Admiral Indem. Co. v Burlington Ins. Co.
2021 NY Slip Op 31391(U)
April 22, 2021
Supreme Court, New York County
Docket Number: 652360/2016
Judge: Laurence L. Love
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. LAURENCE L. LOVE** **PART** **IAS MOTION 63M**

Justice

---X

ADMIRAL INDEMNITY COMPANY, DERMER MANAGEMENT, INC., IRONCLAD ARTISTS, INC.,

Plaintiff,

- v -

BURLINGTON INSURANCE COMPANY, BEGGARS CAPITAL, LLC, HENRY MARIN, JOAQUIN CAMACHO

Defendant.

---X

INDEX NO. 652360/2016

MOTION DATE 2/17/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 70

were read on this motion to/for JUDGMENT - SUMMARY.

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

Plaintiff commenced the instant action by e-filing a summons and complaint on May 3, 2016, which seeks a declaratory judgment, that the defendant Burlington Insurance Company ("Burlington") is obligated to defend and indemnify the plaintiff Ironclad Artists, Inc.("Ironclad"), in two separate underlying personal injury actions, Henry Marin v. Dermer Management, et al. (Queens County Index No.: 14986/14) and Joaquin Camacho v. Ironclad Artists, Inc. (New York County Index No.: 161948/2014), or alternatively, that Burlington is obligated to defend and indemnify Beggars Capital, LLC ("Beggars"), Burlington's named insured, in the third-party actions that Ironclad has commenced against Beggars in the underlying personal injury actions. On June 8, 2016, Beggars interposed an answer containing cross-claims against Burlington seeking a declaratory judgment that if Burlington is obligated to provide defense and indemnity to Ironclad, that Burlington cannot recover any monies it pays for Ironclad's defense from Beggars based upon

the Anti-subrogation rule. Burlington interposed an answer on July 1, 2016. Defendant, Henry Marin interposed an answer on May 31, 2017.

Plaintiffs now move for summary judgment, and a declaration that Burlington is obligated to provide defense coverage to the plaintiffs Ironclad and Dermer for the personal injury actions described above, a declaration that Burlington's coverage for Ironclad and Dermer is primary to Admiral's obligations and Ordering Burlington to reimburse the plaintiffs for all fees, costs and disbursements already incurred and continuing in defending the underlying Actions that is the subject of this coverage action. Burlington cross-moves for summary judgment, seeking an Order dismissing the instant action and holding that there is no coverage for Ironclad and Dermer as additional insureds under the Burlington Policy.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989).

Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

The relevant facts of the instant matter are not in dispute. At the time of the underlying construction accidents, Admiral Indemnity Company ("Admiral") insured both Ironclad and Dermer Management, Inc. ("Dermer"). Ironclad was the owner of a mixed-use cooperative building located at 134 Grand Street, New York, NY, 10013 (the "Premises") and Dermer was its property manager. Beggars, Burlington's named insured, leased Unit 1W in the Premises from Ironclad. On January 28, 2012, Ironclad and Beggars executed a Shareholder Alteration Agreement pursuant to which Beggars was allowed to install equipment and make alterations to Unit 1W. On February 19, 2014, Beggars subcontracted work to The Palombo Group, Inc. ("Palombo"). On October 14, 2014, Marin sought recovery for personal injuries he sustained on April 7, 2014, as an employee of Palombo, when he fell from a ladder while performing construction work in the Premises. On December 3, 2014, Camacho sought recovery for personal injuries he sustained on September 15, 2014, as an employee of Palombo, when he fell from a scaffold while performing construction work in the Premises.

Burlington issued to Beggars Commercial General Liability Policy Number 670BW27201 for the period January 26, 2014 to January 26, 2015. Ironclad and Dermer are identified as additional insureds on the Policy. On August 6, 2015, defense counsel for Ironclad and Dermer tendered their defense to Beggars for the Marin Action. On October 16, 2015, defense counsel for Ironclad and Dermer tendered their defense to Beggars for the Camacho Action. In letters dated September 9, 2015, and August 9, 2016 respectively, Burlington denied coverage on the grounds that: (1) the Burlington Policy does not cover construction work (2) the Designated Operations Endorsement excludes bodily injury arising out of construction or demolition related work; and

(3) the Shareholder Alteration Agreement did not meet the definition of an "insured contract" under the Burlington Policy. Said denials resulted in the instant action.

Plaintiff's first stated reason for non-tender cites the policy as follows:

> The policy contains the Endorsement CC 20 11 01/96, ADDITIONAL INSURED - MANAGERS OR LESSORS OF PREMISES, which states in part;
>
> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> SCHEDULE
>
> Designation of Premises (Part Leased to You): 134 Grand Street New York, NY 10013
>
> Name of Person or Organization (Additional Insured): Ironclad Artists, Inc. do Dermer Management, Inc. 10 E. 40th Street 45th Floor New York, NY 10016
>
> WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown In the Schedule 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 and subject to the following additional exclusions:
>
> This insurance does not apply to:
>
> Any "occurrence" which takes place after you cease to be a tenant in that premises.
>
> Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule.
>
> Although Ironclad is named as an additional insured on the above endorsement, the provisions of that endorsement are not satisfied in that the Complaint alleges the Plaintiff was performing construction work by or on behalf of Ironclad and/or Dermer. Moreover, Dermer is not listed specifically as an additional insured on the endorsement. Therefore, we are unable to accept-your tender based on additional insured status.

Plaintiff argues that the limitation does not apply because the "Structural alterations, new construction or demolition operations" were not performed by or on behalf of either Ironclad or Dermer. Plaintiff highlights the Shareholder Alteration Agreement between Beggars and Ironclad

which "clearly shows" that it was Beggars, exclusively, who sought to perform the construction work at the Premises. Burlington objects to said characterization arguing that "There has been no showing that the work performed by the underlying plaintiffs was the same work which is the subject of the Shareholder Alteration Agreement." Same would create an issue of fact if Burlington had not also denied the claim on the grounds that the Designated Operations Endorsement excludes bodily injury arising out of construction or demolition related work.

Burlington's denial further provides as follows:

> the policy contains Endorsement IFG-C-0049 (9/01), EXCLUSION—DESIGNATED OPERATIONS, which states in part:
>
> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> SCHEDULE
>
> Description of Designated Operation(s): any and all construction or demolition related work.
>
> Specified Location (If Applicable):
>
> Description of Designated Completed Operations(s): any and all construction or demolition related. work.
>
> Specified Location (If Applicable):
>
> The following exclusion is added to paragraph 2., Exclusions of COVERAGE A - BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I - Coverages):
>
> This insurance does not apply to 'bodily injury" or "property damage" arising out of the operations and/or completed operations described in the Schedule of this endorsement, regardless of whether such operations are conducted by you or on your behalf or whether the operations are conducted for yourself or for others.
>
> Unless a "location" is specified in the Schedule, this exclusion applies regardless of where such operations are conducted by you or on your behalf. If a specific "location" is designated in the Schedule of this endorsement, this exclusion applies only to the described operations and/or completed operations conducted at that "location".
>
> For the purpose of this endorsement, "location" means premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way of a railroad.

> ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.
>
> Even if Ironclad and Dermer qualified as additional insureds on the policy issued to Beggars, which we expressly deny, the above endorsement precludes coverage for "bodily injury" arising out of any and all construction or demolition related work. The Complaint alleges the Plaintiff was performing construction work when he was injured. Therefore, coverage for this matter is precluded and TBIC has no duty to defend and/or indemnify Ironclad, Dermer, Beggars or any other party in this matter.

Plaintiff argues that there is an ambiguity contained in the policy. Language in an insurance policy is ambiguous if there is a reasonable basis for a difference of opinion as to the meaning of the policy (*Fed. Ins. Co. v Intl. Bus. Machs. Corp*., 18 NY3d 642, 646 [2012]). When the ambiguity occurs in a policy exclusion, the courts construe the exclusion strongly in favor of the insured (*Essex Ins. Co. v George E. Vickers, Jr., Enters., Inc*., 103 AD3d 684, 687 [2d Dept. 2013]). In addition, the insurer bears the burden of proving that a policy exclusion applies (*Cont. Cas. Co*., 80 NY2d at 652).

Plaintiff argues that as

> Burlington's Policy provides that "you" and "your" "refer to the Named Insured shown in the Declarations and any other person or organization qualifying as a Named Insured under this policy." The named insured in the declarations is "Beggars Capital, LLC."
>
> Section II of Burlington's Policy sets out "Who Is an Insured." The additional insured endorsements referenced above state that they modify section II to include the listed entities as additional insureds. The policy does not state what difference, if any, exists between a named insured and an additional insured.
>
> New York's Court of Appeals has ruled that "'Additional insured' is a recognized term in insurance contracts, with an understanding crucial to our conclusion in this case. As cases have recognized, the 'well-understood meaning' of the term is 'an entity enjoying the same protection as the named insured'" (Pecker Iron Works of NY, Inc. v Traveler's Ins. Co., 99 NY2d 391, 393 [2003] quoting Del Bello v Gen. Acc. Ins. Co., 185 AD2d 691, 692 [4th Dept. 1992]). Given this rule from the Court of Appeals, and the lack of any language in Burlington's Policy differentiating

> obligations owed to named insureds and additional insureds, the term "you" and "your" in the Designated Operations Exclusionary Endorsement must be read to apply to Ironclad and Dermer.
>
> Burlington's Policy contains a provision for Separation of Insureds, which provides the following:
> Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:
> a. As if each Named Insured were the only Named Insured; and
> b. Separately to each insured against whom claim is made or "suit" is brought.
>
> Applying the Separation of Insureds to the Designated Operations Exclusionary Endorsement provides a reasonable interpretation that the exclusion only applies if the entity seeking coverage was engaged in operations at the premises or such operations were performed on its behalf. As explained above, neither Ironclad nor Dermer were engaged in operations at the Premises nor were any operations conducted on behalf of either. Instead, the operations at the Premises were performed solely by, or on behalf of, Beggars. Thus, the Designated Operations Exclusionary Endorsement does not preclude Ironclad or Dermer from coverage.

In opposition and in support of its cross motion, Burlington correctly argues that: Similar Separation of Insureds clauses as the one in the Burlington Policy do not create ambiguity or negate the effect of an exclusion for injuries to "any insured". Neither the general "Separation of Insureds" clause contained in the Burlington Policy, nor the separation of insureds doctrine (see *Greaves v. Public Serv. Mut. Ins. Co*. 5 N.Y.2d 120, 124-125 [1959], explaining *Morgan v. Greater N.Y. Taxpayers Mut. Ins. Assn*., 305 N.Y. 243, 247-248 [1953]), renders this exclusion ambiguous. The Separation of Insureds clause primarily highlights the named insured's separate rights and duties… it does not negate bargained-for exclusions, or otherwise expand, or limit, coverage. *DRK, LLC v Burlington Ins. Co*., 74 AD3d 693, 694 [1st Dept 2010]; see also *Citzens Ins. Co. of Am. v Illinois Union Ins. Co*., 2012 NY Slip Op 31236[U], *12, n 6 [Sup Ct, NY County 2012].

Further, the Designated Operations Exclusion clearly states, in bold and capital letters: "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY," and therefore would modify the Separation of Insureds clause to the extent the two clauses were in conflict. New York courts have repeatedly found that the Separation of Insureds clause is a general provision, while exclusions are typically specific, and therefore the latter would control to the extent there is a conflict (see *Muzak Corp. v. Hotel Taft Corp*., 1 N.Y.2d 42, 46-47 [1956]; see e.g. *Greenwich Ins. Co. v. Volunteers of Am.-Greater N .Y., Inc*., 62 AD3d 557 [2009]).

Further, the Court notes that to read the policy as plaintiff argues would create coverage for construction accidents where there is none under the policy.

Additionally, Burlington has no duty to defend in the underlying actions. As discussed in *Essex Ins. Co. v. Vickers*, 103 A.D.3d 684, 686–87 (2013), "An insurer's duty to defend is broader than its duty to indemnify, such that an insurer may be obligated to defend its insured even if, at the conclusion of an underlying action, it is found to have no obligation to indemnify its insured" (*Global Constr. Co., LLC v Essex Ins. Co*., 52 AD3d 655, 655-656 [2008]; see *BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]; *Campoverde v Fabian Bldrs., LLC*, 83 AD3d 986, 987 [2011]). "The duty to defend an insured is not triggered, however, 'when the only possible interpretation of the allegations against the insured is that the factual predicate for the claim falls wholly within a policy exclusion' " (*Campoverde v Fabian Bldrs., LLC*, 83 AD3d at 988, quoting *Howard & Norman Baker, Ltd. v American Safety Cas. Ins. Co*., 75 AD3d 533, 534 [2010]; see *Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]; *Global Constr. Co., LLC v Essex Ins. Co*., 52 AD3d at 656). As the applicable policy exclusion excludes "any and all construction or demolition related work" and there is no dispute that the underlying actions concern only injuries suffered through such work, same falls solely within the policy exclusion.

As such, Burlington has established a *prima facie* entitlement to summary judgment as the subject insurance policy specifically excludes the injuries that are the subject of the underlying actions and plaintiff has failed to establish an ambiguity in the policy.

ORDERED that plaintiff's motion is DENIED in its entirety; and it is further

ORDERED that defendant, Burlington Insurance Company's cross-motion is GRANTED in its entirety; and it is further

ORDERED that Burlington Insurance Company is not obliged to provide defense and indemnity to plaintiff Admiral Indemnity Company in the actions of *Henry Marin v. Dermer Management, et al*. (Queens County Index No.: 14986/14) and *Joaquin Camacho v. Ironclad Artists, Inc.* (New York County Index No.: 161948/2014).

4/22/2021
DATE

LAURENCE L. LOVE, J.S.C.

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