Mountain High Pinebrooke II, LLC v Westport Ins. Corp.
2021 NY Slip Op 30826(U)
March 9, 2021
Supreme Court, New York County
Docket Number: 654413/2018
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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INDEX NO. 654413/2018

MOTION DATE 04/29/2019

MOTION SEQ. NO. 001

MOUNTAIN HIGH PINEBROOKE II, LLC,700 BANYAN TRAIL LLC, MINOR BANYAN, LLC, TSL PINEBROOKE II, LLC, and LEDER REALTY & MANAGEMENT, INC.,

Plaintiffs,

- v -

WESTPORT INSURANCE CORPORATION, USI INSURANCE SERVICES, LLC AS SUCCESSOR-IN-INTEREST TO WELLS FARGO INSURANCE SERVICES USA, INC., and TRAVELPRO PRODUCTS, INC.,

Defendants.

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DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34

were read on this motion to/for DISMISS.

Upon the foregoing documents, and upon due deliberation, the motion of defendant Travelpro Products, Inc. ("Travelpro"), to dismiss the action as against it is granted, in accord with the following memorandum.

Background

This case arises from damage to a large commercial building in Boca Raton, Florida (the "Premises"), caused by Hurricane Irma on September 10, 2017 (*see*, Amended Verified Complaint [NYSCEF Doc. No. 14]). On or about August 2, 1995, Travelpro entered into a commercial lease agreement (the "Lease") with non-party Museum Center Corporation ("Museum Corporation") to lease the Premises (*id.* ¶ 8; *see also*, "Lease" [contained in NYSCEF

Doc. No. 29]).[1] Pursuant to the terms of the Lease, Travelpro was obligated to maintain an insurance policy insuring Museum Corporation and covering any loss or damage to the Premises (*id*.). On or about May 20, 2017, defendant Westport Insurance Corporation ("Westport") issued an insurance Policy (the "Policy") naming Travelpro as the first named insured that provided all-risk property insurance coverage for the building located at the Premises (Amended Verified Complaint ¶ 14; Policy [NYSCEF Doc. No. 23]). Defendant Wells Fargo Insurance Services USA Inc. ("Wells Fargo") acted as an insurance broker and/or agent on behalf of Travelpro to procure the Policy (*see id*. ¶ 10). Defendant USI Insurance Services, LLC ("USI") is the successor in interest to Wells Fargo.

On or about June 7, 2017, plaintiff Leder Realty & Management, Inc. ("Leder"), entered into a contract (the "Purchase Contract") to purchase the building from the Museum Corporation (Amended Verified Complaint ¶ 16). Thereafter, "but prior to September 10, 2017," Leder assigned interests in the Purchase Contract to all of the plaintiffs in this action (the "Plaintiffs") (*id*.). "The due diligence period regarding the Purchase Contract expired prior to September 10, 2017" (*id*.). Plaintiffs allege that, during the due diligence period, Plaintiffs contacted Travelpro and requested that they first add Museum Corporation, and later Plaintiffs, as additional insureds or loss payees to the Policy (*id.* ¶¶ 19-23). Plaintiffs further allege that in each instance, Travelpro contacted Wells Fargo and requested the change, and that after each request Wells Fargo then "caused to be created an Evidence of Property Insurance, naming Museum

[1] To be precise, the 1995 execution of Lease was by Travelpro's prior-generational tenant-predecessor-in-interest called Eiffel Design, Inc., d/b/a Travelpro and Rollerboard, Inc. In 2004, the company known as Travelpro International, Inc., became the tenant-successor-in-interest. As of July 3, 2017, the company named as defendant Travelpro Products, Inc., in this action became the tenant-successor-in-interest (*see* lease and lease extension/modification documents contained in NYSCEF Doc. No. 29). For purposes of this decision, the tenant under the Lease, regardless of time period, will be referred to simply as "Travelpro," much the same as the usage employed in the Verified Amended Complaint.

Corporation as having an Additional Interest but not making it clear if Museum Corporation was added as an additional named insured and/or loss payee on the Policy" and "caused to be created an Evidence of Property Insurance naming Plaintiffs as having an Additional Interest but not making it clear if Plaintiffs were added as additional named insureds and/or loss payees on the Policy" (*id.* ¶¶ 19, 23).

As cited in the Amended Verified Complaint, the Policy states the following with respect to additional insureds:

> **SECTION VIII**
> **LOSS ADJUSTMENT AND SETTLEMENT**
>
> **F. Loss Adjustment and Loss Payable**
>
> Loss, if any, will be adjusted with and payable to the First Named Insured, or as may be directed by the First Named Insured. Additional insured interests will also be included in loss payment as their interests may appear when named as additional named insured, lender, mortgagee or loss payee in the Certificates of Insurance on file with the Company. The receipt of the payee(s) so designated shall constitute a release in full of all liability with respect to such loss.
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> * * *
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> **SECTION IX**
> **GENERAL CONDITIONS**
>
> **A. Additional Insurable Interests**
>
> Additional insured interests are automatically added to this POLICY as their interests may appear when named as additional named insured, lender, mortgagee or loss payee in the Certificates of Insurance on file with the Company. Such interests become effective on the dates shown in such certificates but do not further amend or extend the terms, conditions, provisions and limitations of this POLICY.

(Amended Verified Complaint ¶ 24). Citing these provisions, Plaintiffs assert that they became insured under the Policy if, prior to September 10, 2017, Wells Fargo provided Evidence of Property Insurance for Museum Corporation or Plaintiffs to Westport (*id.* ¶ 25).

On September 10, 2017, the Premises suffered physical loss and damage from Hurricane Irma (Amended Verified Complaint ¶ 26). On September 15, 2017, the sale of the Premises was completed and Plaintiffs "purchased the Premises from Museum Corporation and therefore assumed the rights of Museum Corporation under the subject Lease" (*id.* ¶ 28). Plaintiffs then made a claim to Westport under the Policy for the damage (*id.* ¶ 27). Westport declined the claim on the basis that Plaintiffs are not additional insureds or loss payees under the Policy (*id.* ¶ 30).

On February 13, 2018, Plaintiffs commenced an action against Westport and Travelpro in the Circuit Court of the 15th Judicial Circuit in Palm Beach County, Florida, captioned *Mountain High Pinebrooke II, LLC, Mountain High Holdings, Inc., 700 Banyan Trial LLC, Minor Banyan, LLC, TSL Pinebrooke II, LLC, Leder Realty & Management, Inc. v. Westport Insurance Corporation and Travelpro Products, Inc.*, Case Number 502018CA001850XXXXMB (the "Florida Action") (NYSCEF Doc. No. 22). The Florida Action arises from the Lease and Policy at issue in this action and the original complaint filed in that action interposes causes of action for a declaratory judgment seeking a declaration that Plaintiffs are insured under the Policy and a declaration as to the amount of the deductible for the claim; a cause of action for breach of contract against Westport for alleged breach of the Policy; and a cause of action for an accounting against Westport and Travelpro seeking "a complete set of the Policy records" (*id.* ¶ 40).

After Westport moved to dismiss the Florida Action on the ground that a forum selection clause in the Policy designates New York as the place of trial, Plaintiffs voluntarily discontinued the Florida Action as against Westport. On September 5, 2018, Plaintiffs commenced this action against Westport, asserting only a cause of action for breach of contract on the basis of

Westport's denial of, and refusal to pay, Plaintiffs' Policy claim (NYSCEF Doc. No. 2). On March 25, 2019, Plaintiffs filed the Amended Verified Complaint in this action (NYSCEF Doc. No. 14), which added Travelpro as a defendant in this action and interposes a cause of action for a declaratory judgment seeking a declaration that Plaintiffs and/or their assignor, Museum Corporation, are additional insureds under the Policy, and a breach of contract claim against Westport on the basis of Westport's denial of, and refusal to pay, Plaintiffs' Policy claim (NYSCEF Doc. No. 14).[2] On April 24, 2019, Plaintiffs moved to stay the Florida Action pending the outcome in this action (NYSCEF Doc. No. 24). Travelpro then filed the instant motion to dismiss this action.

On May 13, 2019, Plaintiffs filed an amended complaint in the Florida Action (the "Amended Florida Complaint") (NYSCEF Doc. No. 29). The Amended Florida Complaint interposes a single cause of action against Travelpro for its purported breach of the Lease by failing to indemnify Plaintiffs as landlords of the Premises, "failing to maintain a rental income insurance policy with loss payable to the Landlord [i.e., Plaintiffs] in an amount equal to one year's Rent," failing to pay the deductible under the policies that were required to be maintained pursuant to the Lease, and failing to properly maintain the Premises, as required by the Lease (NYSCEF Doc. No. 29 ¶ 16).

In this action, Travelpro moves to dismiss the Amended Verified Complaint as against it on the grounds that it is duplicative of the Florida Action and due to the purported expiration of a contractual limitations period in the Policy.[3] Plaintiffs oppose the motion and assert that the two actions are distinct and not duplicative because, in their current iterations, the Florida Action

[2] A so-ordered stipulation permitting the Amended Verified Complaint is filed as NYSCEF Doc. No. 17.
[3] *See* Policy (NYSCEF Doc. No. 23 at 55 [requiring any suit on the Policy to be "commenced within twelve (12) months next after the date of the physical loss or damage giving rise to any claim hereunder."]).

asserts a cause of action for breach of contract against Travelpro arising from the Lease as distinguished from this action, which asserts causes of action arising from the Policy, and because, Plaintiffs argue, the choice of forum clause in the Policy designating New York as the forum for disputes (NYSCEF Doc. No. 23 at 56), and the situs of the Lease (Florida) prevent litigation of all the claims in one forum. Plaintiffs also argue that Travelpro is a necessary party to this action pursuant to CPLR 1001 (a) because it "might be inequitably affected by a judgment in the action" (NYSCEF Doc. No. 31 at 9, quoting CPLR 1001 [a]). Plaintiffs also contend that the contractual limitations period does not bar their claims against Travelpro in this action.

Discussion

The Contractual Limitations Period:

Travelpro argues that being brought in by Plaintiffs as a defendant in this action in March of 2019 violates the 12-month contractual limitations period found in the Policy (*see* NYSCEF Doc. No. 23 at 55). That provision requires any suit on the Policy to be "commenced within twelve (12) months next after the date of the physical loss or damage giving rise to any claim hereunder" (*id.*). Travelpro points to Plaintiffs' allegation that the Premises suffered "physical loss and damage from a peril covered by the Policy" on or about September 10, 2017 (Verified Amended Complaint ¶ 26). Thus, Travelpro argues that Plaintiffs had until September 10, 2018, to name it as a defendant. Naming Travelpro in March 2019, therefore, exceeds that limitations deadline according to Travelpro. However, the court disagrees with Travelpro's reading of the plain language of the limitations clause – and especially in light of the Policy's language throughout.

The one-year limitations provision in the Policy applies only to a suit on the Policy for the recovery ***of any claim***" (Policy [NYSCEF Doc. No. 23] at 55 [emphasis added]). The term

"claim" is used throughout the Policy to refer to an *insurance* claim, i.e., a claim for a covered loss under the Policy. For example, the section titled "Settlement of Claims" (*id.* at 54) provides that "[t]he amount of loss or damage, for which the Company may be liable," will be paid within 30 days of acceptance of "proof of loss" and "a resolution of the amount of loss." The term is used consistently in this manner throughout the Policy (*see, e.g., id.* § B, "Claims Notification" [providing direction of where to submit a claim]; § V [E], "Insured Time Element Option" ["The insured has the option to make a claim based on either (a) Gross Earnings and Extended Period of Liability; or (b) Gross Profits"], § VIII [D] [3], "Appraisal Provision" [providing conditions in the event that "the Insured and the Company fail to agree on the amount of loss to be paid for a claim insured by this Policy"]). Seeing as Plaintiffs do not seek to recover any claim for loss from Travelpro – nor could it, because Travelpro is not the insurer – the contractual limitations period does not apply to it. Indeed, there is no dispute that Plaintiffs' action, insofar as it relates to the insurer – Westport – *was* commenced prior to September 10, 2018 (*see* Complaint, filed September 5, 2018 [NYSCEF Doc. No. 2]).

Another Action Pending:

Pursuant to CPLR 3211 (a) (4), "[t]he court has broad discretion to dismiss an action on the ground that another action is pending between the same parties arising out of the same subject matter or series of alleged wrongs, and it is inconsequential that different legal theories or claims were set forth in the two actions" (*Shah v RBC Capital Markets LLC*, 115 AD3d 444, 444-445 [1st Dept 2014]). "The critical element is that both suits arise out of the same subject matter or series of alleged wrongs" (*Cherico, Cherico & Assocs. v Midollo*, 67 AD3d 622, 622 [2d Dept 2009] [internal quotes omitted]). "A motion made pursuant to CPLR 3211 (a) (4) should be granted where an identity of parties and causes of action in two simultaneously

pending actions raises the danger of conflicting rulings relating to the same matter" (*Diaz v Philip Morris Cos., Inc.*, 28 AD3d 703, 705 [2d Dept 2006]; *White Light Productions, Inc. v On The Scene Productions, Inc.*, 231 AD2d 90, 93 [1st Dept. 1997] [dismissal is warranted under CPLR 3211[a][4] "to avoid the potential for conflicts that might result from rulings issued by courts of concurrent jurisdiction"]). "[S]ubstantial, not complete, identity of parties is all that is required to invoke CPLR 3211 (a) (4)" (*Syncora Guarantee Inc. v J.P. Morgan Securities LLC*, 110 AD3d 87, 96 [1st Dept 2013]). Generally, a substantial identity of parties "is present when at least one plaintiff and one defendant is common in each action" (*Morgulas v J. Yudell Realty, Inc.*, 161 AD2d 211, 213 [1st Dept 1990]).

Focusing for the moment on the application of these principles alone, dismissal of the complaint as against Travelpro would seem appropriate. Although the Florida Action, in its present iteration, alleges only causes of action arising from the Lease, and this action alleges causes of action arising from the Policy, the two actions nonetheless "arise out of the same subject matter or series of alleged wrongs" because the causes of action asserted in both actions arise from the same set of facts and occurrences (*see Cherico*, 67 AD3d at 622).[4] There is also a substantial identity of parties among the two actions because Plaintiffs and Travelpro are parties to both actions (*Morgulas*, 161 AD2d at 213 [Substantial identity of parties "is present when at least one plaintiff and one defendant is common in each action"]). But the analysis becomes more complicated here due to the New York choice of venue provision in the Policy (NYSCEF Doc. No. 23 at 56) which would seem to prevent Plaintiffs from having the opportunity to be

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[4] To the extent that Travelpro argues in favor of dismissal because the causes of action asserted in this action are duplicative of those *previously* asserted in the Florida Action, this argument is largely irrelevant to this motion. CPLR 3211 (4) is not retributive or designed to punish past pleading or procedurals errors, but is instead designed, primarily, to avoid the danger of conflicting rulings (*see Diaz*, 28 AD3d at 705; *White Light*, 231 AD2d at 93 [dismissal is warranted under CPLR 3211[a][4] "to avoid the potential for conflicts that might result from rulings issued by courts of concurrent jurisdiction"]).

awarded complete relief for all their claims in one action. The Florida Action, which involves real property located in Florida and a Florida lease agreement governed by Florida law (Lease [contained in NYSCEF Doc. No. 29] § 30), is properly venued in Florida, while this action may only be maintained in New York pursuant to the choice of forum provision in the Policy. Given this venue split (Lease litigation in Florida; Policy litigation in New York), the real question before this court is whether Travelpro is a necessary party to this action altogether. As concluded below, this court answers "no" to that question. Travelpro is not a necessary party here.

Pursuant to CPLR § 1001, "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." Plaintiffs assert that Travelpro was named in this action "for the simple reason that [Travelpro] 'might be inequitably affected by a judgment in [this] action'" (NYSCEF Doc. No. 31 at 9). Plaintiffs further contend that if they had "merely proceeded with the New York action without impleading Tenant and this Court determined that Plaintiffs were not properly named as additional insureds, then Tenant would arguably be prejudiced when the pleading in the Florida Action was amended to include a breach of the Lease for failure to add Plaintiffs to the Policy. In such an instance, Tenant would undoubtedly cry foul and argue that it was deprived of its right to participate in the New York action" (*id.*). Of course, that argument becomes somewhat moot by virtue of the plain fact that Travelpro itself has asked to be let out of this case, thereby voluntarily foregoing any opportunity "to participate in the New York action" (*id.*). But apart from that pragmatic observation, Plaintiffs do not articulate any legal right or relationship of Travelpro that would be affected by a determination in this action (*see Staten Island Hosp. v Alliance Brokerage Corp.*, 137 AD2d

674, 677 (2d Dept 1988) [holding that a party is necessary to an action because a judicial determination would affect the legal rights and relationships of that party]).

The only cause of action Plaintiffs have interposed against Travelpro in this action is a cause of action for a declaratory judgment seeking a declaration that Plaintiffs are additional insureds under the policy. Plaintiffs are unquestionably not entitled to such a declaration as against Travelpro, which is the named insured of the Policy. To the extent that Plaintiffs seek recovery in this action for any covered loss under the Policy, they are necessarily only entitled to such recovery from the insurer of their property (Westport) or from the insurer's agent (USI as successor-in-interest to Wells Fargo). Thus, Plaintiffs do not seek any affirmative relief against Travelpro in this action and have not stated a cause of action for which relief may be granted as against Travelpro, which stands alone among the parties here as the named first insured under the Policy. As alleged by Plaintiffs, any obligation to add Plaintiffs as additional insureds arises not from the Policy, but from the Lease that is at issue in the Florida Action. A declaration in this action as to whether Plaintiffs are or are not additional insureds under the Policy will not, on strict analysis, impact the question of whether Travelpro did or did not breach any obligation to add Plaintiffs as additional insureds to the Policy. Nor is Travelpro's presence in this case necessary for the court to afford full relief to the Plaintiffs with respect to the scope of the Policy.

To the extent that Plaintiffs point out that Travelpro may be liable for the payment of any deductible amount under the Policy: this, too, is an obligation that arises from the Lease that is the subject of the Florida Action, which requires Travelpro to "pay all premiums for the insurance policies" (Lease [contained in NYSCEF Doc. No. 29] § 13). While the Amended Verified Complaint in this action does not articulate the nature of the dispute regarding the amount of the deductible, guidance may be derived from the original complaint filed in the

Florida Action which does articulate the nature of the dispute. That complaint alleges (NYSCEF Doc. No. 22 ¶ 19) that Westport "maintains that any deductible under the Policy must include 5% of a 'Time Element.' Defendant Westport states that the 'Time Element' is in the amount of $16,000,000. Plaintiffs maintain that the Policy sets forth no amount for a 'Time Element' of $16,000,000 and therefore Plaintiffs do not have to pay this amount as part of the deductible" (*id.*).[5] Although Plaintiffs assert that Travelpro may ultimately be liable to pay the deductible by virtue of its lease obligations (Lease § 13), the court does not see that as sufficient to deem Travelpro a necessary party to this action, especially since Travelpro itself not only asserts no position on the question of the amount of the deductible, it seeks, by this very motion, to extricate itself from any opportunity to litigate the question here. So, in essence, the dispute regarding the amount of the deductible is a dispute that Plaintiffs have with Westport, relating only to the question of the amount of the deductible. The answer to that question does not affect Travelpro's obligation to pay it under the Lease (§ 13).

As a consequence of the foregoing, Travelpro's motion to dismiss the Amended Verified Complaint as against it is granted.

Accordingly, it is

ORDERED that the motion of defendant Travelpro Products, Inc., to dismiss the Amended Verified Complaint as against it is granted and the Amended Verified Complaint is dismissed as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

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[5] Reference to the notion of "Time Element" is found at Section V of the Policy (NYSCEF Doc. No. 23 at 30).

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the within dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), by way of electronic filing of same, and that said Clerks are directed to mark the court's records to reflect the change in the caption herein.

This will constitute the decision and order of the court.

ENTER:

3/9/2021
DATE **LOUIS L. NOCK, J.S.C.**

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