

Interstate Fire & Cas. Co. v Aspen Ins. UK Ltd.

2022 NY Slip Op 32199(U)

July 11, 2022

Supreme Court, New York County

Docket Number: Index No. 153512/2017

Judge: Margaret Chan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

-----X
 INTERSTATE FIRE & CASUALTY COMPANY,

Plaintiff,

- v -

ASPEN INSURANCE UK LIMITED, ASPEN SPECIALTY
 INSURANCE COMPANY, ASPEN AMERICAN
 INSURANCE COMPANY, and STANDARD
 WATERPROOFING CORPORATION,

Defendants.

INDEX NO. 153512/2017

MOTION DATE 01/14/2022

MOTION SEQ. NO. 008

**DECISION + ORDER ON
 MOTION**

-----X
 ASPEN INSURANCE UK LIMITED

Third-Party Petitioner,

-against-

LIBERTY MUTUAL INSURANCE COMPANY and IMPERIUM
 INSURANCE COMPANY

Third-Party Respondents.

Third-Party
 Index No. 595484/2020

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 247, 248, 249, 250

were read on this motion to/for

SUMMARY JUDGMENT (AFTER JOINDER)

In this action that stems from plaintiff Interstate Fire & Casualty Company's (Interstate) defense of defendant Standard Waterproofing Corporation (Standard) in an underlying construction defect action¹ (the Underlying Action), third-party defendant Liberty Insurance Underwriters Inc. (Liberty) now moves for summary judgment in favor of Liberty dismissing with prejudice all claims and crossclaims

¹ The Underlying Action refers to the suit of the Board against the Sponsor (terms defined in the Background section) of the construction project involved in this action, *Board of Managers of Fifteen Madison North Condominium v Madison Park Owner LLC*, Index No. 652052/2011.

asserted against it. Third-party plaintiff Aspen Insurance UK Limited (Aspen) offers the sole opposition to the motion.

Background

This motion centers on the dispute between Aspen and Liberty about whether Liberty should be liable for sharing defense costs that Interstate incurred in defending Standard in the Underlying Action.

The complaint in the Underlying Action alleges that the subject construction project involved the conversion of a 20-story commercial building into a mixed-use building with commercial tenants on the lower floors and luxury residential condominium units on the upper floors (NYSCEF # 220 – Statement of Material Facts, ¶ 16). The condominium portion of the building occupies the 9th through 20th floors as well as certain common areas and includes approximately 56 residential units (*id.*). The owner/sponsor of the project was Madison Park Owner LLC (the Sponsor) (*id.*). The condominium board responsible for the residential units and certain common areas throughout the building is known as the Board of Managers of Fifteen Madison Square North Condominium (the Board) (*id.* at ¶ 24).

Following the completion of the condominium, the Board on September 26, 2011, filed the Underlying Action against the Sponsor and certain other companies (*id.*). The Board's complaint alleged that the building suffered from numerous defects and deviations from the promises of the Sponsor's offering plan and the requirements of good construction practice and applicable law (*id.*, ¶ 26). As to the Sponsor, the Board alleged, fraud, breach of contract, breach of fiduciary duty, conversion, unjust enrichment, and negligent misrepresentation among other claims (*id.*). To wit, the condominium unit owners, soon after closing title and moving into their units – the first of which was on July 31, 2008 – learned that the construction of the building was “riddled with defects and materially deviated” from the plans and specifications, applicable industry standards and codes, and the requirements of the offering plan (*id.*, ¶ 27). The defects were apparent to all unit owners by mid-2009 (NYSCEF # 227, ¶ 57).

The Sponsor filed a third-party complaint on March 12, 2012, against its general contractor and various subcontractors involved in the project, including Standard (NYSCEF # 220, ¶ 29). The Sponsor asserted causes of action for contribution and indemnification against Standard (*id.*). The Sponsor had engaged Standard in December 2005 to be a waterproofing and exterior restoration on the Project (*id.*, ¶ 18). Liberty asserts that Standard completed its work on the Project by the fall of 2007, which Aspen denies (*id.*, ¶ 19; NYSCEF # 248 – Response to Statement of Material Facts, ¶ 19).

