

<b>American Fire &amp; Cas. Ins. Co. v Mt. Hawley Ins. Co.</b>
2023 NY Slip Op 30263(U)
January 24, 2023
Supreme Court, New York County
Docket Number: Index No. 150282/2022
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

INDEX NO. 150282/2022
MOTION DATE 08/29/2022
MOTION SEQ. NO. 001

AMERICAN FIRE AND CASUALTY INSURANCE COMPANY,

Plaintiff,

- v -

MT. HAWLEY INSURANCE COMPANY, MERCHANTS MUTUAL INSURANCE COMPANY

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for DISMISSAL

Plaintiff American Fire and Casualty Insurance Company (hereinafter "American Fire") commenced this declaratory judgment action against defendants Mt. Hawley Insurance Company ("Mt. Hawley") and Merchants Mutual Insurance Company ("Merchants"). American Fire alleges that these two insurance companies—by virtue of policies covering two of the named construction-company defendants in an underlying action—are also required to defend and indemnify American Fire’s named insured 505 Dental Associates, PLLC ("505 Dental") and Farzin Farokhzadeh. In Motion Sequence 001, Merchants moves to dismiss the complaint under CPLR 3211 (a) (1) and (a) (7) and for a declaration that it has no obligation to defend, indemnify or provide additional insured coverage to 505 Dental and Farokhzadeh. (NYSCEF doc. no. 17, notice of motion.) For the following reasons, Merchants’ motion is granted.

BACKGROUND

In Salmeron v A.F. & J Gold Real Estate (Index No. 25305/2020 [Sup. Ct. Bronx County]), underlying plaintiff Isias Mejia Salmeron commenced a personal injury action against A.F. & J Gold Real Estate LLC ("A.F. & J"), Principal Builders Solutions, Inc. ("Principal Builders"), 505 Dental, and Farokhzadeh for injuries he sustained while performing construction work on a premise located in the Bronx. The underlying complaint alleges that A.F. & J owned the premise, Farokhzadeh (who owns 505 Dental) was its tenant, Farokhzadeh hired Principal Builders to perform work on the premise, Principal Builders subcontracted work to All City Electrical Inc. ("All City"), and Salmeron was injured while working for All City. (See NYSCEF doc. no. 26, underlying action complaint.)

The subcontract between Principal Builders and All City required All City to maintain insurance "as will protect the Subcontractor, the Contractor, the Owner and their officers...for

claims arising out of or resulting from the Subcontractor's work." (See NYSCEF doc. no. 22 at ¶9, subcontract.) The subcontract also provides that All City's required insurance be considered primary and non-contributory: "With respect to each type of Insurance hereunder, the Owner's Insurance and Contractor's Insurance shall be excess to Subcontractor's Insurance." (*Id.* at ¶9.1.)

All City obtained a Commercial General Liability Policy from Merchants with a general aggregate limit of \$2,000,000 and a per occurrence limit of \$1,000,000. The policy lists Principal Builders as an Additional Insured. (NYSCEF doc. no. 19 at 7, Merchants insurance policy.) As part of its obligations under the policy, in January 2021, Merchants agreed to defend Principal Builders in the underlying suit and agreed to reimburse Mt. Hawley (Principal Builders' primary insurer) for all reasonable expenses incurred defending the action thus far and for future expenses as well. (NYSCEF doc. no 18, Kirkpatrick affidavit.)

American Fire commenced the instant declaratory action in January 2022, alleging that Mt. Hawley and Merchants have an obligation to defend and indemnify its own insured—505 Dental and Farokhzadeh—in the underlying action. Two provisions in Merchants' policy are relevant here. The first is a Contractor's Plus Endorsement, form MU 85 55. It provides:

"C. Who is An Insured

3. Additional insured—By Contract, Agreement or Permit

Coverage is included on a blanket basis for Additional Insureds that are required by written contract, agreement, or permit. The provisions as shown in Coverage Form MU 82 77, Additional Insureds—By Contract, Agreement or Permit, apply to this coverage." (NYSCEF doc. no. 19 at 150.)

The second is Coverage Form MU 82 77. This provision states that "Any person or organization, *when you and such person or organization have agreed in writing in a contract, agreement or permit* that was signed and executed prior to the 'bodily injury,' 'property damage,' or 'personal and advertising injury,' that such person or organization be added as an additional insured on your policy." (Emphasis added) (*Id.* at 108.)

On its pre-answer motion to dismiss and for a declaration of rights, Merchants contends that these two provisions preclude 505 Dental and Farokhzadeh as additional insured. It contends that MU 82 77 establishes additional insured status only with entities that All City entered into a written contract and no such contract exists here. In opposition, American Fire argues that the two provisions should be read separately and that the Contractor' Plus Endorsement creates additional insured coverage to 505 Dental and Farokhzadeh. From this perspective, because All City's subcontract required it to defend and indemnify "the Contractors, the Owner, and their officers," 505 Dental and Farokhzadeh—as contractors and owners—are included under the language "Coverage is included on a blanket basis for Additional Insured that are required by written contract."

## DISCUSSION

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), courts afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, and give the plaintiff the benefit of every possible favorable inference. (*Leon v Martinez*, 84

NY2d 83, 87 [1994].) On a CPLR 3211 (a) (1) motion to dismiss on grounds the action is barred by documentary evidence, such documentary evidence must utterly refute plaintiff's factual allegations and conclusively establish a defense as a matter of law. (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002].) With regard to a pre-answer motion to dismiss a declaratory judgment action, the only issue presented for consideration is whether the cause of action for declaratory relief is set forth, not whether the plaintiff is entitled to a favorable declaration. (*Matter of Dashnaw v Town of Peru*, 111 Ad3d 1222, 1225 [3d Dept 2013; citing *North Shore Towers Apts. Inc. v Three Towers Assoc.*, 104 AD3d 825, 827 [2d Dept 2013].)

However, while courts may not ordinarily determine the ultimate rights of the parties in a pre-answer motion (*see* CPLR 3212 (a) ["Any party may move for summary judgment in any action, *after issue has been*" (Emphasis added)]), in certain circumstances declaratory judgment actions provide the court with "exceedingly broad discretion in deciding the issues." (*Daley v M/S Capital NY LLC*, 44 AD3d 313, 315 [1st Dept 2007], *Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie* [2d Dept 2011] ["the motion [to dismiss for failure to state a cause of action] should be taken as a motion for declaration in the defendant's favor and treated accordingly".]) Where a court accepts the material allegation of the complaint to be true and is nonetheless able to determine, as a matter of law, that the defendant is entitled to a declaration in his or her favor, it may enter a judgment making the appropriate declaration. (*Matter of Dashnaw*, 111 AD3d at 1225; *DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC*, 102 AD3d 725, 728 [2d Dept 2013].) By contrast, if the allegations in the declaratory action implicate factual issues such that the parties' rights cannot be determined as a matter of law, a declaration upon a motion to dismiss is not permissible. (*DiGiorgio*, 102 AD3d at 728; *Matter of Tilcon N.Y.*, 87 AD3d at 1151.)

As required, the Court accepts all of the facts alleged in the complaint as true. These facts include the terms of the subcontract between All City and Principal Builders that required All City to defend and indemnify the owners and contractors of the construction project, the relevant terms of the insurance policy between All City and Merchants, and the terms of American Fire's policy with 505 Dental and Farokhzadeh that deems it to be excess coverage over other applicable insurance coverage. Because the declaratory action does not implicate outstanding factual issues, the Court finds it is appropriate to determine the parties' rights on this motion.

Courts resolve disputes over insurance coverage by first looking to the language of the policy, construing it in a such a way that afford the language a fair meaning and leaves no provision without force and effect. (*Raymond Corp. v Nat'l Union Fire Ins. Co.*, 5 NY 3d 157, 162 [2005].) If the plain language permits, courts will give effect to clear provisions. (*Id.*) Further, courts should, where possible, read policy provisions to avoid ambiguities. (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 131 [1st Dept 2006] ["A court [should not] disregard the provisions of an insurance contract which are clear and unequivocal or accord a policy a strained construction merely because that interpretation is possible".]) Where parties differ concerning the meaning of a provision, the court will be guided by a reasonable reading of the plain language. (*Id.*)

Applying these principles, the plain meaning of the two provisions is clear. The Contractor's Plus Endorsement explains, in unambiguous terms, that the provisions of "Form

MU 82 77, Additional Insureds—By Contract, Agreement or Permit” apply to the Contractor’s Plus Endorsement coverage. Thus, the two sentences in the Contractor’s Plus Endorsement—on the one hand, the language describing the blanket coverage provided where required by written contract [regardless of privity]; and on the other, the requirement that MU 82 77 be consulted—cannot be read separately. Any interpretation that attempts to read the first sentence without reference to the second ignores the Court’s obligation to avoid needlessly creating ambiguities where none exist simply because a “strained construction” is possible. (*Gulf Ins. Co.*, 37 AD3d at 131.)

American Fire argues that the provision is ambiguous, its interpretation is reasonable, and *Vargas v City of New York* (158 AD3d 523 [1st Dept 2018]) provides support. The Court finds otherwise. In *Vargas*, the First Department explained that “Endorsement 4,” which, like here, provided that an additional insured is “any person or organization with whom you [the insured] have agreed to add as an additional insured by written contract,” was not dispositive as to whether plaintiff was an additional insured because “Endorsements 1-3” existed, and these endorsements did not require the same privity of contract that Endorsement 4 did. (*Id.* at 524.) In defining coverage under Endorsements 1-3, however, the policy *did not* refer to Endorsement 4. This is a critical distinction: in Merchants’ policy, immediately after the language that American Fire plausibly alleges does not require privity of contract is a sentence that *requires* reference to a form that states privity of contract applies. Put differently, Endorsements 1-3 and Endorsement 4 were materially different from each other, and the broader Endorsements 1-3 included the plaintiff as an additional insured; by contrast, both the Contractor’s Plus Endorsement and MU 82 77 Form in Merchants policy require privity of contract, and because there is no such contract between 505 Dental or Farokhzadeh and All City, both sections counsel against coverage. *Vargas* is thus inapplicable to the current dispute.

Lastly, the Certificate of Insurance does not create an ambiguity in the policy. The Certificate states “*if required in a Written Contract with the Named Insured* [All City], Dr. Farzin Farokhzandeh, 505 Claremon Parkway, Bronx, NY 10457 is added as an Additional Insured to the extent coverage is granted by form MU 82 77.” (Emphasis added.) (NYSCEF doc. no. 22.) This passage appears to merely reaffirm the Court’s above-described conclusion that coverage extends to 505 Dental and Farokhzandeh only once there is a written contract with All City. The Certificate further states, “This Certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies below.” (*See Three Boroughs, LLC v Endurance Am. Specialty Ins. Co.*, 143 AD3d 480, 481 [1st Dept 2016] [the certificate language stating that ‘this certificate is issued as a matter of information only and confers no rights upon the certificate holder’ was insufficient to establish additional insured status under the policy]; *Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 339 [1st Dept 2003].) For these reasons, Merchants is entitled to a declaration of rights that it is no obligated to defend or indemnify 505 Dental or Farokhzandeh.

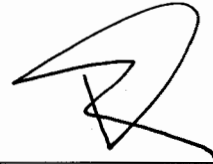
Accordingly, it is hereby

ORDERED that defendant Merchants Mutual Insurance Company’s motion pursuant to 3211 (a) (1) and (a) (7) is granted against American Fire and Casualty Insurance Company; and it is further

ORDERED and ADJUDGED that the Merchants’ declaratory judgment is granted, and that Merchants has no obligation to defend or indemnify 505 Dental Associates, PLLC or Farzin Farokhzadeh; and it is further

ORDERED that counsel for Merchants shall serve a copy of this order, along with a notice of entry, on all parties within ten (10) days of entry.

This constitutes the decision and order of the Court.



1/24/2023  
DATE

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DAKOTA D. RAMSEUR, J.S.C.

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