Certain Underwriters at Lloyd's London v Utica First Ins. Co.
2021 NY Slip Op 30117(U)
January 8, 2021
Supreme Court, New York County
Docket Number: 651373/2019
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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CERTAIN UNDERWRITERS AT LLOYD'S LONDON as subrogee of MICHAEL BORRICO, and MICHAEL BORRICO individually,

Plaintiffs,

- v -

UTICA FIRST INSURANCE COMPANY,

Defendant.

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INDEX NO. 651373/2019

MOTION DATE 10/03/2019, 11/20/2019

MOTION SEQ. NO. 002 003

DECISION, ORDER, AND JUDGMENT

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 73, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 109, 110, 111

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 112, 113, 114, 115, 120

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, and after oral argument, it is ordered that defendant's motion to dismiss (seq. no. 002) and plaintiffs' motion for summary judgment (seq. no. 003) are decided in accordance with the following memorandum.

BACKGROUND[1]

Defendant Utica Insurance Company ("Utica") issued a commercial general liability policy of insurance (NYSCEF Doc. No. 9) to non-party Blueline Construction Group Corp. ("Blueline"). By the terms of the policy, Utica agreed to indemnify Blueline for sums it would be obligated to pay as damages because of property damage caused by Blueline. By the terms of

[1] The facts are derived from the amended complaint (NYSCEF Doc. No. 49) to the extent not contradicted by testimonial or documentary evidence adduced during the pendency hereof.

the policy, Utica further agreed to defend Blueline against any suit in which damages were sought on account of such property damage.

Plaintiff Michael Borrico ("Borrico") is a judgment creditor of Blueline. He owned the real property and structures located at 21 Old Country Road, Water Mill, New York (the "premises"). Borrico retained Blueline to perform demolition in connection with said structures. On or about February 11, 2015, during the course of Blueline's demolition work, the premises sustained extensive damage due to a gas explosion emanating from the basement area where a Blueline employee was cutting gas pipes. Blueline submitted an insurance claim to Utica, notifying it of the incident and requesting that Utica provide defense and indemnification in connection therewith. By correspondence to Blueline dated March 9, 2015, Utica disclaimed coverage for the claim.

Plaintiff Certain Underwriters at Lloyd's London ("Underwriters") is an association of insurance underwriters who subscribe to policies of insurance each for his/her/its proportional share. Underwriters issued a policy of insurance to its subrogor, Borrico, on a surplus line basis. In July 2016, Underwriters and Borrico commenced an action against Blueline titled *Certain Underwriters at Lloyd's London a/s/o Michael Borrico, and Michael Borrico individually v Blueline Constr. Group Corp.* (index No. 156031/2016 [Sup Ct NY County]) (the "underlying property damage action"), alleging that plaintiffs were entitled to judgment against Blueline as a result of its acts of omission or commission which caused property damage to the premises. Utica was aware of the action and did not assign defense counsel on account of its disclaimer of coverage. Blueline, for its part, never appeared in that action. By correspondence dated August 17, 2016, Utica again disclaimed coverage to Blueline, referencing an Explosion Hazard exclusion in its policy as a basis for its disclaimer (which exclusion will be dealt with in detail

hereinbelow). By order dated March 23, 2017, the court in the underlying property damage action granted plaintiffs' motion for a default judgment against Blueline. A damages inquest was conducted on May 22, 2018, in the underlying property damage action resulting in a judgment dated August 22, 2018, per Hon. Ira Gammerman, J.H.O. (the "Judgment"), in favor of plaintiffs, separately, as follows: $3,516.492.28 for Borrico; and $316,145.24 for Underwriters as subrogee of Borrico (NYSCEF Doc. No. 24). By correspondence dated September 5, 2018, Utica acknowledged the Judgment and reiterated its disclaimer to Blueline. On September 7, 2018, plaintiffs served a copy of the Judgment with Notice of Entry upon Blueline. Plaintiffs also served a Demand Pursuant to Insurance Law § 3420 on both Utica and Blueline. The Judgment, to date, remains completely unpaid.

The amended complaint seeks, in the first cause of action, a declaratory judgment declaring that Utica must indemnify Blueline with regard to the underlying property damage action, and that, as a consequence, Utica must satisfy the Judgment up to the limits of the Utica policy.

The second cause of action seeks what are cast as "consequential damages, in excess of the limits of the UTICA policy" (amended complaint ¶ 37) for Utica's failure to defend and indemnify Blueline, leading, allegedly, to Blueline's cessation of its business. This cause of action alleges that "[s]uch damages were within the contemplation of the parties as a probable result of a breach . . ." (*Id.*, ¶ 35.)[2]

[2] The second cause of action will be dealt with in more detail at a further point in this decision. For now, though, the court notes that Blueline is not a party in any action against Utica involving the underlying property damage action; nor has Blueline assigned any rights it might have against Utica to the plaintiffs. In sum, no cognizable theory has been proffered by plaintiffs that could enable them to sue Utica on behalf of Blueline for any alleged injury to Blueline.

STANDARD OF REVIEW

Motion to Dismiss

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). When reviewing such a motion, the court must "accept the facts as alleged as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.*). Ambiguous allegations must be resolved in the plaintiff's favor, and the court's review is limited to the legal sufficiency of the plaintiff's claims (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of "bare legal conclusions" is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied sub nom Spiegel v Rowland*, 552 US 1257 [2008]) and "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

A motion to dismiss based on documentary evidence under CPLR 3211 (a) (1) can be granted "only where the documentary evidence utterly refutes plaintiff's factual assertions, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Motion for Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-*

Stephenson v Waisman, 39 AD3d 303, 306 [1st Dept 2007]). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [internal quotation marks and citation omitted]). Upon proffer of evidence establishing a *prima facie* case by the movant, the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

DISCUSSION

Whether the Explosion Hazard Exclusion of the Policy Applies

Defendant has moved to dismiss the amended complaint, also styled as a motion for summary judgment, on several grounds – one being, the assertion that a certain exclusion contained within the Utica policy exempts it from coverage responsibility in the underlying property damage action. That exclusion is called the "Explosion Hazard" Exclusion. The policy first defines the term "Explosion Hazard" as "property damage arising out of blasting or explosion" (NYSCEF Doc. No. 9 at 29 of 59). In other words, the Utica policy excludes from coverage any property damage caused by explosion (*see, id.* ["This insurance does not apply to property damage included within the Explosion Hazard . . ."]). Naturally, this case does involve an explosion. However, there is a special carve-out which adds back coverage for certain types of explosions; to wit, "Explosion Hazard does not include property damage arising out of the explosion of air or steam vessels, ***piping under pressure***, prime movers, machinery or power transmitting equipment" (*id.* [emphasis added]). In other words, explosions arising from "piping under pressure" *are* to be included in coverage, notwithstanding the general exclusion in the

policy for "explosion."

Under New York law, insurance policies that are "clear and unambiguous . . . must be given their plain and ordinary meaning, and courts must refrain from rewriting the agreement" (*United States Fidelity & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986]). However, in the case of an ambiguity in an insurance policy clause, the clause will be construed in favor of the insured and against the carrier which drafted the policy (*see, Mazzuoccolo v Cinelli*, 245 AD2d 245, 247 [1st Dept 1997]; *Essex Ins. Co. v Vickers*, 103 AD3d 684, 688 [2d Dept 2013]; *Nick's Brick Oven Pizza, Inc. v Excelsior Ins. Co.*, 61 AD3d 655, 657 [2d Dept 2009];[3] *City of N.Y. v Evanston Ins. Co.*, 39 AD3d 153, 156 [2d Dept. 2007]).

The parties in this case disagree on how to construe the carve-out clause, especially in light of the undisputed fact that the explosion involved in this case arose from a Blueline employee's *cutting into* the gas pipe. Defendant Utica argues that the policy's use of the terms "piping under pressure" is unambiguous and must be exclusively read to mean a gas pipe explosion which happened on its own, without human intervention that caused gas to escape from the pipe into an area where it combusted while exposed in open air. As Utica puts it, "*It is the piping that must explode in order for the exception [to the exclusion] to be invoked*" (NYSCEF Doc. No. 93 at 14 [emphasis in original]). In fact, defendant is so convinced of the validity and exclusivity of this construction, that it describes the facts of this case as "fall[ing] squarely within the plain language of the Explosion Hazard Exclusion, and coverage for the same is excluded as a matter of law" (NYSCEF Doc. No. 68 at 11). Confident in that construction, defendant cites the court to the well-established legal principle that insurance policies that are "clear and unambiguous . . . must be given their plain and ordinary meaning, and

[3] "Whether a provision in an insurance policy is ambiguous is a question of law for the court to determine" (*Nick's Brick Oven Pizza, Inc. v Excelsior Ins. Co.*, 61 AD3d 655, 656 [2d Dept 2009]).

courts must refrain from rewriting the agreement" (*United States Fidelity*, 67 NY2d at 232).

Plaintiff adamantly disagrees with Utica's interpretation of the Explosion Hazard Exclusion and argues that an equally reasonable construction of the phrase exists. As plaintiffs put it: "Utica's underwriters utilized language that, at best, allows the clause to be interpreted in two distinct ways: First, that it applies when pressurized gas leaks from the pipe and explodes, and second, when the explosion happens within the pipe" (NYSCEF Doc. No. 85 at 7). Another way of expressing plaintiffs' point is, all the clause says is "piping under pressure." It does not specify where that pressure comes from – whether it comes from the force of gas build-up within the pipe, or perhaps also through the pressure of a construction worker cutting through the wall of the pipe, which is precisely the factual scenario presented in the underlying property damage action. Given the broader stylistic nature of the clause, without limitation to a particular type of "pressure," plaintiff argues that, at a bare minimum, the clause is ambiguous (and quite possibly, that the clause definitely intended a broader scope of "pressure").

This court finds the plaintiff's position compelling. This clause is very far from being unambiguous so as to warrant a definite construction which excludes man-induced pressure, such as the actions done by the Blueline employee in cutting the gas pipe. At the very least, the clause is ambiguous, bringing into direct application the well-settled rule of insurance policy construction that, in the case of an ambiguity in an insurance policy clause, the clause will be construed in favor of the insured and against the carrier which drafted the policy (*see, Mazzuoccolo, supra*, 245 AD2d at 247; *Essex, supra*, 103 AD3d at 688; *Nick's Brick Oven Pizza, supra*, 61 AD3d at 657; *City of N.Y.*, 39 AD3d at 156). For Utica to prevail, it must show that its interpretation of the language in question is the only possible interpretation (*see, City of N.Y., supra*). As plaintiff cogently points out, that is simply not the case here. Nothing prevents a

reader of the clause "piping under pressure" from reasonably understanding that to include situations where: (i) already built-up pressure within the pipe pushes gas out through a cut in the wall of the pipe, which explodes when it comes into contact with atmospheric elements; or (ii) any type of gas explosion caused by the "pressure" of a workman's saw or knife cutting into the wall of the pipe.

Pursuant to the rules governing construction of insurance policies, the ambiguity presented by the broader phrase "piping under pressure"[4] – containing no qualifier as to what type of pressure is intended – militates against the insurer, Utica (*see, e.g., Nick's Brick Oven Pizza, supra,* at 656 ["An exclusion from coverage must be specific and clear in order to be enforced, and an ambiguity in an exclusionary clause must be construed most strongly against the insurer"] [internal quotation marks omitted]). Consequently, Utica's motion to dismiss on the basis of its narrow interpretation of the Explosion Hazard Exclusion is denied.

Whether there Exists a Lack of Standing to Prosecute the Instant Claims

Defendant asserts a separate ground for dismissal; to wit, that Underwriters lacks standing to pursue an action in respect of that part of the Judgment in the underlying property damage action awarding damages to Borrico. To give this context, the Judgment (NYSCEF Doc. No. 24) sets forth two separate decretal paragraphs: (i) a first one awarding judgment to Borrico against Blueline in the amount of $3,516,492.28 (the amount sued for in this action); and (ii) a second decretal paragraph awarding judgment to Underwriters, as subrogee of Borrico, against Blueline in the amount of $316,145.24. Defendant argues that because this action only focuses on the Borrico award contained within the Judgment, Underwriters would possess no

[4] If it, in fact, be ambiguous. Plaintiffs have suggested that the clause, broadly phrased as it is, is definite in its inclusion of the type of pressure involved in the underlying property damage action. This court need not go that far in light of plaintiff's correct observation that the clause is, at a bare minimum, ambiguous.

standing to pursue a claim for that. While the court agrees with that notion, it is of no substantial practical effect at the present stage of the litigation. It might have been different prior to the amendment of this action to add Borrico, individually, as a party plaintiff (*compare* NYSCEF Doc. No. 1 [original complaint] *with* NYSCEF Doc. No. 48 [amended complaint]). That amendment was permitted by order of this court dated September 12, 2019 (NYSCEF Doc. No. 53). Seeing as the amended complaint includes Borrico, individually, as a party plaintiff, the defendant's assertions as to Underwriters' lack of standing to sue for Borrico's award do not affect Borrico's ability to pursue the claims because Borrico, most definitely, has standing to sue in respect of his own award contained in the Judgment. Therefore, in view of the court's earlier finding that the Explosion Hazard Exclusion does not apply, coupled with the instant finding that Borrico naturally possesses standing to sue Utica with regard to his own Judgment award against Blueline (Insurance Law § 3420), there is no impediment to this case proceeding as a viable claim by Borrico, individually, against Utica.

The court does concur with defendant's observation that, in the aftermath of two versions of the complaint in this action – the original complaint filed in March 2019 and the amended complaint filed in September of that year – there still appears to be no claim asserted in connection with Underwriters' Judgment award (i.e., $316,145.24). The amended complaint contains the same *ad damnum* as the original complaint, which is the Borrico Judgment award (i.e., $3,516,492.28). The Judgment itself identifies Underwriters as Borrico's subrogee only in relation to the Underwriters Judgment award ($316,145.24) – which is found nowhere in the *ad damnum* of this action, even after two iterations of the complaint. Therefore, the court grants this prong of defendant's motion to dismiss the amended complaint to the extent of Underwriters as a party plaintiff.

Whether Borrico is Entitled to an Amount Exceeding the Policy Limit

The amended complaint asserts two causes of action. The first cause of action asks for two items of relief. One: a declaratory judgment requiring Utica to indemnify Blueline, and, by virtue of Insurance Law section 3420, allowing Borrico to gain the benefit of such indemnification because said section permits a direct claim against Blueline's insurer – Utica; and Two: a declaratory judgment that Utica must satisfy the Judgment against Blueline "up to the limits of the Utica policy," i.e., $1,000,000. The second cause of action, cast as one for "consequential damages," asks for an award of damages beyond the policy limit on account of Utica's disclaimer of an obligation to defend Blueline in the underlying property damage action, alleged to have caused Blueline's cessation of business operations.

Per the Legislature, the amount recoverable in a direct action by a judgment creditor against an insurer of the judgment debtor, under Insurance Law § 3420, is explicitly limited to an amount "not exceeding the amount of the applicable limit of coverage under such policy or contract" (Insurance Law § 3420 [a] [2]). Based upon this language, an insurer is not required to pay to a judgment creditor of its insured any part of the judgment amount which exceeds the insurer's policy limits (*see, Smith v Allstate Ins. Co.*, 38 AD3d 522 [2d Dept 2007]; *Pollack v Scottsdale Ins. Co.*, 143 AD3d 794 [2d Dept 2016], *lv denied* 29 NY3d 908 [2017]); *Giraldo v Washington Intern. Ins. Co.*, 103 AD3d 775, 776 [2d Dept 2013] ["an injured person who has obtained an unsatisfied judgment against a tortfeasor may commence an action against the tortfeasor's insurer to recover the amount of the unsatisfied judgment, up to the policy limit"]; *Bache & Co., Inc. v Liberty Mut. Ins. Co.*, 47 AD2d 885 [1st Dept 1975]).

Here, the applicable limit of liability of the Utica policy is $1,000,000. Plaintiffs' counsel has, in fact, acknowledged in papers submitted earlier on in this action that plaintiffs'

recovery is limited to the limits of liability (*see*, NYSCEF Doc. No. 26 ¶ 2 ["to the extent that the underlying judgment is in excess of the limit of liability specified in the policy Utica issued to Blueline, affirmant agrees that Utica's liability is $1,000,000"]). To be sure, Insurance Law § 3420 permits a direct action against an insurer, but only for the amount of a judgment obtained against the insurer's insured, and only for an amount not exceeding the applicable limits of liability. Significantly, plaintiffs have not alleged, let alone demonstrated, that Blueline has authorized or assigned to them the right to assert a claim against Utica for extra-contractual damages which might exceed the limits of the Utica policy.

The second cause of action for "consequential damages" against Utica invokes the notion of breach by Utica of its "covenant of good faith and fair dealing" with Blueline (*see*, NYSCEF Doc. No. 49 ¶ 34). Consistent with the legislative focus on policy coverage limits noted in Insurance Law § 3420, any claim for breach of an insurer's covenant of good faith and fair dealing is personal to the insured. It is not included in the largesse granted a judgment creditor in Insurance Law § 3420 to be allowed to pursue a direct action against an insurer with which it naturally shares no privity of contract with. Such a claim cannot be asserted by an insured's judgment creditor absent an assignment of such claim from the insured to its judgment creditor (*see, Corle v Allstate Ins. Co.*, 162 AD3d 1489 [4th Dept 2018] [prior to obtaining the insured's assignment of any insurance bad faith claim, the insured's judgment creditor did not have standing to assert it]).[5]

[5] Plaintiffs draw the attention of this court to a decision and order issued by a court of concurrent jurisdiction herewith in an unrelated 2009 case titled *Diamond State Ins. Co. v Utica First Ins. Co.* (N.Y. Slip Op. 32651[U], 2009 WL 4009122 [Sup Ct NY County 2009]), which allowed a judgment creditor to obtain an award of pre-judgment and post-judgment interest against a judgment debtor's insurer beyond the policy limit. While that decision is, respectfully, not binding on this court, it is still worth noting that said case involved an assignment by the judgment debtor of "all its rights of defense and indemnification against Utica under its policy, to" the judgment creditor's insurer. That, of course, could vest the assignee with complete privity, as measured by the contractual relationship between the judgment debtor and its insurer. In such case, limitations found in Insurance Law § 3420 might not hinder a judgment creditor's ability to seek damages from the judgment debtor's insurer beyond the policy

For all the foregoing reasons, it is

ORDERED that defendant's motion to dismiss is granted to the extent of any claims asserted by plaintiff Certain Underwriters at Lloyd's London as subrogee of Michael Borrico, and to the extent of dismissing the second cause of action for consequential damages, and is otherwise denied; and it is further

ORDERED that plaintiff Michael Borrico's motion for summary judgment is granted to the extent of his first cause of action for declaratory relief up to the limits of the Utica First Insurance Company policy of insurance relevant to this action; and it is accordingly,

ORDERED and ADJUDGED that plaintiff Michael Borrico, individually, shall have judgment against defendant Utica First Insurance Company in the amount of $1,000,000.00, and that plaintiff Michael Borrico, individually, have execution therefor.

This will constitute the decision and order of the court.

ENTER:

1/8/2021
DATE

LOUIS L. NOCK, J.S.C.

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

limit. However, as noted in the within textual discussion, there is no evidence that Blueline assigned its rights to defense and indemnification under the Utica policy to Borrico. Absent the kind of privity that only such an assignment can provide, Borrico must satisfy himself, in this action, with the limited opportunity afforded him under Insurance Law § 3420 to pursue a remedy against Utica up to, and not exceeding, the policy limit of $1,000,000.