

City of New York v Travelers Prop. Cas. Co. of Am.

2020 NY Slip Op 32364(U)

April 3, 2020

Supreme Court, New York County

Docket Number: 450228/2019

Judge: Francis A. Kahn III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 32
Justice
INDEX NO. 450228/2019
THE CITY OF NEW YORK, MOTION DATE N/A
Plaintiff, MOTION SEQ. NO. 001
-v-
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA DECISION + ORDER ON MOTION
Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6 - 31
were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, the motion and cross-motion¹ are decided as follows:

This action originates in an accident that occurred on September 20, 2016. On that date,
Heleyn Frumin ("Frumin") claims she was injured by a falling tree limb within Central Park
between West 74th and 75th Streets adjacent to West Drive. Frumin commenced an action
against Plaintiff, the New You City Department of Parks Central Park Conservancy, Inc.
("CPC") alleging, inter alia, the City of New York ("City") was negligent in failing to or
improperly maintaining the tree at issue.

Pursuant to a written agreement between CPC and City, the former is responsible for
maintenance of Central Park. That agreement requires subcontractors retained by CPC to
maintain general commercial liability insurance covering CPC and City. On June 30, 2015, CPC
and Bartlett Tree Expert Company ("Bartlett") entered into a tree-pruning contract for the
pruning and removal of trees in Central Park. The contract required that the Plaintiff be named
as an additional insured on Bartlett's commercial general liability insurance. Bartlett obtained a
policy from Defendant with an additional insured endorsement covering "[a]ny person or entity
with whom you have agreed in a written contract, executed prior to loss to name as an additional
insured" Under section 1[b] of that endorsement titled "WHO IS AN INSURED" contains an
exception which states that a "person or organization does not qualify as an additional insured
with respect to independent acts or omissions of such person or organization."

By letter dated December 11, 2017, City tendered its request for defense and
indemnification in Frumin's negligence action. Defendant disclaimed in a letter dated January

¹ While sub judice, this action was reassigned to Justice Bluth. However, this court will render the decision
as the motions were orally argued before this court.

18, 2018 claiming City did not qualify as an additional insured under the terms of the policy. Defendant stated as justification that the City was fell within the above exception because Furmin's claims were based upon City's negligent acts or omissions.

Plaintiff commenced this action for a declaration Defendant is obligated to defend Plaintiff in Frumin's action and to recover its costs and expenses associated with this and the underlying action. Now, Defendant moves pursuant to CPLR §3212 to dismiss Plaintiff's complaint. Plaintiff cross-moves, for summary judgment on both of its causes of 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]).

Foundationally, an insurer's duty to defend is broader than the duty to indemnify and exists regardless of the merit of the underlying claim (see *Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]). The Court of Appeals has "repeatedly held that an insurer's duty to defend its insured arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy" (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65 [1991]). More specifically, under the present circumstances, the insurer has the duty to defend "whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim, or where the insurer 'has actual knowledge of facts establishing a reasonable possibility of coverage'" (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997], quoting *Fitzpatrick v American Honda Motor Co.*, supra at 67). Where, however, 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 such duty (*Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45 [1991]; see also *United States Fid. & Guar. Co. v U.S. Underwriters Ins. Co.*, 194 AD2d 1028, 1028-1029 [3rd Dept 1993]).

Here, Defendant posited that since Furmin's claims against Plaintiff are based upon its independent acts or omissions, City fell within the applicable exception and was not an additional insured under the policy at issue. Movant noted City's liability was not alleged in the underlying action to be vicarious and that Bartlett was not named as a co-defendant. Relying principally on *Tishman Tech. Corp. v Travelers Indem. Co. of Am.*, 161 AD3d 517 [1st Dept 2018] for authority, Defendant asserted that City would only be an additional insured if it were vicariously liable for Bartlett's acts.

Defendant's arguments are misplaced and *Tishman* is distinguishable. In the present case, City, unlike the putative additional insured in *Tishman*, is subject to a non-delegable duty as landowner (*Kleeman v Rheingold*, 81 NY2d 270[1993]). Consequently, City could be held vicariously liable for the acts of independent contractors, like Bartlett (see *eg Brothers v. New York State Elec. & Gas Corp.*, 11 NY3d 251 [2008]; *Pesante v Vertical Indus. Dev. Corp.*, 142 AD3d 656 [2nd Dept 2016]). Further, movant has not definitively proved the underlying accident did not result, entirely or partially, from the acts or omissions of Bartlett. As there is a potential

basis for Plaintiff to be held vicariously liable for the acts of Defendant's principal insured, Plaintiff is an additional insured irrespective of whether vicarious liability is ultimately not sustained in the underlying action (*see City of New York v Consolidated Edison Co.*, 238 A.D.2d 119 [2nd Dept 1997]). Accordingly, since the "underlying facts made known to the insurer create a 'reasonable possibility that the insured may be held liable for some act or omission covered by the policy'" (*Fitzpatrick v American Honda Motor Co.*, supra at 70, citing *A. Meyers & Sons Corp. v Zurich Am. Ins. Group*, 74 NY2d 298, 302), Defendant's motion is denied and Plaintiff's motion is granted. It is, therefore

ADJUDGED and DECLARED that Plaintiff is an additional insured under the policy number TC2J-GLSA-1005A129-TIL-15 and Defendant is required to defend Plaintiff in the action titled *Furmin v City of New York, et al*, and it is

ADJUDGED and DECLARED that Defendant shall pay Plaintiff's attorney's fees, costs expenses and interest thereon since December 11, 2017, tender of City's defense and it is therefore

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the Plaintiff's attorney's fees, costs expenses and interest thereon since December 11, 2017 and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M. 646-386-3028 or spref@courts.state.ny.us for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

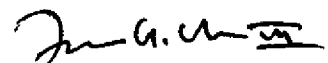
ORDERED that Plaintiff's counsel shall serve a copy of this order with notice of entry on the defaulting Defendants and that counsel for Plaintiff shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212) 401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR §4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.,) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that

may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion.

4/3/2020
DATE


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

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE