101 W. 78th, LLC v New York Mar. & Gen. Ins. Co.
2020 NY Slip Op 32737(U)
August 21, 2020
Supreme Court, New York County
Docket Number: 650393/2017
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT R. REED** **PART 43**

Justice

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101 WEST 78TH, LLC,

Plaintiff,

- v -

NEW YORK MARINE AND GENERAL INSURANCE COMPANY, THE SWEET CONSTRUCTION GROUP, LTD.

Defendant.

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INDEX NO. 650393/2017

MOTION DATE 01/16/2020

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 129, 130, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 156, 158

were read on this motion for JUDGMENT - SUMMARY.

ROBERT R. REED, J.:

This is an action by building owner 101 West 78th, LLC (plaintiff), which seeks an insurance defense in an underlying property-damages claim brought against it in 2015 by its former long-term commercial tenant, non-party 384 Columbus Avenue Associates, LLC, d/b/a Ocean Grill (Ocean Grill).[1]

Plaintiff moves for summary judgment against defendant New York Marine and General Insurance Company (NYM), the insurer of plaintiff's commercial contractor, the Sweet Construction Group, Ltd. (Sweet), and a declaration that plaintiff is entitled to an insurance defense in the *Ocean Grill* action and full coverage. In the alternative, plaintiff seeks a judgment

[1] The underlying action, *384 Columbus Ave. Assocs., LLC d/b/a Ocean Grill v 101 W 78th St. LLC* (Sup Ct, New York County, index No. 654317/2015 [*Ocean Grill* action]), was discontinued with prejudice by stipulation signed in May 2018 (*see* New York State Court Electronic Filing [NYSCEF] Doc No. 110, affirmation of plaintiff's counsel, ¶ 8, citing Doc No. 138, stipulation of discontinuance in the *Ocean Grill* action).

against Sweet for the costs of plaintiff's defense. NYM cross-moves for partial summary judgment and a declaration that it is not obliged to defend or indemnify plaintiff, nor to reimburse plaintiff for its attorney's fees and costs; alternatively, it argues that plaintiff's motion for summary judgment must be denied in its entirety. Sweet opposes plaintiff's motion.

For the reasons set forth below, plaintiff's motion is granted in part and its motion in the alternative is denied as academic; NYM's cross motion is denied.

Factual and Procedural Background

The underlying action

Ocean Grill was a commercial tenant in plaintiff's apartment building for more than 20 years (*see* NYSCEF Doc No. 112, complaint, ¶ 1; *Ocean Grill* action, NYSCEF Doc No. 14, first amended complaint, ¶ 1).[2] Because plaintiff hoped eventually to convert the upper floors of its building to residential condominiums, its lease, dated December 1, 1996, modified on May 26, 2011, factored in the possibility of future renovation and construction work, codified in its paragraph 78, which provided that plaintiff "was to use its 'best efforts' not to allow the work …[to] disrupt with the means of ingress and egress" (*Ocean Grill* action, NYSCEF Doc No. 14, ¶ 8, quoting from the Ocean Grill commercial lease [commercial lease], ¶ 78 [b]). Plaintiff would erect "such construction of the barricades and scaffolding in such manner to allow maximum means of lighting and means of ingress and egress" to the restaurant (*Ocean Grill* action, NYSCEF Doc No. 14, ¶ 8, quoting the commercial lease, ¶ 78 [d]). Plaintiff also agreed

[2] Although it is well-established that an amended pleading replaces the earlier pleading and renders it moot (*see, e.g. Nimkoff Rosenfeld & Schechter, LLP v O'Flaherty,* 71 AD3d 533, 533 [1st Dept 2010], citing *Chalasani v Neuman,* 64 NY2d 879, 880 [1985]), plaintiff has included only a copy of the original complaint as an exhibit to its motion, rather than the first amended complaint (*see Ocean Grill* action, NYSCEF Doc No. 14, first amended complaint, filed on March 9, 2016; NYSCEF Doc No. 15 redlined first amended complaint). This decision will cite hereinafter to the first amended complaint (*Ocean Grill* action, NYSCEF Doc No. 14). Plaintiff is directed to upload a copy of the first amended complaint as a separate document in this action.

that upon Ocean Grill's fulfillment of all conditions under the lease, it would be allowed to "peaceably enjoy the premises" (*Ocean Grill* action, NYSCEF Doc No. 14, ¶ 24, citing commercial lease ¶ 22).

According to Ocean Grill's complaint, plaintiff erected scaffolding around the building in December 2012, commencing "a reconstruction project"; the scaffolding remained in place through the spring of 2014 (*see Ocean Grill* action, NYSCEF Doc No. 14, ¶¶ 1, 10-13). Ocean Grill experienced a "partial loss" of the sidewalk café area in 2013 (*see Ocean Grill* action, NYSCEF Doc No. 14, ¶ 22). Scaffolding was reinstalled in November 2014, along with a construction hoist installed "directly in front of [Ocean Grill]'s customer entrance, as well as netting and barricades in front of the building" (*Ocean Grill* action, NYSCEF Doc No. 14, ¶ 22). The construction work caused excessive noise, vibrations, odors and dust to enter into the premises during hours when the restaurant was open, and water leaks and flooding which required Ocean Grill to temporarily close (*see Ocean Grill* action, NYSCEF Doc No. 14, ¶¶ 25-26). Between January 2013 and November 30, 2015, Ocean Grill lost more than $1.49 million in income (*see Ocean Grill* action, NYSCEF Doc No. 14, ¶ 34). Ocean Grill closed in December 2015 and surrendered possession; it claimed constructive eviction (*see Ocean Grill* action, NYSCEF Doc No. 14, ¶¶ 41-43).

The complaint alleged three causes of action: breach of contract and wrongful constructive eviction, based on plaintiff's failure "to use its best efforts" during renovations, to avoid disrupting the restaurant's means of egress and ingress and prevent "excessive noise, vibrations, odor and dust to enter [the restaurant] during…business hours," as well as water leaks and flooding, and to timely communicate its construction schedule and planned activities to Ocean Grill; a declaratory judgment that plaintiff's alleged failures resulted in Ocean Grill's

constructive eviction, and that the restaurant had no obligation to pay rent after vacating the premises; and negligence based on plaintiff's breach of its duty to perform the work with reasonable care (*see Ocean Grill* action, NYSCEF Doc No. 14, ¶¶ 47-73).

Plaintiff's agreement with Sweet

Plaintiff hired co-defendant Sweet to be the construction manager for its renovation and reconstruction project, pursuant to an agreement dated May 22, 2014 (*see* NYSCEF Doc No. 111, agreement for construction management services and guaranteed maximum price [CM agreement]). The CM agreement was fully signed by June 2, 2014 (*see* NYSCEF Doc No. 111, CM agreement at 72, 73). According to the CM agreement, plaintiff intended to redevelop its seven-story pre-war apartment building to construct a "first-class luxury condominium" (*see* NYSCEF Doc No. 111 at unnumbered 1, first "whereas" clause). The commencement date for the work to begin was based "upon Owner's issuance of a notice to proceed" (*see* NYSCEF Doc No. 111, § 3.2). Sweet accepted "full responsibility" for the work of its subcontractors and the subcontracts in connection with this project (*see* NYSCEF Doc No. 111, § 4.2.1).

The CM agreement required Sweet to purchase commercial general liability insurance for claims pertaining, inter alia, to property damage occurring as a result of the project, and commercial umbrella/excess liability coverage (*see* NYSCEF Doc. No. 111, §§ 13.1.3, 13.1.6). Sweet agreed "to defend and indemnify" plaintiff in "any and all" legal proceedings brought against plaintiff pertaining to the project (*see* NYSCEF Doc No. 111, § 13.6). If Sweet "refuse[d]" to indemnify plaintiff, plaintiff could hire its own counsel and recoup the costs from Sweet (*see* NYSCEF Doc No. 111, § 13.6.2).

Sweet's Comprehensive General Liability Policy with NYM

Sweet procured a project-specific commercial general liability policy from NYM, effective as of August 20, 2014 until August 20, 2016 (*see* NYSCEF Doc No. 113, NYM policy issued on behalf of Sweet [CGL policy] at 03). The CGL policy provided that NYM "ha[d] the duty to defend [Sweet] against any 'suit' seeking [bodily injury or property] damages" (NYSCEF Doc No. 113, CGL policy at 06). The policy included coverage for additional insureds, defined as "any person on whose behalf you are performing work and/or are required to defend and hold harmless and indemnify (including but not limited to property owners [])" (NYSCEF Doc No. 113 at 58 [Endorsement no. 22]; and "any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy" (NYSCEF Doc No. 113, at 59 [Endorsement no. 23]). Coverage was limited "to liability for…'property damage'…caused, in whole or in part, by" the acts or omissions of Sweet or those acting on its behalf "in the performance of [Sweet's] ongoing operations for the additional insured[s] at the locations[s] designated" (NYSCEF Doc No. 113 at 58 [Endorsement no. 22]; *see also* Doc No. 113 at 59 [Endorsement no. 23]).

The definition of "property damage" is two-fold. It is "[p]hysical injury to tangible property, including all resulting loss of use of that property," and "deemed to occur at the time of the physical injury that caused it" (NYSCEF Doc No. 113 at 26, § IV, ¶ 17 [a]). It is also the "[l]oss of use of tangible property that is not physically injured … deemed to occur at the time of the 'occurrence' that caused it" (NYSCEF Doc No. 113 at 26, § IV, ¶ 17 [b]). "Occurrence" is defined as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions" (NYSCEF Doc No. 113 at 25, § V, ¶ 13). The property damage

must have been caused by an "occurrence" during the policy period (*see* NYSCEF Doc No. 113 at 06, § 1 [A] [1] [a]).

The CGL policy contains several coverage exclusions, including damage by work performed prior to the policy's inception date of August 20, 2014 (*see* NYSCEF Doc No. 113 at 62 [Endorsement no. 26]); damages to an area known by Sweet prior to the policy period to have previously been damaged (*see* NYSCEF Doc No. 135, affirmation of NYM's attorney, ¶ 11, quoting Doc No. 113, CGL policy at 06, § 1 [A] [1] [b] [3]; Endorsement no. 4); and property damaged because of Sweet's work or failure to perform work in accordance with the terms of the CM agreement (*see* NYSCEF Doc No. 135, affirmation of NYM's attorney, ¶ 45, citing Doc No. 113, CGL policy at 11, § 1 [A] [2] [m]).

The *Ocean Grill* decision of September 6, 2016

In 2016, plaintiff (the defendant in the *Ocean Grill* action) moved to dismiss that action based on documentary evidence and failure to state a cause of action. Supreme Court granted the motion to the extent that it dismissed the negligence claim, finding the factual allegations to be duplicative of the allegations contained in the breach of contract cause of action (*see* NYSCEF Doc No. 76, decision and order in the *Ocean Grill* action at 12-13, dated September 6, 2016).

NYM's refusal to defend plaintiff

Plaintiff initially tendered its claim to NYM and Sweet by letter dated January 18, 2016, citing the additional insured provision of the CM agreement (*see* NYSCEF Doc No. 119, letter of tender). NYM, through its attorneys, denied plaintiff's tender on several grounds by letter dated February 17, 2017 (*see* NYSCEF Doc No. 121, NYM letter of declination). Grounds included that the *Ocean Grill* complaint identified only plaintiff, and not Sweet, as the cause of the property damage, and did not allege that Ocean Grill had been precluded from using the premises

based on the damages, so as to find that plaintiff's acts or omissions resulted in "property damage" as defined in the CGL policy (*see* NYSCEF Doc No. 121, NYM letter of declination at 5). Even if Ocean Grill had sustained "property damage," the complaint did not allege that the alleged damage resulted from an "occurrence" during the policy period (*see* NYSCEF Doc No. 121 at 5). Coverage was also denied because, while the CGL policy period commenced as of August 20, 2014, the evidence, namely the signing of the CM Agreement in June 2014, shows that Sweet commenced work before the CGL policy was in effect (*see* NYSCEF Doc No. 121 at 6). Sweet's work was thus subject to the CGL policy's prior work exclusion (*see* NYSCEF Doc No. 121 at 6).

The commencement of this action

Plaintiff commenced this action against NYM and Sweet by summons and complaint on January 24, 2017 (*see* NYSCEF Doc No. 1, summons and complaint). Plaintiff seeks a declaration that defendant owes it full insurance coverage in the *Ocean Grill* action for the property damage allegedly caused by Sweet, based on plaintiff's status as an additional insured (*see* NYSCEF Doc No. 110, affirmation of plaintiff's counsel in support, ¶ 11).[3]

NYM's answer denied plaintiff's claims for many of the same reasons cited in its letter of declination (*see* NYSCEF Doc No. 4, answer by NYM). Sweet filed its answer with cross claims seeking declarations that NYM breached its duty and is required to defend and indemnify Sweet in the instant action, which NYM denied (*see* NYSCEF Doc No. 5, answer with cross claims by Sweet). NYM denied the allegations in its reply (*see* NYSCEF Doc No. 6, NYM reply).

[3] Plaintiff's insurer, non-party Colony Insurance Company (Colony), assumed payment of its defense in the *Ocean Grill* action, along with plaintiff (*see* NYSCEF Doc No. 110, affirmation of plaintiff's counsel in support, ¶ 9).

In 2019, this court granted Sweet's cross motion to require NYM to defend it in this action, reasoning that the claim of property damage triggered NYM's duty to defend, even though it may be that Sweet will not ultimately be entitled to coverage or that there are issues as to whether plaintiff is entitled to indemnity (*see* NYSCEF Doc No. 128, notice of entry dated Sept. 16, 2019, and so-ordered transcript of Aug. 22, 2019, at 19-20).

The instant motion and cross motion

Plaintiff's motion for summary judgment

Plaintiff's arguments in support of its motion for summary judgment are summarized below:

"At a minimum," plaintiff has established that NYM has a duty to defend it in the *Ocean Grill* action based on the CGL policy, and summary judgment should be granted. The construction work clearly was overseen by Sweet and caused the damage to Ocean Grill (*see* NYSCEF Doc No. 110, affirmation of plaintiff's counsel in support, ¶ 60). Sweet began its construction work on about August 27, 2014, after it obtained the necessary work permit from the New York City Department of Buildings issued on that date (*see* NYSCEF Doc No. 110, affirmation of plaintiff's attorney in support, ¶ 50, citing NYSCEF Doc No. 115, NYC Buildings Work Permit, Department of Buildings [NYC DOB permit], unnumbered page 3, issued Aug. 27, 2014). Ocean Grill's complaint alleged that in November 2014, a scaffolding was erected on the premises and a construction bridge was built directly in front of the restaurant's customer entrance (*see* NYSCEF Doc No. 110, affirmation of plaintiff's counsel in support, ¶ 52). Ocean Grill alleged that the scaffolding placement caused it to lose the use of the outdoor café case, and, coupled with the construction bridge, caused the loss of ingress and egress to the restaurant as well as loss of "maximum means of lighting" (*see* NYSCEF Doc No. 110, ¶¶ 54-55, 57). It

also alleged water leaks, excessive vibrations, dust, and odors, "which allegedly caused millions of dollars in damages" (NYSCEF Doc No. 110, ¶ 56; *see* NYSCEF Doc No. 114, *Ocean Grill* complaint, ¶¶ 25, 26, 52).

Plaintiff provides documentation from November and December 2014, including emails and excerpts from Ocean Grill's "daily recaps" and "monthly notes" describing the problems faced by the restaurant, including loss of use of the main dining room because of construction, repeated instances noise and dust and odors, broken lights, a "huge flood" on December 31, 2014, damages to walls and ceilings, and loss of sidewalk access to the entranceway (*see* NYSCEF Doc No. 110, ¶¶ 58-59, citing NYSCEF Doc No. 123 [Ocean Grill redacted documents]).

Under the CGL policy, "property damage" explicitly includes "[l]oss of use of tangible property that is not physically injured," and such loss is deemed to occur "at the time of the occurrence that caused it" (NYSCEF Doc No. 110, ¶ 64, quoting NYSCEF Doc No. 113, CGL policy at 26, § V, ¶ 17 [b]). Case law supports the conclusion that viable claims of "property damage" include loss of use (*see* NYSCEF Doc No. 110, affirmation of plaintiff's counsel, ¶¶ 63, 67-68, citing *Willets Point Contr. Corp. v Hartford Ins. Co.*, 53 NY2d 879, 881 [1981] [finding that the policy covered property damage which included "tangible personal property without physical damage thereto"]; *I.J. White Corp. v Columbia Cas. Co.*, 105 AD3d 531, 532 [1st Dept 2013] [claim of loss of use of a facility due to an occurrence is property damage under a commercial general liability policy (*see* NYSCEF Doc No. 110, ¶¶ 74-75). Ocean Grill's claims of loss of use of part or all the restaurant at various times, access to the premises and the outdoor café all fall under the kind of "loss of use" that is defined as property damage in the CGL policy (*see* NYSCEF Doc No. 110, ¶ 65).

