Viewpoint Homes Inc. v Bluestone Constr. of N.Y. Inc.
2013 NY Slip Op 33417(U)
December 18, 2013
Supreme Court, Queens County
Docket Number: 23961/2012
Judge: David Elliot

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IA PART 14

VIEWPOINT HOMES INC.,

Plaintiff,
-against-

BLUESTONE CONSTRUCTION OF NEW YORK INC.,

Defendant.

Index No. 23961 2012

Motion Date August 26, 2013

Motion Cal. No. 115

BLUESTONE CONSTRUCTION OF NEW YORK INC.,

Third-Party Plaintiff,
-against-

UTICA FIRST INSURANCE COMPANY,

Third-Party Defendant.

Motion Seq. No. 3

The following papers numbered 1 to 16 read on this motion by third party defendant Utica First Insurance Company (Utica First) for an order dismissing the third-party complaint and all cross-claims pursuant to CPLR 3211 (a) (1) and (7), and declaring, pursuant to CPLR 3001and 3211 (c), that Utica First has no duty to defend, indemnify or provide coverage to any party in the main action, as well as in the companion action, pending in civil court, entitled *State Farm Fire & Casualty Co, a/s/o Richard Carrington v Bluestone Construction of New York Inc.*[1]

1. It is noted that the civil court action has since been transferred to this court to be tried jointly with the instant action, pursuant to an order dated November 7, 2013.

	Papers Numbered
Notice of Motion-Affirmation- Exhibits.....	1-5
Opposing Affirmation-Affidavit-Exhibit.....	6-9
Opposing Affirmation-Affidavit.....	10-12
Reply Affirmation-Affidavit-Exhibits.....	13-16
Memorandum of Law.....	

Upon the foregoing papers the motion is determined as follows:

On August 14, 2012 plaintiff Viewpoint Homes Inc. (Viewpoint Homes), entered into a contract with Bluestone Construction of New York Inc. (Bluestone), whereby Bluestone was to perform renovation and construction work at the premises known as 134-21 231st Street, Laurelton, New York. On August 24, 2012, the subject house collapsed.

Bluestone, in connection with the construction contract, obtained general liability insurance from Utica First, which also named Viewpoint Homes as an additional insured. Utica First asserts that it was notified of the collapse of the house at the subject premises on September 7, 2012. Following an investigation, Utica First notified Viewpoint Homes and Bluestone in separate letters dated October 5, 2012, that it denied coverage under certain specified policy exclusions.

Richard Carrington is the owner of real property located at 134-23 231st Street Laurelton, New York. Mr. Carrington's property is adjacent to the Viewpoint Homes property, and his residence sustained damage as a result of the collapse of the Viewpoint Homes premises. Mr. Carrington's insurer, State Farm Fire & Casualty Co. (State Farm), paid him the sum of $9,846.67 for said damages. State Farm, in a letter dated January 3, 2013, notified Utica First of its payment to Mr. Carrington, and demanded that Utica First reimburse it for said sum, as its insured was responsible for the damage to Mr. Carrington's property. Utica First, in a letter dated January 30, 2013, notified Bluestone that it was declining coverage under certain specified policy exclusions. A copy of this letter was sent to State Farm.

On December 3, 2012, Viewpoint Homes commenced the main action against Bluestone to recover damages for negligence, breach of contract, and breach of express and implied warranty. Bluestone served an answer and interposed five affirmative defenses and a counterclaim for contribution and indemnification.

On March 20, 2013, State Farm Fire & Casualty Co a/s/o Richard Carrington commenced an action in Civil Court, Queens County, against Bluestone to recover the sum of $9,846.67 it paid to its subrogee Mr. Carrington for damage to his property as a result of the collapse of the adjacent Viewpoint Homes property.

On April 11, 2013, Bluestone, in the Supreme Court action, commenced a third-party action against Utica First to recover damages for negligence and breach of contract. Bluestone, in its third-party complaint, alleges: that, in connection with its contract with Viewpoint Homes, it obtained liability insurance from Utica First which provided coverage for loss or damage caused by, or resulting from, direct physical loss involving the collapse of a building, or any part of a building; that said policy was in force on the date of the building collapse; and that Viewpoint Homes was named as the additional insured. Bluestone alleges that it does not know the cause of the building collapse. It is alleged that Viewpoint Homes commenced the within action against Bluepoint on November 29, 2012. Bluestone alleges that, upon receipt of notice of the alleged property damage claim, it advised Utica First of the alleged property damage claim, via the latter's agent. The first cause of action for negligence alleges that Utica First failed and refused to honor its insurance claim, in that it failed to provide a defense and to indemnify Bluestone in the within action. The second cause of action for breach of contract alleges that Utica First breached the contract of insurance by failing to provide a defense and to indemnify Bluestone in the within action. Bluestone seeks to recover damages, including reimbursement for all costs and expenses incurred in this action, as well as attorneys' fees.

Utica First, in this pre-answer motion, seeks to dismiss the third-party complaint, together with any cross-claims, on the grounds of documentary evidence and the failure to state a cause of action, pursuant to CPLR 3211 (a) (1) and (7). Utica First also seeks, pursuant to CPLR 3211 (c), a declaration to the effect that it had no duty to defend, indemnify or provide any coverage in the within action, or in the Civil Court action.

Utica First's motion papers are devoid of a copy of the pleadings in the main action and third-party action, as well as a copy of the pleadings in the action originally commenced in the Civil Court. Utica First, however, has attached copies of all pleadings to the reply papers. Generally, new material may not be introduced in reply papers. "The function of reply papers is to address arguments made in opposition to the position taken by the movant, not to permit the movant to introduce new arguments or new grounds for the requested relief" (*Allstate Ins. Co. v Dawkins*, 52 AD3d 826, 827 [2008]). A court may consider the newly introduced material when the other party had an opportunity to respond (*Zernitsky v Shurka*, 94 AD3d 875 [2012]; *Hoffman v Kessler*, 28 AD3d 718, 719 [2006]; *Guarneri v St. John*, 18 AD3d 813 [2005]). As the pleadings do not constitute new arguments or new grounds for the requested relief, and as the parties have had an opportunity to respond to the motion,

Utica First's motion will be considered.

It is well established that on a motion to dismiss pursuant to CPLR 3211(a) (7), "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court's "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d at 87-88; *Tom Winter Assoc., Inc. v Sawyer,* 72 AD3d 803 [2d Dept 2010]; *Uzzle v Nunzie Court Homeowners Assn. Inc.*, 70 AD3d 928 [2d Dept 2010]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703 [2010]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1985], *affirmed* 66 NY2d 946 [1985]).

"When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see*, *id.*; *accord*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)" (*Gershon v Goldberg*, 30 AD3d 372 [2d Dept 2006], *quoting Doria v Masucci*, 230 AD2d 764,765 [2d Dept 2006]; *lv. to appeal denied* 89 NY2d 811 [1997]). On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88]; *see Stathakos v Metropolitan Tr. Auth. Long Is. R.R.*, 109 AD3d 979 [2d Dept 2013]; *Green v Gross & Levin*, *LLP,* 101 AD3d 1079, 1080-1081 [2d Dept 2012]).

Moreover, a motion pursuant to CPLR 3211 (a) (1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Stathakos v Metropolitan Tr. Auth. Long Is. R.R.; Green v Gross & Levin, LLP*,

101 AD3d at 1080-1081). Affidavits submitted by a defendant in support of the motion, however, do not constitute documentary evidence (*Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2003]).

As stated by the Court of Appeals in *Automobile Ins. Co. of Hartford v Cook*, (7 NY3d 131, 137 [2006]):

> "It is well settled that an 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' (*Continental Cas. Co. v Rapid-American Corp.,* 80 NY2d 640, 648 [1993]). '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' (*Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 670 [1981]).
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> "The duty remains 'even though facts outside the four corners of [the] pleadings indicate that the claim may be meritless or not covered' (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63 [1991]). For this reason, when a policy represents that it will provide the insured with a defense, . . . it actually constitutes 'litigation insurance' in addition to liability coverage (*see Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984] *quoting International Paper Co. v Continental Cas. Co.*, 35 NY2d 322, 326, [1974]). 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.
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> "When an insurer seeks to disclaim coverage on the basis of an exclusion, the insurer will be required to 'provide a defense unless it can "demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, *in toto*, are subject to no other interpretation" ' (*Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 159 [1992] [citation omitted]). In addition, exclusions are subject to strict construction and must be read narrowly (*see Seaboard*, 64 NY2d at 311)."

When a liability insurer has breached its duty to defend its insured, the insurer may not later rely on policy exclusions to escape its duty to indemnify the insured for a judgment against him (*see K2 Inv. Group, LLC v American Guar. & Liab. Ins. Co.*, 21 NY3d 384, 387 [2013]).

"[A]n insurance company that disclaims in a situation where coverage may be

arguable is well advised to seek a declaratory judgment concerning the duty to defend or indemnify the purported insured. If it disclaims and declines to defend in the underlying lawsuit without doing so, it takes the risk that the injured party will obtain a judgment against the purported insured and then seek payment . . . Under those circumstances, having chosen not to participate in the underlying lawsuit, the insurance carrier may litigate only the validity of its disclaimer and cannot challenge the liability or damages determination underlying the judgment" (*Lang v Hanover Insurance Company*, 3 NY3d 350 [2004]).

Here, it is undisputed that the subject insurance policy did not provide property damage insurance, and Bluestone makes no claim with respect to such coverage. Rather, Bluestone asserts that, pursuant to the general commercial liability insurance policy issued by First Utica, it is entitled to a defense and possible indemnification in the main action.

Bluestone's first cause of action against Utica First seeks coverage and indemnification based upon the insurer's alleged negligence. Bluestone, however, has failed to allege conduct giving rise to a breach of a legal duty independent of the contract. "[M]erely alleging that the breach of a contract duty arose from a lack of due care will not transform a simple breach of contract into a tort" (*Sommer v Federal Signal Corp.,* 79 NY2d 540, 551 [1992]; *see Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc*., 18 NY3d 675, 684 [2012]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 390 [1987]; *Countrywide Home Loans, Inc. v United Gen. Tit. Ins. Co.,* 109 AD3d 953, 954 [2d Dept 2013]; *Chiarello v Rio*, 101 AD3d 793, 796 [2d Dept 2012]). Here, the first cause of action sounding in negligence is "merely a restatement, albeit in slightly different language, of the 'implied' contractual obligations asserted in the cause of action for breach of contract" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d at 390). Therefore, that branch of Utica First's motion which seeks to dismiss the third-party complaint's first cause of action for negligence is granted.

Utica First also seeks to dismiss Bluestone's second cause of action for breach of contract, and relies upon certain policy exclusions that exclude coverage for property damage arising out of a collapse. Utica First has submitted a copy of the subject insurance policy, its disclaimer letters, and a print out from the New York City Department of Buildings website, which states that a notice of violation (NOV) had been issued to Sukhwinder Singh with respect to the Viewpoint Homes property for the "FAILURE TO SAFEGUARD PUBLIC & PROPERTY NOTED INTERIOR DEMOLITION IN PROGRESS . . . AND A STORY WOOD STRUCTURE COLLAPSED WALLS AT EXP2 & EXP4 ARE LEANING ONTO ADJ PROPERTIES STOP ALL WOR[K]." Utica First's investigation of the incident apparently was based largely upon said NOV. However, it is noted that the NOV was not issued to Bluestone, and that it provides for a hearing that was scheduled for October 16, 2012. Utica First has not submitted any documentary evidence with respect to said hearing.

No discovery has been had in the main action, and Utica First has not submitted an affidavit by a person with personal knowledge of the facts so as to demonstrate that the occurrence falls within one or any of the exclusions as defined by the policy. The insurer's counsel's assertion that the collapse of the subject building was due to demolition or renovation work, and therefore is excluded under the terms of the policy's collapse exclusion, is speculative at best. Therefore, the evidence submitted herein is insufficient to establish that the building collapse was due to the work performed by Bluestone. Notably, no determination has been made as to what work had been done or was performed at the time of the collapse and as to the cause of the collapse. Therefore, that branch of the motion which seeks to dismiss the second cause of action for breach of contract is denied.

That branch of Utica First's motion which seeks to have the within motion treated as one for summary judgment and seeks a declaration to the effect that it does not have a duty to defend, indemnify, or provide coverage to any of the parties in this action, or in the former Civil Court action, is denied. Bluestone, in its third-party complaint, has not asserted a claim for declaratory judgment. With respect to the *State Farm* action, the within motion was fully submitted prior to this court's order granting a joint trial, and Bluestone's third-party complaint makes no mention of the *State Farm* action. It is noted that, in any event, any relief sought with respect to the *State Farm* action should be made under that index number, as these two actions have not been consolidated for all purposes.

Accordingly, Utica First 's motion to dismiss the third party complaint is granted to the extent that Bluestone's first cause of action for negligence is dismissed, and is denied in all other respects.

Dated: December 18, 2013

J.S.C.