Associated Indus. Ins. Co., Inc. v Unified Window Sys. Inc.
2023 NY Slip Op 34238(U)
December 6, 2023
Supreme Court, New York County
Docket Number: Index No. 159970/2022
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK **PART** **11M**

Justice

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ASSOCIATED INDUSTRIES INSURANCE COMPANY, INC.,

Plaintiff,

- v -

UNIFIED WINDOW SYSTEMS INC.,OLVIN ROMERO'S HOME IMPROVEMENT INC.., WANDA CASPI,

Defendant.

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INDEX NO. 159970/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

UNIFIED WINDOW SYSTEMS INC.

Plaintiff,

-against-

BORG & BORG, INC., BORG RISK MANAGEMENT SERVICES, INC.

Defendant.

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Third-Party
Index No. 595767/2023

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

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

Background

Defendant Unified Window Systems Inc. ("Unified") is a home improvement business engaged in the installation, inspection, and repair of windows, doors, siding, and roofing. Unified bought a Commercial General Liability Insurance policy (the "Policy") from Plaintiff Associated Industries Insurance Company, Inc. ("Associated"). In making its application for the Policy (the "Application"), Unified submitted an application which described Unified's "*primary*

operations" as window and door installation. In a separate part of the application, Unified listed window and door installation, but not roofing, as part of a schedule of hazards.[1]

On August 15, 2022, Wanda Caspi filed the action *Caspi v. Unified Window Systems Inc.*, Index Number 159970/2022 (the "Underlying Action") in which Ms. Caspi alleges she suffered personal injuries from "incomplete" and "deficient" work performed by Unified or its subcontractors. Unified notified Associated of a claim on the Policy for the Underlying Action. Associated disclaimed coverage for the Underlying Action via a letter dated October 7, 2022, on two separate grounds. First, Associated argues the "Prior Work Exclusion", a provision of the Policy, excluded coverage. Second, Associated argues that Unified made material misrepresentations on its insurance application.

Associated then filed this action seeking a judgment rescinding the Policy and declaring that Associated has no duty to defend or indemnify Unified in the Underlying Action. Associated is providing a defense to Unified in the Underlying Action pending resolution of this action.

Before the Court is Associated's motion for summary judgment and motion for default judgment seeking a judgment in its favor. Unified opposes Associated's motion and cross moves seeking to have Associated's first cause of action, seeking a declaratory judgment regarding the application of the Prior Work Exclusion, dismissed. Associated opposes Unified's cross motion. In addition, third-party defendants Borg & Borg, Inc. and Borg Risk Management Services, Inc. (the "Borg Parties") oppose Associated's motion for summary judgment.

Discussion

Standard of Review for a Motion for Summary Judgment

[1] The Court would like to thank Jason Lowe, Esq. for his assistance in this matter.

An application for summary judgment pursuant to CPLR § 3212 "must make a prima facie showing of entitlement to judgement as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]; see also *Zuckerman v. New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Id*. "[B]ald, conclusory assertions or speculation and '[a] shadowy semblance of an issue' are insufficient to defeat summary judgment." (*Stonehill Capital Mgt. LLC v. Bank of the W.*, 28 N.Y.3d 439, 448, 45 N.Y.S.3d 864, 68 N.E.3d 683 [2016]). Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Alleged Misrepresentation on Insurance Application

For an insurer to be entitled to rescind a policy *ab initio*, the insurer must show that it issued the policy in reliance on a knowing and material misrepresentation by the applicant (see *128 Hester LLC v New York Mar. Gen. Ins. Co.*, 126 AD3d 447, 5 N.Y.S.3d 69 [1st Dept 2015]; *Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co.*, 61 AD3d 412, 877 N.Y.S.2d 253 [1st Dept 2009]). "A misrepresentation is a statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof" (Insurance Law § 3105 [a]). "No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such a contract" (Insurance

Law § 3105 [b]). Although the materiality of a misrepresentation ordinarily is a jury question, the issue may be decided as a matter of law of law when the evidence concerning materiality is clear and substantially uncontradicted (see *Process Plants Corp. v Beneficial Nat'l Life Ins. Co.*, 53 A.D.2d 214, 385 N.Y.S.2d 308 [1st Dept 1976]), affd 42 NY2d 928, 366 N.E.2d 1361, 397 N.Y.S.2d 1007 [1977]).

Initially, the Court must determine whether the application contained a misrepresentation. Associated claims there are two misrepresentations, the failure to list roofing as part of the question regarding Unified's "primary" operations and the failure to list roofing under the schedule of hazards. "An answer to an ambiguous question on an application for insurance cannot be the basis of a claim of misrepresentation by the insurance company against its insured where…a reasonable person in the insured's position could rationally have interpreted the question as he or she did" (*Garcia v Am. Gen. Life Ins. Co.*, 264 AD2d 808, 809 [2d Dept 1999]).

The question on the insurance application regarding Unified's primary operations could reasonably be interpreted to exclude the need to list operations which are not primary to the applicant's business. Thus, there is, at the very least, a question of fact as to whether Unified omitting roofing from its primary operations on the Application was a material misrepresentation.

With regards to the failure to list roofing in the section of the application requesting a "Schedule of Hazards", the Court notes that the schedule of hazards form does not state how detailed the list must be and no guidance is provided for what minimum amount of activity is necessary to be listed. The question is whether a reasonable individual in Unified's position could rationally have interpreted the schedule of hazards form to require listing the roofing in the particular circumstances of this case where little guidance is provided as to how detailed the list

on the schedule of hazards must be. The Court is not required to answer that question because the Court declines to grant summary judgment on alternative grounds.

Associated attempts to show materiality by presenting an affidavit along with excerpts from its underwriting guidelines. The one-page excerpt from Associated's underwriting guidelines show a bullet point which states "Prohibited: all 'exterior work' classes". NYSCEF #9. Associated has produced no evidence as to what constitutes exterior work classes pursuant to its applicable underwriting guidelines.[2] The fact that exterior work has quotation marks around it seems to indicate that it is a term of art and there is no definitive proof as to what that term means.

Associated filed this motion prior to any discovery occurring thereby preventing any exploration of what constitutes exterior work classes. It is unclear if there are other parts of Associated's underwriting guidelines which address what qualifies as an exterior work class or if there are other parts of the underwriting guidelines which may be applicable to whether Associated would have insured Unified had it known about Unified's roofing work. Further, Unified has not had an opportunity to conduct discovery as to how Associated actually wrote policies pursuant to the underwriting guidelines at issue. Evidence regarding underlying guidelines, including any information that may contradict limited excerpts from the underwriting guidelines, is generally exclusively in the possession of the insurer and therefore an insured is entitled to discovery on that issue prior to determination of a motion for summary judgment in the insurer's favor. CPLR 3212(f).

[2] Though roofing work could be considered exterior work, there is no definitive evidence that it is always considered exterior work. For instance, in this case, it appears that the incident complained of in the Underlying Action regards material falling from an interior ceiling. NYSCEF #17, ¶ 14.

In reply, Associated submits a new affidavit in an attempt to explain why the Policy was approved when the installation of windows and doors, items which Unified listed on the application for the Policy, also may constitute exterior work. It is improper to consider Associated's reply affidavit because "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." (*Dannasch v Bifulco*, 184 AD2d 415, 417, 585 NYS2d 360, 362 [1st Dept 1992].) Specifically in the context of a motion for summary judgment, a party may not remedy deficiencies in meeting its factual *prima facie* burden with evidence first submitted on reply. (*Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381, 822 NYS2d 264, 266 [1st Dept 2006].)

Nevertheless, the evidence Associated submitted, even if considered, does not resolve the issues of fact as to whether Associated would have written the Policy had it known that Unified did some roofing work. The emails at NYSCEF #74 indicate that most, but not all, of the window and door installation was interior. The fact that Associated still wrote the policy despite knowing that Unified did some exterior window and door installation creates an issue of fact as to how much exterior work a potential insured could do before Associated would refuse to write a policy. The evidence is that Associated would tolerate the risk for classes of work that include at least some exterior work.

Further, if Associated did not consistently follow its underwriting guidelines with regards to exterior work, then the underwriting guidelines are not evidence that Associated would not have written the policy had it known about the risk Associated claims should have been disclosed, i.e. Unified's roofing work. (*Best v United States Life Ins. Co. in City of NY*, 2008 NY Slip Op 32927[U], *6 [Sup Ct, Queens County 2008]) ("Evidence of the practice of the insurer,

which made the contract, as to the acceptance or rejection of similar risk is also admissible (see Insurance Law § 3105[c]).") In total, there are questions of fact as to whether Associated would have refused to make the policy if Associated had known that Unified did roofing work and therefore Associated's motion for summary judgment seeking to rescind the policy is denied.

Prior Work Exclusion

Associated moves for summary judgment seeking a declaration that it has no duty to indemnify or defend Unified due to the Prior Work Exclusion in the Policy. The Prior Work Exclusion states:

> Prior Work Completed, Sold or Abandoned
>
> Any "bodily injury," "property damage," or "personal and advertising injury" which, in whole or in part, directly or indirectly, arises out of or is related to "your work" performed by or on behalf of an "insured," or by or on behalf of any other person or entity when:
>
> (1) "your work" is completed;
>
> (2) any structure, building or land owned by the insured and on which an insured is also performing work is sold; or
>
> (3) "your work" has been "abandoned" prior to the date stated in the schedule.

The date listed in the policy schedule is July 19, 2021. Associated argues the Prior Work Exclusion applies and Associated has no duty to defend or indemnify Unified in the underlying action because Unified's work was "completed" prior to the date in the policy schedule. Unified argues that, Associated has failed to offer sufficient evidence that Unified's work at issue was "completed" prior to July 19, 2021, and therefore the Prior Work Exclusion does not apply.

"A duty to defend exists whenever the allegations in the complaint in the underlying action, construed liberally, suggest a reasonable possibility of coverage, or where the insurer has actual knowledge of facts establishing such a reasonable possibility" (*City of NY v Wausau Underwriters Ins. Co.*, 145 AD3d 614, 617 [1st Dept 2016]) quoting (*DMP Contr. Corp. v Essex Ins. Co.*, 76 AD3d 844, 845, 907 NYS2d 487 [1st Dept 2010]). The facts Plaintiff relies on to show the Prior Work exclusion applies are facts outside of the four corners of the complaint in the Underlying Action. The Underlying Action alleges that Caspi was damaged on September 1, 2021, for incomplete work. See NYSCEF #54, ¶¶ 14-15. These allegations from the Underlying Action do not fall into the Prior Work exclusion as they explicitly allege injury from work incomplete as of September 1, 2021, and the Prior Work exclusion applies to work completed before July 19, 2021. Therefore, Associated's motion for summary judgment seeking a declaration that it has no duty to defend Unified in the Underlying Action is denied.

Similarly, Associated seeks a declaration that it has no duty to indemnify Unified due to the Prior Work exclusion. In cases in which the insurer wants to exclude or except certain coverage from its policy obligations, the exclusionary language must be "specific and clear in order to be enforced. Exclusions and exceptions are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction" (*Seaboard Sur. Co. v. Gillette Co.*, 64 NY2d 304, 311, 476 N.E.2d 272, 486 N.Y.S.2d 873 [1984]). It is the insurer's burden to establish that the exclusions or exemptions apply to the facts of the case and that the insurer's interpretation of the policy language is the only fair and reasonable one (*Dean v. Tower Ins. Co. of NY*, 19 NY3d 704, 708, 979 N.E.2d 1143, 955 N.Y.S.2d 817 [2012]; *Cragg v. Allstate Indem. Corp., Id.; Pioneer Tower Owners Assn. v. State Farm Fire & Cas. Co. v. Gillette Co.*, 12

NY3d 302, 307, 908 N.E.2d 875, 880 N.Y.S.2d 885 [2009], *citing Breed v. Insurance Co. Of N.A.*, 46 NY2d 351, 353, 385 N.E.2d 1280, 413 N.Y.S.2d 352 [1978].)

The evidence Associated submits with regards to when the work on the roof was completed is an affidavit from a representative of an affiliate of Associated who states that the principal of Unified advised someone other than the affiant that the work on Caspi's home was performed in March of 2021. NYSCEF #24, ¶ 4. Even if the Court were to find that a statement by an affiant about what happened in a communication between two other individuals is admissible,[3] the statement that work was performed in March of 2021 does not establish when the work at Caspi's home was completed. Thus, Associated has failed to meet its burden to show that the Prior Work exclusion applies even without regard to evidence submitted by Unified. Therefore, Associated's motion for summary judgment seeking a declaration that it has no duty to indemnify Unified in the Underlying Action is denied.

Motion for Default Judgment

Associated's motion requests that a default judgment be entered against Unified and another defendant, Romero's Home Improvement, Inc. ("Romero"). However, in reply, Associated noted that it agreed to allow Unified file a late answer and was not pursuing its motion for a default judgment against Unified. Therefore, the motion for default judgment against Unified is denied.

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[3] This case is distinguishable from (*Tower Ins. Co. of N.Y. v. Brown*, 130 A.D.3d 545, 546 [1st Dep't 2015]; *Tower Ins. Co. of N.Y. v. Hossain*, 134 A.D.3d 644, 644 [1st Dep't 2015]) because the affiant in those matters made a statement about an admission made to the affiant (*Tower Ins. Co. of N.Y. v. Brown*, 130 A.D.3d 545, 546 [1st Dep't 2015][noting that the affiant "spoke with Brown, who admitted that he did not reside at the premises when the incident occurred"]; *Tower Ins. Co. of New York v. Hossain*, No. 160273/2013, 2014 WL 7337552, at *2 [N.Y. Sup. Ct. Dec. 19, 2014][noting the "insurance investigator affirm[ed] that he spoke with Hossain and Hossain admitted that he did not reside at the premises when the incident occurred".]) The affiant in this case stated facts about a conversation the affiant apparently was not a party to as the affiant states the relevant conversation was between Unified's principal and Pleskun and the affiant is not Pleskun. NYSCEF #24, ¶ 4.

Romero has not answered and has not filed an opposition to the motion for default judgment against it. However, it is unclear what relief Associated is seeking against Romero. The Complaint seeks a declaration that Associated has no duty to defend or indemnify Unified in the Underlying Action and rescission of the Policy. Neither of these requests for relief concern Romero or can be granted due to Romero's default. Therefore, the motion for default judgment against Romero is denied, without prejudice.

Unified's Motion For Summary Judgment

Unified moves for summary judgment on the first cause of action in the complaint wherein Associated seeks a declaration that it has no duty to defend or indemnify Unified in the Underlying Action due to the Prior Work exclusion. Unified argues the first cause of action is premature because it depends on the determination of a fact that is at issue in the Underlying Action. The specific fact Unified claims is at issue in the Underlying Action is whether it completed the work at issue prior to July 19, 2021.

The resolution of a cause of action seeking a declaration regarding a duty to indemnify or defend which requires resolution of an issue in an underlying action is premature (*N. River Ins. Co. v. ECA Warehouse Corp.*, 172 A.D.2d 225, 226 [1st Dep't 1991]). However, it is not clear that the Underlying Action must resolve whether the relevant work was completed prior to July 19, 2021. Therefore, there is a question of fact as to whether first cause of action is premature and Unified's motion is denied, without prejudice.

Discovery

Unified served discovery demands on or around March 15, 2023. In opposition to this motion, Unified noted that no discovery had been exchanged. This Court's rules do not stay discovery while a motion for summary judgment is pending. Since it is clear that discovery is

necessary due to the outstanding factual issues, the parties are to proceed with discovery. This Court's rules encourage entering into discovery stipulations without court intervention to the extent possible. Thus, the parties are directed to meet and confer and enter, or attempt to enter, into a discovery stipulation that addresses the outstanding discovery issues including set a schedule to respond to any outstanding demands, service of and response to any supplemental demands, scheduling of EBT, and service of and response to any post EBT demands. The parties are to submit their proposed discovery stipulation by January 10, 2024, or, if the parties are unable to agree to a discovery stipulation, the parties are to contact the Court by January 10, 2024, to request a discovery conference.

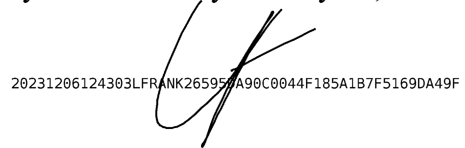
Accordingly, it is hereby

ADJUDGED that Plaintiff's motion for summary judgment is denied; and it is further

ADJUDGED that Plaintiff's motion for a default judgment is denied; and it is further

ADJUDGED that Defendant's cross motion for summary judgment is denied; and it is further

ORDERED that the parties are to meet and confer regarding a discovery stipulation and either submit a discovery stipulation to the Court or, if the parties are unable to agree to a discovery stipulation, contact the Court to request a discovery conference by January 10, 2024.



12/6/2023			LYLE E. FRANK, J.S.C.
DATE			
CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION
APPLICATION:	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART — [ ] OTHER
	[ ] SETTLE ORDER		[ ] SUBMIT ORDER
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT — [ ] REFERENCE