Bosquez v RXR Realty LLC

2020 NY Slip Op 32610(U)

August 10, 2020

Supreme Court, New York County

Docket Number: 450464/2020

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ, Justice — PART IAS MOTION 47EFM

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JOSE RODOLFO RODRIGUEZ BOSQUEZ,

Plaintiff,

- v -

RXR REALTY LLC, ET AL,

Defendants.

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INDEX NO. 450464/2020

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 503-523, 541, 611-615, 623-632, 638-645

were read on this motion to/for DISMISS/SUMMARY JUDGMENT.

In this labor law action, third-party defendant Global Iron Works, Inc., plaintiff's employer, moves pursuant to CPLR 3211(a)(7) and CPLR 3212 seeking dismissal of the third-party complaint brought by defendants/third-party plaintiffs Hunter Roberts Construction Group LLC, RXR Pier 57 MT LLC and Super P57, LLC, the general contractor and owners of the construction site, based on the anti-subrogation rule.

Pursuant to the common law anti-subrogation rule, an insurer "has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered." *N.Y.C. Dep't of Transp. V. Petric & Assoc.*, 132 A.D.3d 614 (1st Dep't 2015) (quoting *North Star Reins. Corp. v. Continental Ins.*, 82 N.Y.2d 281, 294 (1993). Here, Global argues that it is insured for the claims asserted in the third-party complaint by the primary and excess policies that Hunter Roberts purchased pursuant to a Contractors Consolidated Insurance Program (CCIP) for itself and other subcontractors involved in the project as follows: (1) CCIP Commercial General Liability policy issued by Arch Insurance Company with a limit of $2 million per occurrence; (2) CCIP Corridor Excess policy issued by National Union Fire Insurance Company with a limit of $3 million per occurrence; (3) Lead Umbrella Policy also issued by National Union which has a limit of $25 million per occurrence; and (4) CCIP Excess Layer Policies. Affirmation of Jason L. Beckerman dated January 8, 2020, Exhs. M-P. The third-party plaintiffs do not

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dispute that Global is an additional insured under the primary and excess CCIP policies. However, they argue that these policies do not provide Global with coverage for the common law defense and indemnification claims that are asserted in the third-party complaint because of the employer liability exclusion contained in these policies.

With respect to the Arch Commercial General Liability Policy, the policy contains an employer liability exclusion which states that the insurance does not apply to bodily injury to an employee of the insured arising out of his employment and that this exclusion applies to any obligation to share damages with or repay someone else who must pay damages because of the injury. Beckerman Aff., Exh. M, p. 38. However, the exclusion does not apply to liability assumed by the insured pursuant to an "insured contract," which is defined as "[t]hat part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Beckerman Aff., Exh. M, p. 49. Here, Global's subcontract with Hunter Roberts, which required Global to indemnify and defend Hunter Roberts for claims arising out of the performance of Global's work, is clearly within the scope of an "insured contract" as defined in the policy, and the third party plaintiffs do not argue otherwise. Beckerman Aff., Exh. B, p. 10. Thus, although the employer liability exclusion in the policy applies to the third-party plaintiff's common law indemnification claims, it is not applicable to any contractual indemnification claims under the insured contract exception to the exclusion. *See N.Y.C. Dep't of Transp. v. Peteric & Assoc.*, 132 A.D.3d 614 (1st Dep't 2015).

The third-party plaintiffs also argue that they have not asserted any contractual indemnification claims against Global in the third-party complaint, only common law indemnification claims, and therefore, the anti-subrogation rule is inapplicable. However, this strategy was rejected by the Court of Appeals in *North Star Reins. Corp. v. Continental Ins.*, 82 N.Y.2d 281, 296 (1993), where the Court recognized that a mutual insurer "can fashion the litigation so as to minimize its liability under the [general contractors' liability insurance]. By failing to assert a contractual indemnification claim on the owner's behalf, the insurer can trigger coverage under other insurance policies held by the contractor such as workers' compensation or excess policy." Indeed, the fact that the third-party plaintiffs failed to assert viable

contractual indemnification claims against Global based on the subcontract is an admitted attempt to avoid triggering Global's coverage under the policy demonstrates that the "conflict is real, not simply imagined." *Id.* at 296, fn. 5; *see also N.Y.C. Dep't. of Transp. v. Petric*, 132 A.D.3d 614 (1st Dep't 2015) (holding that third-party complaint was barred by anti-subrogation rule to the extent of coverage provided by mutual insurers even though the third-party action against the employer asserted only common law causes of action); *National Union Fire Ins. v. Aetna Casualty & Surety Corp.*, 790 F. Supp. 491, 492-93 (S.D.N.Y. 1992) (insurer failure to assert contractual indemnification claim while asserting common law claims in order to improperly trigger insured employer's liability policy), *aff'd*, 983 F.2d 1048 (2d Cir. 1992). Accordingly, the anti-subrogation rule bars the claims in the third-party complaint to the extent of the common coverage afforded by the Arch Commercial General Liability Policy. Since the CCIP Corridor Excess policy issued by National Union Fire Insurance Company follows the form of the Arch Commercial General Liability Policy, the anti-subrogation rule bars the third party claims as well to the extent of common coverage afforded by this policy.

Turning next to the Lead Umbrella Policy issued by National Union, the employer liability exclusion in this policy differs from the prior two policies, providing in relevant part that the insurance "does not apply to liability arising out of Bodily Injury to an employee sustained in the course of employment, where the obligation of any underlying insurer or self-insurance mechanism providing employer's liability coverage for the Insured is by law unlimited." Beckerman Aff., Exh. O, p. 54. Here, Global is insured by a Workers' Compensation/Employer's Liability policy, which Hunter Roberts purchased pursuant to the CCIP, and which provides unlimited coverage to Global for any claims covered under the New York Workers' Compensation Law and for common law indemnification claims. Affirmation of Olivia M. Gross dated June 19, 2020, Exh. 2. Global's Workers' Compensation/Employer Liability policy provides unlimited coverage to Global for these claims, as required by law. *See Oneida Ltd. V. Utica Mut. Ins. Co.*, 263 A.D.2d 825, 826 (3d Dep't 1999). Thus, the exclusion is applicable here since Global's liability in this action arises out of a bodily injury to one of its employees sustained in the course

of his employment, and an underlying policy, namely the Workers' Compensation/Employer's Liability policy, provides liability coverage for Global that is by law unlimited.

Global argues that even if the exclusion applies to a common law indemnification claim, which is covered under its Workers' Compensation/Employer Liability policy, it does not apply to any potential contractual indemnification claims, which are not covered by this policy. However, the exclusion does not distinguish between different theories of recovery. In other words, it simply does not matter whether the theory of recovery is based on common law or contractual indemnification since, in either case, Global's liability arises out of an injury to its employee that is covered under Global's Workers' Compensation/Employer Liability policy. Thus, the exclusion in the policy is applicable, regardless of the theory of recovery.

Next, Global argues that even if the exclusion is applicable, the third-party plaintiffs are not entitled to the benefit of this exclusion since they failed to timely disclaim coverage as required by Insurance Law Section 3420(d)(2). However, as the third party plaintiffs point out, "an insurance carrier's duty to timely disclaim is not triggered until an insurer satisfies a notice of claim provision in an insurance contract, because that provision is a condition precedent to coverage and absent a valid excuse, the failure to satisfy the notice requirement vitiates the policy." *J.T. Magen v. Hartford Fire Ins.*, 64 A.D.3d 266, 269 (1st Dep't 2009). Here, the Lead Umbrella Policy requires that the insurance company be notified as soon as practicable of any claim or lawsuit brought against any insured which is reasonably likely to involve the policy. Beckerman Aff., Exh. O, p. 20.

Global argues that a letter dated March 26, 2018 from Arch Insurance Company, which issued the CCIP Commercial General Liability policy, to AIG, whose two members Lexington and National Union issued umbrella and upper layer excess policies, is sufficient to satisfy its notice obligation pursuant to the policy. Beckerman Aff., Exh. R. However, although the letter mentions that Global is an enrolled subcontractor of the CCIP and that it is an insured under the CCIP Arch Commercial General Liability Policy, Arch did not state that it was providing coverage to Global for the incident or that it was seeking a defense, indemnification or coverage on behalf of Global for any potential claims against it arising out of

the incident. *Id.* Thus, this letter is insufficient to satisfy Global's contractual obligations to provide notice of the claim to the umbrella and upper layer excess insurers. In any event, even if the letter was sufficient, Global had an independent obligation to notify the carrier of the claim, which it indisputably failed to do. *See City of New York v. St. Paul Fire & Marine Ins.*, 21 A.D.3d 978, 981 (1st Dep't 2005) (City, as additional insured under excess policy, had an independent duty to provide the excess insurer with timely notice of the claim against it and its demand for coverage; the fact that the insurer may have received notice of the claim from the primary insured or from another source does not excuse an additional insured's failure to provide notice). Thus, Global has not demonstrated that the third party plaintiffs failed to timely disclaim coverage as under Insurance Law Section 3420, and are thus not entitled to the benefit of the exclusion in the Lead Umbrella Policy since Global has not shown that it duly and timely notified the insurer of the claims asserted against it, as required by the policy. Accordingly, the third-party plaintiffs have demonstrated that the employer liability exclusion in the Lead Umbrella Policy is applicable to the claims asserted against Global in this action and thus the anti-subrogation rule does not bar the claims insofar as they are covered under this policy. Since the CCIP High Excess Policies follow the form of the Lead Umbrella Policy, the employer liability exclusion in these policies likewise precludes Global's coverage for the claims in this action and thus the anti-subrogation rule does not bar the third party plaintiff's claims insofar as they are covered under these policies.

Finally, the third-party plaintiffs argue that the anti-subrogation rule is inapplicable here because since August 2018, they have been defended in the underlying action by Axis, as additional insureds pursuant to their contract with third-party defendant Allran Electric of NY, and not by the CCIP insurers. If Axis is seeking to recover from Global in the third-party action, these claims would not be barred by the anti-subrogation rule as Global is not insured under the Axis policy. *See National Union Fire Ins. v. State Ins. Fund*, 222 A.D.2d 369 (1st Dep't 1995). However, if it is the CCIP insurers seeking indemnification from Global on behalf of the third-party plaintiffs, these claims would be barred by the anti-subrogation rule to the extent of coverage provided by the CCIP Commercial General Liability policy and the CCIP Corridor Excess policy. Since the third-party plaintiffs do not explain whether Axis is representing them in

the third-party action against Global or whether they are being represented by the CCIP insurers, this argument must be rejected.

Accordingly, it is

ORDERED that the motion is granted to the extent that the claims in the third-party complaint are barred until the liability limits of the CCIP Commercial General Liability policy issued by Arch Insurance Company and the CCIP Corridor Excess policy issued by National Union Fire Insurance Company are exhausted, and is otherwise denied.

8/10/20
DATE

PAUL A. GOETZ, J.S.C.

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