

**American Empire Surplus Lines Ins. Co. v Federal
Ins. Co.**

2020 NY Slip Op 32727(U)

August 20, 2020

Supreme Court, New York County

Docket Number: 159793/2017

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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INDEX NO. 159793/2017

AMERICAN EMPIRE SURPLUS LINES INSURANCE
COMPANY,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 002

- v -

FEDERAL INSURANCE COMPANY, SUANNE
ASSOCIATES, WINTER MANAGEMENT CORP., LUIS
FIERRO

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 109, 110, 111

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The motion by plaintiff for summary judgment is denied.

Background

Plaintiff seeks a declaration that it has no obligation to defend or indemnify defendants Suanne Associates and Winter Management Corp. relating to claims brought by defendant Fierro in an action pending in the Bronx. Plaintiff asks the Court to find that it is entitled to withdraw the defense it is currently providing, that defendant Federal Insurance Corporation (“FIC”) is obligated to assume the defense and indemnify of Suanne and Winter under FIC’s policy, that it can recover reimbursement from FIC and that if the Court finds additional insured coverage for Suanne and Winter under plaintiff’s policy, it must be equally shared between plaintiff and FIC.

On September 4, 2013 Fierro claims he was hurt while working at a construction project in Manhattan. He contends he fell through the base of a fire escape as he was working on the building's facade. Fierro subsequently brought a Labor Law case against numerous defendants, including Suanne , Winter and Skyline Restoration Inc. ("Skyline"). He worked for Sky VL.

Skyline obtained an insurance policy from plaintiff. Plaintiff claims that because Skyline did not own or control the fire escape on which Fierro was injured, it should not have to provide coverage for Suanne and Winter. Plaintiff points out that Suanne was the owner of the premises while Skyline was the general contractor and Winter acted as agent for Suanne (and hired Skyline). Plaintiff insists that the landing of the fire escape collapsed because of long term corrosion and rust build up. Plaintiff argues that the proximate cause of Fierro's injuries has nothing to do with Skyline, and therefore, it has no obligation to provide coverage to Winter or Suanne under the Court of Appeals decision in *Burlington*.

In opposition, all defendants (except for Fierro) note that in the contract between Suanne and Skyline, Skyline was responsible for taking all reasonable steps to ensure safe working conditions including workers of any subcontractors such as Sky VL. The contract also required that Skyline provide general liability coverage naming Suanne and Winter as additional insureds. Defendants argue that a trier of fact could find that Skyline's subcontractors (acting on behalf of Skyline) were a proximate cause of Fierro's alleged injuries. Skyline apparently subcontracted out its work to Pofi Construction Corp ("Pofi"), who agreed in the contract to take reasonable safety precautions.

In reply, plaintiff claims that Skyline did not own or control the fire escape and was not responsible for maintaining it. Plaintiff admits that all defendants in Fierro's case in the Bronx were recently found liable under Labor Law § 240(1) but still insists that Suanne and Winter

were solely negligent. Plaintiff argues that “it would simply be inequitable to reward Suanne and Winter with coverage . . . when they are responsible for the bulk (if not all) of the fault” (NYSCEF Doc. No. 111 at 2).

Discussion

“The 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]).

“An insurance agreement is subject to principles of contract interpretation. Therefore, as with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court” (*Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 321, 2017 NY Slip Op 04384 [2017] [internal quotations and citations omitted]).

An insurance policy endorsement with the words “caused, in whole or in part” requires “proximate causation since ‘but for’ causation cannot be partial. An event may not be wholly or partially connected to a result, it either is or it is not connected. Stated differently, although there may be more than one proximate cause, all ‘but for’ causes bear some connection to the outcome even if all do not lead to legal liability” (*id.* at 322). The terms “caused, in whole or in part, by”

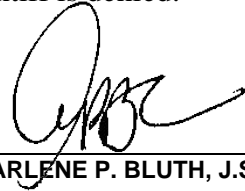
and “solely caused by” are not synonymous (*id.*). “[C]overage for additional insureds is limited to situations where the insured is the proximate cause of the injury. Liability exists precisely where there is fault” (*id.* at 323).

The Court denies the motion. There is an issue of fact with respect to whether Skyline (plaintiff’s insured) was a proximate cause of Fierro’s injury. Skyline was the general contractor at the worksite where Fierro was injured. There is no question that Skyline had a duty to ensure a reasonably safe worksite. While plaintiff argues it had no control over the fire escape, that does not compel the Court to grant the motion. Fierro was working on the façade; therefore, a jury could find that Skyline had a duty to make sure the places upon which subcontractors were working were safe and not susceptible to collapse. A jury might find that Skyline had constructive notice and should have conducted some investigation into the fire escape while the façade work was performed. That inspection may have revealed rust or some suspicion that the fire escape was not safe. It may be that Suanne and Winter share some of the responsibility as property owner and manager, but the Court is unable to find as a matter of law that Skyline was not a proximate cause of Fierro’s purported injuries.

The fact is that Fierro brought a Labor Law case against many defendants, including Skyline and there has not been a determination made in that case that Skyline was not negligent as a matter of law. Fierro purportedly brought a claim under Labor Law § 200, which is a codification of common law negligence. Plaintiff even admits in reply that there may be a possibility that Skyline is responsible for some portion of fault. As the Court of Appeals pointed out in *Burlington*, there can be more than one proximate cause for an incident.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by plaintiff is denied.



8/20/2020

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: