Burlington Ins. Co. v American Dream Prod. Corp.

2007 NY Slip Op 34475(U)

May 31, 2007

Sup Ct, NY County

Docket Number: 1108733/09

Judge: Cynthia S. Kern

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[*1] SCANNED ON 6/7/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____

Justice

Index Number : 108733/2009
BURLINGTON INSURANCE
VS.
AMERICAN DREAM PRODUCTION
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

RECEIVED
JUN 4 2012
MOTION SUPPORT OFFICE
SUPREME COURT - CIVIL

FILED
JUN 07 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/31/12 _____, **J.S.C.**

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

THE BURLINGTON INSURANCE COMPANY,

Plaintiff,

Index No. 1108733/09

-against-

DECISION/ORDER

AMERICAN DREAM PRODUCTION CORP., METROPLEX ON THE ATLANTIC, LLC, STATE INSURANCE FUND and EDWIN CASCO RUILOVA,

Defendants.

----------x

FILED

JUN 07 2012

NEW YORK
COUNTY CLERK'S OFFICE

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits and Cross Motion	
Affirmations in Opposition	2,3,4,5
Replying Affidavits	6,7
Exhibits	8

Plaintiff Burlington Insurance Company ("Burlington") commenced the instant action seeking a judgment declaring that it has no duty to defend or indemnify its insured, American Dream Production Corp. ("American Dream") or alleged additional insured, Metroplex on the Atlantic, LLC ("Metroplex") in connection with an underlying action, that it is entitled to a rescission of the policy of insurance it maintains with American Dream and seeking damages from the State Insurance Fund (the "SIF") for reimbursement of defense costs. Burlington now moves for an Order pursuant to CPLR § 3212 seeking a declaration that (1) it has no duty to defend or indemnify American Dream or Metroplex in connection with an underlying action; or,

in the alternative (2) it is entitled to rescind the insurance policy issued to American Dream, Policy No. 614BW09784 with a policy period of 6/19/07 - 6/19/08 based on American Dream's alleged material misrepresentations in its application for insurance; and (3) the SIF has a duty to defend American Dream in the underlying action and must reimburse Burlington for half of all defense costs incurred by Burlington in the underlying action following the tender of American Dream's defense to the SIF. For the reasons set forth more fully below, Burlington's motion for summary judgment is granted in part and denied in part.

The relevant facts are as follows. American Dream, a contracting company, entered into two contracts with Metroplex, a landowner and developer, to perform construction services on a fifteen-story apartment building located at 120 Beach 26th Street, Far Rockaway, New York (the "Project"). Both contracts were executed on behalf of Metroplex by Jerzy Szymczyk ("Mr. Szymczyk") and on behalf of American Dream by its President, Edwin Bissell ("Mr. Bissell").

The first contract, dated May 1, 2007 (the "GC Contract"), called for American Dream to perform twelve separate construction tasks to be completed before May 15, 2008, including "Windows," "Masonry," "Steel," "Plumbing," "Sprinklers," "Electric," "Metal Studs," "Sheetrocking," "Painting and Plastering," "Flooring," "Kitchen Cabinets" and "Roofing." In exchange for the performance of these services, American Dream was to receive the sum of $5,480,000. The second contract, dated May 15, 2007 (the "Carpentry Contract"), called for American Dream to perform "[c]arpentry work including all related work to set up the forms for the concrete slabs in the building including terraces, and balconies from the 1st to 15th Floor." In exchange for the performance of these services, American Dream was to receive the sum of $300,000.

Following the execution of the two contracts and commencement of American Dream's work on the Project, American Dream submitted an application for insurance with Burlington on or about June 19, 2007 (the "Application"). American Dream stated on the Application that the nature of its business was "Interior Carpentry" and that its annual "gross sales" were $800,000, among other things. Based on that information, Burlington issued Policy No. 614BW09784 to American Dream with a policy period of 6/19/07 - 6/19/08 (the "Burlington Policy"). The Burlington Policy provided commercial general liability insurance coverage for certain liabilities that American Dream might incur as a result of its business operations. Additionally, the Burlington Policy contains certain conditions applicable to this coverage action, including duties owed by American Dream and any putative additional insured in the event of an "occurrence, offense, claim or suit."

The Burlington Policy also contains a "Composite Rate Endorsement" which, per the policy's declarations page, provides the applicable "classification, rates and premiums" for the policy as referenced on the Undeclared Operations Endorsement. The classification schedule on the Composite Rate Endorsement states that the applicable class for the policy is "91341 - Interior Carpentry." The Classification Schedule did not limit American Dream to declaring this one trade. Rather, American Dream had the opportunity to declare and purchase insurance for any number of additional trades.

In addition to the Burlington Policy, American Dream obtained a Workers' Compensation/Employers' Liability policy (the "State Fund Policy"), which was issued by the SIF. This policy provides coverage to American Dream, also known as "1B Coverage," for common law liability arising out of an injury to an employee of American Dream.

On July 2, 2007, defendant Edwin Casco Ruilova ("Mr. Ruilova"), an American Dream employee, was allegedly injured while working on the Project. On or about September 24, 2007, Mr. Ruilova brought an action in the Supreme Court of the State of New York, Kings County (the "Underlying Action") against Metroplex alleging that

> [t]he defendant, METROPLEX was careless, reckless, and negligent in the ownership, operation, control, management, maintenance, supervision, inspection, and repair of the aforesaid premises...

American Dream was not originally a party to the action because, as Mr. Ruilova's employer, it was protected from suit by the Workers' Compensation bar.

American Dream first provided Burlington with notice of Mr. Ruilova's accident by an October 31, 2007 letter from Mr. Bissell. In the letter, Mr. Bissell wrote that "[t]he injured employee Edwin Ruilova [Ruilova] sustained internal injuries while performing carpentry operations." On November 7, 2007, Burlington issued a disclaimer of coverage to American Dream for Mr. Ruilova's accident based on the Workers' Compensation and Employer Liability exclusions in the Burlington Policy. At that time, Burlington alleges it was still unaware of the Underlying Action and American Dream was not yet named as a party to that action.

On or about November 28, 2007, Metroplex provided Burlington with a copy of the complaint in the Underlying Action and simultaneously requested defense and indemnification from Burlington based on Metroplex's purported additional insured status. On December 11, 2007, Burlington issued a disclaimer to Metroplex, noting, *inter alia*, that Metroplex was not an additional insured under the terms of the Burlington Policy.

In or around February 2008, Metroplex filed a third-party complaint against American Dream in the Underlying Action. On or about March 7, 2008, American Dream tendered its

defense in the Underlying Action to Burlington and provided Burlington with a copy of the Third-Party Complaint. On March 13, 2008, Burlington disclaimed any duty to defend or indemnify American Dream on the common law indemnification and breach of contract claims, but otherwise advised that it would defend American Dream on the contractual indemnification claim in the Underlying Action subject to a reservation of rights. In its reservation of rights letter, Burlington advised that "we reserve the right to assert additional policy provisions or legal principles that may limit or preclude any defense or indemnity obligations in this matter." Subsequent to receiving the GC Contract from American Dream, on July 28, 2008, Burlington issued a supplemental reservations of rights letter relative to the Undeclared Operations Endorsement given that the GC Contract provided by American Dream reflects general contracting activities. In or around August 2008, American Dream provided Burlington with a copy of the Carpentry Contract and further stated that Mr. Ruilova "was working as a carpenter performing rough carpentry, preparing the forms to put the concrete on the balcony which reflects the classification 91341-Interior Carpentry on our Policy # 614BW09784."

On January 6, 2009, Mr. Ruilova was deposed in the Underlying Action. Three weeks later, on or about January 23, 2009, Burlington received a summary of his testimony from defense counsel in the Underlying Action. The deposition summary indicated that, at the time of his accident, Mr. Ruilova was conducting exterior demolition work with a butane blow torch when the balcony he was dismantling collapsed. Upon receipt of the deposition summary, Burlington requested a copy of Mr. Ruilova's deposition transcript. A review of the transcript confirmed that Mr. Ruilova testified that he was "demolish[ing]" a balcony with a torch at the time he allegedly fell from a third-story balcony. Based on this testimony, Burlington sent a

disclaimer letter notifying American Dream that (1) Burlington disclaimed any coverage for Mr. Ruilova's accident under the Burlington Policy; (2) Burlington would continue to defend it under a reservation of rights while Burlington sought a Court declaration of no coverage; (3) Burlington reserved its rights to rescind the Burlington Policy based on material misrepresentations; and (4) Burlington would seek reimbursement of defense costs expended. On January 15, 2009, American Dream tendered its defense and indemnification in the Underlying Action to the SIF. However, the SIF did not respond to American Dream's request.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

The court first turns to Burlington's motion for an Order pursuant to CPLR § 3212 seeking a declaration that Burlington has no duty to defend or indemnify American Dream in the Underlying Action. As an initial matter, Burlington has established its prima facie right to summary judgment on the ground that coverage for the Underlying Action is excluded pursuant to the Burlington Policy. "An insurer seeking to avoid its obligation to defend a policyholder based on a policy exclusion bears a heavy burden." *Mount Vernon Fire Ins. Co. v. Chios Constr. Corp.*, 1996 U.S. Dist. LEXIS 414, *3 (S.D.N.Y. Jan. 12, 1996). "To negate coverage by virtue

of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies to the particular case." *Continental Casualty Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 652 (1993). When such an exclusion is shown to be clear and unambiguous, New York courts have consistently upheld them. *See, e.g., Mount Vernon*; *see also Ruiz v. State Wide Insulation & Constr. Corp.*, 269 A.D.2d 518 (2d Dept 2000) (holding that regardless of the insured's knowledge of the limitation, it was not entitled to coverage resulting from roof repair as the terms of the policy limiting coverage to "painting" were clear and unambiguous).

In the instant case, Burlington has established its prima facie case that it has no duty to defend or indemnify American Dream as it has demonstrated that the Burlington Policy is clear and unambiguous in its exclusion for the work Mr. Ruilova's was performing when his accident occurred. The Undeclared Operations Endorsement (IFG-G-0085 12 05) to the Burlington Policy expressly provides that the

> [I]nsurance does not apply to 'bodily injury'...arising out of: (a) Premises or locations not scheduled in the policy; or (b) **Operations or 'products-completed operation' not included in the Classification schedule in the policy**, whether or not such operations or 'products-completed operation' are continuous, intermittent, incidental, temporary or seasonal in nature.

(emphasis added). The Classification Schedule, also known as the Composite Rate Endorsement, specifies that the only coverage American Dream would receive was for bodily injury arising out of "Interior Carpentry" work performed. Burlington has established, however, that Mr. Ruilova's accident occurred not while he was performing "carpentry operations" as initially put forth by American Dream, but that it occurred while performing exterior demolition

of a metal balcony while using a butane blow torch.

In response, American Dream has failed to raise an issue of fact as to whether coverage is excluded under the Burlington Policy. As an initial matter, American Dream does not dispute the fact that Mr. Ruilova was injured while demolishing a metal balcony located on the outside of the building using a butane blow torch. Further, American Dream has not suggested that the Burlington Policy is unclear or ambiguous. American Dream's assertion that the work being performed by Mr. Ruilova when his accident occurred was covered by the policy because it can be considered "Interior-Carpentry" work is without merit. In *Atl. Cas. Ins. Co. v. C.A.L. Constr. Corp.*, the Eastern District held that a classification endorsement limiting coverage to interior carpentry and drywall was clear and unambiguous and that "rooftop renovations, exterior brick work, the construction of a driveway, and the construction of an entrance ramp exceed the scope of what can be classified as interior carpentry and drywall work." 2008 U.S. Dist. LEXIS 58815, *14-15 (E.D.N.Y. 2008). Similarly, in *Mount Vernon Fire Ins. Co.*, 1996 U.S. Dist. LEXIS 414 (S.D.N.Y. 1996), an insurer successfully sought a declaration of no coverage based on testimony in the underlying action that the insured had exceeded its declared operations. As in the Burlington Policy, the policy in *Mount Vernon* limited coverage to "Carpentry-Interior" operations. The Southern District defined carpentry as "relat[ing] to woodworking." *Id.* at *5-6. Based on the claimant's testimony that he was not performing some sort of woodworking at the time of his accident, but was instead "cleaning steel beams," the court declared that the insurer had no duty to defend or indemnify in the underlying action. *Id.* at *11. Here, based on the testimony of Mr. Bissell and Mr. Ruilova that at the time of Mr. Ruilova's accident, he was demolishing a metal balcony with a blow torch, it is clear that the work exceeded the scope of the

insurance coverage for "Interior-Carpentry" work.

The court next turns to Burlington's motion for an Order pursuant to CPLR § 3212 seeking a declaration that Burlington has no duty to defend or indemnify Metroplex in the Underlying Action. To the extent this court has already declared that coverage in the Underlying Action for American Dream is excluded under the Burlington Policy, coverage in the Underlying Action for Metroplex, a purported additional insured under the Burlington Policy, is also excluded. Moreover, Metroplex has conceded that it is not an additional insured pursuant to the Automatic Additional Insureds Endorsement to the Burlington Policy. Thus, Burlington is entitled to a declaration that it has no duty to defend or indemnify Metroplex in the Underlying Action.

The court next turns to Burlington's motion for an Order pursuant to CPLR § 3212 seeking a declaration that Burlington is entitled to rescind the Burlington Policy based on American Dream's alleged material misrepresentations in its Application. As Burlington makes clear in its Notice of Motion, Burlington is seeking this relief as an alternative to the primary relief sought, namely, a declaration that Burlington does not have a duty to defend or indemnify American Dream or Metroplex in the Underlying Action. As this court has already granted that part of Burlington's motion for summary judgment which seeks an Order declaring that Burlington has no duty to defend or indemnify American Dream or Metroplex in the Underlying Action, that part of Burlington's motion for summary judgment seeking a declaration that Burlington is entitled to rescind the Burlington Policy issued to American Dream is denied.

The court next turns to Burlington's motion for an Order pursuant to CPLR § 3212 seeking a declaration that the SIF has a duty to defend American Dream in the Underlying Action

and must reimburse Burlington for half of all defense costs incurred by Burlington in the Underlying Action following the tender of American Dream's defense to the SIF, on January 15, 2009. As an initial matter, this court lacks subject matter jurisdiction over this matter based on the doctrine of sovereign immunity. Actions seeking monetary relief against the State are typically required to be filed in the Court of Claims and not the Supreme Court. *See D'Angelo v. State Ins. Fund*, 48 A.D.3d 400 (2d Dept 2008). Although Burlington asserts that this matter is properly before the Supreme Court because it is seeking declaratory relief against the SIF, that argument is without merit. While the Supreme Court has jurisdiction to render declaratory judgments against the State, it cannot do so if the claim is primarily one for money damages. *See Cavaioli v. Board of Trustees of State Univ. of* N.Y., 116 A.D.2d 689 (2d Dept 1986); *see also Schaffer v. Evans*, 86 A.D.2d 708 (3d Dept 1982)("[r]egardless of how plaintiff attempts to characterize this matter in his pleadings, his causes of action against the State Comptroller and Chief Administrator are, in reality, nothing more than claims against the State of New York for money damages.") Here, although Burlington is seeking a declaration that the SIF has a duty to defend American Dream in the Underlying Action, its primary claim against the SIF is for the reimbursement of half of all defense costs expended by Burlington in the Underlying Action. Thus, as Burlington's claim is primarily one for money damages, it is not properly before the Supreme Court and must be brought in the Court of Claims.

Accordingly, Burlington's motion for an Order pursuant to CPLR § 3212 seeking a declaration that it has no duty to defend or indemnify American Dream or Metroplex in the Underlying Action is granted, Burlington's motion for an Order pursuant to CPLR § 3212 seeking a declaration that it has the right to rescind the Burlington Policy due to alleged

misrepresentations by American Dream in its Application is denied and Burlington's motion for an Order pursuant to CPLR § 3212 seeking a declaration that the SIF has a duty to defend American Dream in the Underlying Action and must reimburse Burlington for half of all defense costs is denied. This constitutes the decision and order of the court.

Dated: 5/31/12

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J.S.C.

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