Noble Constr. Group LLC v Farm Family Cas. Ins. Co.
2021 NY Slip Op 30412(U)
February 8, 2021
Supreme Court, Kings County
Docket Number: 525653/19
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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NOBLE CONSTRUCTION GROUP LLC, MP 145 WS LESSEE LLC, 10 HURON FS CONDO LLC 19 INDIA FEE OWNER LLC, and URBAN DEVELOPMENT PARTNERS NEW YORK, LLC,

Plaintiffs, Decision and order

- against - Index No. 525653/19

FARM FAMILY CASUALTY INSURANCE COMPANY,

Defendant, February 8, 2021

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PRESENT: HON. LEON RUCHELSMAN

On May 9, 2016 an entity called Country Wide Masonry Corporation entered into a contract with plaintiff Noble Construction Group LLC, the construction manager, whereby Country Wide would perform masonry work at a construction site located at 145 West Street in Kings County. Country Wide purchased insurance from defendant Farm Family and named Noble as an additional insured. On September 4, 2018 Jamie Allacio an employee of Country Wide initiated a lawsuit pursuant to Labor Law §240(1) and related statutes against numerous defendants including Noble on the grounds he was injured at the construction site from a gravity related event. Noble sought coverage from Farm Family as an additional insured under the policy. Farm Family denied coverage. Thereafter, Noble initiated this lawsuit against Farm Family alleging Farm Family breached their contract in failing to defend and indemnify Noble in the lawsuit with

Allacio. Further, the complaint seeks a declaratory judgement Farm Family is obligated to defend Noble.

Noble moved seeking to compel discovery. Farm Family cross-moved arguing the discovery request is moot since the complaint fails to state any claim. Farm Family seeks to dismiss the complaint on the grounds the Allacio complaint "fails to articulate any claims against the Plaintiffs that can reasonably be interpreted to allege that his claimed bodily injury was "caused, in whole or in part, by" any acts or omissions of CWM and, therefore, constitute potentially covered claims against Plaintiffs as putative additional insureds under the Farm Family Policies. As indicated, there are also no facts known to Farm Family that establish a reasonable possibility of coverage for Plaintiffs and Plaintiffs do not alleged in their coverage complaint that Farm Family is aware of such facts" (Affirmation in Support of Cross-Motion, ¶15). Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the

complaint states in some recognizable form any cause of action known to our law" (AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

As an additional insured the plaintiff must demonstrate that Allacio's injuries were caused by acts or omissions of Country Wide the insured party of Farm Family. Thus, to succeed upon a motion to dismiss the defendant must conclusively establish that there are no such acts or omissions committed by Country Wide. The complaint in the Allacia action does not allege any acts or omissions committed by Country Wide at all. The plaintiff argues that in any event Farm Family must provide coverage because there are extrinsic facts which demonstrate a possibility that coverage is applicable.

In Bacon Construction Company Inc., v. Arbella Protection Insurance Company Inc., 208 A3d 595 [Supreme Court of Rhode Island 2019] the court held that where a bodily injury exclusion prevented an injured party from suing the insured party, for example, where worker's compensation rules prevent such action,

then the insurer could not be compelled to defend an action against an additional insured. As the court explained, the opposite result would mean the additional insured would be entitled to greater coverage than the insured party. The court concluded that the additional insured could only benefit from the insurance contracted where the injury resulted from the insured's acts or omissions whereby the insured committed some negligence.

However, that conclusion has been criticized. Thus, in Dhein v. Frankenmuth Mutual Insurance Company, 394 Wis2d 470, 950 NW2d 861 [Court of Appeals of Wisconsin 2020] the court held the additional insured was entitled to coverage regardless of whether the insured committed any negligence as long as the injury was caused by the acts or omissions of the insured.

Again, in Capital City Real Estate LLC v. Certain Underwriters at Lloyd's London, 788 F3d 375 [4th Cir. 2015] the court noted the mere fact the underlying personal injury complaint did not contain any causes of action against the insured and did not even allege any wrongdoing on the part of the insured did not mean the additional insured was not entitled to coverage. The court explained that while the complaint did not allege any improper acts or omissions committed by the insured "the additional insured, is entitled to introduce" the involvement of the insured "by way of extrinsic evidence" (id).

Thus, while there might be a conflict among various courts as to the level of wrongdoing necessary for an additional insured seeking such coverage, namely whether a showing of negligence is required, all courts agree the additional insured should be entitled to present whatever such evidence is necessary. Therefore, in The Charter Oak Fire Insurance Company v. Zurich American Insurance Company, 462 F.Supp3d 317 [S.D.N.Y. 2020] the court held that even though the underlying complaint did not even mention the insured, a company called Slade, the insurer was required "'to provide a defense when it has actual knowledge of facts establishing a reasonable possibility of coverage'" (id). This was true because the additional insured "was concerned about lawsuits against it. It did not care about lawsuits pled solely against Slade and seeking to impose liability only against Slade. ASB [the additional insured] was concerned about having to defend itself in lawsuits that were caused by Slade's negligence—regardless of whether Slade was named or pursued for damages" (id). Thus, the availability of insurance for an additional insured is not based upon the availability of the insured's access to such insurance. Rather, the duty to defend the additional insured is only based upon whether the insured committed acts or omissions that could give rise to liability. As the court noted in Servidone Construction Corp., v. Security

Insurance Company of Hartford, 64 NY2d 419, 488 NYS2d 139 [1985] "a declaration that an insurer is without obligation to defend a pending action could be made 'only if it could 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 the insurance policy'" (id).

Consequently, there must be some evidence presented, and further evidence may be explored to determine whether Country Wide committed any acts or omissions that would trigger the additional insured coverage. First, Paragraph 23 of the complaint in this case states that "Mr. Allacio was working under the direction and control of his supervisor, another County-Wide Masonry employee, when he was allegedly struck by an unsecured falling object" (id).

Thus, this complaint may serve as potential evidence and notice that Country Wide was negligent. In Indian Harbor Insurance Company v. Alma Tower LLC, 165 Ad3d 549, 87 NYS3d 9 [1st Dept., 2018] the court noted that third party and other complaints may serve as knowledge of acts or omissions giving rise to coverage.

Thus, at this stage of the litigation the plaintiff shall have an opportunity to examine evidence which can shed light upon

whether Country Wide committed any wrongdoing that would then permit coverage to the additional insured. The argument that the motion must be dismissed at this juncture because the claim cannot proceed against Country Wide and therefore cannot proceed against Noble is rejected.

Further, the case of The Burlington Insurance Company v. New York City Transit Authority, 29 NY3d 313, 57 NYS3d 85 [2017] requires that any acts or omissions of Country Wide must be the proximate cause of Alleica's injury. There is no basis to dismiss this entire action on that factual question.

Therefore, the motion seeking to dismiss the lawsuit is denied without prejudice. The motion seeking discovery on the issue of Country Wide's participation and potential liability, in spite of a Worker's Compensation bar is granted. Following the completion of all discovery in this regard any party may make any further motion.

So ordered.

ENTER:

DATED: February 8, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC