

**Kookmin Best Ins. Co., LTD v Cambridge Mut. Fire
Ins. Co.**

2021 NY Slip Op 30134(U)

January 14, 2021

Supreme Court, Kings County

Docket Number: 522354/17

Judge: Dawn M. Jimenez-Salta

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At an IAS Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of January, 2021.

P R E S E N T:

HON. DAWN M. JIMENEZ-SALTA

Justice.

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KOOKMIN BEST INSURANCE COMPANY, LTD
(US branch) f/k/a LEADING INSURANCE GROUP
INSURANCE COMPANY, LTD,

Plaintiff(s),

- against -

Index No. 522354/17

Mot. Seq. 3 and 4

CAMBRIDGE MUTUAL FIRE INSURANCE
COMPANY,

Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

64-76 79-83
80-83
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Upon the foregoing papers in this insurance coverage dispute, plaintiff Kookmin Best Insurance Company, Ltd. (US branch) f/k/a Leading Insurance Group Insurance Company, Ltd. (KBIC) moves (in motion sequence [mot. seq.] three) for an order, pursuant to CPLR 3212, granting it summary judgment: (1) declaring that defendant Cambridge Mutual Fire Insurance Company (Cambridge) is obligated to provide nonparty L&C 6417 18th Ave. Inc. (L&C) with a defense and indemnity in the underlying personal injury action commenced by Marylou Levenhar (Levenhar Action)

on a primary basis, and (2) declaring that Cambridge must reimburse KBIC for all costs, fees and disbursements that it paid on L&C's behalf in the Levenhar Action.

Cambridge cross-moves (in mot. seq. four) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and declaring that it is not obligated to provide a defense and indemnity in the Levenhar Action.

Background

Levenhar's Accident

This insurance coverage dispute arises out of a December 8, 2013 accident in which Marylou Levenhar (Levenhar) was allegedly injured when she tripped and fell on the metal cellar door on the public sidewalk abutting the premises at 6417 18th Avenue in Brooklyn (Premises).

The Compustar Lease

L&C owns the Premises. Prior to Levenhar's accident, L&C leased the ground floor and basement of the Premises to L&L 18th Ave. Computer Inc. d/b/a Compustar (Compustar), pursuant to a March 1, 2010 lease (Compustar Lease). Paragraph 8 of the Compustar Lease provides, in relevant part, that:

"Tenant agrees, at Tenant's sole cost and expense, to maintain commercial general liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises, effective from the date Tenant enters into possession of the demised premises and during the term of this lease. Such insurance shall be in an amount and with carriers acceptable to Owner. Such policy or policies shall be delivered to Owner. . . ."

The Cambridge Policy

Cambridge issued a businessowners insurance policy to Compustar, effective from October 23, 2013 through October 23, 2014 (Cambridge Policy). The Cambridge Policy contains an endorsement (Form BP0402) entitled "ADDITIONAL INSURED – MANAGERS OR LESSORS OF PREMISES," which provides, in relevant part:

- "A. The following is added to Paragraph C. WHO IS AN INSURED in the Businessowner Liability Coverage Form:
4. The person or organization shown in the Schedule is also an insured, *but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule*" (emphasis added).

A Declaration in the Cambridge Policy identifies L&C as the "additional insured" under the foregoing endorsement.

The Cambridge Policy, under Section H of the "Businessowners Common Policy Conditions" entitled "Other Insurance," provides:

"H. Other Insurance

1. If there is other insurance covering the same loss or damage, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable Limit of Insurance.
2. Business Liability Coverage is excess over any other insurance that insures for direct physical loss or damage.
3. When this insurance is excess, we will have no duty under Business Liability Coverage to defend any claim or 'suit' that any other insurer has a duty to defend. If no other insurer defends, we will undertake to do so; but we will be entitled to the insured's rights against all those other insurers."

The KBIC Policy

KBIC issued a commercial liability policy to L&C, effective from September 10, 2013 through September 10, 2014 (KBIC Policy). Section IV, paragraph 4 of the KBIC Policy, entitled "Other Insurance," provides, in relevant part:

"4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph b. below applies. . . .

b. Excess Insurance

(1) This insurance is excess over:

* * *

(b) Any other primary insurance available to you covering liability for damages arising out of the premises . . . for which you have been added as an additional insured by attachment of an endorsement.

(2) When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any 'suit' if any other insurer has a duty to defend the insured against that 'suit.' If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers."

The Levenhar Action¹

On October 20, 2014, Levenhar and her husband commenced the Levenhar Action against L&C, Compustar and others, alleging that L&C owned, operated, maintained,

¹ See *Levenhar, et ano. v The City of New York, et al.*, Sup Ct Kings County index No. 14913/14.

managed and controlled the Premises and the sidewalk which contained metal cellar doors (Levenhar Action complaint at ¶¶ 16-30). The Levenhar Action complaint asserts a cause of action against L&C, Compustar and the other defendants for negligence:

“[o]n or about the 8th day of December 2013, the plaintiff, **MARYLOU LEVENHAR**, was lawfully and properly traversing upon the aforesaid premises, when she was caused to trip and/or slip and fall, and otherwise be precipitated to the ground, thereby causing [her] to sustain severe and serious personal injuries, due to the negligence of the defendants, in the ownership, operation, maintenance, management, and control of the above said premises” (*id.* at ¶ 61).

At her deposition, Levenhar testified that she tripped on a cellar door hinge in front of the store at the Premises while she was walking on the public sidewalk. Levenhar’s husband, Julius Levenhar, asserted a derivative claim against L&C, Compustar and the other defendants for loss of consortium (*id.* at ¶¶ 69-70).

This Declaratory Judgment Action

On November 16, 2017, KBIC commenced this declaratory judgment action against Cambridge by filing a summons and a complaint seeking a declaration that Cambridge has a duty to provide L&C with a defense and indemnification in the Levenhar Action. The complaint asserts two causes of action for: (1) a judgment declaring that Cambridge is required to defend and indemnify L&C in the underlying action, and (2) a judgment declaring that Cambridge must reimburse KBIC for the costs, fees and disbursements that it paid on L&C’s behalf in the Levenhar Action.

On January 17, 2018, Cambridge answered the complaint, denied the material allegations therein and asserted affirmative defenses.

On March 18, 2020, KBIC filed a note of issue and a certificate of readiness for trial indicating that discovery was complete.

KBIC's Instant Summary Judgment Motion

KBIC now moves, once again,¹ for summary judgment granting the relief sought in the complaint based on the terms of the Compustar Lease, the Cambridge Policy and the KBIC Policy. KBIC submits a certified copy of the Compustar Lease and argues that it “explicitly required Compustar to procure general liability insurance on L&C’s behalf.” KBIC’s summary judgment motion is supported by an affidavit from KBIC’s Claims Litigation Supervisor, Frank Rodriguez, who has authenticated the KBIC Policy.

KBIC argues that Cambridge has a duty to defend and indemnify L&C in the Levenhar Action based on the additional insured endorsement in the Cambridge Policy which extends coverage to L&C “with respect to liability arising out of ownership, maintenance or use of that part of the premises leased to [Compustar] . . .” KBIC asserts that Levenhar’s accident on the sidewalk abutting the leased Premises arises out of Compustar’s “ownership, maintenance or use” of the leased Premises, as a matter of law. KBIC also argues that Cambridge’s coverage obligation to L&C is primary to KBIC’s coverage obligation based on the “other insurance” clause in the KBIC Policy.

Cambridge's Opposition and Summary Judgment Cross Motion

Cambridge, in opposition and in support of its summary judgment cross motion, argues that the Compustar Lease only requires Compustar to procure insurance on behalf of L&C regarding “claims for bodily injury . . . occurring in or upon the demised

¹ KBIC previously moved (in mot. seq. two) for summary judgment, but the motion was denied because KBIC submitted and relied upon an unauthenticated copy of the Compustar Lease.

premises” and the Compustar Lease defines the “demised premises” as the “Ground Floor Store and Basement” of the Premises. Cambridge argues that the metal cellar doors on the public sidewalk adjacent to the Premises are not included in the Compustar Lease’s definition of the “demised premises.”

Cambridge further contends that the Compustar Lease is ambiguous because paragraph 4 only requires Compustar to make “nonstructural” repairs to the sidewalk, while paragraph 30 obligates Compustar to make “all repairs and replacements” to the sidewalk. Cambridge notes that neither of those paragraphs of the Compustar Lease “expressly address the duty to make structural repairs to the metal cellar doors . . .” Cambridge argues that “[a]t a minimum, the terms and definitions of the lease agreement in question and [the] Cambridge Mutual insurance policy create genuine questions of material facts as to any purported duty to defend and indemnify . . .” Cambridge also argues that the “Other Insurance” clauses in the Cambridge and the KBIC Policies “cancel each other out” and, thus, KBIC and Cambridge “must apportion the costs of defending and indemnifying” L&C.

KBIC, in reply and in opposition to Cambridge’s cross motion, argues that “New York courts have repeatedly held, for purposes of interpreting identical additional insured endorsements, that an accident occurring on the abutting sidewalk arises out of the ‘ownership, maintenance or use’ of the leased premises as a matter of law[,]” “regardless of the tenant’s obligations to repair the sidewalk under the lease agreement.” Regarding the priority of coverage, KBIC argues that when Compustar agreed in the Compustar Lease to procure general liability insurance for L&C as an additional insured, it agreed that coverage would be primary, as a matter of law.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment 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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

“An insurer’s duty to defend its insured is exceedingly broad” (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 15 NY3d 34, 37 [2010]), and “is broader than the duty to indemnify” (*Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264 [2011]). “If a complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend” (*Regal Constr. Corp.*, 15 NY3d at 37). The “exceedingly broad” duty to defend “applies equally to additional insureds and named insureds” (*see id.* at 37).

“Under New York law, the coverage afforded by a premises liability policy extends by implication to that portion of an outside sidewalk necessary for access to the covered premises” (*Antoine v City of New York*, 56 AD3d 583, 585 [2008]). The leading authority is the opinion by the Court of Appeals in *ZKZ Assocs. v CNA Ins. Co.*, wherein the Court of Appeals held:

“As an additional insured under the policy issued to Guardian . . . plaintiff building owner was covered only for liability arising out of the ownership, maintenance and use of that part of the described premises which is leased to [Guardian]. . . . [T]he ambiguous additional insured endorsement . . . gave plaintiff at least a right to an insurer-sponsored defense in the action that was brought against it for injuries sustained by a pedestrian who allegedly tripped and fell on the sidewalk outside its building. The part of the sidewalk where the alleged accident occurred was necessarily used for access in and out of the garage Guardian operated and was thus, by implication, part of the . . . premises that Guardian was licensed to use under the parties’ agreement. Consequently, the claim arose out of the ownership, maintenance [or] use of the garage” (89 NY2d 990, 991 [1997]).

Although the Court of Appeals in *ZKZ Assocs.* only addressed the insurer’s duty to defend, it has been relied upon to find a duty to indemnify as well (*see Ambrosio v Newburgh Enlarged City School Dist.*, 5 AD3d 410, 412 [2004]).

Here, L&C, the owner of the Premises, is an “additional insured” under the Cambridge Policy issued to Compustar, the tenant of the ground floor store and basement of the Premises. The Cambridge Policy states that L&C is an additional insured “only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to [Compustar].” The record reflects that the metal cellar door on the sidewalk abutting the Premises, where Levenhar allegedly tripped and fell, was used for access in and out of the basement leased by Compustar, and therefore, was “part of” the

Premises leased to Compustar under the Cambridge Policy, as a matter of law. Thus, KBIC is entitled to a declaration that Cambridge has a duty to defend and indemnify L&C in the Levenhar Action as an additional insured under the Cambridge Policy.

“Where the same risk is covered by two or more policies, each of which was sold to provide the same level of coverage . . . priority of coverage (or, alternatively, allocation of coverage) among the policies is determined by comparison of their respective other insurance clauses” (*Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 18 [2009]; *see also Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 686-687 [1999]).

Here, the “other insurance” clause in the KBIC Policy provides that “coverage is excess over any other primary insurance available to you covering liability for damages arising out of the premises . . . for which you have been added as an additional insured by attachment of an endorsement” (emphasis added). The Cambridge Policy similarly provides that “[i]f there is other insurance covering the same loss or damage, we will pay only for the amount of covered loss or damage *in excess* of the amount due from that other insurance . . .” (emphasis added).

Where there are two competing “other insurance” clauses, both of which declare that coverage is excess over another policy, and “giving each policy’s clause effect would leave the insured without primary insurance, the “other insurance” clauses are deemed to cancel each other out, and the insurers are required to cover the loss on a pro rata basis” (*Sport Rock Intl., Inc.*, 65 AD3d at 19; *see also QBE Ins. Corp. v Public Service Mut. Ins. Co.*, 102 AD3d 442, 443 [2013]). Based on the language in the competing “other

insurance” clauses at issue here, the costs of defending L&C in the Levenhar Action must be equally allocated between KBIC and Cambridge. Accordingly, it is

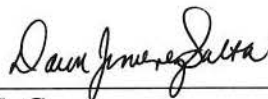
ORDERED that KBIC’s motion (mot. seq. three) for summary judgment is only granted to the extent that Cambridge is obligated to provide L&C with a defense and indemnity in the Levenhar Action; and it is further

ORDERED, ADJUDGED AND DECLARED that: (1) KBIC and Cambridge are both required to provide L&C with a defense and indemnity in the Levenhar Action on a pro rata basis, and the cost of such defense and indemnification shall be allocated equally between KBIC and Cambridge, and (2) Cambridge shall reimburse KBIC for 50% of the costs, fees and disbursements that it has already paid on L&C’s behalf in the Levenhar Action; and it is further

ORDERED that Cambridge’s cross motion (mot. seq. four) for summary judgment dismissing the complaint is denied.

This constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.

Hon. Dawn Jimenez-Salta
Justice of the Supreme Court