the behest of PCS is not covered under the policy.

Based on the foregoing, dismissal of Plaintiff’s entire complaint as requested by Scottsdale is unwarranted and the Court must declare the rights and obligations of the parties (see *eg Lanza v Wagner*, 11 NY2d 317, 334 [1962]). The release executed by 314 West is immaterial in determining and declaring what the scope of coverage of the terms of the policy is under the circumstances. It is therefore

ADJUDGED and DECLARED that Defendant Scottdale Insurance Company is not required to indemnify or pay any claims by Plaintiff under the commercial general liability policy No. NCS0000655 for any expenditures to rectify, remedy or replace any defective concrete work performed by PBG at the behest of PCS, and it is

ADJUDGED and DECLARED that Defendant Scottdale Insurance Company is required to indemnify or pay any claims by Plaintiff under the commercial general liability policy No. NCS0000655 for expenditures made by Plaintiff to repair actual damages to 314 West premises.

As to the cross-motions by Defendants Navigators and PCS, both are procedurally defective as relief is sought against Plaintiff, not the movant as required by CPLR §2215 (see *eg Kershaw v Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). In any event, neither cross-movant demonstrated *prima facie* that the causes of action asserted against them were

² Since 314 West has settled its claims with Defendant Scottdale, only the latter element of these damages, if any, are potentially recoverable under the policy.

defective as a matter of law. Defendant Navigator's reliance on the release executed by the owner of 314 West does not demonstrate how its policy did not provide indemnification for the damages Plaintiff claims it incurred repairing 314 West's premises. Defendant PCS offered no argument how Plaintiff's declaratory judgment and breach of contract claims based on PCS's alleged defectively executed concrete work were deficient as a matter of law.

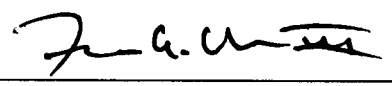
The parties are directed to appear for a preliminary conference on **April 14, 2020 at 9:30 a.m.**, at 111 Center Street, IAS Part 14, courtroom in Courtroom 1127(B).

2/14/2020
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED SETTLE ORDER GRANTED IN PART OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE


 FRANCIS A. KAHN III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.