

National Cas. Co. v Starr Indem. & Liab. Co.

2023 NY Slip Op 30623(U)

March 1, 2023

Supreme Court, New York County

Docket Number: Index No. 650347/2022

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

NATIONAL CASUALTY COMPANY,

Plaintiff,

- v -

STARR INDEMNITY & LIABILITY COMPANY and
NATIONAL FIRE & MARINE INSURANCE COMPANY,

Defendants.

-----X

INDEX NO. 650347/2022

MOTION DATE 05/06/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36

were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Upon the foregoing documents, the motion by defendant National Fire & Marine Insurance Company (“National Fire”) to dismiss the complaint as against it is granted for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 12-13, 33) and the exhibits attached thereto, in which the court concurs as summarized herein.

In this insurance declaratory judgment action, plaintiff National Casualty Company seeks a declaration that its insured is entitled to coverage in an underlying personal injury suit from the defendants. The plaintiff in the underlying lawsuit alleges that on October 9, 2018, while he was engaged in construction work at the Nassau Veterans Memorial Coliseum, was “caused to fall from a height/work platform” as a result of the “careless and negligent manner in which Defendants owned, maintained, controlled and performed construction work and inspection on the aforesaid location” (underlying amended complaint, NYSCEF Doc. No. 17, ¶¶ 123-25). One of the defendants in the underlying action, AEG Presents Productions, LLC (“AEG”), is a

subsidiary of the Anschutz Corporation (“Anschutz”). Anschutz, in turn, is insured by National Fire (National Fire policy, NYSCEF Doc. No. 18). The National Fire policy contains a Construction Operations exclusion, which provides that the policy “does not apply to any ‘bodily injury’ . . . either arising out of, or related to, any construction, renovation, rehabilitation, demolition, erection, excavation or remediation of any building, property or structure” (*Id.* at 071.)

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]).

“When an exclusion clause is relied upon to deny coverage, the burden rests upon the insurance company to demonstrate that the allegations of the complaint can be interpreted only to exclude coverage” (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 444 [2002]). More specifically:

To be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision.

(*Frontier Insulation Contractors, Inc. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997].)

"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 AD3d 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 NY3d 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 NY2d 621, 633 [1997]). An interpretation is incorrect if "some provisions are rendered meaningless" (*County of Columbia v Continental Ins. Co.*, 83 NY2d 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 AD3d 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 NY2d 351, 355 [1978]).

Here, plaintiff seeks a declaration that its insured is an additional insured under National Fire's policy, and, thus, is entitled to contribution of coverage in the underlying action. National Fire asserts that the Construction Operations exclusion applies to preclude coverage. Whether an insurer has a duty to defend is based on the four corners of the underlying complaint (*A.J. Sheepskin and Leather Co., Inc. v Colonia Ins. Co.*, 273 AD2d 107, 107 [1st Dept 2000]). The amended complaint in the underlying action clearly asserts that the plaintiff was engaged in construction work, specifically erecting a structure inside the Coliseum, which no party meaningfully disputes. Thus, the allegations of the underlying complaint are "wholly within" the Construction Operations exclusion (*Frontier Insulation Contractors, Inc.*, 91 NY2d at 175).

In opposition, plaintiff argues that the Construction Operations exclusion is ambiguous, as it fails to define the meaning of “construction.” However, the terms of a policy are not ambiguous simply because they are not defined (*Lend Lease (US) Constr. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 56 [1st Dept 2015], *affd on other grounds sub nom. Lend Lease (US) Constr. LMB Inc. v Zurich Am. Ins. Co.*, 28 NY3d 675 [2017]). “[U]nless otherwise defined by the policy, words and phrases are to be understood in their plain, ordinary, and popularly understood sense, rather than in a forced or technical sense” (*id.* [internal quotation marks and citations omitted]). The text of the exclusion applies to, *inter alia*, the construction or erection of “any building, property or structure,” and makes no differentiation based on the temporary or permanent nature of the building or structure in question (National Fire policy, NYSCEF Doc. No. 18 at 071).

Further, in the context of construction litigation, the courts of this state have examined and defined what constitutes construction or alteration of a building or structure. “[A]ny production or piece of work artificially built up or composed of parts joined together in some definite manner” qualifies as a building or structure (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]). To prevail in an action under Labor Law § 240(1), which the plaintiff in the underlying action alleges as one of his claims, the construction work performed by plaintiff must have “altered or caused a substantial, or indeed any, physical change to the building” (*Royce v DIG EH Hotels, LLC*, 139 AD3d 567, 568 [1st Dept 2016] [internal quotation marks and citations omitted]). Even the erection or dismantling of a temporary structure is within the ambit of the statute, so long as it is not merely cosmetic (*e.g.*, *McCoy v. Abigail Kirsh at Tappan Hill, Inc., et al.*, 99 AD3d 13, 17 [2d Dept 2012] [worker fell while disassembling a large wedding canopy]; *Sinzieri v. Expositions, Inc.*, 270 AD2d 332, 333 [2d Dept 2000] [worker injured while

dismantling an expo exhibit]; *Panico v. General Electric, et al.*, 2011 WL 675561, 2011 NY Slip Op 30379[U] at *9 [Sup Ct, NY County, 2011] [worker injured while setting up expo exhibit]). Thus, under the plain and ordinary meaning of the words “construction,” “erection,” and “structure,” the allegations of the amended complaint in the underlying action, which allege the construction or erection of a temporary structure inside the Coliseum, portray a circumstance that is properly excluded from coverage.

Finally, plaintiff’s reliance on Insurance Law § 3420 to prevent National Fire from disclaiming coverage is unavailing. That statute, which requires that insurers timely disclaim coverage on the basis of a defense or a policy exclusion to their insured or waive such defense, has no application to claims between co-insurers (*Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 91 [1st Dept 2005] [“[S]ection 3420 (d) was never intended to apply to another insurer”]). *Harco Constr., LLC v First Mercury Ins. Co.* (190 AD3d 831, 833 [2d Dept 2021]), cited by plaintiff, is not to the contrary, as that case does not address whether the statute applies to claims between co-insurers.

Accordingly, it is

ORDERED that the motion of defendant National Fire & Marine Insurance Company to dismiss the complaint as against it seeking a declaratory judgment that said defendant is obliged to provide a defense to, and provide coverage for, plaintiff’s insured in the action of *Walter Danowsky v Nassau Events Center, LLC, et al.* (index No. 604259/2020 [Sup Ct Nassau County]), is granted, and a declaratory judgment shall be rendered in said defendant’s favor;¹ and it is further

¹ “Upon a motion to dismiss for failure to state a cause of action, a court may reach the merits of a properly pleaded cause of action for a declaratory judgment where no questions of fact are presented by the controversy” (*North Oyster Bay Baymen's Assn. v Town of Oyster Bay*, 130 AD3d 885, 890 [2d Dept 2015]).

ADJUDGED and DECLARED that defendant National Fire & Marine Insurance Company is not obliged to provide a defense to, and provide coverage for, the plaintiff's insured in the said action pending in Nassau County; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the aforesaid dismissal (i.e., the sole defendant will be Starr Indemnity & Liability Company), and that all future papers (except for a judgment reflecting the holding of this Decision and Order) filed with the court bear the amended caption; and it is further

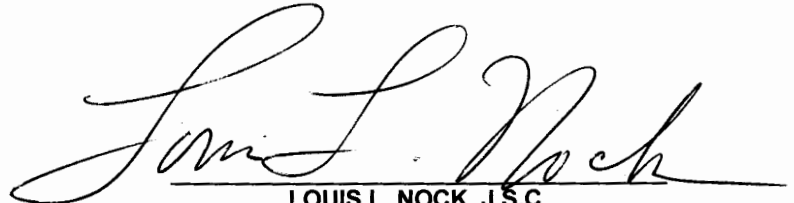
ORDERED that counsel for the moving parties shall collaborate to serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website)]; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on March 22, 2023, at 2:00 PM.

This constitutes the decision and order of the court.

ENTER:


LOUIS L. NOCK, J.S.C.

3/1/2023
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<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