Southwest Mar. & Gen. Ins. Co. v Covington Specialty Ins. Co.
2020 NY Slip Op 31887(U)
May 29, 2020
Supreme Court, New York County
Docket Number: 152493/2018
Judge: Francis A. Kahn III

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN III** **PART** **IAS MOTION 32**

Justice

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SOUTHWEST MARINE AND GENERAL INSURANCE COMPANY,

Plaintiff,

- v -

COVINGTON SPECIALTY INSURANCE COMPANY

Defendant.

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INDEX NO. 152493/2018

MOTION DATE 02/25/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 29, 30, 31, 32, 33, 34, 35, 36, 37, 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

were read on this motion to/for SUMMARY JUDGMENT.

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

This action originates in the redevelopment of a parcel of waterfront real property owned by Tri-Mac Funding, LLC ("Tri-Mac") located at 40 Bayside Drive, Point Lookout, New York. Prior to the commencement of construction activities, Tri-Mac obtained a general commercial liability insurance policy (No. VBA247325) from Defendant Covington Specialty Insurance Company ("Covington") which named Tri-Mac as an insured and covered the premises at issue. The policy contained an exclusion from coverage for bodily injury "arising out of and 'real estate development activities' by or on behalf of any insured". Real estate development activities are defined in the policy as "design, site preparation, construction, marketing or sales of residential, commercial or industrial buildings". At the time the policy was issued, the subject real property was encumbered by a single-family rental dwelling, but in the application for the policy of insurance, Tri-Mac indicated its intention to demolish the existing structure and to seek re-zoning with the purpose of developing the parcel to accommodate three residences.

As part of the redevelopment of the premises, John McIntyre ("McIntyre"), a member of Tri-Mac and principal of McIntyre Contracting, Inc. ("McIntyre Contracting"), engaged J.D. Marine Restoration ("JD Marine") to replace a 60-foot bulkhead –or waterfront retaining wall-- located at the property. On January 31, 2014, while the disputed policy was in effect, Brent Wiedemeier ("Wiedemeier"), an employee of JD Marine, was injured when he fell approximately ten feet while working on the bulkhead project. As a result of this accident, Wiedemeier commenced an action in Supreme Court, Nassau County and pled, among other matters, causes of action under Labor Law §240[1], 241[6] and 200. In his suit, Wiedemeier included as defendants Tri-Mac, McIntyre Contracting and McIntyre.

Prior to the accident, Plaintiff Southwest Marine and General Insurance Company ("Southwest") issued a commercial general liability policy of insurance (Policy No. GL2013LHB00539) naming Tri-Mac, McIntyre Contracting and McIntyre as insureds. Upon receiving notice of the action, Covington agreed to defend Tri-Mac under a reservation of rights letter wherein it claimed there was no coverage under two of the three causes of action alleged. Covington claims its counsel were not permitted to participate in the defense of Tri-Mac and that counsel retained by Southwest exercised exclusive control over the defense.

Wiedemeier's motion for summary judgment on liability as against Tri-Mac was granted without opposition and after a damages trial, a jury verdict of $450,000.00 was rendered. The parties latter settled the matter for $425,000.00.

Plaintiff commenced this action alleging a single declaratory judgment cause of action against Defendant Covington and sought as relief, *inter alia*, a declaration that Covington is "obligated to contribute and share equally in the defense costs and indemnification of Tri-Mac".

Now, Defendant Scottdale moves for summary judgment dismissing the cause of action against it and for a declaration it has no duty to reimburse the Plaintiff for any damages, costs or expenses arising out of the Wiedemeier litigation. Plaintiff cross-moves for summary judgment against Covington on its cause of action for declaratory judgment.

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 Covington posits two arguments to support that it is not required reimburse Plaintiff for any costs or expenses incurred in its defense and indemnification of Tri-Mac in the underlying litigation. Relying on the endorsement to the policy titled "EXCLUSION – REAL ESTATE DEVELOPMENT ACTIVITIES", Covington contends that since work on the bulkhead at the premises was a real estate development activity and that Wiedemeier's accident arose out of that work, coverage under the policy is excluded. Covington also relies on an endorsement titled "CLASSIFICATION LIMITATION" and asserts that since the bulkhead work constituted "operations which are not classified or shown on the Commercial General Liability Coverage Part Declarations" the accident is excluded from coverage.

In the present case, the real estate development activities exclusion is unambiguous (*see generally Monteleone . Crow Constr. Co.*, 242 AD2d 135 [1st Dept 1998]; *ACHS Mgt. v Chartis Prop. Cas. Co.*, ___Misc3d___, 2015 NY Slip Op 30380[U][Sup Ct NY Cty]) and Defendant Covington established that Wiedemeier's accident "arose out" of Tri-Mac's activities on the premises (*see Castlepoint Ins. Co. v Southside Manhattan View LLC*, 179 AD3d 507 [1st Dept 2020]; *Zurich Am. Ins. Co. v ACE Am. Ins. Co.*, 165 AD3d 558 [1st Dept 2018]). Moreover, movant established that there are no issues of fact that the bulkhead construction constituted "site preparation" and/or "construction" under the circumstances which relieved it of any obligation to defend or indemnify the insureds under the policy. (*cf. Admiral Ins. Co. v Joy Contrs., Inc.*, 19 NY3d 448, 458 [2012]). By the circumstances of the underlying accident, the causes of action asserted in Wiedemeier litigation and the documentary evidence movant established that but for Tri-Mac's activities in developing the premises at issue, Wiedemeier would not have been at the premises or injured. Furthermore, the insurance application completed by McIntyre, the principal of Tri-Mac, expressly noted that site preparation would begin in September 2013 and included work on the bulkhead.

In opposition, Plaintiff failed to raise an issue of fact as to any ambiguity in or applicability of this exclusion. Plaintiff's claim that Covington is still obliged to contribute to its defense costs based upon the principle that an insurer's duty to defend is broader than its duty to indemnify is misplaced. Where, as here, the insurer demonstrates, as a matter of law, no possible factual or legal basis exists upon which it might ultimately be obligated to indemnify under any policy provision, the insurer is relieved of its duty to defend (*Allstate Ins. Co. v Zuk,* 78 NY2d 41, 45 [1991]; *see also Zurich Am. Ins. Co. v ACE Am. Ins. Co.*, supra; *United States Fid. & Guar. Co. v U.S. Underwriters Ins. Co.,* 194 AD2d 1028, 1028-1029 [3rd Dept 1993]). Plaintiff's argument that Covington is estopped from denying coverage because it acknowledged a duty to defend Tri-Mac is misplaced as the documentary evidence conclusively establishes that Defendant undertook the defense with an express reservation of rights (*see American Guar. & Liab. Ins. Co. v CNA Reins. Co.*, 16 AD3d 154 [1st Dept 2005]).

Likewise, Plaintiff's reliance on the matching "other insurance" and "sharing" clauses in the policies is unavailing. Covington's policy was limited by the exclusion of real estate development activities, while the Plaintiff's policy was not similarly limited. As such, Plaintiff and Covington were not "co-insurers" of the same risk, to wit Wiedemeier's accident and,

therefore, Plaintiff may not seek contribution for its defense costs (*see eg Ace Fire Underwriter's Ins. Co. v. ITT Indus., Inc.*, 55 AD3d 346 [1st Dept 2008]; *Pennsylvania Manufacturers' Assn. Ins. Co. v Liberty Mut. Ins. Co.*, 39 AD.d 1161 [4th Dept 2007]).

Plaintiff's argument that Covington is estopped from relying on the exclusion based upon Insurance Law §3420[d] is unavailing as that provision does not apply to a dispute between insurance companies (*see Admiral Ins. Co. v State Farm Fire & Cas. Co.*, 86 AD3d 486, 488 [1st Dept 2011]; *JT Magen v Hartford Fire Ins. Co.*, 64 AD3d 266 [1st Dept 2009]).

Finally, as exclusions in policies of insurance are read *seriatim*, meaning if any one exclusion applies there can be no coverage, and the real estate activities exclusions has been found applicable, there is no need to address the other exclusion (*see Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 470 [2005]).

Based on the foregoing, Defendant Covington's motion is granted and Plaintiff's cross-motion is denied. Dismissal of Plaintiff's complaint as requested by Covington is unwarranted as the Court must declare the rights and obligations of the parties (*see eg Lanza v Wagner*, 11 NY2d 317, 334 [1962]). It is therefore

ADJUDGED and DECLARED that Defendant Covington Specialty Insurance Company is not required to pay any claims by Plaintiff under the commercial general liability policy No. VBA247325 for contribution or indemnification of any defense costs or payment of damages in the Wiedemeier action.

5/29/2020
DATE

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

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