

<b>Wesco Ins. Co. v JRS Realty Enters., LLC</b>
2022 NY Slip Op 32354(U)
July 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 501724/2019
Judge: Ingrid Joseph
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of July 2022.

P R E S E N T : HON. INGRID JOSEPH  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
WESCO INSURANCE COMPANY, as subrogee of R&C  
MANAGEMENT CO. and 297 LENOX REALTY LLC,

Index No. 501724/2019

Plaintiff,

- against -

JRS REALTY ENTERPRISES, LLC, GEMSTAR  
CONTRACTING CORP., MR. DEMOLITION, INC.,  
STRUCTURAL ENGINEERING & DETAILING P.E., P.C.,  
and ROBERT SIQECA, P.E.,

Defendants.

-----X  
JRS REALTY ENTERPRISES, LLC and GEMSTAR  
CONTRACTING CORP,

Third-Party Plaintiffs,

- against -

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,  
UNITED SPECIALTY INSURANCE COMPANY, MAIN  
STREET AMERICA GROUP, CELA CONCRETE, INC.,  
STRUCTURAL ENGINEERING & DETAILING P.E., P.C.,  
ROBERT SIQECA, P.E. and NEW YORK CITY  
DEPARTMENT OF BUILDINGS,

Third Party Defendants.

-----X  
The following e-filed papers read herein:

Notices of Motion  
Affidavits/Affirmations, Exhibits Annexed  
Answer/Opposing Affidavits (Affirmations)  
Reply Papers

NYSCEF Doc No. #:

74 - 76, 87 - 94  
119, 120 -127, 142 -143  
144 - 146

In this matter, third-party defendant, Certain Underwriters at Lloyd's London ("Lloyd's"), moves (Motion Seq. 2) pursuant to CPLR § 3211 (a)(1) and (a)(7) to dismiss the Amended Third-Party Complaint filed by Third-Party Plaintiffs, JRS Realty Enterprises, LLC ("JRS") and Gemstar Contracting Corp. ("Gemstar") (referred to collectively as "TPP"). Third-Party Defendant, United Specialty Insurance Company ("United Specialty"), seeks dismissal on the same grounds (Motion Seq. 4).

Plaintiff, Wesco Insurance Company, as subrogee of its insured, R&C Management Co. and 297 Lenox Realty LLC, commenced this action by the filing of a Summons and Complaint on January 24, 2019 to recover damages in the amount of \$1,556,067.81, plus interest, costs and disbursements on negligence grounds and strict liability under Section 28-3309 of the New York City Building Code against defendants, JRS, Gemstar, Mr. Demolition, Inc., Structural Engineering & Detailing P.E., P.C. and Robert Siqeca, P.E. (referred to collectively as "defendants"). In the Complaint, Wesco asserts that its insured R&C Management and 297 Lenox Realty LLC, are the manager and owner, respectively, of a six story building containing sixty-six (66) residential apartments and an unfinished basement, located at 297 Lenox Road, Brooklyn, New York.

Wesco further asserts that JRS owns the adjacent property, 309 Lenox Road, previously a two-story building, that JRS demolished to allow for the construction and

development of a new, eight-story, residential apartment building. Wesco alleges that JRS engaged defendants, including Gemstar as Construction Manager, to work on the project. Wesco indicates that a review of the records from the New York City Department of Buildings reveal that permits were issued contemporaneously to Mr. Demolition and Gemstar on or about September 29, 2016. Wesco asserts that prior to and around January 2017, Mr. Demolition and Gemstar were performing excavation, construction and/or demolition work at the 309 Lenox Road property in a manner that violated multiple sections of the New York City Building Codes. Wesco further asserts that by January 25, 2017 multiple complaints were made, stop-work orders, and violations were issued by the Department of Buildings Enforcement Safety Team and Excavation Unit. In particular, Wesco alleges that the excavation work at 309 Lenox undermined its insureds' adjacent property (297 Lenox Road) by failing to provide lateral and subjacent support. Wesco asserts that the faulty excavation caused soil movement under portions of the foundation of the building at 297 Lenox Road, causing the building to shift and sustain multiple structural cracks.

Wesco asserts that it is subrogated to all claims that were filed by, or on behalf of, its insured to cover damage caused by the excavation work for which it has paid claims totaling \$1,556,067.81 to date. In the complaint, Wesco seeks recovery on negligence grounds and strict liability grounds pursuant to Section 28-3309 of the New York City Building Code against all of the defendants.

JRS and Gemstar commenced a third-party action, among other things, for a declaration that Lloyd's<sup>1</sup>, and commercial excess liability insurer, United Specialty<sup>2</sup>, are obligated to defend and indemnify JRS and Gemstar in the underlying action, as well as in a companion case, styled S&G Lenox, LLC v JRS Realty Enterprises, LLC, et al, currently pending in Supreme Court, Kings County (Index No. 523126/2018) ("the S&G case"). JRS and Gemstar also filed breach of contract claims and seek recovery from third-party defendant, Cela Concrete, Inc. ("Cela"), on negligence grounds, for breach of contract, contractual indemnification, common law indemnification, and statutory contribution.

In the amended third-party complaint, JRS and Gemstar allege that Gemstar entered into a contract with Cela for excavation, underpinnings, foundation and footing, shoring, and work on an elevator pit for the project. Under the section entitled, "Building Damage Incident," JRS and Gemstar assert that the New York City Department of Buildings issued a complaint with category code of "building shaking, vibrating, structural stability affected," and, following an inspection by the Fire Department, a structural stability inspection was requested "due to a pay loader striking the building causing a crack from parapet to 1<sup>st</sup> floor." Thereafter, JRS and Gemstar requested defense and indemnification

---

<sup>1</sup>By Endorsement, the Lloyd's insurance policy, issued to Gemstar, gives JRS automatic additional insured status as a result of Gemstar's contractual obligation to JRS.

<sup>2</sup>The United Specialty excess liability policy automatically provides JRS with additional insured status, since JRS is an additional insured under the Lloyd policy.

from Lloyds, which ultimately issued a declination letter to JRS and Gemstar that denied coverage, and its obligation to defend or indemnify, on the ground, among other things, that there was no coverage for earth movement. The third-party complaint also provides that JRS and Gemstar notified Cela of the building damage incident and requested defense and indemnification, which Cela has refused to provide.

In support of the motions to dismiss, Lloyds and United Specialty contend that their respective policies of insurance contain exclusions that exclude, among other things, coverage for damage caused by excavation work. Lloyd's relies on the "Exclusion - Movement of Land, Earth or Soil" exclusion in its policy of insurance, which provides, in pertinent part,

This insurance does not apply to any actual or alleged "bodily

injury", "property damage", or "personal and advertising injury", caused directly or indirectly, based on or attributable to, arising out of, resulting from, or in any manner related to the "movement of land, earth or soil", or the existence of the substance Bentonite in the soil. This exclusion applies regardless of any other cause or event contributing concurrently or in any sequence or manner to the loss including, but not limited to the following causes:

- (1) Flood waters, surface waters, subterranean waters, percolating waters, riparian and navigable waters, waves, tidal water or tidal waves, overflow of streams or other bodies of water, spray from any of the foregoing, or irrigation or other appropriated waters, all whether driven by wind or not;
- (2) Storm or sanitary sewer drain stoppage or backflow or water which backs up through sewers or drains;
- (3) Surface water or water below the surface of the ground including that which exerts pressure on or flows, seeps or leaks through sidewalks, driveways, foundations, walls, basement or other floors, or through doors, windows, or any other openings in such sidewalks, driveways, foundations, walls or floors

- (4) Water leakage, overflow or other escape from plumbing, heating, ventilating, air conditioning or other systems, equipment or appliances;
- (5) Any acts, decisions, error or omission, including the failure to act or decide, of any person, group, organization or governmental body;
- (6) Faulty, inadequate or defective:
  - a. planning, zoning, development, surveying, siting;
  - b. designs, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction, drainage;
  - c. materials used in repair, construction, renovation or remodeling; or
  - d. maintenance; of part or all of any property wherever located.

**EXCLUSION - MOVEMENT OF LAND, EARTH OR SOIL**

(continued): As used in this exclusion, "movement of land, earth or soil" includes, but is not limited to, earthquake, landslide, subsidence, mudflow, sinkhole, erosion, upheaval, slippage, sliding, sinking, rising, shifting, tilting, expanding or contracting of earth or soil.

United Specialty contends that its commercial excess policy of insurance provides that it will follow the same provisions, exclusions and limitations that are contained in the Lloyd's policy, and, to the extent that the provisions in both policies of insurance differ or conflict, the provisions of the excess policy of insurance will apply. Based upon this provision, United Specialty contends that the Earth Movement exclusion (in the Lloyd's policy) also precludes coverage under the excess policy. United Specialty argues that even if coverage is not precluded under the Earth Movement exclusion, the excess coverage policy contains a Subsidence Exclusion that explicitly precludes coverage for "[i]njury or damage which would not have occurred in whole or in part but for the subsidence of land caused in whole or in part by the operations of any insured or any subcontractor."

JRS and Gemstar, through their counsel, argue that the policies of insurance on which Lloyd's and United Specialty rely are insufficient to utterly refute and dispose of JRS and Gemstar's claims. JRS and Gemstar argue that the factual allegations in the third-party complaint sufficiently state causes of action against both insurers for declarations that both have a duty to defend and indemnify JRS and Gemstar, as well as for breach of contract. JRS and Gemstar argue that Lloyds and United Specialty failed to provide authenticated copies of the insurance policies in issue, or fully address and refute the predicate facts in the third-party complaint. Additionally, JRS and Gemstar argue that the policy terms in both policies of insurance are ambiguous and therefore, do not meet the standard of clear and unmistakable language that is applicable when an insurer seeks to exclude coverage. Further, JRS and Gemstar argue that even if it is determined that the earth movement exclusion applies, neither policy conclusively provides Lloyd's or United Specialty with a defense against JRS and Gemstar, both of which have asserted in their third-party complaint that the building was damaged by a pay loader.

Third-Party Defendant, Cela Concrete, Inc. ("Cela"), also opposes Lloyd's and United Specialty's motions to dismiss. Cela reiterates many of the same arguments presented by JRS and Gemstar but also points out that Lloyd's counsel mis-characterized the Movement of Land, Earth or Soil exclusion in the Lloyd policy by including the word, "excavation" in his recitation of the exclusion language in that section of the Lloyd's policy of insurance. Cela makes the point that the word "excavation" is not one of the

earth movement categories referenced in the policy of insurance and therefore, damage resulting from excavation work is not precluded under the Lloyd's insurance policy. Cela reiterates the point that the earth movement may not apply, since the third-party complaint contains an allegation that the damage was caused by a pay loader. Additionally, Cela recognizes that United Specialty has asserted an independent basis for dismissal based on the subsidence exclusion contained in its policy.

In response, United Specialty contends that the pleadings and the Department of Buildings violation, which provides that the adjacent property at 297 Lenox Road received damage due to settlement, are conclusive evidence to support a ruling by this court that coverage is precluded by the earth movement exclusion.

On a motion pursuant to CPLR § 3211(a)(7) to dismiss for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Scialdone v. Stepping Stones Assoc., L.P.*, 148 AD3d 953 [2d Dept 2017]; *Leon v. Martinez*, 84 NY2d 83, 87 [1994]; *Morone v. Morone*, 50 NY2d 481, 484 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 634 [1976]). Thus, “a motion to dismiss made pursuant to CPLR § 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law” (*Shaya B. Pac., LLC v. Wilson*,

*Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]). A motion made pursuant to CPLR § 3211 (a)(1) may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). To constitute documentary evidence, the evidence must be "unambiguous, authentic, and undeniable" (*Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996, 997, 913 N.Y.S.2d 668), such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable (*Prott v. Lewin & Baglio, LLP*, 150 AD3d 908 [2d Dept 2017]).

Here, in the amended third-party complaint, JRS and Gemstar, seek declarations that Lloyd's and United Specialty owe a defense and that both insurers are obligated to indemnify JRS and Gemstar in the instant matter as well as the S&G case. JRS and Gemstar further seek damages from Lloyd's and United Specialty on breach of contract grounds. This court, having accepted the facts underlying each claim as true and accorded such claims every possible inference favorable to JRS and Gemstar, finds that the third-party complaint sets forth cognizable claims under New York law. It is well understood that Lloyd's and United Specialty, as insurers, owe a defense and must indemnify Gemstar and JRS subject to the limits in the policies of insurance. The court recognizes that JRS is not in direct privity with either Lloyd's or United Specialty. However, an entity that is not

privy to an insurance contract but would nevertheless benefit from the insurance policy may bring a declaratory judgment action to determine whether the insurer owes a defense and/or coverage under the policy (*see Costa v. Colonial Penn Ins. Co.*, 204 AD2d 591 [2d Dept 1994]; *Reliance Ins. Co. v. Garsart Bldg. Corp.*, 122 AD2d 128 [2d Dept 1986]; see also, *Town of Islip v. Zara & Sons Contr. Co.*, 207 AD2d 339 [2d Dept 1994]). Since JRS and Gemstar's causes of action for declarations that their insurers owe a defense and for indemnification are recognized under New York law, the court finds dismissal for failure to state causes of action is not warranted.

Lloyd's and United Specialty's motions to dismiss under 3211 (a)(1) are based upon the Earth Movement and Subsidence exclusions, respectively, in the subject policies of insurance. In the third-party complaint, JRS and Gemstar attribute the incident to a construction pay loader controlled by Cela. They also concede that the incident warranted a complaint from the DOB with a category code of "building shaking, vibrating, structural stability affected." JRS and Gemstar further concede that the complaint stated "FDNY requests structural stability inspection due to a pay loader striking building causing a crack from parapet to 1<sup>st</sup> floor." JRS and Gemstar also conceded that the incident involving the pay loader resulted in damage to 298 Lenox Road. Since the Lloyd's earth movement exclusion disregards what caused the movement of land, earth, or soil, the fact that it could have been caused by a pay loader is of no consequence. The Lloyd's policy specifically provides that the exclusion applies regardless of any other cause or event contributing

concurrently or in any sequence or manner to the movement of land, earth or soil. Even under a strict, narrow construction, the court finds that the language in Lloyd's earth movement exclusion specifically, clearly, and unmistakably excludes coverage for the damage resulting from the pay loader incident.

To the extent that coverage is precluded for JRS and Gemstar under the Lloyd's policy, it follows that both entities are also precluded from obtaining coverage under the United Specialty commercial excess coverage policy. Even if this were not the case, the subsidence exclusion contained in the United Specialty policy specifically and unequivocally excludes coverage for damage that would not have occurred, in whole or part, but for the subsidence (the caving in or sinking) of land that is caused in whole or in part by the operations of any insured or any subcontractor, such as Cella in this case.

In light of the foregoing the court need not address the parties remaining contentions.

Based upon the foregoing, it is hereby

ORDERED, that the motion (Motion Seq. 2) of defendant, Certain Underwriters at Lloyd's of London, is granted such that the causes of action in the third-party complaint, to the extent that such causes of action are against Certain Underwriters at Lloyd's of London, are hereby dismissed, and it is further

ORDERED, that the motion (Motion Seq. 4) of defendant, United Specialty Insurance Company, is granted to the extent that the causes of action in the third-party

complaint, to the extent that such causes of action are against United Specialty Insurance Company, are dismissed, and it is further

ORDERED, that the moving defendants shall serve a copy of this order with notice of entry upon all parties herein.

This constitutes the decision and order of the court.

ENTER,



HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph**  
**Supreme Court Justice**