Seneca Ins. Co., Inc. v Rosanna Food Corp
2024 NY Slip Op 33147(U)
September 4, 2024
Supreme Court, New York County
Docket Number: Index No. 650663/2023
Judge: Louis L. Nock
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
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

SENECA INSURANCE COMPANY, INC., and 580 LENOX ASSOCIATES, LLC,

Plaintiffs,

- v -

ROSANNA FOOD CORP, GENERAL CASUALTY COMPANY OF WISCONSIN, and GREAT AMERICAN SECURITY INSURANCE COMPANY,

Defendants.

----------X

INDEX NO. 650663/2023

MOTION DATE 08/04/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, and 46 were read on this motion for PARTIAL SUMMARY JUDGMENT.

LOUIS L. NOCK, J.S.C.

This insurance declaratory judgment action arises out of a personal injury action captioned *Annie Robinson v. 580 Lenox Associates, LLC and Rosanna Food Corp, d/b/a Key Food Supermarket*, bearing Index No. 151671/2022 and pending in this court before the Hon. Richard G. Latin (the "Underlying Action"). In brief, the plaintiff in the underlying action alleges that while walking outside of a building owned by 580 Lenox Associates, LLC ("580 Lenox"), and leased to Rosanna Food Corp. ("Rosanna"), she tripped over a defective portion of the sidewalk and fell. Plaintiff Seneca Insurance Company ("Seneca") issued an insurance policy to 580 Lenox. Defendant General Casualty Company of Wisconsin ("GCCW") issued an insurance policy to Rosanna, and defendant Great American Security Insurance Company ("Great American") issued an umbrella insurance policy to Rosanna.

Plaintiffs Seneca and 580 Lenox commenced this action seeking a declaration that 580 Lenox is an additional insured under the GCCW and Great American policies; that GCCW and Great American must defend and indemnify Lenox on a primary and non-contributory basis in the Underlying Action; and for an award of 580 Lenox's defense costs. Before the court, is plaintiff's motion for partial summary judgment seeking a declaration regarding the priority of coverage, specifically, that 580 Lenox is an additional insured under the GCCW policy; that GCCW must defend and indemnify 580 Lenox on a primary and non-contributory basis; and that both the GCCW and Great American policies apply before reaching the Seneca policy. The motion is denied for the reasons set forth in the opposition papers (NYSCEF Doc. Nos. 36-38, 45) and the exhibits attached thereto, in which the court concurs, as summarized herein.

Background

The original lease signed by 580 Lenox and Rosanna's predecessors in interest provides that the landlord is leasing the "store premises" located within the building at 592 Lenox Avenue, New York, New York (1990 Lease, NYSCEF Doc. No. 20 at 39 of 44). The landlord must "keep the building structure in the leased premises . . . in good repair" (*id.*, ¶ 65). The tenant must maintain the "demised premises and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto and needed to preserve them in good working order and condition" (*id.*, ¶ 4). The tenant agreed to "maintain general public liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises" (*id.*, ¶ 8). The 2008 Assignment of Lease provides, with regard to insurance, that Rosanna would, in addition to any other requirements in the lease, "maintain . . . general liability insurance, insuring both the Landlord and the Tenant against liability for personal injury and/or death occurring in or about

the Premises[,]" as well as Umbrella coverage (2008 Assignment of Lease, NYSCEF Doc. No. 22, ¶ 5).

The GCCW policy issued to Rosanna contains an endorsement titled "Blanket Additional Insured – When Required by Written Agreement," (the "AI endorsement") which provides that any person or organization who must be named as an additional insured when required by contract is an additional insured under the policy (AI endorsement, NYSCEF Doc. No. 24 at 86, AH BP 80 84 10 17, § A). Such additional insured coverage extends to bodily injury or property damage caused by Rosanna's "acts or omissions or the acts or omissions of those acting on [Rosanna's] behalf" as a result of Rosanna's "ongoing operations" or in connection with the leased premises (*id.*). Additionally, additional insured coverage is "excess over any other valid and collectable insurance available to the additional insured whether that insurance is primary, excess, contingent or on any other basis," unless Rosanna's contract requires coverage to be primary (*id.*, § C). Further, the "Additional Insured Managers of Lessors of Premises" endorsement (the "AI Premises endorsement") provides specifically with respect to 580 Lenox that it is an additional insured only with respect to liability "arising out of the ownership, maintenance or use of the part of the premises leased to [Rosanna]" (AI Premises endorsement, NYSCEF Doc. No. 23 at 129, § A).

The Great American policy contains an endorsement titled "Broad Named Insured Endorsement" (the "NI endorsement"), which provides that any person or organization with whom Rosanna has a contract requiring the purchase of insurance is an additional insured under Great American's policy (NI endorsement, NYSCEF Doc. No. 24 at 9). In addition, an amendment to the policy provides that Great American's coverage is the next contributing policy after any underlying primary coverage is exhausted, provided that the underlying contract

between the named insured an additional insured requires the named insured to procure primary coverage (Other Insurance Condition, NYSCEF Doc. No. 24 at 41, § 3). Otherwise, Great American's coverage is excess of all other "valid and collectable insurance" (*id.*, § 1).

In the Underlying Action, the plaintiff claims that she fell on a raised and broken sidewalk outside of the leased premises (Underlying complaint, NYSCEF Doc. No. 19, ¶¶ 24-26). Plaintiffs tendered the Underlying Action to GCCW on July 3, 2022. By letter dated October 11, 2022, GCCW declined coverage on the ground that it was not clear that the defect in the sidewalk was Rosanna's responsibility to repair or was caused by Rosanna's use of the leased premises.

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is

any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion

"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]).

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]).

Here, plaintiffs are not entitled to summary judgment. The underlying complaint alleges that the plaintiff tripped and fell on the sidewalk outside of the leased premises, and that the plaintiff's injuries resulted from both 580 Lenox's and Rosanna's negligent maintenance of the sidewalk. The complaint clearly alleges that the sidewalk was "in a raised broken condition and was missing pieces" (Underlying complaint, NYSCEF Doc. No. 19, ¶ 24). New York City Administrative Code § 7-210 provides, as specifically relevant herein, that "[i]t shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition" (Administrative Code of City of NY § 7-210[a]). The lease is in harmony with the statute, as Rosanna's obligations with regard to the sidewalk are limited to "non-structural repairs" (1990 Lease, NYSCEF Doc. No. 20, ¶ 4). As the Appellate Division, First Department, recently held in a similar case, there is no reasonable possibility of coverage if the lease does not require the tenant to repair a structural defect in the sidewalk (*3650 White Plains Corp. v Mama G. African Kitchen Inc.*, 205 AD3d 468, 470 [1st Dept 2022]).

Further, even if such additional insured coverage was available under the GCCW policy, it is not primary and non-contributory as argued by plaintiffs. The GCCW policy provides that it is excess to any other insurance unless the contract between 580 Lenox and Rosanna requires primary coverage (AI endorsement, NYSCEF Doc. No. 24 at 86, AH BP 80 84 10 17, § C). A review of the lease shows that it lacks any such requirement. By contrast, the Seneca policy explicitly provides that it is primary, except in certain circumstances that do not apply here (Seneca Policy, NYSCEF Doc. No. 28 at 123, CG 00 01 04 13, § 4). Finally, the Great

American policy provides that it is excess over any other valid and collectible insurance (Great American Policy, NYSCEF Doc. No. 24 at 41, § 1), except in certain circumstances that do not apply here. The Seneca policy qualifies as "other valid and collectable insurance." Where a policy is clearly meant to be excess, all primary policies must be exhausted before the insured may look to the excess or umbrella insurers (*Tishman Const. Corp. of New York v Great Am. Ins. Co.*, 53 AD3d 416, 419-20 [1st Dept 2008]).

Accordingly, it is hereby

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on September 25, 2024, at 2:15 PM. Prior to the conference, the parties shall meet and confer regarding discovery and, in lieu of appearing at the conference, may submit a proposed preliminary conference order, in a form that substantially conforms to the court's form Commercial Division Preliminary Conference Order located at https://ww2.nycourts.gov/courts/1jd/supctmanh/preliminary_conf_forms.shtml, to the Principal Court Attorney of this Part (Part 38) at ssyaggy@nycourts.gov.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

9/4/2024
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE