

**New York Mar. & Gen. Ins. Co. v Eastman Cooke & Assoc.**

2020 NY Slip Op 32867(U)

July 10, 2020

Supreme Court, New York County

Docket Number: 152612/2014

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*

-----X  
NEW YORK MARINE AND GENERAL INSURANCE COMPANY,  
Plaintiff, INDEX NO. 152612/2014  
MOTION DATE N/A, N/A  
MOTION SEQ. NO. 002 003

- v -

EASTMAN COOKE & ASSOCIATES, MT. HAWLEY INSURANCE COMPANY  
Defendant. **DECISION + ORDER ON MOTION**

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 84, 86, 88, 90, 92, 94, 106, 107, 108, 110, 112, 113, 116  
were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 85, 87, 89, 91, 93, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 109, 111, 114, 115, 117, 118, 119, 120, 121  
were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motions are determined as follows:

This action originates in a series of incidents that occurred in a commercial leasehold located at the ground floor of 207 East 84<sup>th</sup> Street, New York, New York ("Premises"). The Premises was leased by Jennifer Chaitman ("Chaitman") and Veterinary Internal Medicine & Allergy Specialists, LLC ("VIMAC"). Although the exact relationship is not specified in the moving papers, it is undisputed that Chaitman and VIMAC leased the premises from one or more of the following entities FSM Holdings, LLC, DMZ III, LLC and SM 84<sup>th</sup> TIC, LLC and the principals of these entities are supposedly Francis Moezinia, David Moussazadeh and Samy Mahfar (collectively referred to as "Lessors").

The incidents at issue occurred between early fall 2010 and August 2012. Distilled to their essence, the incidents at issue constituted numerous significant interferences with the lessee's use and occupancy of the premises, a 24-hour veterinary clinic, and damage to property. For instance, during their occupancy Chaitman and VIMAC assert they endured multiple incidents of loss of services (including heat, toilets, electricity, phone and internet), substantial noise, flooding (including raw sewage and human waste) and insect infestations.

Most, but not all, of the alleged incidents related to a construction project located in other locations in the building containing the Premises. The construction project was commenced by another lessee at the premises, New York University ("NYU"), who contracted with Eastman Cooke & Associates, LLC ("Eastman") in 2010 and 2012 to perform significant renovations to floors three and

four, and then floor two, the one directly above the Premises. As concerns this action, Eastman obtained a commercial general liability policy of insurance from Plaintiff, New York Marine and General Insurance Company (Policy No. LP100643/2011), covering the period from April 15, 2011 to April 15, 2012. Previously, Defendant Mt. Hawley Insurance Company (“Hawley”) issued a commercial general liability policy (Policy No. MGL0170943) to Defendant Eastman which was effective on August 27, 2010.

As a result of these interferences with their leasehold and business, Chaitman and VIMAC commenced an action in Supreme Court, New York County, titled *Chaitman, et al. v Moezinia*, Index No 653037/2012 against the Lessors wherein she asserted causes of action for injunctive relief, a declaration Defendants constructively evicted Plaintiff and breach of contract. In the complaint, Plaintiffs’ demanded relief included claims for compensatory and punitive damages. Lessor Defendants in the Chaitman action commenced a third-party action against NYU and Eastman alleging, *inter alia*, claims of contractual and common-law indemnification as well as breach of contract for failure to obtain insurance.

Defendants and Third-Party Defendants in the Chaitman action tendered their defenses to Hawley and Plaintiff. Apparently, Hawley committed to defend these parties and retained counsel upon its understanding Plaintiff would share in the costs equally. By letter to Eastman, Plaintiff agreed to partake in the defense under a reservation of the right to disclaim. Subsequently, Plaintiff commenced this action and Hawley claims that Plaintiff has not participated in the defense.

In this action, Plaintiff pled eight causes of action for declaratory judgment and sought as relief, *inter alia*, a declaration that Plaintiff is not is not obligated to defend or indemnify Eastman in the Chaitman action and are entitled to reimbursement of its expenses in defending Eastman in the underlying action. Defendant Hawley counterclaimed for declaratory relief that Plaintiff is estopped from denying a defense to Eastman, damages of 50% of the defense costs in the Chaitman action and for attorney’s fees and expenses of this action.

Now, Defendant Hawley moves for summary judgment on its counterclaims. Plaintiff moves by separate motion for summary judgment that it has no duty to defend or indemnify Eastman and for dismissal of Hawley’s counterclaims.

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]).

As to this action, “before an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case” (*Seaboard Surety Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]). “Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction” (*id*). Any ambiguity in an exclusionary clause is construed most strongly against the insurer (*see Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983]). Unambiguous policy provisions, on the

contrary, must be accorded their plain and ordinary meaning (*see Sanabria v American Home Assur. Co.*, 68 NY2d 866, 868 [1986]).

Plaintiff posits two arguments to support that it is not required defend or indemnify Eastman or reimburse Hawley. First, Plaintiff avers that any “property damage” involved in the Chaitman action occurred outside the policy period. Second, it asserts that Chaitman’s claimed damages for constructive eviction and breach of contract are not covered under the policy.

Defendant Mt. Hawley disputes these arguments and argues in support of its motion, *inter alia*, that allegations in the complaint compel Plaintiff to defend, Plaintiff’s coverage is co-primary to Mt. Hawley’s, that Plaintiff should be estopped from denying coverage, and that Mt. Hawley is entitled to attorney’s fees and expenses incurred defending this action.

It has been repeatedly observed that “the primary obligation of an insurer is to provide its insured with a defense” (*Greenwich Ins. Co. v City of New York*, 122 AD3d 470 [1<sup>st</sup> Dept 2014], quoting *Recant v Harwood*, 222 AD2d 372, 373, 635 NYS2d 231 [1<sup>st</sup> Dept 1995]) and that the duty to provide a defense is “exceedingly broad” (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 37 [2010]). Because of the scope of that obligation, “a liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence,” even when “facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered” (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63 [1991]). As such, the duty to defend encompasses “groundless, false or baseless . . . suit[s]” (*Village of Brewster v Virginia Sur. Co., Inc.*, 70 AD3d 1239, 1241 [3<sup>rd</sup> Dept 2010]) and an insurer may be contractually bound to defend “even though it may not ultimately be bound to pay, either because its insured is not factually or legally liable or because the occurrence is later proven to be outside the policy’s coverage” (*Fitzpatrick v American Honda Motor Co.*, *supra* at 65).

“The duty to defend is not triggered, however, when the only interpretation of the allegations against the insured is that the factual predicate for the claim falls wholly within a policy exclusion” (*Yangtze Realty, LLC v Sirius Am. Ins. Co.*, 90 AD3d 744, 744-745 [2<sup>nd</sup> Dept 2011] [internal quotation marks omitted]; *see also Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45 [1991]). In making the analysis, the “court should not attempt to impose the duty to defend on an insurer through a strained, implausible reading of the complaint ‘that is linguistically conceivable but tortured and unreasonable’” and “a court may look to judicial admissions in the insured’s responsive pleadings in the underlying tort action or other formal submissions in the current or underlying litigation to confirm or clarify the nature of the underlying claims” (*Northville Indus. Corp. v Nat’l Union Fire Ins. Co.*, 89 NY2d 621, 635 [1997][internal citations omitted]). Ultimately, to avoid defending an action, the insurer bears the heavy burden of showing that the claim is not even potentially covered (*see United States Fid. & Guar. Co. v U.S. Underwriters Ins. Co.*, 194 AD2d 1028, 1028-1029 [3<sup>rd</sup> Dept 1993]).

In the present matter, the four corners of the complaint clearly place the Chaitman action within the contractual responsibilities of Plaintiff to provide a defense to Eastman (*see Greenwich Ins. Co. v City of New York*, *supra*). In paragraphs 45 through 65 of their complaint, Chaitman and VIMAS allege occurrences and resulting damages during the policy period that were expressly or impliedly attributable to the actions of Eastman. Contrary to Plaintiff’s assertion, the bill of particulars and deposition testimony proffered do not satisfy movant’s substantial burden that the allegations against Eastman are not potentially covered (*see General Accident Ins. Co. of Am. v Idbar Realty Corp.*, 229 AD2d 515 [2<sup>nd</sup> Dept 1996]; *Framapac Delicatessen v. Aetna Cas. & Sur. Co.*, 249 AD2d 36 [1<sup>st</sup> Dept 1998]). The

proof does not demonstrate that the liability and damages did not "occur" within the policy period, but only that Chaitman and VIMAS have been compensated for those damages from another source. At most, it would mean the action was, perhaps, meritless as to those claims which is definitively not a basis to refuse a defense (see Village of Brewster v Virginia Sur. Co., Inc., supra). Moreover, a determination regarding the scope of the damages in the underlying action is properly made by motion therein and not in the present action for declaratory relief (see Axis Surplus Ins. Co. v GTJ Co., Inc., 139 AD3d 604 [1st Dept 2016]).

Plaintiff's assertion that the damages claimed for constructive eviction and breach of contract do not trigger coverage are belied by the express terms of the policy. "Property Damage" is defined under Section V [17] as "[p]hysical injury to tangible property, including all resulting loss of use of that property." Here, Chaitman and VIMAS have alleged physical damage to tangible property, the leasehold, and resultant loss of use, to wit constructive eviction. To the extent that Plaintiff argues that the damages for loss of use may have been incurred outside the policy period, the above definition further provides that "[a]ll such use shall be deemed to occur at the time of the physical injury that caused it". Thus, since the complaint arguably states claims for loss of use of the leasehold connected to events attributable to Eastman that occurred during the policy period, a defense is required.

However, given the unresolved status of the Chaitman action and the issues of fact remaining therein the court cannot conclude on the proffered papers that Plaintiff is required to indemnify Eastman for any damages in the underlying litigation (see Vargas v City of New York, 158 AD3d 523 [1st Dept 2018]).

As both the policies issued by Plaintiff and Mt. Hawley contain reciprocal other insurance clauses purporting to be excess to the other, these sections cancel one another out and, for the purposes of the underlying defense, the policies are co-primary and the insurers are required to share defense costs in the underlying action (see Kel-Mar Designs, Inc. v Harleysville Ins. Co. of N.Y., 127 AD3d 662 [1st Dept 2015]). Defendants are also entitled to recovery of half of the attorney's fees and defense costs it has incurred in the Chaitman action (see Kookmin Best Ins. Co., Ltd. v Seneca Ins. Co., \_\_\_ Misc3d \_\_\_, 2020 NY Slip Op 31690; see also Madison 96th Assoc., LLC v 17 E. Owners Corp., 117 AD3d 482, 482-483 [1st Dept 2014]; City of New York v Endurance Am. Ins. Co., 98 AD3d 900, 901 [1st Dept 2012]).

Based on the foregoing, Plaintiff's motion for summary judgment is denied and Defendants' motion is granted to the extent that it is

ADJUDGED and DECLARED that Plaintiff New York Marine and General Insurance Company is required to defend Eastman Cooke & Associates, LLC in the action titled Chaitman, et al. v Moezinia, Index No 653037/2012, to contribute equally to the costs thereunder and to reimburse Mt. Hawley Insurance Company for attorney's fees and defense costs incurred in the Chaitman action to date.

7/10/2020  
DATE

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

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: