

City of New York v Travelers Indem. Co.

2023 NY Slip Op 30065(U)

January 3, 2023

Supreme Court, New York County

Docket Number: Index No. 451003/2020

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

THE CITY OF NEW YORK,

Plaintiff,

- v -

TRAVELERS INDEMNITY COMPANY and TRAVELERS
PROPERTY CASUALTY COMPANY OF AMERICA,

Defendants.

-----X

TRAVELERS INDEMNITY COMPANY,

Third-Party Plaintiff,

-against-

ZURICH AMERICAN INSURANCE COMPANY and
IRONSHORE INSURANCE SERVICES LLC,

Third-Party Defendants.

-----X

INDEX NO. 451003/2020

MOTION DATE 12/21/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595285/2021

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 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, 64, 65, 66, 67, 68, 69, 73, 74, 75, and 81 were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, the motion is granted. In this declaratory judgment action, plaintiff City of New York (the “City”) seeks a declaration that it is entitled to a defense from defendants Travelers Indemnity Company and Travelers Property Casualty Company of America (collectively, “Travelers”), as well as reimbursement for defense costs expended. The City initially sought relief regarding seven separate underlying personal injury lawsuits for which Travelers had allegedly issued a relevant insurance policy. During this litigation, Travelers has undertaken the defense of the City in three of those actions, the City has withdrawn its

declaratory judgment claims as to two, and the parties have settled the City's declaratory judgment claims regarding one other, leaving only the City's declaratory judgment claims as to its defense in *Macancela, et al. v E.W. Howell Co., LLC, et al.*, pending in the Supreme Court, Kings County, under Index No. 518515/2017 (the "underlying action").

Background

The City contracted with nonparty TDX Construction Corporation ("TDX") for construction management services at, *inter alia*, Coney Island Hospital. Relevant to the underlying action, TDX was to "design and build out" an imaging services space on the fifth floor of the main hospital building, including "reconfiguring of partitions, new ceilings and lighting, furniture, and reconfiguration and addition of electrical outlets" (TDX contract, NYSCEF Doc. No. 19 at CNY_005601, § C.2). The TDX contract required TDX to "indemnify, defend and hold harmless" the City from claims arising out of TDX's work at the hospital, and that TDX would be "solely responsible for all injuries to persons . . . sustained during its operations and work" (*id.* at CNY_005565, § 6.1). TDX was also required to carry insurance covering "any and all claims for property damage, personal injury and death arising out of [TDX's work], and any work incidental thereto" (*id.* at CNY_005567-68, § 6.3.9[ii]), and naming the City as an additional insured (*id.* at CNY_005708).

Pursuant to these requirements, TDX obtained a Commercial General Liability policy from Travelers. The policy contained an endorsement naming as an additional insured any person or entity that TDX agreed "in a written contract requiring insurance to include as an additional insured," such as the City, but only covering claims of "bodily injury, property damage or personal injury" and only where "the injury or damage is caused by acts or omissions of you or your subcontractor in the performance of [TDX's work] to which the written contract

requiring insurance applies” (Travelers policy, NYSCEF Doc. No. 20 at CG D2 46 08 05, ¶ 1). The City is not an additional insured under the policy with respect to its “independent acts or omissions” (*id.*, ¶ 1[b]). Further, such coverage afforded to the City is “excess over any valid and collectable ‘other insurance,’ whether primary, excess, contingent or on any other basis” (*id.*, ¶ 3).

According to the complaint filed in the underlying action, the plaintiff Jorge Macancela (“Macancela”) was working at Coney Island Hospital when he was struck by a falling object (underlying complaint, NYSCEF Doc. No. 21). The notice of claim sent to the City stated that while working on the fifth floor, Macancela was struck by an object believed to be a duct (notice of claim, NYSCEF Doc. No. 22). The complaint identifies the City as the party who engaged “a general contractor, contractors and/or subcontractors with reference to work being performed at the premises” (underlying complaint, ¶ 49). Accordingly, the City tendered to Travelers the defense of the underlying action on January 14, 2019 (tender letter, NYSCEF Doc. No. 22). It is undisputed that Travelers never responded to the tender.

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

Discussion

"The unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning" (*Broad St., LLC v Gulf Ins. Co.*, 37 A.D.3d 126, 130-31 [1st Dept 2006]). The policy should be read as a whole, and no particular words or phrases should receive undue emphasis (*Bailey v Fish & Neave*, 8 N.Y.3d 523, 528 [2007]). Courts should give effect to every clause and word of an insurance contract (*Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 N.Y.2d 621, 633 [1997]). An interpretation is incorrect if "some provisions are rendered meaningless" (*County of Columbia v Continental Ins. Co.*, 83 N.Y.2d 618, 628 [1996]). It is the insured's burden to show that the provisions of a policy provide coverage (*BP A.C. Corp. v One Beacon Ins. Group*, 33 A.D.3d 116, 134 [1st Dept 2006]). Moreover, where the policy language offers no reasonable basis for a difference of opinion, the court should not find it ambiguous (*Breed v Insurance Co. of N.A.*, 46 N.Y.2d 351, 355 [1978]). Provisions in a contract are not ambiguous merely because the parties interpret them differently (*Mount Vernon Fire Ins. Co. v Creative Housing Ltd.*, 88 N.Y.2d 347, 352 [1996]).

The duty to defend under an insurance policy is exceedingly broad and extends beyond the limits of the duty to indemnify, covering any situation where the allegations of the complaint "suggest a reasonable possibility of coverage" (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal quotations and citation marks omitted]). "Thus, an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course" (*id.*). "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" (*id.* [internal quotations and citation marks omitted]). The duty

remains “even though facts outside the four corners of the pleadings indicate that the claim may be meritless or not covered” (*id.* [internal quotations and citation marks omitted]).

Here, Travelers argues that it has no duty to defend for two reasons. First, Travelers claims the City has failed to join certain indispensable parties, namely other insurance companies who may be obligated to provide coverage to the City. Second, Travelers claims that the underlying action seeks to hold the City liable for its own acts or omissions and therefore the City is not entitled to additional insured coverage pursuant to the terms of the policy. Regarding joinder, the City is seeking a declaration only as regards Travelers’ obligation to provide a defense, not any other party. Moreover, where, as is undisputed, no other insurance company defends the City, Travelers obligated itself under the policy to provide a defense if there is coverage (Travelers policy at CG 00 01 10 01, ¶ IV[4][b] [“If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers”]). Thus, unlike the cases cited by Travelers, the court’s declaration will impact Travelers and Travelers alone, and the policy provides Travelers with the right to enforce any other coverage obligations running in favor of the City (*see David Christa Const., Inc. v Am. Home Assur. Co.*, 41 AD3d 1211, 1212 [4th Dept 2007] [“According to defendant, its obligation to provide insurance coverage to plaintiff is excess to the primary obligation of United Pacific Insurance Company (United Pacific) and, because United Pacific is not a party to this action, it would not be bound by any declaration”]). Indeed, Travelers has already done so by commencing a third-party action against other insurers herein.

Regarding whether the underlying action seeks to hold the City liable solely for its own negligence, precluding coverage, as set forth above, the duty to defend is exceedingly broad, and extends to wherever there is a reasonable possibility of coverage, even if facts outside of the

complaint indicate that there may ultimately be no coverage (*Cook*, 7 NY3d at 137). The complaint in the underlying action alleges, *inter alia*, that the City owned and operated the Coney Island Hospital, that it hired contractors to perform work at the premises, and while performing such work, Macancela was injured. The underlying complaint alleges claims of negligence, but also violations of various provisions of the Labor Law, for which the City would only be vicariously liable. Thus, the allegations of the complaint provide a scenario where the City would potentially be liable for TDX's or its construction manager's or subcontractor's negligence or misconduct, casting it within "the embrace of the policy" (*id.*). Until such time as the underlying action proves otherwise, Travelers must defend the City (*id.*). Moreover, where the allegations of an underlying action trigger a duty to defend, the insurer is also obligated to pay defense costs (*Federal Ins. Co. v Kozlowski*, 18 AD3d 33, 40 [1st Dept 2005]). Thus, Travelers is obligated to reimburse the City for its costs from the date of tender to the date Travelers begins defending the action (*see National Union Fire Ins. Co. of Pittsburgh, PA v. Greenwich Ins. Co.*, 103 A.D.3d 473, 474 [1st Dept 2013]). The amount of such damages shall be severed and determined at a later hearing before the undersigned.

Accordingly, it is

ORDERED that the motion of plaintiff City of New York for summary judgment on the City's first cause of action seeking a declaratory judgment that defendants Travelers Indemnity Company and Travelers Property Casualty Company of America are obliged to provide a defense to, and provide coverage for, the City of New York in the action of *Macancela vs. E.W. Howell Co., LLC, et al*, Index No. 518515/2017, Supreme Court, Kings County, is GRANTED, and a declaratory judgment shall be rendered in said plaintiff's favor; and it is further

ADJUDGED and DECLARED that defendants herein are obliged to provide a defense to, and provide coverage for, the City of New York in the aforesaid action pending in Kings County; and it is further

ORDERED that the balance of this action is severed and continued; and it is further

ORDERED that counsel shall appear for a scheduling conference in Room 1166, 111 Centre Street on January 25, 2023 at 10:00 AM.

This constitutes the decision and order of the court.



<u>1/3/2023</u> DATE	<hr/> LOUIS L. NOCK, 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"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE