

Arch Specialty Ins. Co. v Nautilus Ins. Co.
2022 NY Slip Op 30188(U)
January 13, 2022
Supreme Court, New York County
Docket Number: Index No. 651364/2021
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE LOVE PART 63M

Justice

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ARCH SPECIALTY INSURANCE COMPANY,
Plaintiff,

INDEX NO. 651364/2021

MOTION DATE 10/28/2021

MOTION SEQ. NO. 001

- v -

NAUTILUS INSURANCE COMPANY, BORDONE
CONTRACTING, LLC

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 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

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

The following read on plaintiff's motion for summary judgment, CPLR 3212, that i) defendant Bordone Contracting, LLC ("Bordone") is an additional insured on the insurance policy at issue issued by defendant Nautilus Insurance Company ("Nautilus"); ii) that Nautilus is estopped from disclaiming coverage to Bordone; iii) that Nautilus is obligated to defend Bordone in the bodily injury action underlying the instant declaratory judgment, iv) that Nautilus is obligated to reimburse Arch Specialty Insurance Co.'s ("Arch") for the attorneys' fees and defense costs it has incurred, plus any indemnity payments, on behalf of Bordone in the underlying action; v) or/in the alternative, upon a declaration that Nautilus has no coverage obligation to Bordone, a declaration that Arch has no obligation to provide defense or indemnity to Bordone with regard to the underlying action pursuant to the New York Limitation Endorsement of the Arch policy at issue.

The following also reads on defendant Nautilus' cross-motion for summary judgment, CPLR 3212, on their counterclaim i) declaring that defendant Bordone is not an additional

insured under the Nautilus primary or excess policies; ii) declaring that Nautilus has no obligation to defend and/or indemnify Bordone in the bodily action underlying the instant declaratory judgment action; iii) declaring that Nautilus has no obligation to reimburse Arch for the attorneys' fees and defense costs incurred, nor indemnity payments made, on behalf of Bordone in the underlying bodily injury action; iv) ordering reimbursement of the attorneys' fees, costs and expenses incurred by Nautilus in the defense of defendant Bordone in the underlying bodily injury action; v) or/in the alternative, only to the extent that the court determines that Nautilus has a duty to defend Bordone: a) declaring that Nautilus and Arch have a joint obligation to defend and/or indemnify Bordone in the bodily action underlying the instant declaratory judgment action; and b) declaring that the Nautilus excess policy is excess to both the Nautilus primary policy and Arch's policy.

A summons and complaint were filed on September 1, 2021 with causes of action for i) a declaratory judgment that Nautilus is required to defend and indemnify Bordone under the Nautilus Policy and that such coverage applies on a primary and non-contributory basis; ii) that Arch is entitled to reimbursement of the defense costs it has expended in the defense of Bordone; iii) that Arch is entitled to recover a money judgment from Nautilus in an amount equal to the attorneys' fees and defense costs it has incurred, plus any indemnity it may incur on behalf of Bordone in the underlying action; iv) Arch and/or Bordone are entitled to reimbursement of the costs expended in this declaratory judgment action seeking coverage for Bordone due to Nautilus' withdrawal of its defense prior to obtaining a judicial determination; and v) a declaration that there is no coverage for Bordone under the Arch Policy with regard to the Underlying Action based on the Arch Policy's New York Limitation Endorsement.

Defendant Nautilus submitted an Answer on May 19, 2021 with a counterclaim for i) a declaratory judgment that there was no written agreement to provide additional insurance to defendant Arch, ii) that defendant Bordone is not an additional insured under the Nautilus Primary Policy or the Nautilus Excess Policy, and iii) that defendant Nautilus is not obligated to defend or indemnify defendant Bordone in connection with the underlying action.

Proof of service of the summons and complaint upon Bordone has not been provided.

CPLR § 3212 (b) states that, “the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact.” *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986).

Plaintiff submits a “statement of material facts.”

“[this] action arises from an underlying bodily injury action captioned *Abbos abbosov, et ux. v. Bordone Contracting LLC, Southbay Engineering PLLC, Wildflower LTD LLC, and WF Industrial I LLC*, Supreme Court, Kings County, Index No. 522981/2018 (“Underlying Action”). Abbos Abbosov alleges that on May 29, 2018, during the course of his employment with GSC Services Corp. (“GSC”) on a construction project at the premises located at 578 Corzine Avenue, Brooklyn, New York, and on which Bordone Contracting LLC was serving as general contractor, he sustained bodily injury, when he fell through the building’s roof to the ground below, as a result of the defendants’ (Bordone) negligence and violations of the New York Labor Law” (see NYSCEF Doc. No. 9 Pars. 1 – 2).

Defendant submits a “statement of material facts,”

where “plaintiff Abbosov was performing work at a construction project on behalf of GSC Services Corp (“GSC”), when he fell through the building’s roof to the ground below, sustaining bodily injuries. Disputed that Arch is entitled to the declaration it seeks, as

Arch/Bordone have failed to satisfy their burden of demonstrating the existence of a written contract by which GSC promised to procure additional insurance on behalf of Bordone, nor that Abbosov's injuries resulted from work performed by GSC. Undisputed that Bordone retained GSC to provide asbestos abatement at a construction project in Brooklyn, New York and that the parties' obligations are memorialized in a written contract, titled 'Bordone Contracting LLC Subcontract Agreement Form,' and duly executed on April 26, 2018. Disputed that document titled 'Invoice Requirements for Bordone Contracting LLC' constituted a part of the parties' written contract, was otherwise incorporated into the parties' written contract, or that it was a written agreement by which GSC promised to procure additional insurance for Bordone (see NYSCEF Doc. No. 36 Pars. 2, 3, 5).

The subcontract between Bordone and GSC has been submitted (see NYSCEF Doc. No. 12). Plaintiff – Arch Insurance submits the “Tender for Defense and Indemnification as an Additional Insured and Contractual Indemnitee” document (see NYSCEF Doc. No. 13).

Further, plaintiff's affirmation affirms, “although Nautilus agreed to provide a defense to Bordone with regard to the Underlying Action as an additional insured on the Nautilus policy issued to GSC Services Corp (“GSC”) and assigned counsel to defend Bordone, nearly two years after accepting Bordone's tender, Nautilus, without seeking a judicial determination that it was permitted to withdraw from Bordone's defense, advised the counsel it assigned to defend Bordone in the Underlying Action that it determined that Bordone is not an additional insured on the Nautilus policy and, therefore, it would not reimburse counsel for any further expenses incurred in the defense of Bordone in the Underlying Action. As a consequence, Arch has since been funding Bordone's defense of the Underlying Action” (see NYSCEF Doc. No. 11 Par. 4).

A submitted document from Berkley Environmental states,

“Berkley Environmental is responding on behalf of Nautilus Insurance Company, the Environmental Combined Insurance policy carrier for GSC Services Corp under the policy referenced above. You have submitted the claim on behalf of your insured Bordone Contracting, LLC for defense, indemnification and additional

insured coverage consideration under the environmental combined insurance policy ECP2026031-10 issued by Nautilus issued to GSC” (see NYSCEF Doc. No. 14).

Defendant – Nautilus submits the Nautilus Primary Policy (see NYSCEF Doc. No. 38), the Nautilus Additional Insured Endorsement (see NYSCEF Doc. No. 39), and the Nautilus Excess Policy (see NYSCEF Doc. No. 40).

“To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented.” *Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 (1968).

“Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable.” *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 (2004).

As this court has reviewed the submitted documents, memorandum of law, and legal theories put forth by the parties, there remains a certain degree of doubt about insurance coverage for the above referenced “underlying action.” As “summary judgment should not be granted where there is any doubt” the documents, contracts, and relationship between the parties need further analysis and judicial review.

ORDERED that plaintiff’s motion for summary judgment, CPLR 3212, is DENIED; and it is further

ORDERED that defendant’s counterclaim for summary judgment, CPLR 3212, is DENIED.

1/13/2022
DATE


LAURENCE LOVE, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE