

J.T. Magen & Co. Inc. v Starr Indem. & Liab. Co.

2023 NY Slip Op 31030(U)

March 31, 2023

Supreme Court, New York County

Docket Number: Index No. 655529/2021

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

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J.T. MAGEN & COMPANY INC.

Plaintiff,

- v -

STARR INDEMNITY & LIABILITY COMPANY,

Defendant.

-----X

INDEX NO. 65529/2021

MOTION DATE 03/27/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 30, 31, 32, 33, 34, 35

were read on this motion to/for

JUDGMENT - SUMMARY

Defendant's motion for summary judgment is granted.

Background

Plaintiff is a general contractor and contends it was hired to do a project at One Wall Street in Manhattan. In connection with this project, plaintiff alleges defendant provided insurance to the property owner as the named insured and to defendant as an additional insured. Plaintiff observes that an employee for a subcontractor was doing work at the project on September 18, 2020 when he fell through a duct shaft barrier; he did not survive the fall. It contends that the project was shut down for six weeks after this incident pursuant to a stop work order issued by the relevant agencies.

Plaintiff claims that as a result of the shutdown, it was required to replace all of the safety barriers on the site. It seeks coverage under the policy issued by defendant for 1) the replacement costs of the barriers, 2) costs to keep the project operational, 3) losses related to the delay as well as 4) professional fees and claim preparation costs.

Plaintiff asserts it gave notice of the loss on September 15, 2021. It seeks declaratory relief about whether plaintiff's action against defendant for recovery under the policy would be barred if not commenced within twelve months after the occurrence.

Defendant moves for summary judgment on the ground that the policy only insures against direct physical loss or damage to the property. It insists that the policy does not provide coverage arising out of mandates from governmental agencies. Defendant argues that plaintiff's claim is barred because the notice of loss provision required notice as soon as possible, but no later than 30 days after the loss. Here, the notice was sent nearly a year after the loss despite plaintiff's awareness of the incident.

Defendant argues that after the incident, DOB issued a violation relating to the guardrail system and ordered that certain steps be taken to remediate the safety hazards. Defendant points out that plaintiff sent notice of loss to other insurers, including one on March 22, 2021, about six months before it contacted defendant. Defendant insists that the policy was a builder's risk policy, meaning that it is designed to compensate an insured for loss from physical damage or construction to the project itself. It argues that any costs incurred by plaintiff were due to the DOB's mandates following the death of a construction worker and had nothing to do with physical damage to the property itself.

In opposition, plaintiff contends that the project's safety barrier was damaged when the worker fell through the barrier. It argues that it merely wants coverage to repair the barrier as well as other damages caused by the accident. Plaintiff insists it need not comply with the notice provision because that only applies to the named insured—the property owner. It also argues that it does not seek damages flowing from a governmental agency or from delay. Rather, plaintiff claims it seeks costs incurred to remedy the damage and to expedite the work to avoid a delay.

In reply, defendant observes that the named insured, the property owner, never made a claim under this policy and that plaintiff was required to comply with the 30-day notice provision. It claims that plaintiff did not establish that there was any damage to the property and the claim that the barrier was moved out of its position does not constitute a loss under any common-sense definition of physical damage.

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

“In determining a dispute over insurance coverage, we first look to the language of the policy. We construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect” (*Consol. Edison Co. of New York, Inc. v Allstate Ins. Co.*, 98 NY2d 208, 221-22, 746 NYS2d 622 [2002] [internal quotations and citations omitted]).

The policy at issue provides that: “This Policy, subject to the terms, exclusions, limitations and conditions contained herein or endorsed hereto, insures against all risks of direct physical loss of or damage to property insured while at the location of the INSURED PROJECT*, while in offsite temporary storage or while in transit, all within this Policy’s territory and occurring during the Period of Insurance of this Policy” (NYSCEF Doc No. 2 at 7).

The initial question for this Court is to assess the “direct physical loss or damage to [the] property”—what the policy says it insures. In opposition, plaintiff submits the affidavit of its project manager for the site, who explains that “I recall that the barrier was physically moved, and its original position was altered as a result of the accident” (NYSCEF Doc. No. 34, ¶ 7).

The Court finds that the movement of a barrier does not constitute a physical loss or damage to the property at issue here. Plaintiff did not assert that the barrier was destroyed; it only claims it was moved. Nor does plaintiff detail any damage to the property itself. The remaining items listed in the complaint for which plaintiff seeks coverage also do not constitute a physical loss or damage to the property. That includes “1) cost to replace the safety barriers at the Project; (2) costs associated with the Project’s “General Conditions” to keep the Project operational; (3) losses associated with the delay to the Project and/or to expedite the Project’s schedule to avoid any delay; and (4) professional fees and claim preparation costs” (NYSCEF Doc. No. 1, ¶ 20).

None of those costs fall within the ambit of the unambiguous coverage provision in the subject builder's policy. Plaintiff's attempt to rephrase or recharacterize these items as physical damage is without merit. The Court also observes that the policy contains two exclusions that prohibit nearly all of the claimed coverage in the complaint. The policy excludes coverage for "Consequential loss, damage or expense of any kind or description including but not limited to loss of market or delay, liquidated damages, performance penalties, penalties for non-completion, delay in completion, or non compliance with contract conditions, whether caused by a peril insured or otherwise" (NYSCEF Doc. No. 2 at 15). And it contains an exclusion for "Loss, damage, costs, expenses, fines or penalties incurred or sustained by or imposed on the Insured at the order of any government agency, court or other authority arising from any cause whatsoever" (*id.* at 16).

Taken together, that excludes coverage arising out of any delays to the project or any additional work plaintiff was required to take in accordance with the demands of government agencies. As alleged by plaintiff, it had to expend substantial resources after the accident to comply with various governmental edicts as well as make up for the six weeks in which the project was shut down. Unfortunately, the subject policy exclusions directly prohibit the recovery of these consequential damages, none of which relate to actual physical damage to the property. In short, the record on this motion does not raise an issue of fact about anything that might fall under the subject insurance policy and so the Court grants the motion.


Having found that the claimed losses do not fall under the terms of the subject policy (the merits of the case), the Court need not rule about whether or not plaintiff timely notified defendant or whether that notice provision, on its own, prevents plaintiff from seeking coverage.

The Court also observes that because this is a declaratory judgment action decided on the merits in defendant’s favor, it must issue a declaration in defendant’s favor instead of merely dismissing the complaint (*Spada v Aspen Univ., Inc.*, 202 AD3d 494, 495, 163 NYS3d 27 [1st Dept 2022]).

Accordingly, it is hereby

ORDERED that defendant’s motion for summary judgment dismissing the complaint is granted and the Clerk is directed to enter judgment in favor of defendant and against plaintiff along with costs and disbursements upon presentation of proper papers therefor; and it is further

DECLARED that defendant need not provide any coverage under the subject insurance policy at issue here relating to plaintiff’s September 15, 2021 notice of occurrence of a loss.

<p><u>3/31/2023</u> DATE</p>			 <hr/> ARLENE P. BLUTH, J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:			<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE