

**American Empire Surplus Lines Ins. Co. v Hudson
Ins. Group**

2022 NY Slip Op 30228(U)

January 20, 2022

Supreme Court, New York County

Docket Number: Index No. 653422/2020

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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AMERICAN EMPIRE SURPLUS LINES INSURANCE
COMPANY,

Plaintiff

Index No. 653422/2020

-against-

DECISION AND ORDER

HUDSON INSURANCE GROUP,

Defendant

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LUCY BILLINGS, J.S.C.:

I. RELIEF SOUGHT

Plaintiff moves for partial summary judgment, C.P.L.R. § 3212(b) and (e), seeking a declaratory judgment that defendant is obligated to defend nonparties Inter Renovation, Inc., and 130 E. 18 Owners Corp. in an underlying personal injury action, Berrones v. 130 E. 18 Owners Corp. and Inter Renovation, Inc., Index No. 159487/2019 (Sup. Ct. N.Y. Co.), under an insurance policy that defendant issued to its insured, nonparty Unibud Restoration, Inc. C.P.L.R. § 3001. The parties do not dispute that the policy named Inter Renovation as an additional insured, but plaintiff claims the policy covers 130 E. 18 Owners as well. Plaintiff further seeks reimbursement for plaintiff's expenses in defending Inter Renovation and 130 E. 18 Owners up to now. Finally, plaintiff seeks a declaratory judgment that defendant's policy is primary over plaintiff's policy and affords non-

contributory coverage to both Inter Renovation and 130 E. 18th Owners as additional insureds.

II. PLAINTIFF'S FAILURE TO MEET THE STANDARDS FOR SUMMARY JUDGMENT

To obtain summary judgment, plaintiff must make a prima facie showing of entitlement to judgment as a matter of law through admissible evidence, eliminating all material factual issues. C.P.L.R. § 3212(b); Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039, 1043 (2016); Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015); Voss v. Netherlands Ins. Co., 22 N.Y.3d at 734; Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012). If plaintiff fails to make this evidentiary showing, the court must deny plaintiff's motion. Voss v. Netherlands Ins. Co., 22 N.Y.3d at 734; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 475 (2013); Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Dorador v. Trump Palace Condo., 190 A.D.3d 479, 481 (1st Dep't 2021).

Plaintiff does not authenticate any signature on either defendant's commercial general liability policy to Unibud Restoration or plaintiff's own commercial general liability policy or excess policy to Inter Renovation, which, as on any contract, must be authenticated for the policies to be admissible. Without any policy in admissible form, plaintiff fails to establish that defendant insured Inter Renovation or 130

E. 18th Owners or owed coverage for the plaintiff Berrones's injury claimed in the underlying action. Clarke v. American Truck & Trailer, Inc., 171 A.D.3d 405, 405-406 (1st Dep't 2019); Kenneth J. v. Lesley B., 165 A.D.3d 439, 441 (1st Dep't 2018); B & H Florida Notes LLC v. Ashkenazi, 149 A.D.3d 401, 403 n.2 (1st Dep't 2017); AO Asset Mgt. LLC v. Levine, 128 A.D.3d 620, 621 (1st Dep't 2015). Although plaintiff contends that defendant's policy is admissible because plaintiff received the policy from defendant in disclosure, plaintiff fails to show that it received the policy in response to a request for such a document created by defendant. C.P.L.R. § 4540-a.

Plaintiff also does not authenticate the subcontract between general contractor Inter Renovation and subcontractor Unibud Restoration, which is further necessary to establish that Inter Renovation and building owner 130 E. 18 Owners are covered by defendant's policy. The subcontract that plaintiff presents required Unibud Restoration to indemnify Inter Renovation and the "Owner of the property" against any bodily injury claims arising from work performed on Unibud Restoration's behalf. Aff. of Brendan P. LoPuzzo Ex. C, at 16. Defendant's policy provides:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damages" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages.

LoPuzzo Aff. Ex. D, at 252. Thus plaintiff may not establish

that defendant owes a duty to defend Inter Renovation and 130 E. 18 Owners without first demonstrating that Unibud Restoration owes a contractual obligation to indemnify Inter Renovation and 130 E. 18 Owners. Since plaintiff does not present any admissible evidence of such facts, plaintiff utterly fails to show its entitlement to summary judgment. C.P.L.R. § 3212(b).

III. THE SUBSTANTIVE MERITS

Even were the court to consider the insurance policies and the subcontract, plaintiff still fails to establish defendant's duty to defend Inter Renovation and 130 E. Owners as a matter of law. "A duty to defend exists whenever the allegations in the complaint in the underlying action, construed liberally, suggest a reasonable possibility of coverage, or where the insurer has actual knowledge of facts establishing such a reasonable possibility." City of New York v. Wausau Underwriters Ins. Co., 145 A.D.3d 614, 617 (1st Dep't 2016). See Automobile Ins. Co. of Hartford v. Cook, 7 N.Y.3d 131, 137 (2006); Frontier Insulation Contrs. v. Merchants Mut. Ins. Co., 91 N.Y.2d 169, 175 (1997); Ruiz v. 829 Realty LLC, 198 A.D.3d 581, 581 (1st Dep't 2021). Because the allegations in the underlying action trigger this duty, it is broader than the duty to indemnify. Fieldston Prop. Owners Ass'n, Inc. v. Hermitage Ins. Co., 16 N.Y.3d 257, 264 (2011); Regal Const. Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA, 15 N.Y.3d 34, 37 (2010); BP Air Conditioning

Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 714 (2007);
American States Ins. Co. v. Graphic Arts Mut. Ins. Co., 193
A.D.3d 608, 608 (1st Dep't 2021). To determine whether an
insurer owes a duty to defend, the court may "look to judicial
admissions in the insured's responsive pleadings in the
underlying tort action or other formal submissions in the current
or underlying litigation to confirm or clarify the nature of the
underlying claims." Northville Indus. Corp. v. National Union
Fire Ins. Co. of Pittsburgh, Pa., 89 N.Y.2d 621, 635 (1997);
American States Ins. Co. v. Graphic Arts Mut. Ins. Co., 193
A.D.3d at 609.

A. The Allegations in Inter Renovation's Third Party
Complaint Do Not Raise a Reasonable Possibility of
Coverage.

Plaintiff maintains that defendant owes a duty to defend
Inter Renovation and 130 E. 18 Owners because the former filed a
third party complaint against defendant's insured, Unibud
Restoration, alleging that Berrones was injured while working on
Unibud Restoration's behalf, triggering coverage of his injuries
under the subcontract between Inter Renovation and Unibud
Restoration. Defendant contends that Inter Renovation
disingenuously filed its third party complaint to trigger
defendant's duty, since Berrones previously attested, in both his
verified bill of particulars and his deposition in the underlying
action, that he was employed by nonparty RKZ Restoration Corp.,

not Unibud Restoration. *Aff. of Michael F. Panayotou Ex. 1*, at 31, 40, 47, 49-50; *Ex. 2*, at 7.

A "liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence," despite whether "facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered." *Fitzpatrick v. American Honda Motor Co.*, 78 N.Y.2d 61, 63 (1991); *American States Ins. Co. v. Graphic Arts Mut. Ins. Co.*, 193 A.D.3d at 609; *Axis Surplus Ins. Co. v. GTJ Co., Inc.*, 139 A.D.3d 604, 604 (1st Dep't 2016). Nevertheless, plaintiff's only allegation that raises a possibility of coverage for Inter Renovation and 130 E. 18 Owners is Inter Renovation's unverified third party complaint, which defendant refutes through sworn, admissible, extrinsic evidence that Berrones did not work on Unibud Restoration's behalf. See *American States Ins. Co. v. Graphic Arts Mut. Ins. Co.*, 193 A.D.3d at 609.

The main complaint in the underlying personal injury action, moreover, alleges that Berrones was "engaged in the performance of construction, renovation, demolition, painting, repair and/or alterations at said premises." *LoPuzzo Aff. Ex. A*, at 16. Yet under the subcontract, Unibud Restoration agreed only "to provide all Hanging [sic] and pipe scaffold, labor and material to complete this project as per drawings and specifications," while Inter Renovation agreed "to install and maintain bridge for

duration of the project," referring to the elevated platform from which Berrones alleged he fell. LoPuzzo Aff. Ex. C, at 2. Since none of Berrones's purported work activities overlaps with Unibud Restoration's contractual obligations to Inter Renovation, its allegation that Berrones worked on Unibud Restoration's behalf is "without factual merit." Worth Constr. Co. v. Admiral Ins. Co., 10 N.Y.3d 411, 416 (2008). Inter Renovation's third party complaint, by itself, thus falls short of reasonably suggesting that defendant owes a duty to defend Inter Renovation and 130 E. 18 Owners. Contracting Plumbers' Coop. Restoration Corp. v. Hartford Accident & Indem. Co., 46 N.Y.2d 857, 858 (1979); City of New York v. Wausau Underwriters Ins. Co., 145 A.D.3d at 621-22.

In the decisions granting summary judgment to parties relying on an underlying complaint to trigger coverage, they supported the pleading with disclosure that reinforced the complaint's allegations. American States Ins. Co. v. Graphic Arts Mut. Ins. Co., 193 A.D.3d at 609; All State Interior Demolition Inc. v. Scottsdale Ins. Co., 168 A.D.3d 612, 613 (1st Dep't 2019). Here, as set forth above, the disclosure, Berrones's deposition, as well as his sworn bill of particulars, directly and completely refute the underlying third party complaint. Therefore, even were the policies and subcontract admissible, plaintiff fails to establish its prima facie claim.

B. Plaintiff Presents No Admissible Evidence That Defendant Actually Knew Facts Establishing a Reasonable Possibility of Coverage.

Nor does plaintiff present admissible evidence that defendant actually knew facts demonstrating that it owed a defense to Inter Renovation and 130 E. 18 Owners. WDF Inc. v. Harleystown Ins. Co. of New York, 193 A.D.3d 667, 667 (1st Dep't 2021); Indian Harbor Ins. Co. v. Alma Tower, LLC, 165 A.D.3d 549, 549 (1st Dep't 2018); City of New York v. Wausau Underwriters Ins. Co., 145 A.D.3d at 617. Plaintiff contends that a report from Public Investigation Service, Inc., required defendant to defend Inter Renovation and 130 E. 18 Owners because the report named Unibud Restoration as Berrones's employer. The report is inadmissible, however, as unsworn hearsay. People v. Ramos, 13 N.Y.3d 914, 915 (2010); Glueck v. Starbucks Corp., 173 A.D.3d 450, 451 (1st Dep't 2019); Ulm I Holding Corp. v. Antell, 155 A.D.3d 585, 586 (1st Dep't 2017); O'Connor v. Restani Const. Corp., 137 A.D.3d 672, 673 (1st Dep't 2016). Although plaintiff insists that defendant produced the report in disclosure, that production does not authenticate the report, because defendant did not create the report. C.P.L.R. § 4540-a; McCarthy v. Haméed, 191 A.D.3d 1462, 1462 (4th Dep't 2021).

Plaintiff next points to correspondence from defendant's attorney disclaiming coverage, which admits that defendant knew about Inter Renovation's allegations against Unibud Restoration,

but the correspondence, again, is unauthenticated. Clarke v. American Truck & Trailer, Inc., 171 A.D.3d at 406; Kenneth J. v. Lesley B., 165 A.D.3d at 441; B & H Florida Notes LLC v. Ashkenasi, 149 A.D.3d at 403 n.2; AO Asset Mgt. LLC v. Levine, 128 A.D.3d at 621. Even if C.P.L.R. § 4540-a covers documents created by defendant's attorney on behalf of defendant, plaintiff still does not show the correspondence was part of defendant's document production, since plaintiff does not attest that it requested this specific document nor provide a copy of plaintiff's request for documents.

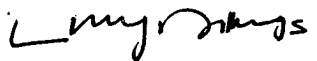
Finally, plaintiff maintains that a New York State Workers' Compensation Board decision, finding that Unibud Restoration employed Berrones, shows that defendant actually knew facts that raised a reasonable possibility of coverage. While the Workers' Compensation Board decision does not preclude a determination in defendant's favor that Unibud Restoration did not employ Berrones, since defendant was not a party to the Workers' Compensation proceeding, Liss v. Trans Auto Sys., 68 N.Y.2d 15, 22 (1986); Martinez v. 250 W. 43 Owner, LLC, 179 A.D.3d 420, 422 (1st Dep't 2020), plaintiff may not even rely on the decision as evidence because it is not certified. Li Xian v. Tat Lee Supplies Co., 170 A.D.3d 538, 539 (1st Dep't 2019). Although plaintiff may introduce the Public Service Investigation report, the correspondence by defendant's attorney, and the Workers'

Compensation Board's decision in admissible form at trial, in their current form they do not entitle plaintiff to summary judgment. C.P.L.R. § 3212(b).

IV. CONCLUSION

For the reasons explained above, the court denies plaintiff's motion for partial summary judgment, C.P.L.R. § 3212(b), seeking a declaratory judgment that defendant owes a duty to defend Inter Renovation, Inc., and 130 E. 18 Owners Corp. in the underlying action. C.P.L.R. § 3001. Since plaintiff fails to establish that defendant owes a duty to defend, the court need not address whether defendant owes reimbursement for plaintiff's incurred defense expenses, nor whether defendant's policy is primary and non-contributory to plaintiff's policy. Therefore the court also denies plaintiff's motion to the extent it seeks a declaratory judgment that defendant owes reimbursement for plaintiff's incurred defense expenses and that defendant's policy is primary and non-contributory to plaintiff's policy. C.P.L.R. §§ 3001, 3212(b). This decision constitutes the court's order.

DATED: January 20, 2022



LUCY BILLINGS, J.S.C.

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