Standard had insurance policies issued by the following carriers: Interstate from March 30, 2006 to October 22, 2007; Aspen from October 22, 2007 to October 22, 2009; Imperium Insurance Company (Imperium) from October 22, 2009 to October 22, 2010; and Liberty from October 1, 2010 to October 1, 2014 (NYSCEF # 220, ¶ 6). Interstate provided Standard with a defense to the Sponsor's allegations

in the Underlying Action and later settled the case on Standard's behalf, all subject to a reservation of rights (*id.*, ¶ 30).

Interstate then brought this action against Aspen in April of 2017, which asserted a cause of action for a declaration that Aspen had a duty to defend Standard and, accordingly, is liable for contribution of its share of the defense costs that Interstate paid (NYSCEF # 234 – Complaint, at 6-8). Interstate did not assert claims against Imperium or Liberty. On May 20, 2021, this court granted Interstate partial summary judgment on motion sequence 003, declaring that Aspen had a duty to defend Standard in the Underlying Action but denying Interstate's motion for a money judgment (NYSCEF # 240 at 6). The court noted that “[b]ecause the record is scant on the timing of the damage, this court cannot determine or allocate the defense costs at this time” (*id.* at 5).

This court previously denied Aspen's motion to dismiss under CPLR 3211 (a) (10) based on Interstate's decision not to bring this action against Imperium and Liberty, which Aspen alleged were necessary parties (NYSCEF # 239 – Decision and Order of October 24, 2019, at 5). The court noted that Aspen may implead such parties in this matter or seek contribution from them in a separate action (*id.*). By complaint dated June 24, 2020, Aspen brought a third-party action in this case against Imperium and Liberty (NYSCEF # 235). Aspen asserted that if it is to be found liable to Interstate for defense and indemnity costs, then Aspen is entitled to contribution from Imperium and Liberty for their pro rata share (*id.*, ¶ 8).

In support of its motion, Liberty argues that the uncontroverted facts establish that to the extent construction defects causing property damage were alleged in the Underlying Action, those defects were identified well before the October 1, 2010 inception date of Liberty's policy (NYSCEF # 219 – MOL at 2, 14-22). Accordingly, Liberty asserts that its policy does not apply given its exclusion for property damage which began prior to the start date of the policy (*id.*). This argument is consistent with the position Liberty took in denying Standard coverage two separate times, on March 27, 2012, and November 6, 2014 (NYSCEF # 243 – Denial Letters). Liberty further argues that a “New Residential Construction” exclusion provides an independent basis for Liberty's denial of coverage (NYSCEF # 219 at 22-24). Liberty also claims that its policy does not cover (i) intentional acts such as those alleged by the Board against the Sponsor and (ii) claims of faulty workmanship (*id.* at 15-18). Finally, Liberty argues that even if Aspen were to establish that coverage extends to Liberty, the coverage would only diminish Aspen's pro rata time on the risk responsibility, not entitle it to recover from Liberty on its contribution or indemnification claims (*id.* at 25-28).

Aspen counters that Liberty's motion is premature and should be denied until the parties conduct additional discovery because issues of fact exist “as to the timing of the alleged property damage” (NYSCEF # 247 – Aff in Opp at 2-4; ¶'s 6,

17). Specifically, Aspen asserts that discovery may show that Standard was covered by Liberty at the time of the alleged water infiltration. And if that is the case, Liberty would be liable as a matter of law and responsible for a pro rata contribution (*id.*, ¶ 30). Aspen adds that since Aspen filed its third-party complaint, there had been no notice of any depositions or any fact discovery. Aspen points out that this court had twice found that there was insufficient evidence in denying two dispositive motions (*id.*, ¶'s 6, 12). Aspen also disputes Liberty's intentional acts defense, arguing that the claims of fraud and breach of contract are not alleged in this matter, and that "Aspen is alleging only theories of contribution and indemnification against Liberty – both of which are viable claims based on these facts" (*id.*, ¶'s 18-19). As for Liberty's reliance on additional endorsements or exclusions within its policy to eliminate any duty to defend or indemnify Standard; Aspen argues that the endorsements "contradict the plain language and intent of the policy and should be construed against Liberty" (*id.*, ¶ 35). Finally, Aspen appeals to principles of efficiency and preservation of judicial resources, indicating that if Liberty were dismissed from this case, Aspen would "simply file another action against it and move to consolidate it with this matter" (*id.*, ¶'s 42-44).

In reply, Liberty disagrees that its motion is premature since Aspen does not identify any outstanding discovery that would impact a summary judgment in its favor (NYSCEF # 249, ¶ 10). Moreover, Liberty notes that the court previously granted partial summary judgment to Interstate against Aspen (*id.*, ¶'s 11-14). Liberty also argues that "the record is clear that the underlying allegations involved damages that began in mid-2009. Thus, even if damages did continue from mid-2009 into later policy periods... the Known Injury or Loss Exclusion ... precluded coverage" (*id.*, ¶ 23). Respecting the New Residential Construction exclusion, Liberty contends that "Aspen has waived its defense to this issue by failing to oppose this aspect of [Liberty's] motion" (*id.*, ¶ 30).

Discussion

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). "A motion for summary judgment, irrespective of by whom it was made, empowers a court to search the record and award judgment where appropriate" (*GHR Energy Corp. v Stinnes Interoil Inc.*, 165 AD2d 707, 708 [1st Dept 1990]).

“[B]efore an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case . . . and that they are subject to no other reasonable interpretation” (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984] [citations omitted]). “Insurance contracts must be interpreted according to common speech and consistent with the reasonable expectations of the average insured” (*Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 [2011]). “[A]mbiguities in an insurance policy are to be construed against the insurer, particularly when found in an exclusionary clause” (*Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 353 [1978]).

“It is well settled that an insurance company’s duty to defend is broader than its duty to indemnify. Indeed, the duty to defend is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage. If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be” (*Auto. Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal citation and quotation marks omitted]). However, a duty to defend will not be found when the underlying complaint contains “no possible factual or legal basis on which the insurer might eventually be held to be obligated to indemnify” (*Greenwich Ins. Co. v City of N. Y.*, 122 AD3d 470, 471 [1st Dept 2014] [internal citation and quotation marks omitted]). At the same time, an insurer must “provide a defense where, notwithstanding the complaint allegations, underlying facts made known to the insurer create a reasonable possibility that the insured may be held liable for some act or omission covered by the policy” (*Fitzpatrick v Am. Honda Motor Co.*, 78 NY2d 61, 70 [1991] [quotation marks omitted]). Insurers may not, however, “look beyond the complaint’s allegations to avoid their obligation to defend” (*id.* at 66). “[T]he insurer must afford a defense to the insured for covered as well as noncovered claims if the latter are intertwined with covered claims” (*Fed. Ins. Co. v Kozlowski*, 18 AD3d 33, 41 [1st Dept 2005]).

Despite an insurer’s broad obligation to defend, Liberty’s motion for summary judgment is granted as Liberty has made a prima facie showing that it is entitled to judgment as a matter of law while Aspen has failed to establish the existence of material issues of fact. In particular, Liberty has established that its continuing loss exclusion (labeled the Known Injury or Loss exclusion in Liberty’s policy) applies, since the defects, and the resultant damages, alleged in the complaint necessarily began before the October 2010 inception of Liberty’s policy. This exclusion provides:

This insurance does not apply to “bodily injury”, “property damage”, “personal and advertising injury” which began prior to the inception date of this policy, and which is alleged to continue into the policy period.

This exclusion applies whether or not:

1. The damage or its cause was known to any insured before the inception date of this policy;
2. Repeated or continued exposure to conditions causing such “bodily injury”, “property damage” or “personal and advertising injury” occurred during the policy period or caused additional or progressive “bodily injury”, “property damage” or “personal and advertising injury” during the policy period; or
3. The insured’s legal obligation to pay damages was established as of the inception date of this policy.

(NYSCEF # 242 at 33).

The complaint in the Underlying Action alleges: “By mid-2009, the defects in the Condominium’s design and construction and the deviations in its construction from the plans and specifications, applicable industry standards and Codes, the requirements set forth in the Offering Plan ... were apparent to all Unit owners and were promptly brought to the attention of the [Board]” (NYSCEF # 227, ¶ 57). The complaint then details numerous of such defects, which can only reasonably be interpreted to allege damage involving improper waterproofing. Aspen also describes the allegations of the underlying action as consisting “of damages related to water infiltration for an undefined period of time” (NYSCEF # 247, ¶ 29).

As alleged, the water damage can only be reasonably interpreted to have begun prior to the inception of Liberty’s policy. Hence, Aspen’s supposition that discovery may reveal that Liberty was providing coverage when Standard caused the alleged water infiltration cannot be sustained (NYSCEF # 247, ¶ 30). Rather, it is clear that because of the applicability of the continuing loss exclusion, there is no reasonable possibility of coverage even if discovery reveals that Standard also caused water damage during the time it was insured by Liberty. Accordingly, Liberty did not have an obligation to come forward with a defense (*see e.g. Hudson Meridian Const. Group, LLC v Utica Nat. Assur. Co.*, 2015 WL 1910016 [Sup Ct, NY County 2015] [upholding applicability of continuing loss exclusion where the party seeking insurance coverage offered “no factual basis for finding that the damages at issue may not have occurred or were set in motion to occur until . . . the start date of the applicable policy”]). Aspen’s reliance on *Consol. Edison Co. of New York v Allstate Ins. Co.* is inapplicable because a continuing loss exclusion was not at issue (98 NY2d 208 [2002]).

Aspen’s argument that Liberty’s motion is premature is without merit as it fails to put forth any basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion are exclusively within the knowledge and control of Liberty (*Vikram Const., Inc. v Everest Nat. Ins. Co.*, 139 AD3d 720, 721 [2d Dept 2016] [granting summary judgment to insurer as a matter of law prior to the completing of discovery]). Aspen’s assertion that no discovery occurred among the parties after Interstate made its motion for summary

judgment is insufficient. The “mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion” (*Vikram Const., Inc.*, 139 AD3d at 721). Further, Aspen is incorrect in stating that this court has already ruled twice that sufficient evidence does not exist to warrant granting of dispositive motions. As Liberty points out, this court previously granted partial summary judgment to Interstate against Aspen.

Aspen’s argument that Liberty’s exclusions contradicts the plain language and intent of the policy is unavailing (*see e.g. Lend Lease (US) Const. LMB Inc. v Zurich Am. Ins. Co.*, 28 NY3d 675, 685 [2017 [finding that where exclusion does not defeat all of the coverage afforded under the policy’s applicable provision, accordingly the “enforcement of the exclusion does not create a result that would have the exclusion swallow the policy” and render it illusory]). The continuing loss exclusion set forth in Endorsement No. 2 had in bold, all caps at the top of the endorsement the warning that “THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.” (NYSCEF # 242 at 31 [emphasis in original]).

Given this finding, the court need not reach the parties’ additional arguments.

Conclusion

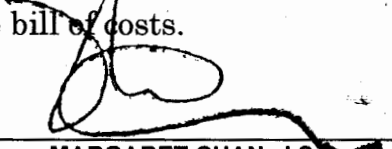
In view of the above, it is

ORDERED that third-party defendant Liberty Insurance Underwriters Inc.’s motion (MS 008) for summary judgment is granted and the third-party complaint and all cross claims are dismissed against it; and it is further

ORDERED that the claims and cross claims against third-party defendant Liberty Insurance Underwriters Inc. are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk shall enter judgment in favor of third-party defendant Liberty Insurance Underwriters Inc. and dismissing the third-party claims and cross claims against it, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

7/11/2022
DATE


MARGARET CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE