300 Malcolm X LLC v Lancer Indem. Co.
2020 NY Slip Op 32444(U)
July 23, 2020
Supreme Court, Kings County
Docket Number: 522369/17
Judge: Kathy J. King
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At an IAS Term, Part 64 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of July 2020.

P R E S E N T:

HON. KATHY J. KING,

Justice.

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300 MALCOLM X LLC,

Plaintiff, Index No. 522369/17

- against -

LANCER INDEMNITY COMPANY,

Defendant.

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The following e-filed papers read herein:	NYSCEF Docket No.:	
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	12,13	22,33,32[1],41
Opposing Affidavits (Affirmations)	32	42[2]
Reply Affidavits (Affirmations)	42	50[3]

Upon the foregoing papers, defendant Lancer Indemnity Company ("Lancer") moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint of plaintiff, 300 Malcolm X LLC (Mot. Seq#1).

[1] While normally the court does not number memoranda of law, as plaintiff uses document 32 to support his cross motion as well as oppose the defendant's motion, it has been listed.

[2] Since document 42 is identical to document 46, the latter is not listed.

Plaintiff cross moves for summary judgment, pursuant to CPLR 3212, on the first, second, and third causes of action in its complaint. Plaintiff's cross motion also seeks an order extending the time to file the instant motion (Mot. Seq.# 2).

Background

Plaintiff is the owner of a four-story building located at 300 Malcolm X Boulevard, Brooklyn, NY ("the subject premises") which contain a commercial space on the ground floor occupied by Casablanca, a bar, and residential apartments on the second, third and fourth floors. Plaintiff brings this action seeking a declaratory judgment against Lancer, its insurer, declaring that it is obligated to defend and indemnify plaintiff in an underlying personal injury action, commenced by Jaki Mojumder against plaintiff, bearing Index No. 512090/16[4]. The underlying action arises from a June 10, 2016 accident at the subject premises. Mojumder claims that he was injured during the course of his employment with Mojibur Rahaman d/b/a R&S Construction, while painting the subject premises.

According to Charles Willis Jr. (Willis), plaintiff's managing member, the subject premises was purchased in July 2012, at which time it was determined that the facade of the building required restoration, and on August 13, 2013, Willis entered into a written contract with R & S Construction (R & S), owned by Mojibur Rahaman (Rahaman), to renovate the exterior of the building.

At the time of the accident, plaintiff had purchased commercial property and general liability coverage for the premises, from Lancer, effective through January 26, 2017. By its terms, the policy covered both bodily injury and property damage liability, and provided a defense against any lawsuit seeking such damages, even if the allegations are groundless, false, or fraudulent.

[4] On July 14, 2016, Mojumder filed the underlying action against 300 Malcolm, asserting claims under the Labor Law, Rule 23 of the Industrial Code and for common law negligence. 300 Malcolm X also seeks damages.

However, under the policy, Lancer had no duty to defend 300 Malcolm against any suit seeking damages for bodily injury or property damage to which this insurance policy did not apply (*see* Section I – Coverages, Coverage A [1] [a]).

By letter dated April 3, 2017, Lancer informed Willis that it would not defend or indemnify plaintiff in the underlying action because coverage was barred under the contractor's exclusion. Lancer also disclaimed coverage to Casablanca on this basis, and because it is not an insured or additional insured under 300 Malcolm's policy.[5]

Lancer now seeks a declaration pursuant to CPLR 3212 that the disclaimer was validly issued, that Lancer has no duty to defend or indemnify the underlying action, and dismissal of the complaint. Plaintiff cross moves for a declaratory judgment against Lancer for defense and indemnification.

Summary Judgment

Summary judgment is a drastic remedy that deprives a litigant of his day in court and thus, should only be employed when there is no doubt as to the absence of triable issues of material fact (*see Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]); *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. The motion should be granted only when it is clear that no material and triable issue of fact is presented (*see Di Mena & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be

[5] Lancer moving papers states that it understood that at the time of the alleged incident, Casablanca had its own insurance policy with Utica First Insurance Company and that 300 Malcolm was an additional insured on Casablanca's policy.

denied (*see Phillips v Kantor & Co*, 31 NY2d 307, 311 [1972]; *Museums at Stony Brook v Vil of Patchogue Fire Dept*, 146 AD2d 572 [2d Dept 1989]).

Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman* 49 NY2d at 557).

Discussion

As an initial matter, while plaintiff's cross motion is admittedly untimely, the Court in the interests of justice shall deem the motion timely since it was filed within 120 days of the Note of Issue pursuant to the CPLR.

The obligation of an insurer to defend is separate and distinct from its obligation to indemnify (*Spoor-Lasher Co. v Aetna Cas. & Sur. Co.*, 39 NY2d 875, 876 [1976]). An insurers duty to defend its insured is "exceedingly broad" - broader than its duty to indemnify - and is triggered whenever the allegations in a complaint "suggest a reasonable possibility of coverage" (*Regal Construction Corp. v Nat. Union Fire Ins. Co. of Pittsburgh*, 15 NY3d 34, 37 [2010]; *Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]; *Global Constr. Co., LLC v Essex Ins. Co.*, 52 AD3d 655, 656 [2d Dept 2008]). "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" (*Automobile Ins. Co. of Hartford*, 7 NY3d at 137, quoting *Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 670 [1981]); *see also Regal*, 15 NY3d at 37; *Mack-Cali Realty Corp. v MGM Ins. Co.*, 119 AD3d 905 [2d Dept 2014]). "If the allegations of the complaint are even potentially within the language of the insurance policy, there is a duty to defend" (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 443 [2002]; *see also Natural Organics, Inc. v OneBeacon Am. Ins. Co.*, 102 AD3d 756, 758 [2d Dept 2013]). "[A]n insurer may be obligated to defend its insured even if, at the conclusion of an underlying

action, it is found to have no obligation to indemnify its insured" (*Global Constr.*, 52 AD3d at 655-656).

In order to meet its burden of establishing prima facie entitlement to summary judgment as a matter of law, the defendant insurer must demonstrate that an exclusion or an exception to coverage applies, that it is specific clear and unmistakable, and that is not subject to any other reasonable interpretation, such that it has no duty to indemnify or defend as a matter of law (*see Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]; *Natasi v County of Suffolk*, 106 AD3d 1064, 1066 [2d Dept 2013]; *Essex Ins. Co. v Pingley*, 41 AD3d 774, 776 [2d Dept 2007]).

In the case at bar, the instant complaint asserts four causes of action for: (1) a judgment declaring that the contractors exclusion upon which Lancer relies to deny coverage is inapplicable, and that Lancer is obligated to defend plaintiff in the underlying action and to pay its defense costs; (2) a declaration that the exclusion is inapplicable and that Lancer is obligated to indemnify 300 Malcolm for property damage and/or personal injury in the underlying action, should it become necessary; (3) damages for breach of the covenant of good faith and fair dealing, which has caused 300 Malcolm to incur attorney's fees and costs in the underlying action; and (4) damages for breach of the covenant of good faith and fair dealing, bad faith conduct that was wrongful, deceptive and misleading under General Business Law § 349 (a).

Based on review of the moving papers, Lancer failed to establish prima facie entitlement to summary judgment as a matter of law as to dismissal of first and third cause of action within plaintiff's complaint, since Lancer failed to show that the contractors exclusion applies permitting Lancer's exclusion of coverage, and the allegations in the complaint can only be interpreted to exclude coverage (*see Massena,* 98 NY2d at 444; *Seaboard Sur. Co.*, 64 NY2d at 311; *Natasi*, 106 AD3d at 1066). The record shows that plaintiff's contract with R & S ended two years prior to the underlying action in early 2014 when the contractual work was completed, and R & S was paid.

Willis testified that, without first getting consent, Rahaman did scraping and painting work on the lower cornice on the day of the accident and when Willis asked Rahaman why he did it, Rahaman could not remember or did not know.

As a related issue, the Court finds that plaintiff has established prima facie its entitlement to summary judgment and Lancer is obligated to defend plaintiff in the underlying action and to pay its defense costs. (*Regal Construction Corp.*, 15 NY3d at 37; *Automobile Ins. Co. of Hartford*, 7 NY3d at 137). The four corners of the complaint are not the sole criteria for measuring an insurer's duty to provide a defense (*see Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 66 [1991]). An "insurer must provide a defense if it has knowledge of facts which potentially bring the claim within the policy's indemnity coverage" (*id.*). The duty to defend, however, is not triggered when "as a matter of law…there is no possible factual or legal basis upon which the insurer might eventually be held to be obligated to indemnify the claimant under any provision of the insurance policy" (*id.* at 656, quoting *Bruckner Realty, LLC v County Oil Co., Inc.*, 40 AD3d 898, 900 [2d Dept 2007]; *see also Queens Org., LLC v First Am. Tit. Ins. Co.*, 172 AD3d 932, 933 [2d Dept 2019]).

The complaint pleads that plaintiff either contracted for, or supervised, work at the premises, and was negligent in either its ownership, operation, or control of the location, and thereby responsible for Mojumder's injury. On its face, these allegations arguably place the incident within the plain language of the contractor's exclusion. However, the record demonstrates that Lancer had actual knowledge of facts that raise questions about whether the contractor's exclusion applies (*see Fitzpatrick*, 78 NY2d at 66). In an affidavit submitted in the underlying action, John Carlson, president of Casablanca Brooklyn, Ltd., the owner of Casablanca bar, stated that neither he, nor Casablanca, nor anyone affiliated with them contracted for, hired or authorized Rahaman or anyone else to perform any construction or repair work to the exterior of the building

in 2016. Rahaman testified he did not mention the accident to Willis or that he had stopped by to do the touch up work prior to 2017. Rahaman alleges that the cornice touch-up was a five-minute job. Rahaman also testified that there was no existing contract with 300 Malcolm to do the work at the time of Mojumder's accident. In addition, Rahaman testified that he did the work of his own volition and did not send plaintiff a bill after completing the work. As a result, at the time that Lancer issued its disclaimer letter, Lancer knew of Willis' contention that he did not contract for, have knowledge of, supervise, or approve work performed at the subject premises by Rahaman and Mojumder. Accordingly, plaintiff's cross-motion for summary judgment on the first and third cause of action is granted.

Plaintiff and defendant both move for summary judgment regarding the applicability of the contractor's exclusion and defendant's duty to indemnify within the second cause of action.

Plaintiff has established a prima facie entitlement to summary judgment on indemnification since the plaintiff alleges that they did not hire, retain, nor authorize the work performed within the underlying action.

However, the Court finds Lancer, in opposition, raises a triable issue of fact as to whether the contractor exclusion applies which affects issue whether indeminifcation was triggered(*Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). Lancer's investigation concluded that the accident was arguably part of an "ongoing operation" or "completed work" – i.e., that Rahaman was acting as a contractor at the time of the accident, since he was touching up peeling paint at the premises based on August 13, 2013 contract with the plaintiff. The conflicting testimony of Willis and Rahaman fails to show whether Rahaman was not acting as 300 Malcolm's contractor, or that the work did not arise "out of any and all ongoing operations and completed work performed by any contractor or its employees or "acts or omissions of any insured in connection with the general supervision of any ongoing operations and completed work performed

by any contractor or its employees."

Accordingly, both Lancer's motion and 300 Malcolm's cross motion for summary judgment on the issue of indemnification within the second cause of action of plaintiff's complaint is denied.

Lancer also moves for summary judgment dismissing 300 Malcolm's General Business Law § 349 (a) cause of action.[6] General Business Law § 349 prohibits deceptive acts and practices in the conduct of any business, trade or commerce or in furnishing any service and "is directed at wrongs against the consuming public" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25 [1995]). A private dispute over policy coverage that is unique to the parties, rather than conduct that affects consumers at large, are not encompassed by the statute (*see Oswego Laborers'*, 85 NY2d at 25; *Korn v First Unum*, 277 AD2d 355 [2d Dept 2000]). Lancer argues that 300 Malcolm failed to meet its burden of proving its General Business Law § 349 claim. In this regard, Lancer contends that 300 Malcolm merely speculated or incorporated the pleadings by reference without providing evidence that Lancer engaged in consumer-oriented, deceptive conduct aimed at the public at large. Here, Lancer has met its burden of demonstrating prima facie entitlement to summary judgment by submitting evidence that the cause of action is a private insurance dispute that is unique to the parties that does not involve consumer-oriented deceptive practices (*see Anthony Tranchina General Contracting Corp. v Greco Bros. Ready Mix Concrete Co., Inc.*, 138 AD3d 647, 648 [2d Dept 2016]; *Biancone v Bossi*, 24 AD3d 582, 583 [2d Dept 2005]). In opposition, plaintiff asserts that the contractor's exclusion is insufficient to raise a triable issue of fact. Accordingly, Lancer's motion to dismiss the General Business Law § 349 cause of action is granted.

To the extent not specifically addressed herein, the parties remaining contentions and

[6] 300 Malcolm does not cross-move for summary judgment on their General Business Law § 349 claim.

arguments were considered and found to be without merit and/or moot.

Conclusion

Accordingly, it is, hereby,

ORDERED that defendant's motion for an order, pursuant to CPLR 3212, for summary judgment, is granted to the extent that plaintiff's fourth cause of action under General Business Law § 349 is dismissed. In all other respects, defendant's motion is denied (Mot. Seq. One); and it is further,

ORDERED that the branch of plaintiff's cross motion for an order, pursuant to CPLR 2004 extending plaintiff's time to cross-move for summary judgment is granted (Mot. Seq. Two); and it is further,

ORDERED, ADJUDGED and DECLARED that the branch of plaintiff's cross motion for an order, pursuant to CPLR 3212, is granted to the extent that plaintiff is entitled to a defense from defendant in the underlying action and defendant must pay all defense costs. In all other respects, plaintiff's motion is denied.[7] (Mot. Seq. Two)

This constitutes the decision and order of the court.

ENTER,

HON. KATHY J. KING
J.S.C

[7] Although pled in the complaint, the plaintiff does not specifically address the cause of action for a breach of the covenant of good faith and fair dealing and for attorneys' fees in its motion. Consequently, that branch of plaintiff's motion is denied.