100 Church Fee Owner LLC v Harleysville Worcester Ins. Co.
2015 NY Slip Op 30633(U)
April 21, 2015
Supreme Court, New York County
Docket Number: 650117/14
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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100 CHURCH FEE OWNER LLC,

Plaintiff,

Index No. 650117/14

-against-

DECISION/ORDER

HARLEYSVILLE WORCESTER INSURANCE COMPANY,

Defendant.

----------x

HON. CYNTHIA S. 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
Affirmations in Opposition to the Motion	2
Notice of Cross-Motion and Affidavits Annexed.....	3
Replying Affidavits.....	4
Exhibits.....	5

Plaintiff 100 Church Fee Owner LLC (hereinafter referred to as "plaintiff" or "100 Church") commenced the instant action against defendant Harleysville Worcester Insurance Company (hereinafter referred to as "defendant" or "Harleysville") seeking a declaratory judgment concerning plaintiff's rights under an insurance policy issued by defendant. Plaintiff now moves for an Order (a) pursuant to CPLR § 3212 for partial summary judgment declaring that (1) defendant is obligated to defend plaintiff in an action filed in the Supreme Court of the State of New York, New York County, Index. No. 156829/12, captioned *Michael Wenzel Jr. v. 100 Church Fee Owner LLC* (hereinafter referred to as the "Underlying Action"); (2) defendant is obligated to reimburse plaintiff its past defense costs incurred in the Underlying Action; (3) the

coverage defendant afforded to plaintiff as an additional insured is primary to any other coverage available to plaintiff as named insured; and (4) plaintiff is entitled to consequential damages, including attorney's fees and expenses incurred in this action; and (b) setting a hearing date to liquidate the amounts to be paid by defendant and to be reduced to a partial judgment for plaintiff's past defense costs in the Underlying Action and plaintiff's consequential damages. Defendant cross-moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint. The motions are resolved as set forth below.

The relevant facts are as follows. Plaintiff owns the building located at 100 Church Street, New York, New York (the "subject premises"). Pursuant to a June 22, 2010 "Standard Form of Agreement Between Owner and Contractor," (the "Contract"), Ecker Window Corp. ("Ecker") agreed to install windows at the subject premises. Additionally, Ecker agreed to procure liability insurance coverage for itself and plaintiff and to designate plaintiff as an additional insured on its policy. Specifically, pursuant to the Contract,

> [Ecker] shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from [Ecker's] operations and completed operations under the Contract....
>
> ...
>
> [Ecker] shall cause the commercial liability coverage required by the Contract Documents to include (1) [100 Church], the Architect and the Architect's consultants as additional insureds for claims caused in whole or in part by [Ecker's] negligent acts or omission during [Ecker's] operations....
>
> ...
>
> 14) Ecker to name [100 Church] as insured on CGL insurance policy #1 million per occurrence policy limit...Ecker shall provide additional

> 25 mm excess umbrella coverage....

Additionally, Ecker agreed

> [t]o the fullest extent permitted by law [Ecker] shall indemnify and hold harmless [100 Church], Architect, Architect's consultants, and agents and employees of any of them from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work....

Thereafter, defendant issued Ecker an insurance policy (the "Harleysville Policy") in which Harleysville agreed to pay those sums that Ecker becomes legally obligated to pay as damages because of "bodily injury" or "property damage" and to defend Ecker against any "suit" seeking such damages. Further, the Harleysville Policy was amended by endorsement CG-7254, captioned "Additional Insured - Owners, Lessees or Contractors - Automatic Status When Required In Construction Agreement With You" (the "Additional Insured Endorsement"), which states as follows:

> THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
>
> **A.** **Section II - Who Is An Insured** is amended to include as an additional insured any person for whom you are performing operations only as specified under a written contract...that requires that such person or organization be added as an additional insured on your policy....
>
> **B.** The insurance provided to additional insured by this endorsement is limited as follows:
>
> a. The additional insured is covered only for such damages which are caused, in whole or in part, by the acts or omissions of [Ecker], or those acting on behalf of [Ecker], to which the additional insured is entitled to be indemnified by [Ecker] pursuant to the "written contract" and only for those sums that the additional insured is legally obligated to pay as damages under tort law principles to the injured party because of

> "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies, and in accordance with the stated policy limits and policy conditions....

In or around October 2012, Michael Wenzel, Jr. ("Wenzel") commenced the Underlying Action against 100 Church alleging that he sustained personal injuries on August 17, 2010 while performing work on behalf of Ecker at the subject premises. Specifically, the pleadings allege that "[t]he occurrence as aforesaid was caused solely and wholly by reason of the negligence, carelessness and recklessness of the defendants, their contractors..." and that "[p]laintiff was employed as a journeyman ironworker for [Ecker] at the time of the aforesaid occurrence...." Plaintiff served its answer and served a third-party complaint upon Ecker asserting a claim for, *inter alia*, contractual indemnification.

On or about December 21, 2012, plaintiff tendered to defendant its defense and requested indemnification of its potential liabilities for the Underlying Action. In a letter dated June 28, 2013, defendant declined plaintiff's request for defense in the Underlying Action and explained as follows:

> The contract states that Ecker shall indemnify and hold harmless the owner from losses arising out of or resulting from performance of the work, but "only to the extent caused by the negligent acts/omissions of the contractor, subcontractor or anyone directly or indirectly employed by them." This loss was not caused by the negligent acts/omissions of Ecker. We understand there was no general contractor on this job; therefore, the owner 100 Church Owner LLC would have had a non-delegable duty to keep the premises safe and free of debris. Based on the foregoing, there is no contractual trigger.
>
> ...
>
> In order for our additional insured coverage to be triggered the loss must have arisen from the acts or omissions of our insured. As outlined above, this loss did not arise from the acts or omissions of the named insured. Furthermore, had the additional insured endorsement been triggered, this policy would have been excess to

> any other available insurance as the contract does not contain the "primary and non-contributory" language as required in the endorsement.

Prior to Wenzel's accident, 100 Church procured a commercial general liability policy from Zurich-American Insurance Company (the "Zurich Policy"), which provides coverage subject to a $150,000 self-insured retention ("SIR") applicable to both defense and indemnity.

Plaintiff then commenced the instant declaratory judgment action seeking to determine its rights under the Harleysville Policy. Plaintiff now moves for an Order (a) pursuant to CPLR § 3212 for partial summary judgment declaring that (1) defendant is obligated to defend plaintiff in an action filed in the Supreme Court of the State of New York, New York County, Index. No. 156829/12, captioned *Michael Wenzel Jr. v. 100 Church Fee Owner LLC* (hereinafter referred to as the "Underlying Action"); (2) defendant is obligated to reimburse plaintiff its past defense costs incurred in the Underlying Action; (3) the coverage defendant afforded to plaintiff as an additional insured is primary to any other coverage available to plaintiff as named insured; and (4) plaintiff is entitled to consequential damages, including attorney's fees and expenses incurred in this action; and (b) setting a hearing date to liquidate the amounts to be paid by defendant and to be reduced to a partial judgment for plaintiff's past defense costs in the Underlying Action and plaintiff's consequential damages. Defendant cross-moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint.

The court first turns to plaintiff's motion. 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.*

As an initial matter, that portion of plaintiff's motion for summary judgment declaring that defendant is obligated to defend plaintiff as an additional insured in the Underlying Action is granted. An insurer's duty to defend its insured is "exceedingly broad." *BP Air Conditioning Corp. v. One Beacon Ins. Group*, 8 N.Y.3d 708, 714 (2007). An insurer's duty to defend must be determined from the complaint's allegations and the policy's terms. *See Incorporated Village of Cedarhurst v. Hanover Ins. Co.*, 89 N.Y.2d 293 (1996). "The inquiry is whether the allegations fall within the risk of loss undertaken by the insured, '[and, it is immaterial] that the complaint against the insured asserts claims which fall outside the policy's general coverage or within its exclusionary provisions.'" *BP Air Conditioning Corp.*, 8 N.Y.3d at 714. Indeed, "an insurer will be called upon to provide a defense whenever the allegations of the complaint 'suggest...a reasonable possibility of coverage.'" *Automobile Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131, 137 (2006)(citing *Continental Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 648 (1993)). "If the complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend." *Technicon Elecs. Corp. v. American Home Assur. Co.*, 74 N.Y.2d 66, 73 (1989). "'Additional insured' is a recognized term in insurance contracts...the 'well-understood meaning' of [which] is 'an entity enjoying the same protection as the named insured.'" *Pecker Iron Works of N.Y. v. Traveler's Ins. Co.*, 99 N.Y.2d 391, 393 (2003). "Thus, the standard for determining whether an additional insured is entitled to

a defense is the same as that which is used to determine if a named insured is entitled to a defense." *Mack-Cali Realty Corp. v. NGM Ins. Co.*, 119 A.D.3d 905, 906 (2d Dept 2014).

Here, this court finds that plaintiff has established its *prima facie* right to summary judgment declaring that defendant is obligated to defend it in the Underlying Action. The Additional Insured Endorsement in the Harleysville Policy states that 100 Church, as the additional insured, is covered for damages "which are caused, in whole or in part, by the acts or omissions of Ecker, or those acting on behalf of Ecker, to which 100 Church is entitled to be indemnified by Ecker pursuant to the Contract. Indeed, pursuant to the Contract, Ecker agreed to indemnify 100 Church from and against all claims, damages, losses and expenses arising out of or resulting from performance of Ecker's work at the subject premises. The First Department has held that the phrase "'caused by' does not materially differ from the phrase, 'arising out of.'" *National Union Fire Ins. Co. of Pittsburgh, PA v. Greenwich Ins. Co.*, 103 A.D.3d 473, 474 (1st Dept 2013); *see also W & W Glass Sys., Inc. v. Admiral Ins. Co.*, 91 A.D.3d 530, 531 (1st Dept 2012)("the phrase 'caused by your ongoing operations performed for that insured,' does not materially differ from the general phrase, 'arising out of.'") Indeed, the Court of Appeals has "interpreted the phrase 'arising out of' in an additional insured clause to mean 'originating from, incident to, or having any connection with.'" *Regal Constr. Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 15 N.Y.3d 34, 38 (2010). "It requires 'only that there be some causal relationship between the injury and the risk for which coverage is provided.'" *Id.* (citing *Maroney v. New York Cent. Mut. Fire Ins. Co.*, 5 N.Y.3d 467, 472 (2005)).

Here, the court finds that the additional insured clause in the Harleysville Policy triggers defendant's obligation to defend plaintiff in the Underlying Action on the ground that the

complaint in the Underlying Action alleges that Wenzel's injuries arose out of the work being performed by Ecker at the subject premises. Indeed, it is well-settled that "where...the loss involves an employee of the named insured, who is injured while performing the named insured's work under [a] subcontract, there is a sufficient connection to trigger the additional insured 'arising out of operations' endorsement and fault is immaterial to this determination." *Hunter Roberts Contr. Group, LLC v. Arch Ins. Co.*, 75 A.D.3d 404, 408 (1st Dept 2010); *see also Tishman Interiors Corp. v. Fireman's Fund Ins. Co.*, 236 A.D.2d 385 (2d Dept 1997)("when a workman is injured while performing...work which the subcontractor is contractually obligated to perform for the contractor, it must be concluded that the workman's injury arose from the subcontractor's work for the contractor so as to trigger the [additional insured] coverage provided in the contract [for the contractor]").

Defendant's assertion that summary judgment should be denied because it is only obligated to defend plaintiff if plaintiff obtains a judgment against Ecker for indemnification of any recovery by Wenzel against plaintiff is without merit. It is immaterial whether Ecker may be obligated to indemnify plaintiff for Wenzel's claims in the Underlying Action. Wenzel claims he was injured while working at the subject premises on behalf of Ecker and that his injury was caused by defendants and contractors of defendants, which would include Ecker. Thus, any liability on behalf of plaintiff arises out of Ecker's operations at the subject premises, which triggers the duty to defend plaintiff as an additional insured. *See Tishman Interiors Corp.*, 236 A.D.2d 385. As long as an additional insured's alleged liability "arises out of" the work or operations of the named insured, the culpability or negligence of the additional insured is not relevant. *See Structure Tone v. Component Assembly Systems*, 275 A.D.2d 603 (1st Dept 2000).

Additionally, as this court has already explained, the duty to defend is much broader than the duty to indemnify and defendant must defend plaintiff in the Underlying Action if the complaint alleges any facts or allegations which bring the claim even potentially within the protection purchased.

Additionally, that portion of plaintiff's motion for partial summary judgment declaring that defendant is obligated to reimburse plaintiff its past defense costs incurred in the Underlying Action is granted. It is well-settled that "the allegations that trigger a duty to defend also trigger an obligation to pay defense costs." *Mack-Cali Realty Corp. v. NGM Ins. Co.*, 119 A.D.3d 905, 907 (2d Dept 2014). Here, as defendant's duty to defend under the terms of the Harleysville Policy is triggered by a "suit" against an insured, such duty arose upon the commencement of the Underlying Action, and thus, defendant is obligated to reimburse plaintiff its past defense costs from the commencement of the Underlying Action.

However, that portion of plaintiff's motion for partial summary judgment declaring that the coverage defendant afforded to plaintiff as an additional insured is primary to any other coverage available to plaintiff as named insured is denied on the ground that Zurich, plaintiff's insurer, is not a party to the action. The court declines to consider said portion of plaintiff's motion on the ground that any determination the court made could have an adverse effect on Zurich, thus making Zurich a necessary party to the action.

Additionally, that portion of plaintiff's motion for partial summary judgment declaring that plaintiff is entitled to consequential damages, including attorney's fees and expenses incurred in this action, is denied. As an initial matter, "[t]he rule is well settled in this state that the successful party in litigation may not recover attorneys' fees, except where authorized by the

parties' agreement, statutory provision or court rule." *Chase Manhattan Bank, N.A. v. Each Individual Underwriter Bound to Lloyd's Policy No. 790/004A89005*, 258 A.D.2d 1, 4 (1st Dept 1999). Although an insured is allowed to recover its legal fees in an action brought against it by an insurer "in an effort to free itself from its policy obligations," recovery of counsel fees "may not be had in an affirmative action by [the insured] to settle its rights." *Mighty Midgets v. Centennial Ins. Co.*, 47 N.Y.2d 12, 21 (1979). As the instant action was brought by the insured to settle its rights as to defendant, the insurer, it may not recover attorney's fees and expenses incurred in this action.

To the extent plaintiff moves for summary judgment declaring that it is entitled to consequential damages, including attorney's fees and expenses incurred in this action, because of defendant's bad faith coverage declination, its motion is denied as it has not established as a matter of law that defendant's coverage declination was made in bad faith.

> "[I]n order to establish a prima facie case of bad faith, the plaintiff must establish that the insurer's conduct constituted a 'gross disregard' of the insured's interests–that is, a deliberate or reckless failure to place on equal footing the interests of its insured with its own interests....In other words, a bad-faith plaintiff must establish that the defendant insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable....

Indeed, a showing of bad faith requires "more than an arguable difference of opinion between carrier and insured over coverage...It would require a showing of such bad faith in denying coverage that no reasonable carrier would, under the given facts, be expected to assert it." *Sukup v. State of New York*, 19 N.Y.2d 519, 522 (1967). Here, plaintiff asserts that defendant's "bad faith is obvious" based on defendant's declination of coverage on the ground that the loss was not caused by the negligent acts/omissions of Ecker. However, although this court has found that

defendant was wrong and plaintiff was right as to whether defendant is required to defend plaintiff in the Underlying Action, the record does not show any gross disregard for defendant's policy obligation in asserting noncoverage. Rather, the record shows an arguable case in which the insurer is wrong in its interpretation of coverage which is not enough to impose a liability beyond the terms of the contract. *See Sukup*, 19 N.Y.2d 522.

Based on this court's findings herein, defendant's motion for summary judgment dismissing the complaint is granted only to the extent that that portion of the complaint which seeks a declaration that plaintiff is entitled to consequential damages, including attorney's fees and expenses incurred in the instant action, is dismissed.

Accordingly, the motions are resolved to the extent set forth herein. An inquest is hereby directed on the issue of the amount of past defense costs plaintiff may recover against defendant on a date to be set by the calendar clerk upon entry and service of a copy of this order together with payment of the appropriate fee. Judgment shall thereafter be entered in favor of the plaintiff and against defendant for the amount found upon the inquest. This constitutes the decision and order of the court.

Dated: 4/21/15

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.