

Zurich Am. Ins. Co. v Harleystville Worcester Ins. Co.

2024 NY Slip Op 31785(U)

May 21, 2024

Supreme Court, New York County

Docket Number: Index No. 650883/2023

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

Zurich American Insurance Company et al

INDEX NO. 650883/2023

- v -

MOT. DATE

Harleysville Worcester Insurance Company

MOT. SEQ. NO. 001

The following papers were read on this motion to/for sj
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

ECFS Doc. No(s).
ECFS Doc. No(s).
ECFS Doc. No(s).

This is a declaratory judgment action arising from an underlying personal injury action brought by William Foronjy alleging that Foronjy was injured in the course of his employment for Harleysville Worcester Insurance Company's ("Harleysville") named insured, D&D Electrical Construction ("D&D" and sometimes the "Subcontractor") at a construction project located at 45 East 75th Street, New York, New York. Plaintiffs Zurich American Insurance Company and American Guarantee and Liability Insurance Company (collectively "plaintiffs") now move for partial summary judgment seeking a declaration that (1) Harleysville has a duty to defend E.W. Howell Co., LLC ("Howell") and The Hewitt School (the "School") as additional insureds on a primary, non-contributory basis in the underlying action which is pending in this court and is entitled William Foronjy and Diane Foronjy v. The Hewitt School and E.W. Howell Co., LLC d/b/a E.W. Howell Construction Group, Index No. 159931/2017 (the "underlying action"); (2) that Harleysville has a duty to reimburse plaintiffs for defense costs incurred post-dating plaintiffs' January 24, 2018 tender, plus interest; and (3) that any coverage provided by Harleysville to the plaintiffs' insureds under its commercial excess policy is primary to the plaintiff's Policies.

In a separate decision/order issued on even date in the underlying action, which is herein incorporated by reference, the court inter alia held that D&D is obligated to defend and indemnify Howell and the School since Foronjy sustained injuries arising out of D&D's work.

Copies of the applicable insurance policies have been provided to the court. The Insurance Rider to the D&D's Subcontract obligates D&D to name Howell and the School as additional insureds. It further provides that "Subcontractor's excess/umbrella policies must be endorsed to be primary and non-contributory for the additional insureds." The Subcontract further obligates D&D to "make sure their workmen follow the safety rules and requirements of the project" and "Subcontractor alone shall be responsible for the safety, efficiency and adequacy of the Subcontractor's work, plant, appliances and methods and for any damage which may result from the failure or the improper construction, maintenance or operation of such Work."

Dated: 5/21/24

[Signature]
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [] GRANTED IN PART [X] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [X] REFERENCE

Paragraph 8.2 of the Subcontract further provides:

8.2 PROTECTION OF LIVES AND HEALTH - The Subcontractor is required to perform the Subcontractor's Work in a safe and reasonable manner. The Subcontractor shall seek to avoid injury, loss or damage to persons or property by taking reasonable steps to protect employees and other persons at the site.

...

k. Subcontractor and/or its insurance carrier, as an obligation under this insured agreement, shall be responsible for defense and indemnification of Contractor when one of its employees confronts the ordinary and obvious hazards of his employment and has at his disposal the time and other resources to enable him to proceed safely, but elects to perform his job so as to injure himself. Additionally subcontractor shall also defend and indemnify Contractor should one of the subcontractor employees gets injured by any of the hazards that are a part of or inherent in the very work being performed under this subcontract or as a result of those hazards that may be readily observed by reasonable use of the senses.

The CG 2010 endorsement to Harleysville's Policy provides in relevant part as follows:

Name of Additional Insured Person(s) or Organization(s):

E W Howell Co LLC; Hewitt School; Robert A M Stern Architects LLP; Janet R Duggan & Associates Inc; Joan Lonergan and John Merrow; Jane Weldon (And all consultants, officers, trustees, shareholders, managers, employees, partners, agents, servants or representative of the foregoing)

Location(s) of Covered Operations

The Hewitt School 45 E 75th St New York, NY

...

A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

An additional insured is defined under Harleysville's Policy as follows:

Who Is An Insured is amended to include as an insured any person or organization for whom you are performing operations only as specified under a written contract (for purposes of this endorsement referred to as the "written contract") that requires that such person or organization be added as an additional insured on your policy. *Such person or organization is an additional insured only with respect to liability caused, in whole or in part, by the acts or omissions of the "Named Insured", or those acting on behalf of the "Named Insured", in the performance of the "Named Insured's" ongoing operations for the additional insured only as specified under the "written contract".* A person's or organization's status

as an insured under this endorsement ends when your on-going operations for that insured are completed.

(Emphasis in italics added.)

DISCUSSION

It is well established that the party claiming coverage bears the burden of proving entitlement (*National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 570 [1st Dept 2006]; *Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]). The “well-understood meaning” of “additional insured” is “an entity enjoying the same protection as the named insured” (*Pecker Iron Works of N.Y. v Traveler’s Ins. Co.*, 99 NY2d 391, 393 [2003] [internal quotation marks and citation omitted]).

[A]n 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.

(*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal quotation marks and citations omitted]). An insurer owes a duty to defend as long as “the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered” (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63 [1991]). “[I]f any of the claims against [an] insured arguably arise from covered events, the insurer is required to defend the entire action” (*Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 17 [1st Dept 2009] [internal quotation marks and citations omitted]).

In *Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.* (89 NY2d 621, 634-635 [1997]), the Court of Appeals further clarified the standard for an insurer’s duty to defend an insured:

A court should not attempt to impose the duty to defend on an insurer through a strained, implausible reading of the complaint that is linguistically conceivable but tortured and unreasonable. Moreover, a court may look to judicial admissions in the insured’s responsive pleadings in the underlying tort action or other formal submissions in the current or underlying litigation to confirm or clarify the nature of the underlying claims” (internal quotation marks and citation omitted).

An insurer may obtain a declaration absolving it of its duty to defend only when a comparison of the policy and the underlying complaint on its face shows that, as a matter of law, “there is no possible factual or legal basis on which the insurer might eventually be held to be obligated to indemnify the insured under any provision of the insurance policy”

(*Greenwich Ins. Co. v City of New York*, 122 AD3d 470, 471 [1st Dept 2014], quoting *Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424 [1985]).

“While the duty to defend is measured against the possibility of a recovery, the duty to pay is determined by the actual basis for the insured’s liability to a third person” (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 178 [1997] [internal quotation marks omitted]). “[A]n insurer may be contractually bound to defend even though it may not ultimately be bound to pay, either because its insured is not factually or legally liable or because the occurrence is later proven to be outside the policy’s coverage” (*Fitzpatrick*, 78 NY2d at 65).

As plaintiff correctly points out, D&D was responsible for supervising and directing Foronjy's injury-producing work, including his acts and omissions, at the time of his accident. Therefore, the duty to defend was triggered (see *i.e. M&M Realty of New York, Inc. v. The Burlington Insurance Company*, 170 AD3d 407 [1st Dept 2019]). Separately, the safety obligations contained in D&D's subcontract provide an additional basis to trigger Harleysville's duty to defend.

Harleysville argues that additional insured provisions do not cover claims by an employee for injury caused by a dangerous premises condition controlled by an additional insured. However, Foronjy may have been injured by his own negligence or his version of the accident may be discredited. Therefore, the fact that there is potentially a dangerous premises condition claim does not relieve Harleysville of its duty to defend. Moreover, there is no proof that Howell or the School created a dangerous premises condition which proximately caused Foronjy's injuries such that plaintiff seeks coverage solely for Howell or the School's sole negligence. To the extent that Harleysville argues that Foronjy was engaged in work outside the scope of D&D's contracted-for work, electrical work not specifically enumerated in the underlying subcontract is still properly considered part of D&D's ongoing operations at the project.

Finally, with regard to priority of coverage, Harleysville has failed to raise a triable issue of fact sufficient to defeat plaintiffs' motion. Rather, plaintiffs have established that the Harleysville Excess Policy is primary to the Zurich CGL Policy for Howell where the written contract requires D&D to provide primary, non-contributory coverage and the additional insured is a named insured under the Harleysville Policy. As for defense costs, it is of no moment that plaintiffs' initial tender did not include Howell, since the subject letter demanded that D&D shall defend and indemnify all required indemnitees... Nor is laches applicable on these facts where plaintiff timely tendered in 2018 and Harleysville has not shown any prejudice *i.e.* a well-founded belief that plaintiffs had abandoned their claims herein.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for partial summary judgment is granted to the following extent:

- a. Harleysville is required to provide a defense to Hewitt and the School as additional insureds under the Harleysville CGL Policy on a primary, non-contributory basis;
- b. the Harleysville Excess Policy apply primary to the Zurich CGL Policy; and
- c. Harleysville is obligated to reimburse Zurich for all post-tender defense costs, plus interest; and it is further

And it is further **ORDERED** that the issue of what amount Harleysville should reimburse the defendants School and Howell for defense costs incurred to date, with statutory interest, is referred to the Special Referee Clerk for assignment to a Special Referee or JHO to hear and **determine**; and it is further


ORDERED that plaintiff's counsel shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a complete Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

5/21/24
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.