American Empire Surplus Lines Ins. Co. v Hudson Ins. Group
2023 NY Slip Op 32753(U)
July 31, 2023
Supreme Court, New York County
Docket Number: Index No. 653422/2020
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41
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AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY,

Plaintiff

Index No. 653422/2020

-against-

DECISION AND ORDER

HUDSON INSURANCE GROUP,

Defendant

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LUCY BILLINGS, J.S.C.:

Plaintiff moves to renew its prior motion for summary judgment, C.P.L.R. § 2221(e), which the court denied in an order dated January 20, 2022. The prior motion sought a declaratory judgment that defendant is obligated to defend nonparties Inter Renovation, Inc., and 130 E. 18 Owners Corp. in an underlying personal injury action, Berrones v. 130 E. 18 Owners Corp. and Inter Renovation, Inc., Index No. 159487/2019 (Sup. Ct. N.Y. Co.), under an insurance policy defendant issued to its insured, nonparty Unibud Restoration, Inc. C.P.L.R. § 3001. The court denies plaintiff's motion as follows.

I. THE "NEW" EVIDENCE

In support of the current motion, plaintiff presents: (1) authenticated copies of Unibud Restoration's insurance policy and its subcontract with Inter Renovation; (2) the deposition testimony of Roman Jamielty, co-owner of Inter Renovation; and

(3) the deposition testimony of Krzysztos Zagroba, co-owner of Unibud Restoration. Obviously nothing prevented plaintiff from presenting authenticated contracts in support of plaintiff's prior motion. Plaintiff also admits that it previously did not conduct the depositions of Jamielty and Zagroba as a tactical maneuver to avoid the risk of either witness contradicting evidence in the underlying action. Again, nothing prevented plaintiff from conducting those depositions before plaintiff moved for summary judgment; in fact, plaintiff filed the note of issue well before its deadline. Thus none of plaintiff "new" evidence warrants renewal of plaintiff's prior motion. C.P.L.R. § 2221(e)(2); Martinez v. ITF LLC, 216 A.D.3d 429, 430 (1st Dep't 2023); Kolchins v. Evolution Mkts., Inc., 182 A.D.3d 408, 410 (1st Dep't 2020); Eurotech Constr. Corp. v. Fischetti & Pesce, LLP, 169 A.D.3d 597, 597 (1st Dep't 2019); Redstone v. Herzer, 162 A.D.3d 583, 584 (1st Dep't 2018). Even if the court considers plaintiff's current motion a successive motion for summary judgment, such a motion would not promote judicial economy. Dembele v. Action Carting Envtl. Servs., Inc., 211 A.D.3d 508, 508 (1st Dep't 2022).

Since plaintiff could have presented all its "new" evidence when plaintiff moved for summary judgment, plaintiff's failure to do so is grounds alone to deny its current motion. Even if the court disregards the fact that the evidence is not in fact new,

however, it is not admissible evidence that would have changed the court's initial determination. Martinez v. ITF LLC, 216 A.D.3d at 430.

II. THE APPLICABLE POLICY PROVISION

To trigger coverage for Inter Renovation and 130 E. 18 Owners as additional insureds under defendant's policy, plaintiff must establish that Berrones's injury was "caused, in whole or in part, by: [Unibud Restoration's] acts or omissions; or . . . the acts or omissions of those acting on [Unibud Restoration's] behalf." Aff. of Brendan LoPuzzo, NYSCEF Doc. 18, Ex. D, at HUDSON-0274. This "ADDITIONAL INSURED" endorsement in defendant's policy requires plaintiff to demonstrate that Unibud Restoration was the proximate cause of Berrones's injury. Id.; Burlington Ins. Co. v. New York City Tr. Auth., 29 N.Y.3d 313, 323 (2017).

Plaintiff insists that Zagroba's testimony raises a reasonable possibility of coverage under the policy, because Zagroba testified that Unibud Restoration employed Berrones and that: "The foreman told me that he was walking along with Marcos [Berrones] on the sidewalk shed and Marco [sic] tripped on one of the planks and he get onto his knees . . . ." Aff. of Brendan LoPuzzo, NYSCEF Doc. 43, Ex. C, at 53. This latter quoted part of Zagroba's testimony, however, is hearsay. People v. Slade, 37 N.Y.3d 127, 140 (2021).

III. UNIBUD RESTORATION'S SUBCONTRACT

Moreover, even if Unibud Restoration employed Berrones, and even if he tripped over an uneven sidewalk bridge plank, plaintiff still fails to demonstrate that defendant's policy covers Berrones's injury. The subcontract between Unibud Restoration and Inter Renovation expressly imposed the responsibility on "Unibud Restoration Corp. to provide all hanging and pipe scaffold, labor and material to complete this project as per drawings and specifications." LoPuzzo Aff., NYSCEF Doc. 43, Ex. D, at 2. In contrast, the subcontract imposed the responsibility on "Inter Renovation to install and maintain" the sidewalk bridge. Unibud Restoration's work was limited "to provid[ing] hanging and pipe scaffold, labor and material." Id. Nowhere in the subcontract did Unibud Restoration agree to work on the sidewalk bridge after providing the material for the bridge.

Consequently, Zagroba's testimony, even were it admissible, still would fail to implicate Unibud Restoration. If anything, Zagroba's testimony indicates that Inter Renovation's work was the proximate cause of Berrones's injury, in which case defendant would owe no coverage to either additional insured. Burlington Ins. Co. v. New York City Tr. Auth., 29 N.Y.3d at 325; Hanover Ins. Co. v. Philadelphia Indem. Ins. Co., 159 A.D.3d 587, 588 (1st Dep't 2018).

IV. PLAINTIFF'S THIRD PARTY COMPLAINT

Plaintiff, relying on All State Interior Demolition Inc. v. Scottsdale Ins. Co., 168 A.D.3d 612, 613 (1st Dep't 2019), also contends that the allegations in its underlying third party complaint trigger defendant's duty to defend plaintiff in Berrones's personal injury action. The third party complaint in All State Interior Demolition, however, "incorporate[d] the underlying complaint by reference," which specifically alleged that the insured's acts caused the underlying plaintiff's injury. Id. Thus an insurer's third party complaint does not singlehandedly trigger another insurer's coverage, absolving the third party plaintiff. An additional insured is owed a defense when "the allegations of the underlying complaint and the third-party complaint suggested a reasonable possibility of coverage." Live Nation Mktg., Inc. v. Greenwich Ins. Co., 188 A.D.3d 422, 422 (1st Dep't 2020) (emphasis added).

Here, plaintiff does not identify any factual allegation in the main complaint or otherwise in the underlying acton that suggests any fault on the part of Berrones himself, as a Unibud Restoration employee, or other Unibud Restoration employees in causing his injury, to raise a reasonable possibility of coverage under defendant's policy. Absent such allegations, plaintiff's third party complaint is merely conclusory.

V. THE DUTY TO DEFEND 130 E. 18 OWNERS

Finally, the subcontract does not establish that Unibud Restoration owes any contractual duty to defend or indemnify 130 E. 18 Owners. The subcontract names "Inter Renovation, Inc.," as the "Contractor," "Unibud Restoration Corp." as the "Subcontractor," and "130 East 18th Street" as the "Project," but notably does not define the "Owner." The court may not assume an intended indemnitee. Tonking v. Port Auth. of N.Y. & N.J., 3 N.Y.3d 486, 489-90 (2004); Ruisech v. Structure Tone Inc., 208 A.D.3d 412, 416-17 (1st Dep't 2022); Tavarez v. LIC Dev. Owner, L.P., 205 A.D.3d 565, 567 (1st Dep't 2022).

Although plaintiff points to Jamielty's testimony to show that 130 E. 18 Owners was the building's owner, Jamielty was an owner of Inter Renovation, so his assumption about the owner of 130 East 18th Street is inadmissible hearsay. Plaintiff also points to Berrones's allegations in his complaint that 130 E. 18 Owners owned the property and building at 130 East 18th Street, apprising defendant of a reasonable possibility of coverage. Only the subcontract, not Berrones's complaint, however, binds Unibud Restoration to provide a defense and indemnification. Defendant's policy, in turn, requires a written contract that a particular entity be added as an additional insured for that entity to be covered under the policy. Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Mar. Ins. Co., 31 N.Y.3d 131,

135 (2018); Arch Specialty Ins. Co. v. Nautilus Ins. Co., 213 A.D.3d 404, 405 (1st Dep't 2023).

The subcontract fails not only to name the "Owner," but also to specify whether it is the owner of the land, the building, or the construction project. Nor did Unibud Restoration directly contract with 130 E. 18 Owners to identify it as the "Owner." Therefore 130 E. 18 Owners is not entitled to additional insured coverage under defendant's policy. See ACC Constr. Corp. v. Merchants Mut. Ins. Co., 200 A.D.3d 551, 553 (1st Dep't 2021); Dynatec Contr., Inc. v. Burlington Ins. Co., 184 A.D.3d 475, 475 (1st Dep't 2020); Structure Tone, Inc. v. National Cas. Co., 130 A.D.3d 405, 406 (1st Dep't 2015); Kel-Mar Designs, Inc. v. Harleysville Ins. Co. of N.Y., 127 A.D.3d 662, 663 (1st Dep't 2015). Although Inter Renovation might claim against Unibud Restoration for failing procure insurance for 130 E. 18 Owners, Gilbane Bldg. Co./TDX Const. Corp. v. St. Paul Fire & Mar. Ins. Co., 31 N.Y.3d at 137, defendant's obligations arise from the policy's terms, not the subcontract's terms that required Unibud Restoration to purchase coverage. Id.; Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co., 53 A.D.3d 140, 145 (1st Dep't 2008).

VI. CONCLUSION

Consequently, for the reasons explained above, the court denies plaintiff's motion to renew its motion for summary judgment. C.P.L.R. § 2221(e).

DATED: July 31, 2023

LUCY BILLINGS, J.S.C.

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