The CGL policy's "prior work exclusion" is not relevant, for two reasons (*see* NYSCEF Doc No. 110, ¶ 71). First, Sweet averred in several documents that it could not and did not commence work "before the inception date of the policy" because it had not obtained the required permit from the City of New York before then (*see* NYSCEF Doc No. 110, ¶ 71, citing NYSCEF Doc. No. 115 [email with Sweet's document production]; NYSCEF Doc No. 116 [affidavits from Sweet's principal]; NYSCEF Doc No. 117 [Sweet's verified interrogatory responses]; NYSCEF Doc No. 118 [NYC DOB permit and related documents]). Second, the CGL policy was a "project specific policy," written to provide commercial general liability insurance coverage for Sweet's renovation and construction work at the premises, and the policy would be illusory and violate public policy if its inception date was later in time than the date agreed upon by the parties for the work to commence (*see* NYCEF Doc No. 110, affirmation of plaintiff's counsel, ¶¶ 72-73, citing *Lend Lease [U.S.] Const. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 60 [1st Dept 2015], *affirmed* 28 NY3d 675 [2017]).

This court's earlier decision that Sweet was entitled to an insurance defense in this action, should inform the analysis here (*see* NYSCEF Doc No. 110, ¶¶ 76-77). The standard for determining whether an additional named insured is entitled to a defense is the same standard used to determine if a named insured is entitled to a defense (*see* NYSCEF Doc No. 110, ¶ 77, citing *BP Conditioning Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714-715 [2007]). Accordingly, this court's earlier ruling that Sweet is entitled to a defense should be deemed law of the case, and NYM should be directed to provide a defense to plaintiff (*see* NYSCEF Doc No. 110, ¶¶ 76-78).

If, however, the court disagrees that NYM owes plaintiff a duty to defend, then it should find that plaintiff is entitled to judgment against Sweet based on its breach of the CM agreement

for failing to procure additional insured coverage (*see* NYSCEF Doc No. 110, ¶ 85). A contractor that breaches its agreement to procure insurance coverage for the owner is liable for damages resulting from the breach, including indemnity and defense that should have been undertaken by the insurer (*see* NYSCEF Doc No. 110, ¶ 84, citing *Figueroa v New York City Hous. Auth.*, 236 AD2d 154, 156 [1st Dept 1997]).

NYM's opposition and cross motion

NYM's arguments in opposition to plaintiff's motion for summary judgment and in support of its own cross motion for summary judgment are summarized below:

Plaintiff has not met its burden of proving entitlement to coverage under the CGL policy (*see* NYSCEF Doc No. 135, affirmation by defense counsel in opposition, ¶ 15, citing *Nicotra Group, LLC v American Safety Indem. Co.*, 48 AD3d 253 [1st Dept 2008]). Under the CGL policy's "additional insured" provision, plaintiff must prove that the liability is for property damage caused, in whole or in part, by the acts or omissions of the insured, Sweet, or of those acting on its behalf (*see* NYCEF Doc No. 135, ¶ 19, citing Doc No. 113, CGL policy at 58 [Endorsement no. 22]). While the duty by an insurer to defend is triggered when "the allegations within the four corners of the underlying complaint potentially give rise to a covered claim" (NYSCEF Doc No. 135, ¶ 20, quoting *Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]), an insurer has no obligation to defend a purported additional insured when "it [can] be concluded as a matter of law that there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision of insurance policy" (NYSCEF Doc No. 135, quoting *Servidone Constr. Corp. v Security Ins. Co. of Hartford,* 64 NY2d 419, 424 [1985] [interior quotation marks and citation omitted]).

Although the CM agreement appears to require Sweet to add plaintiff as an additional insured, the face of the *Ocean Grill* complaint makes no reference to Sweet; it therefore does not raise the "possibility" that the alleged property damages were caused, "in whole or in part," by the acts of Sweet or its subcontractors (*see* NYSCEF Doc No. 135, ¶ 21). NYM's duty to defend has not been triggered (*see* Doc No. 135, ¶ 21).

In a different vein, Sweet's work began before the CGL policy's inception date of August 20, 2014, as seen in the "definitive evidentiary proof" that the CM agreement between Sweet and plaintiff was signed by the parties as of June 2, 2014 (NYSCEF Doc No. 135, ¶¶ 36-37). The prior work exclusion applies to property damage "that arose out of a job, project or operation that began prior to August 20, 2014," the date the CGL policy went into effect, "irrespective of whether the alleged 'property damages' actually occurred within the [CGL] policy period" (NYSCEF Doc No. 135, ¶ 36).

The presence of the prior work exclusion does not make the CGL policy illusory, since the policy validly provides coverage for some acts, although subject to a potentially wide exclusion (*see* NYSCEF Doc No. 135, ¶ 43, citing *Lend Lease [U.S.] Const. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d at 60). Had Sweet commenced work after the August 20, 2014 inception of the CGL policy, the prior work exclusion would not have applied (*see* NYSCEF Doc No. 135, ¶ 43). Therefore, neither the provision nor the policy can be deemed "illusory" (*see* NYSCEF Doc No. 135, ¶ 43).

Coverage was properly denied as well because the CGL policy distinguishes between "property damage," which is covered, and "impaired property," which is not. A claim of "property damage," that is, "physical injury to tangible property, including all resulting loss of use of that property," would include "some evidence" that Ocean Grill "sustained some actual

physical injury to its property" or that it lost use of its property (NYSCEF Doc No. 135, ¶¶ 45-46). Ocean Grill's allegations of leaks, vibrations, dust, and odors as a result of the construction work, and loss of use of the restaurant because of the scaffolding and construction bridge, fall under the category of "impaired property," meaning tangible property that cannot be used or has become less useful because of a failure to carry out the terms of a contract, but which could be restored by Sweet fulfilling the terms of the CM agreement (*see* NYSCEF Doc No. 135, ¶ 45). In particular, the CM agreement included plaintiff's promise that any scaffolding would be stationed in such a way to allow visibility and street access to the restaurant; Sweet's alleged positioning of the scaffolding and construction bridge in 2014 violated that promise (*see* NYSCEF Doc No. 135, ¶ 47).

Willets Point Contracting Corp. (53 NY2d 879) is wrongly relied upon by plaintiff for the statement by the Court of Appeals that under the terms of a comprehensive commercial general liability policy, loss of use of tangible personal property, even without physical damage, constitutes "property damage." Plaintiff overlooks that the Court of Appeals affirmed the Second Department's holding that the defendant insurance company had no duty to defend its insured, Willets Point Contracting, against a property owner's claim that it had blocked ingress and egress to the owner's property while doing street repair and resurfacing (*see* NYSCEF Doc No. 135, ¶ 48, citing *Willets Point Contr. Corp. v Hartford Ins. Group,* 53 NY2d 879, *affirming* 75 AD2d 254 [2d Dept 1980]). As detailed by the Second Department, the insurance policy in *Willets Point Contr. Corp.* covered the street repair work, but excluded coverage for loss of use of tangible property resulting from, inter alia, the failure of the "work performed by or on behalf of the named insured," to meet the standards warranted by the named insured (NYSCEF Doc No. 135, ¶¶ 49, 50, quoting *Willets Point Contr. Corp.*, 75 AD2d at 257). The Court reasoned that,

because the suing property owner claimed only breach of the contractual representations or warranties promising that Willets Point Contracting would maintain ingress and egress to the properties abutting the street, the claim fell within the policy's impaired property exclusion (*see* NYSCEF Doc No. 135, ¶¶ 48-49, citing *Willets Point Contr. Corp.*, 75 AD2d at 258-259). In affirming, the Court of Appeals, while noting that the comprehensive general liability policy provided coverage for loss of use of tangible personal property not physically damaged, held that coverage for claims of breach of contract was excluded under a particular policy provision (*see Willets Point Contr. Corp.*, 53 NY2d at 881).

New York courts have "consistently" held that "[t]he general rule is that a commercial liability policy does not afford coverage for breach of contract, but rather for bodily injury or property damage" (NYSCEF Doc No. 135, ¶ 23, quoting *Structural Bldg. Prods. Corp. v Business Ins. Agency, Inc.*, 281 AD2d 617, 619 [2d Dept 2001] [where the underlying complaint alleged economic loss, coverage was denied because the commercial general liability policy covered only bodily injury and property damage, and provided no coverage for claims such as lost profits, breach of contract, negligence, or negligent misrepresentation and fraud]). The two surviving claims in the *Ocean Grill* action, following plaintiff's motion for summary judgment, were for breach of contract and a declaratory judgment, claims not covered under the CGL policy (*see* NYSCEF Doc No. 135, ¶ 23). There is simply no legal or factual basis for NYM to defend plaintiff herein (*see* NYSCEF Doc No. 135, ¶¶ 23-24).

The law of the case doctrine, which plaintiff argues applies based on this court's holding that NYM was obligated to defend Sweet in this action, is not applicable (*see* NYSCEF Doc No. 135, ¶ 18). The court's holding was based on its analysis of the allegations as they pertain to Sweet, in this case; plaintiff seeks coverage as an additional insured in the underlying action, and

the court's decision did not need to consider "certain requirements imposed on [plaintiff as an additional insured] as a perquisite to coverage under [the CGL] policy" in the *Ocean Grill* action (NYSCEF Doc No. 135, ¶ 18).

For these several reasons, the court should grant NYM's cross motion for partial summary judgment and a declaration that it has no duty to defend or indemnify plaintiff. If, however, the court finds that NYM has a duty to defend plaintiff as an additional insured, the court must find that NYM's duty terminated on September 6, 2016, when Supreme Court dismissed *Ocean Grill*'s negligence cause of action (*see* NYSCEF Doc No. 135, ¶¶ 28, 30-32). The settlement reached by plaintiff and Ocean Grill, occurring after Supreme Court dismissed Ocean Grill's negligence cause of action, would have addressed the remaining claims of breach of contract and declaratory action, neither of which is covered under the CGL policy (*see* NYSCEF Doc No. 135, ¶ 29, citing *Marine Midland Servs. Corp. v Kosoff & Sons, Inc.*, 60 AD2d 767, 768 [4th Dept 1977] [an insurer's duty to defend "will end if, and when, it is shown unequivocally that the damages alleged are not covered by the policy"]; NYSCEF Doc No. 135, ¶ 31). NYM therefore has no duty to defend plaintiff in the *Ocean Grill* action.

Sweet's Opposition to Plaintiff's Motion

Sweet's arguments in opposition to plaintiff's motion for summary judgment are summarized below:

There are several bases for why this court should deny plaintiff's motion in the alternative to require it to provide plaintiff with contractual defense and indemnity, if the court denies plaintiff's motion against NYM (*see* NYSCEF Doc No. 152, brief of Sweet in opposition at 1). To begin, Sweet obtained insurance that covered plaintiff as an additional insured, and it is premature to determine that NYM's denial of coverage to plaintiff as an additional insured

means that Sweet violated the CM agreement (*see* NYSCEF Doc No. 152 at 8-9, citing *Arner v RREEF Am., LLC*, 121 AD3d 450, 450-451 [1st Dept 2014]).

Sweet's duty to defend and indemnify plaintiff under the CM agreement is triggered only by a determination that it owes contractual indemnity (*see* NYSCEF Doc No. 152 at 10, citing *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 809 [2d Dept 2009]). Plaintiff is required to show, first, that the loss for which it seeks indemnity arose out of Sweet's negligent work or wrongful acts, and, second, that it provided timely written notice of the occurrence, an "express condition[] precedent" to coverage (*see* NYSCEF Doc No. 152 at 11, citing NYSCEF Doc No. 111, CM agreement at §§ 13.6.1 [indemnification], 1.1.17 [definition of "claim"]). Plaintiff has not offered evidentiary proof showing that the losses it seeks to recover arose from Sweet's work (*see* NYSCEF Doc No. 152, brief by Sweet in opposition at 11). Nor has plaintiff shown that it provided notice either "within 30 days after occurrence of the event giving rise" to the claim, or within 30 days "after the claimant first recognizes the condition giving rise to the [c]laim" (NYSCEF Doc No. 152 at 6, 12; quoting NYSCEF Doc No. 111, CM agreement at § 1.1.17). Under the CM agreement, the failure to provide timely notice of the claim will, "to the extent the other party is prejudiced by such a failure," result in the forfeiture of the claim and "a complete and unconditional waiver of any rights that would [sic] have had to such [c]laim" (NYSCEF Doc No. 152, brief by Sweet in opposition at 7, quoting NYSCEF Doc No. 111, CM agreement, § 1.1.17).

The 2018 settlement agreement between plaintiff and Ocean Grill is silent as to whether the agreed-upon sum paid by plaintiff pertained solely to Sweet's negligence, given that Ocean Grill's complaint also alleged breach of contract and other claims "unrelated to anything [Sweet] did or failed to do" (NYSCEF Doc No. 152, brief by Sweet in opposition at 12, 13). Moreover,

because Colony Specialty is providing plaintiff with defense and indemnity coverage in the *Ocean Grill* action, plaintiff has waived its right to seek recovery of any "loss to the extent covered by" Colony against Sweet (NYSCEF Doc No. 152 at 4, 14, citing Doc. No. 111, CM agreement, § 1.1.17).

Plaintiff's opposition to the cross motion and in support of its motion

Plaintiff's arguments in opposition to the cross motion and in further support of its own motion are summarized below:

New York case law provides that "the mere possibility of coverage" gives rise to the duty to defend (*see* NYSCEF Doc No. 153, affirmation of plaintiff's counsel in opposition, ¶ 16, citing *Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 66-67 [1991]). Thus, NYM's duty to defend has been triggered based on the allegations in the *Ocean Grill* complaint that the work on the project caused Ocean Grill to lose the use of the restaurant and suffer damages to its property (NYSCEF Doc No. 153, ¶ 4).

NYM errs in arguing that, because Ocean Grill's negligence cause of action was dismissed by Supreme Court, plaintiff has no basis on which to assert entitlement to a defense by NYM in the *Ocean Grill* action (*see* NYSCEF Doc No. 153, ¶ 22). Ocean Grill's complaint asserted numerous claims of tangible damage to the restaurant space and its business, and Ocean Grill submitted documents detailing the business disruptions and property damage that occurred in November and December 2014 because of the construction (*see* NYSCEF Doc No. 153, ¶ 22 [b-d], citing NYSCEF Doc No. 123, documents from *Ocean Grill* action). The documents detail instances of property damage sustained by the restaurant in November and December, 2014, and sufficiently show, as required, that the damage was not expected or intended and resulted in loss of revenues, thus triggering NYM's duty to defend (*see* NYSCEF Doc No. 153, affirmation of

plaintiff's attorney in opposition, ¶¶ 23, 35). As for *Willets Point Contr. Corp.* (75 AD2d 257), the policy exclusion cited by the Appellate Division differs from any exclusion in the CGL policy, making that case inapplicable (*see* NYSCEF Doc No. 153, ¶ 37).

NYM's claim that the project's work commenced at the time of the signing of the CM agreement in late May and early June 2014, or immediately thereafter, is not based on evidence (*see* NYSCEF Doc No. 153, ¶ 25). The NYC DOB permit was issued on August 27, 2014, and there is documentary evidence from Sweet showing that the project commenced after the CGL policy's August 20, 2014 inception date. As previously argued, if NYM's claim is that the signing date of the CM agreement reflects the commencement date of the project's work, then the court must conclude that the CGL policy is illusory and the prior work exclusion void as a matter of public policy (*see* NYSCEF Doc No. 153, ¶¶ 31-32).

Only if the court finds that NYM "has a primary and non-contributory duty to defend [plaintiff] in the *Ocean Grill* Action" should Sweet be deemed to have met its contractual obligation to "obtain and maintain" additional insured coverage on plaintiff's behalf (NYSCEF Doc No. 153, ¶ 39). If for any reason the court finds that the NYM policy does not provide coverage for plaintiff as an additional insured for Sweet's work, then it should find that Sweet breached its agreement with plaintiff (*see* NYSCEF Doc No. 153, ¶ 41). Sweet accordingly becomes obligated to pay plaintiff's defense costs in the *Ocean Grill* action (*see* NYSCEF Doc No. 153, ¶ 44).

As for notice, plaintiff "provided notice [to NYM] at least as early as January 18, 2016, on which Sweet was copied, when it demanded that [NYM] provide additional insured coverage to [plaintiff] for the *Ocean Grill* Action" (NYSCEF Doc No. 153, ¶ 42, citing Doc No. 119, tender by plaintiff to NYM). Sweet has not "demonstrated any prejudice to any alleged failure to

timely provide notice of the claim, which is a requirement for such a waiver" (NYSCEF Doc No. 153, affirmation of plaintiff's counsel in opposition, ¶ 42).

NYM's reply to plaintiff and in support of its cross motion

NYM's arguments in reply to plaintiff and in further support of its cross motion are summarized below:

The *Ocean Grill* complaint, naming only plaintiff, fails to allege a reasonable possibility that the restaurant's damages were caused in whole or in part by the acts or omissions of Sweet, and establishes as a matter of law that there is no possible factual or legal basis on which NYM is obligated to indemnify plaintiff as an additional insured under any provision of the CGL policy (*see* NYSCEF Doc No. 154, ¶¶ 8, 10-11, citing *Servidone Const. Corp.*, 64 NY2d at 424). Other than Sweet's "self-serving affidavits," plaintiff has never proffered documentary evidence, such as a notice to proceed or payroll documentation, to support its claim that work on the project began only after August 20, 2014 (*see* NYSCEF Doc No. 154, ¶ 27 [noting that plaintiff claims no such documentation exists]). For the purpose of the prior work exclusion, it is "irrelevant" whether the actual physical work at the project began after August 20, 2014 "insofar as any damages purportedly alleged by Ocean Grill derived from and/or arose out of the [CM agreement] that was dated prior to August 20, 2014" (NYSCEF Doc No. 154, ¶ 25).

Sweet was aware of the prior work exclusion in the CGL policy. NYM's underwriting file, which includes copies of the applications for insurance, "communications between Sweet's insurance broker and the underwriter, insurance binders and copies of the policy and requests for changes to the policy," shows nothing to indicate that the prior work exclusion endorsement was "improperly included or should have been removed" from the CGL policy (NYSCEF Doc No. 154, ¶ 26). The two insurance binders are dated prior to the inception of the [CGL] policy, and

"specifically reference" the prior work exclusion endorsement (*see* NYSCEF Doc No. 154, ¶ 26). Sweet, being aware of the exclusion endorsement, had the right to seek coverage from another insurer for its early work, but did not (*see* NYSCEF Doc No. 154, ¶ 26).

Even if plaintiff were found to be an additional insured, the allegations in *Ocean Grill* are based on Sweet's delay or failure to perform the CM agreement in accordance with its terms; under the GCL policy, they are claims of impaired property which are excluded from coverage under the "damage to impaired property or property not physically injured endorsement" (NYSCEF Doc No. 154, ¶¶ 33, 37; *see* NYSCEF Doc No. 140, CGL policy, § 1 [A] [2] [m]). NYM's duty to cover plaintiff as an additional insured has not been triggered (*see* NYSCEF Doc No. 154, ¶ 10, citing *Burlington Ins. Co. v New York City Trans. Auth.*, 29 NY3d 313, 323 [2017] [duty to defend is triggered where the complaint raises the possibility that the alleged accident or property damage was proximately caused by an act or omission on the part of the named insured (*see* NYSCEF Doc No. 154, ¶ 10).

Discussion

For summary judgment, the movant must "make a prima facie showing of entitlement to judgment as a matter of law" by presenting sufficient evidence in admissible form to show the absence of material issues of fact (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016]). The party opposing must "rebut the moving party's claims with factual proof" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The issue for the court is not whether the plaintiff can ultimately establish liability, but "whether there exists a substantial issue of fact in the case on the issue of liability which requires a plenary trial" (*Barr v County of Albany*, 50 NY2d 247, 254 [1980]). Facts will be viewed in the light most favorable to the non-movant (*see Vega v Restani*

Constr. Corp., 18 NY3d 499, 503 [2012]). The court's role is "limited to issue finding, not issue resolving" (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 531-532 [1991]).

In the context of commercial liability insurance coverage, the insurer's duty to defend arises from the complaint and the insurance contract (*see Fitzpatrick v American Honda Motor Co.*, 78 NY2d at 68, citing *Technicon Elecs. Corp. v American Home Assur. Co.*, 74 NY2d 66, 73 [1989]). The duty to defend is "exceedingly broad" (*see Automobile Ins. Co. of Hartford v Cook*, 7 NY3d at 131, 137 [2006] [internal quotation marks and citation omitted]). The duty to defend is separate from the duty to pay (*see Servidone Constr. Corp.*, 64 NY2d at 424). The contractual duty is triggered when the complaint's allegations against the insured fall within the scope of the risks undertaken by the insurer, regardless of how false or groundless those allegations may be (*see Seaboard Surety Co. v Gillette Co.*, 64 NY2d 304, 310 [1984]; *Automobile Ins. Co. of Hartford*, 7 NY3d at 137). It is triggered when there is "a possibility" that the underlying claim may be covered (*see BP Air Conditioning Corp.*, 8 NY3d at 715). It is "immaterial" that the complaint may also make additional claims that fall outside of the policy or fall within policy exclusions (*see B.P. Air Conditioning*, 8 NY3d at 714, citing *Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 444 [2001]). Rather than "wooden[ly]" apply "the four corners of the complaint" rule to determine coverage, the courts will require the insurer to provide a defense "when it has actual knowledge of facts establishing a reasonable possibility of coverage" (*Fitzpatrick*, 78 NY2d at 67).

An "[a]dditional insured is a recognized term in insurance contracts," and it is well-understood that an additional insured is "an entity enjoying the same protection as the named insured" (*BP Air Conditioning Corp*, 8 NY3d at 714-715, quoting *Pecker Iron Works of N.Y. v Traveler's Ins. Co.*, 99 NY2d 391, 393 [2003] [internal quotation marks omitted]). The duty to

defend the additional insured exists where "there is a reasonable possibility that [the named insured] proximately caused the injury" (*Indian Harbor Ins. Co. v Alma Tower, LLC*, 165 AD3d 549, 549 [1st Dept 2018]; *see Burlington Ins. Co. v New York City Trans. Auth.*, 29 NY at 322).

An insurer will be relieved of the duty to defend its insureds only when it can demonstrate that policy exclusions or exemptions to coverage apply in the particular case (*see Foley v Foley*, 158 AD2d 666, 668 [2d Dept 1990], citing *Seaboard Surety Co. v Gillette Co.*, 64 NY2d at 310). This is true as well for additional insureds (*see B.P. Air Conditioning Corp.*, 8 NY3d at 714-715). The insurer must "establish[] as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision" (*Allstate Ins. Co. v Zuk,* 78 NY2d 41, 45 [1991]). When there is an issue of fact as to whether a policy exclusion is applicable, summary judgment cannot be granted (*Foley,* 158 AD2d at 669).

It is clear that the CM agreement provided that, for the construction project, Sweet was to include plaintiff as an additional insured in its insurance policy, and that the CGL policy includes the provision to designate plaintiff as an additional insured. The question becomes whether plaintiff is excluded from coverage because of an endorsement or exclusion in the CGL policy.

As an initial matter, the court finds no merit in NYM's argument that, because the *Ocean Grill* complaint did not name nor refer to Sweet in its complaint, NYM is thereby absolved from its duty to provide a defense. It is not beyond reason that an aggrieved party in a construction contract would name only the building owner as a defendant, with whom it had an agreement for construction work at the property. In any event, NYM does not allege that it did not timely receive notice of Ocean Grill's claim, nor that it did not have "actual knowledge of the facts

establishing a reasonable possibility of coverage" at the time of its denial (*see Fitzpatrick*, 78 NY2d at 67).

NYM's argument that the construction project must have commenced prior to the inception of the CGL policy, apparently because plaintiff and Sweet signed the CM agreement in June 2014, is pure speculation and without basis in fact. The NYC DOB permit, dated August 27, 2014, coupled with its statements that Sweet did not start work before acquiring the permit, provide sufficient evidence to rebut NYM's unsupported claim of pre-contract work. Further, the CM agreement provided that the project's work was only to begin when plaintiff gave Sweet notice. Despite plaintiff's inability to provide a copy of its notice to Sweet of the commencement of work, NYM has provided only supposition that, by signing the contract, Sweet immediately thereafter began its work. Plaintiff's argument that the prior work exclusion is illusory becomes academic.

This court finds that not all the damages claimed by Ocean Grill were the apparent result of Sweet's breach of its agreement with plaintiff in the CM agreement. Certainly, the need to erect and place the scaffolding, hoist, and construction bridge in a manner that caused as little harm as possible can be understood to be a breach of the CM agreement. *Ocean Grill* also alleged unintended physical damage to its property, in particular, by a "flood" that caused damage to the restaurant walls and ceiling, and repair or replacement of the pipe. Since at least one of the claims asserted against plaintiff "[arose] from covered events, the insurer is required to defend the entire action" (*Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 17 [1st Dept 2009] [internal quotation marks and citations omitted]).

NYM argues that, because Supreme Court dismissed the negligence cause of action in the *Ocean Grill* action, leaving only the breach of contract and declaratory action, plaintiff has no

claim that can be covered under the CPL policy. While it is generally true that a commercial general liability insurance policy covers only claims of bodily injury and property damage, and not breach of contract or other claims (*see J.W. Mays, Inc. v Liberty Mut. Ins. Co.*, 153 AD3d 1386, 1387 [2d Dept 2017]), the analysis for purposes of insurance coverage turns on "not whether the complaint states a contract or tort theory, but whether the damage to be remedied is the faulty work or product itself or injury to person or other property" (*Royal Ins. Co. of Am. v Ru-Val Elec. Corp.*, 1996 WL 107512, *2; 1996 US Dist LEXIS 3094, *5 [ED NY March 8, 1996, No. CV-92-4911]). "The nature of [the] claims asserted in [the] complaint is to be determined based upon the facts alleged and not the conclusions which the pleader draws therefrom or upon the characterization applied to a claim by a party" (*J. Lucarelli & Sons., Inc. v Mountain Val. Indem. Co.*, 64 AD3d 856, 858 [3d Dept 2009] [internal quotation marks and citation omitted]). Ocean Grill's complaint asserted various claims of property damage, and there is no merit to NYM's argument that the mere dismissal of the negligence cause of action forecloses coverage in the *Ocean Grill* action.

Although Sweet's motion to require NYM to defend it in this action was previously granted, NYM asserts that the general rule -- that when determining entitlement to an insurance defense an additional insured need only meet the same standard as an insured -- is not applicable here. NYM argues that there are separate requirements that plaintiff as an additional insured must meet. Although NYM makes this assertion, it has not given specific examples of anything in the CGL policy that would pertain to plaintiff and not to Sweet. NYM's argument lacks persuasion.

Plaintiff's argument that were the court to rule that NYM had no duty to cover plaintiff in the underlying action, Sweet should be required to fully indemnify it, need not be addressed, given this decision.

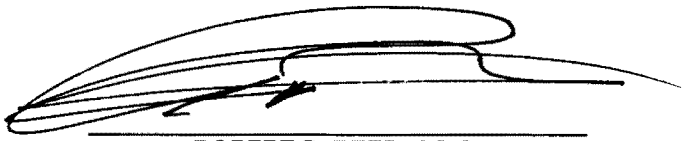
Accordingly, it is

ORDERED that plaintiff's motion is granted to the extent that NYM is directed to cover plaintiff's past defense costs in the now-settled action, and is otherwise denied; it is further

ORDERED that NYM's cross motion is denied; and it is further

ORDERED that plaintiff is to file a copy of the first amended complaint in the underlying *Ocean Grill* action, as an ancillary exhibit in this litigation; and it is further

ORDERED that the parties shall appear for a compliance conference in Part 43 on September 22, 2020 at 10:00 a.m. at which time a schedule will be set for completion of discovery and the filing of the note of issue.



8/21/2020
DATE

ROBERT R. REED, 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