

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

2020 NY Slip Op 30812(U)

March 16, 2020

Supreme Court, New York County

Docket Number: 651372/2018

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 59EFM

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AMERICAN STATES INSURANCE COMPANY, and GENERAL INSURANCE COMPANY OF AMERICA,	INDEX NO.	<u>651372/2018</u>
Plaintiff,	MOTION DATE	<u>05/21/2019</u>
- v -	MOTION SEQ. NO.	<u>003</u>
GRAPHIC ARTS MUTUAL INSURANCE COMPANY, NOVA CASUALTY COMPANY, PRAETORIAN INSURANCE COMPANY, and NAVIGATOR INSURANCE COMPANY,	DECISION + ORDER ON MOTION	
Defendants.		

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HON. DEBRA A. JAMES:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 92
were read on this motion to/for JUDGMENT – PARTIAL SUMMARY

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiffs American States Insurance Company and General Insurance Company of America's motion for partial summary judgment in this action for declaratory is granted; and it is further

ADJUDGED and DECLARED that defendant Nova Casualty Company is obligated to defend defendant New York Ready Mix, Inc. in connection with the claims against it in the action entitled County of Nassau v Commercial Concrete Corp. and Town of North Hempstead, Index No.: 608267/2016E, in the Supreme Court of the State of New York, County of Nassau; and it is further

ADJUDGED and DECLARED that the coverage of Nova Casualty Company for defendant New York Ready Mix applies on a primary basis as compared to the coverage of American States Insurance Company and General Insurance Company of America.

DECISION

In this action for a declaratory judgment, plaintiffs American States Insurance Company (American) and General Insurance Company of America (General) move, pursuant to CPLR 3212, for partial summary judgment as against defendant Nova Casualty Company for an Order: (1) declaring that Nova is required to defend New York Ready Mix, Inc. (Ready Mix) in the action entitled County of Nassau v Commercial Concrete Corp., and Town of North Hempstead, Index No. 608267/2016E, pending in the Supreme Court of the State of New York, County of Nassau (the underlying action); (2) declaring that Nova's coverage for Ready Mix applies on a primary basis, as compared to American and General's policies.

Background

On or about October 25, 2016, the County of Nassau commenced the underlying action, and filed an amended complaint in or about February 2018. The County seeks compensatory damages and injunctive relief with respect to a series of illegal discharges of waste from the facilities of Commercial

Concrete Corp. (Commercial Concrete) and/or Ready Mix, located at 115 Rushmore Street, Westbury, New York, or 120 Rushmore Street, Westbury, New York. The County alleges that the discharges occurred over a period of time, on a regular basis, and were caused, in part, by Commercial Concrete and/or Ready Mix washing out Commercial Concrete and Ready Mix concrete mix trucks on or near its facilities and allowing a mixture of concrete and water to flow onto Rushmore Street and into catch basins owned, operated, regulated and maintained by the Town of North Hempstead, and from those catch basins, into a pipe that is part of the County's separate storm water drainage system (the "Rushmore Drain").

The County asserts that the blockage of the Rushmore Street Drain was caused by operations of Commercial Concrete and/or Ready Mix, involved in washing out concrete mixing trucks on or near its facilities. The County further alleges that the process of washing out concrete mixing trucks created a concrete slurry, which flowed downhill under the force of gravity and it entered the drain causing a blockage and a flood.

On or about November 28, 2016, Commercial Concrete impleaded Ready Mix into the underlying action. Commercial Concrete alleges two causes of action against Ready Mix, sounding in contribution and common law indemnity.

On or about February 28, 2018, the County amended the complaint to add Ready Mix as a direct defendant:

"6. On or about November 28, 2016, Commercial Concrete filed a third-party summons and complaint impleading third-party defendant New York Ready Mix, Inc. into this action. In the third-party complaint, Commercial Concrete alleges that to the extent the County suffered damages, the damages were caused by New York Ready Mix.

* * *

8. Further, in its response to the County's Combined Discovery Demands directed to Commercial Concrete dated July 11, 2017, Commercial Concrete stated "please be advised that the truck washed out area are not part of Commercial Concrete Corp's facilities, but are part of New York Ready Mix, Inc. facilities . . .

9. Based on Commercial Concrete's third-party complaint and statement that the cement truck washout area is part of New York Ready Mix's facilities, New York Ready Mix either was involved in conducting the concrete truck wash-outs that resulted in the blockage that led to flooding conditions in and around Rushmore Street, or allowed concrete trucks to be washed at its facilities"

Ready Mix takes the position that it did not own concrete mixing trucks, and that the trucks at issue were owned by Commercial Concrete. Nova issued a Commercial Auto policy, No. NSC-CL-0010126-0, with a policy period from September 30, 2013 to September 30, 2014, to Commercial Concrete, as the first Named Insureds (Nova policy). The declaration of the Nova Policy lists 37 vehicles as owned by Commercial Concrete, and they are also identified as scheduled covered autos. Most of these trucks are concrete mixers.

The business auto coverage form has an insuring agreement that provides, in relevant part:

"Who is an insured

The following are 'insureds':

- a. You [the Named Insured] for any covered 'auto'
- b. Anyone else while using with your [the Named Insured's] permission a covered 'auto' you own, hire or borrow except:
* * *
- c. Anyone liable for the conduct of an 'insured' described above but only to the extent of that liability
(Lee affirmation exhibit 24 at 2 of 12).

SECTION II-LIABILITY COVERAGE

A. 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 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 a covered 'autos.' However, we will only pay for the 'covered pollution cost or expense' if there is . . . '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' to which this insurance does not apply. We may investigate and settle any claim or 'suit' as we consider appropriate. Our duty to defend or settle ends when the Covered 'Autos' Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements"

(Lee affirmation exhibit 24 at 2 of 12).

By letter dated August 1, 2017, American and General tendered the defense and indemnity of Ready Mix to Nova, which has been defending Commercial Concrete in the Underlying Action.

By letter dated September 11, 2017, Nova conceded that a "permissive user" would have been qualified as an "insured" under the business auto policy Nova issued to Commercial Concrete, and that Commercial Concrete's trucks were used to transport concrete supplied by Ready Mix. However, in disclaiming coverage to Ready Mix, Nova claimed that Ready Mix was not a "permissive user" because Ready Mix did not "use" the Commercial Concrete trucks at issue.

By letter dated March 22, 2018, American and General again tendered the defense and indemnity of Ready Mix to Nova, advising Nova that the County recently filed a motion for leave to amend its Complaint to add Ready Mix as a direct defendant. In the motion, the key allegation against Ready Mix is that Ready Mix was either involved in the concrete truck wash-outs that resulted in the blockage or allowed Commercial Concrete to wash concrete trucks at Ready Mix's facilities.

Notwithstanding these additional allegations that Ready Mix employees used the concrete mixing trucks, Nova failed and refused to accept the tender and provide a defense to Ready Mix.

Discussion

Plaintiffs argue that Nova owes Ready Mix a duty to defend, and, specifically, that Nova may not disclaim on the ground that the Ready Mix did not "use" the trucks at issue. Specifically, plaintiffs argue that the claims against Ready Mix are alleged

to arise from the washing out of the concrete mixing trucks and that these acts of cleaning or washing the concrete mixing truck is an integral part of the mechanism of this type of truck and its overall function. According to General Insurance, the "daily washing of the trucks, inherent in Commercial Concrete's transport and delivery of concrete mix, is thus a necessary act and proximate cause for the damage caused to the County's storm system" (General's memorandum in support at 17).

In opposition, Nova argues that it has no duty to defend Ready Mix. First, Nova states that the "words" "Ready Mix" are not found in the Nova Policy. "The plain fact is that Ready Mix is not an 'insured' under any provision of that policy and is therefore not entitled to coverage from Nova in the underlying action" (Nova memorandum in opposition at 1). Thus, under this policy, Nova argues, a stranger to the policy, such as Ready Mix, can be insured only if: (i) it is alleged to be a permissive user of automobiles owned, hired or borrowed by Commercial Concrete; or (ii) it is alleged to be liable for the conduct of Commercial Concrete. As for the first condition, use, according to Nova, the alleged negligent washing of the mixing trucks on the premises owned by Ready Mix does not constitute "permissive use" under the policy, as "permissive use" requires supervision and the ability to control the operation of the vehicle.

Nova argues that because there are no allegations in the underlying complaint concerning Commercial Concrete's ownership of the trucks in question, or that Ready Mix was a "permissive user" of trucks owned by Commercial Concrete, Nova has no duty to defend Ready Mix. Nova specifically argues that while Commercial Concrete, the named insured, is covered for liability "resulting from the ownership, maintenance, or use of a covered auto," permissive users are covered only while using . . . a covered auto" (Nova memorandum in opposition at 3), and that the amended complaint in the underlying action does not allege that Commercial Concrete owned the trucks, it simply alleges damages from the location of the truck washing:

"The blockage of the Rushmore Street Drain was caused by the conduct and operations of Commercial Concrete and NY Ready Mix, specifically washing out concrete mixing trucks on or near their facilities on Rushmore Street, Westbury, New York"

(Goodman affirmation, exhibit 2, ¶ 10).

Under the Nova policy, a named insured, the owner of a vehicle, is covered for liability arising from the 'ownership, maintenance or use of a covered 'auto'" (Lee affirmation, exhibit 24 at 2 of 12). According to Nova, coverage for a permissive user is much narrower, and applies only when the purported permissive user is "using" the vehicle. Nova argues that the washing of the vehicles is "maintenance," and not

"use," and that there is a distinction between "use" and "maintenance" in auto policies:

"The term 'maintenance' includes acts of either commission or omission relative to the external or mechanical condition of a vehicle. Specifically, negligence in cleaning of the automobile is covered, provided that the accident is a proximate result thereof, as well as repair work.

The term 'use' is the general catchall of the insuring clause designed and construed to include all proper use of the vehicle not falling within either the 'operation' or 'maintenance'."

(70 NY Jur. Insurance § 1761).

"Use of an automobile encompasses more than simply driving it and includes all necessary incidental activities such as entering and leaving its confines" (Allstate Ins. Co. v Reyes, 109 AD3d 468, 469 [2d Dept 2013]). Nova argues that the Court's decision in Gering v Merchants Mutual Ins. Co., (75 AD2d 32 [2d Dept 1980]), cited by movants, supports their point about the distinction between use and maintenance. In Gering, the Court described use of a vehicle as follows: "The 'use' of a vehicle encompasses more than just driving a car. It may include control of the vehicle while a flat tire is being repaired; getting in and out of the car; unloading a vehicle; examining the vehicle's gas gauge while filling up its tank; and supervising a retarded child while being transported" (id., 75 AD2d at 323 [internal citations omitted]). Employing this definition, the Court found that the plaintiff's activity constituted a "use" of the subject

vehicle, as the plaintiff, with the permission and co-operation of the owner of the vehicle, attempted to perform an emergency repair so that the hunting party could continue on its way home" (id.). The Court distinguished between 'use' and 'maintenance':

"In our opinion, plaintiff's activity constituted a 'use' of the De Rosa vehicle. Plaintiff, with the permission and co-operation of De Rosa, attempted to perform an emergency repair so that the hunting party could continue on its way home. Such an act was not maintenance, in the sense of the periodic checks and repairs performed in order to keep the vehicle in proper condition and good working order, but was directly connected with the continued 'use' of the vehicle" (id.).

Additionally, with respect to vicarious liability, Nova argues in opposition that there is no basis in fact or law that "even assuming that Ready Mix did not use the concrete mixing trucks, these claims establish, at a minimum, that Ready Mix is being held liable for the conduct of Commercial Concrete." According to Nova, it is with this statement that plaintiffs argue that Ready Mix is an 'insured' under paragraph c of "who is an insured," which provides that "anyone liable for the conduct of an 'insured' described above but only to the extent of that liability," is an "insured" (Pavlik affirmation, exhibit 1 at 2, 3).

Nova further argues, that there is not one allegation in the amended complaint in the underlying action, supporting Ready Mix's vicarious liability. Instead, the County claims that Ready Mix and Commercial Concrete are liable for their own

actions and omission. The amended complaint does not allege that Ready Mix is liable for Commercial Concrete's conduct. For example, in the amended complaint, the County alleges:

"The blockage of the Rushmore Street drain was caused by the conduct and operations of New York Ready Mix, specifically washing out concrete mixing trucks on or near their facilities at Rushmore Street, Westbury New York. . . Concrete slurry [was] generated by the conduct and activities of Ready Mix. . . The actions and/or omissions of New York Ready Mix proximately caused an unreasonable and substantial interference. . ."

(¶¶ 10, 12, 13, 36, and 37).

In their reply papers in support of their motion, plaintiffs argue that there is ample evidence that Commercial Concrete is the owner of the subject trucks. Plaintiffs cite the amended complaint, in which the County alleges that the unlawful discharge was caused by "Commercial Concrete . . . concrete mixing trucks," and cites to Nova's response to plaintiffs' tender letter, in which Nova identifies the subject trucks as Commercial Concrete trucks. Further, the County filed surveillance photographs in support of its Order to Show Cause, seeking a temporary restraining order and a preliminary injunction and those photographs show concrete mixing trucks continuing the alleged wrongful action, and the trucks bear the name and logo of "Commercial Concrete" on them. In an affidavit, the Vice President of Ready Mix averred that "NY

Ready Mix does not own any concrete mixing trucks, nor does it have an interest in concrete mixing trucks operated by co-defendant Commercial Concrete Corp." (Lee affirmation, exhibit 9).

1. The Duty to Defend

"The duty to defend is exceedingly broad and an insurer would be called upon to provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage" (Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131, 137 [2006]). "If, 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" (id. at 137).

The Court finds that Nova has an obligation to defend Ready Mix in the underlying action. With respect to the question concerning Commercial Concrete's ownership of the subject vehicles, the Court finds that the allegations set forth in the amended complaint in the underlying action suggest a reasonable possibility of coverage. In that complaint, the County of Nassau alleges: "[t]he illegal discharges occurred over a period of time, on a regular basis, and were caused, in part, by Commercial Concrete and NY Ready Mix concrete mixing trucks to be washed . . ." (Goodman affirmation, exhibit 2 at 1). Thus,

the complaint alleges that the trucks were owned by Commercial Concrete, the insured, and/or by Ready Mix. The Court will now address the question of "permissive use."

Plaintiffs argue that based upon the allegations in the underlying complaint, there is a reasonable possibility for coverage based upon Ready Mix's "permissive use" of Commercial Concrete's vehicles. Plaintiffs' contend that the accident resulted from the "use" of the vehicle. Plaintiffs state that to meet its objectives, a "concrete mixing truck is outfitted with pressurized water tanks, chutes, hoppers and revolving drums" (plaintiffs memorandum of law in support at 17). It is plaintiffs' position that the "washing out of a concrete mixing truck is more than removing accumulated mud or dirt from the vehicle. To ensure the continuous use of this type of truck, not only the exterior parts, such as the chutes and hoppers, but also the interior of the drums of the truck must be washed out at the end of each workday, because otherwise, concrete hardens and sticks to the drum and these parts," (plaintiffs' memorandum of law in support at 17). For this proposition, plaintiffs rely on a publication issued by the United States Environmental Protection Agency (EPA). (Lee affirmation exhibit 25). This publication states that the "[a]t the end of each work-day, drums of concrete trucks must be washed out," (id.).

"When it comes to defining "use" under New York law, the parties agree that 1) the accident must arise from the 'inherent nature' of the automobile, and 2) that the automobile must produce the injury, which is established by showing negligence in the use of the vehicle" (Harleysville Worcester Insurance Company v Wesco Insurance Company, Inc., 314 F Supp3d 534, 545 [SD NY 2018]). Likewise, in Gering, the Court made a distinction between use and maintenance of a vehicle, describing maintenance as a periodic check and repairs performed in order to keep the vehicle in proper condition and good working order" rather than actions taken that are "directly connected to the continued 'use' of the vehicle"

Here, the washing out of the concrete truck was essential to the use of the truck. Rather than a periodic check or repair, the washing of the truck had to be done at the end of every day of use to prevent the hardening of the concrete. This washing is, therefore, directly connected to the use, or inherent nature, of the vehicle (see also Employers Mutual Casualty Company v Bonilla, 613 F3d 512 [5th Cir 2010] [the Court found that because the known and expected use of a truck, outfitted with a kitchen, included cooking and cleaning grease off the truck's kitchen floor was a natural and necessary use of the truck, the accident arose out of "use" or "maintenance" of

the vehicle])). Thus, the allegations of the amended complaint, concerning Ready Mix's negligent washing out of the concrete trucks, allegedly owned by Commercial Concrete, supports a finding that Ready Mix was a permissive user of the trucks at issue and creates questions concerning coverage, entitling plaintiffs to a defense. This Court grants this portion of plaintiffs' motion enforcing Nova's duty to defend Ready Mix in the underlying action and need not address the issue of vicarious liability.

2. Nova policy provides primary coverage as compared to plaintiffs' policies

"Where the same risk is covered by two or more policies, each of which was sold to provide the same level of coverage . . . priority of coverage among the policies is determined by comparison of their respective 'other insurance' clauses" (*Sport Rock Int'l , Inc. v American Cas. Co. of Reading, PA*, 65 AD3d 12, 18 [1st Dept 2008]).

The American States policies have an applicable excess "other insurance" provision as the "loss arises out of the . . . use of . . . autos' ". The General policies have an applicable excess "other insurance" provision, as well, as Commercial Concrete owned the concrete mixing trucks, as admitted by Commercial Concrete. On the other hand, the Nova Policy provides: "[f]or any covered 'auto' you own, this Coverage Form

provides primary insurance. For any covered 'auto you don't own', the insurance provided by this coverage form is excess over any other collectible insurance" (Lee affirmation, exhibit 24 at 9)

In their opposition papers, Nova does not offer any argument in opposition to plaintiffs' position on this question of primary coverage. Nor does Nova deny that Commercial Concrete is the owner of the trucks. Instead, Nova argues that there are no allegations in the amended complaint, in the underlying action, that Commercial Concrete is the owner of the trucks. However, in that amended complaint, the County alleges: "[t]he illegal discharges occurred over a period of time, on a regular basis, and were caused, in part, by Commercial Concrete and NY Ready Mix concrete mixing trucks to be washed" (Goodman affirmation, exhibit 2 at 1), suggesting Commercial Concrete's ownership of the trucks. Further, in their September 11, 2017 letter in response to American Insurance's tender letter, Nova stated: "Commercial Concrete's trucks transported concrete supplied by Ready Mix: Ready Mix, itself did not use the trucks. Nor are there any allegations, in the County of Nassau Action, that Ready Mix was a "permissive user" of Commercial Concrete's trucks" (Lee affirmation, exhibit 20).

The Court finds that, based upon the language in the other insurance provision of the applicable Nova policy, and upon

Nova's failure to oppose this portion of the motion, and Nova's statements concerning Commercial Concrete's ownership of the trucks in its September 11, 2017 letter, as well as the evidence submitted by plaintiffs concerning Commercial Concrete's ownership of the trucks, the Nova policy provides primary coverage.

3/16/2020

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