

<b>Phase 1 Group, Inc. v Burlington Ins. Co.</b>
2023 NY Slip Op 30350(U)
January 25, 2023
Supreme Court, New York County
Docket Number: Index No. 656986/2022
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE P. BLUTH PART 14**

*Justice*

-----X

PHASE 1 GROUP, INC.,

Plaintiff,

- v -

THE BURLINGTON INSURANCE COMPANY,

Defendant.

-----X

INDEX NO. 656986/2022

MOTION DATE 01/24/2023

MOTION SEQ. NO. 004

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 54, 55, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Plaintiff’s motion for partial summary judgment that defendant has a duty to defend plaintiff in an underlying action is granted.

**Background**

This action concerns plaintiff’s allegation that defendant improperly denied insurance coverage to plaintiff relating to an ongoing underlying litigation. Plaintiff contends it is owed defense and indemnity from defendant, but defendant has refused in bad faith to defend its insured.

Plaintiff is a plumbing company and it subcontracted with Moretrench for a construction job on Governor’s Island. The general contractor, Turner, then commenced a lawsuit in which it alleged that while Moretrench was excavating a trench along a road, it struck an electrical conduit and caused substantial damage to the power grid on Governor’s Island. Turner alleged two causes of action each against plaintiff and Moretrench.

In this motion, plaintiff seeks summary judgment on its first cause of action— for a declaration that defendant has a duty to defend plaintiff in the underlying action. It contends that it seeks coverage under a commercial general liability policy (“CGL policy”) it obtained from defendant for the subject construction job. Plaintiff insists that defendant has improperly denied plaintiff’s requests for a defense in the related litigation and defendant has relied upon factors outside of the contract in denying plaintiff’s demand.

Plaintiff emphasizes that defendant has to show that there is no possibility of coverage in order to deny a defense request and that the underlying action clearly implicates the provisions of the subject insurance policy. It maintains that it must only show that there is a reasonable possibility that defendant may have to provide coverage to plaintiff in order to trigger the duty to defend. Plaintiff observes that the underlying litigation suggests that plaintiff is responsible for the property damage because Moretrench was working at plaintiff’s direction.

In opposition, defendant observes that the CGL policy only provides coverage for bodily injury and property damage claims. It emphasizes that the policy also contains an explicit exclusion for a breach of contract cause of action. Defendant contends that plaintiff can seek coverage as an additional insured pursuant to a policy issued to Moretrench. Defendant argues that plaintiff is attempting to create coverage where none exists only because Moretrench’s policy coverage may be limited. It insists that the underlying complaint only asserts a breach of contract claim against plaintiff and that renders any coverage under the policy as inapplicable. Defendant maintains it does not rely upon any extrinsic evidence and instead merely directs the Court to the complaint in the related action. It also argues that the instant motion is premature.

In reply, plaintiff contends that defendant failed to demonstrate how the alleged exclusion applies to the actions alleged in the underlying litigation. Plaintiff emphasizes that property

damage is clearly alleged in the complaint and directs the Court to two exceptions to the exclusion.

### Discussion

“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, 818 NYS2d 176 [2006] [internal quotations and citations omitted]).

Here, the Court begins with the complaint in the underlying litigation. In that case, Turner Construction Company (“Turner”) (the general contractor) and Governors Island Corporation (“GIC”) (the apparent owner) sued both plaintiff and Moretrench (NYSCEF Doc. No. 42). Turner and GIC bring two causes of action against plaintiff and Moretrench, both of which are for breach of contract. The first cause of action against plaintiff contends that plaintiff failed to do its job correctly to complete the subcontract and that plaintiff’s defective work caused damage to Turner and GIC (*id.* ¶ 52). The complaint seeks damages arising out of the damage to the power grid on Governor’s Island due to Moretrench’s striking of an electrical conduit (*id.* ¶ 45).

Next, the Court must turn to the subject insurance policy issued by defendant to plaintiff. It provides, in part, that “We will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies. We will have the right and duty to defend the insured against any ‘suit’ seeking those damages.

However, we will have no duty to defend the insured against any ‘suit’ seeking damages for ‘bodily injury’ or ‘property damage’ to which this insurance does not apply. We may, at our discretion, investigate any ‘occurrence’ and settle any claim or ‘suit’ that may result” (NYSCEF Doc. No. 43 at 16).

“This insurance applies to ‘bodily injury’ and ‘property damage’ only if: (1) The ‘bodily injury’ or ‘property damage’ is caused by an ‘occurrence’ that takes place in the ‘coverage territory’” (*id.*). Occurrence “means an accident, including continuous or repeated exposure to substantially the same general harmful conditions” (*id.* at 29).

The policy also contains exclusions. One exclusion for “Contractual Liability” states that:

“‘Bodily injury’ or ‘property damage’ for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.

This exclusion does not apply to liability for damages: (1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an ‘insured contract’, provided the ‘bodily injury’ or ‘property damage’ occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an ‘insured contract’, reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of ‘bodily injury’ or ‘property damage’, provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same ‘insured contract’; and

(b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged” (*id.* at 17).

The Court finds that the policy requires defendant to defend plaintiff in connection with the underlying litigation. The Court agrees with plaintiff’s argument that the allegations in the underlying complaint clearly relate to an occurrence, as defined under the terms of the CGL policy, concerning property damage. There is no dispute that the underlying litigation contends

that actions by Moretrench and plaintiff contributed to substantial property damage on Governor's Island. That Turner and GIC only characterized its causes of action as breach of contract claims does not foreclose plaintiff's right to seek defense. "A party's characterization[s] of the causes of action alleged in a complaint are not controlling" (*Curtis v Nutmeg Ins. Co.*, 204 AD2d 833, 834, 612 NYS2d 256 [3d Dept 1994]). When determining whether a duty to defend exists, the Court must assess "the nature of the claims based upon the facts alleged and not the conclusions which the pleader draws therefrom" (*id.*).

The fact is that plaintiff procured an insurance policy from defendant that contained a duty to defend arising out of a property damage lawsuit and plaintiff was sued about property damage connected to its work on Governor's Island. When construing the allegations in the complaint liberally, as the Court must (*City of New York v Wausau Underwriters Ins. Co.*, 145 AD3d 614, 617, 45 NYS3d 3 [1st Dept 2016]), the Court finds that the policy is clearly implicated. There is a reasonable possibility of coverage. And defendant simply did not meet its burden to raise an issue of fact about the exclusions. Defendant did not sufficiently argue why any of the exclusions should apply here or even address why the exceptions to the contractual liability exclusion are inapplicable (a point highlighted by plaintiff in reply).

Moreover, defendant's claim that the instant motion is premature is without merit as the motion only required the Court to consider the allegations in Turner's complaint—that does not involve any additional discovery as this complaint was attached to the motion papers.

The Court rejects defendant's contention that the motion should be denied because the implications of a declaration in plaintiff's favor may not be immediate. That another insurance company (pursuant to Moretrench's policy) may be currently providing a defense is not this Court's concern. That is a matter to be decided between the insurance companies and the parties.

The Court also denies defendant’s assertion that the statute of limitations bars the instant relief. Although defendant included an affirmative defense of the statute of limitations, it did not make a separate motion for such relief pursuant to CPRL 3211(e) and so that argument is waived.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for partial summary judgment on its first cause of action is granted; and it is further

DECLARED that defendant is obliged to provide a defense to the plaintiff in the action pending in New York County under Index Number 652841/2016; and it is further

ORDERED that the balance of this action is severed and continued.

Conference: February 28, 2023 per NYSCEF Doc. No. 54.

1/25/2023

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE