Taunus Corp. v Zurich Am. Ins. Co.
2016 NY Slip Op 31747(U)
September 19, 2016
Supreme Court, New York County
Docket Number: 652275/2011
Judge: Lawrence K. Marks
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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TAUNUS CORPORATION, n/k/a DB USA CORPORATION, DEUTSCHE BANK TRUST COMPANY AMERICAS, and DBAB WALL STREET LLC, :

Third-Party Plaintiffs, : Index No. 652275/2011

-against- :

ZURICH AMERICAN INSURANCE COMPANY, :

Third-Party Defendant. :

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LAWRENCE K. MARKS, J.

Third-party defendant Zurich Insurance Company ("Zurich") moves, pursuant to CPLR 3212, for an order granting summary judgment in the remaining third-party action on the ground that the third-party plaintiffs are not additional insureds under the relevant Zurich insurance policies.

BACKGROUND

In the main action, plaintiff Federal Insurance Co. ("Federal Insurance") had sought a judgment declaring that the defendant insurers were obligated to pay a pro rata share of the defense costs, fees and indemnity payments incurred by the defendant/third-party plaintiffs Taunus Corporation, Deutsche Bank Trust Company Americas and DBAB Wall Street LLC (collectively, the "Deutsche Bank Entities") in the underlying tort actions.

Those underlying tort actions were commenced by workers in the building and

construction industry on allegations that each sustained personal injury from exposure to toxic material and contaminated air during clean-up and demolition activities at the Deutsche Bank Entities' buildings, following the September 11, 2001 terrorist attacks on the World Trade Center in Manhattan. *See In re World Trade Ctr. Disaster Site Litig.*, Civil Action No. 21 MC 100 (S.D.N.Y.); *In re World Trade Ctr. Disaster Site Litig. v Bankers Trust Co.*, Civil Action No. 21 MC 102 (S.D.N.Y.); *In re Combined WTC & Lower Manhattan Disaster Site Litig.*, 21 MC 103 (S.D.N.Y.), (collectively, the "*WTC Litigations*"). Approximately 327 workers, at one time or another, filed suit against one or more of the Deutsche Bank Entities. Opp Br at 2.[1]

In the second amended third-party complaint, the Deutsche Bank Entities sought an order declaring that the third-party defendant insurers, including Zurich, must defend and indemnify them in the *WTC Litigations*, pursuant to the terms of the relevant insurance policies and contracts. The Deutsche Bank Entities impleaded Zurich on allegations that they are additional insureds under two consecutive Zurich commercial general liability insurance policies with nonparty Gilbane Building Company ("Gilbane"), bearing policy numbers GLO 3495312-00 and GLO 3495312-01. Opp Br at 3. *See* Mov Moriarty Aff, Exhs F, G (the "Zurich policies"). The first policy was in effect from June 30, 2000 to June 30, 2003, and the second policy was in effect from June 30, 2003 to June

[1] After agreeing to provide a defense, Federal Insurance filed suit, seeking reimbursement of defense costs and a determination of cost allocation among the insurers. Opp Br at 3. The Deutsche Bank Entities were named as nominal defendants but no claims were asserted against them by Federal Insurance. *Id.*

30, 2004. *Id.* The Zurich policies cover work performed at the Deutsche Bank Entities' buildings located at 130 Liberty Street and 4 Albany Street in Manhattan.

Allegedly in anticipation of the sale of the building located at 130 Liberty Street, (the "Liberty Street Building") to nonparty Lower Manhattan Development Corporation ("LMDC"), the Deutsche Bank Entities permitted companies engaged by their insurers or by LMDC to inspect, assess and perform work in the Liberty Street Building. LMDC purchased that building at a closing held on August 31, 2004.

One company permitted access to the Liberty Street Building was Gilbane. The Deutsche Bank Entities allege that Gilbane was the general construction manager overseeing work performed by nonparty LVI Environmental Services, Inc. ("LVI") and other contractors at the Liberty Street Building. Opp Br at 1-2.

In May 2004, Gilbane was authorized by the Deutsche Bank Entities to enter, investigate and inspect the Liberty Street Building, pursuant to the Contractor Access Agreement, Release and Assumption of the Risk (the "Access Agreement"), dated May 11, 2004. The Access Agreement required Gilbane to procure insurance covering the Deutsche Bank Entities as additional insureds. Mov Moriarty Aff, Exh D (the "Access Agrmt"), § 6 (b).

Following joinder of issue in the main action, the Deutsche Bank Entities impleaded multiple insurers, including Zurich, on allegations that they were each contractually bound to provide the Deutsche Bank Entities with a defense and/or

indemnification in the *WTC Litigations*.

In its answer to the second amended third-party complaint, Zurich denied all allegations of wrongdoing asserted against it in that complaint and in the cross-claims filed against it. Zurich also asserted 25 affirmative defenses, including lack of coverage under the Zurich policies. Zurich further asserted a counterclaim and a cross-claim of its own, for a declaration that the *WTC Litigations* claims are covered solely by insurance policies not issued by Zurich or, in the alternative, a declaration regarding priority of coverage.

Discovery has been completed, and the Note of Issue has been filed.[2]

<u>DISCUSSION</u>

Zurich moved for summary judgment in its favor on the third-party claims and cross-claims arising out of the Zurich polices, and a declaration that those policies impose no duty upon Zurich to defend or indemnify any of the Deutsche Bank Entities in the *WTC Litigations*. Zurich contends that the Deutsche Bank Entities gave notice of the *WTC Litigations* to all insurers with a connection to the building who may have had an insurance obligation, and named certain insurers because it was difficult to determine who was responsible. Mov Br at 18.

However, discovery has ended, and Zurich claims that no further information has

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[2] At this time, plaintiff Federal Insurance, all the defendants and all but one of the third-party defendants are no longer parties to this action. The caption was updated to reflect the current parties in this dispute. *See* edoc # 864.

been obtained that supports the Deutsche Bank Entities' claim against Zurich. *Id.* Specifically, Zurich contends that the Deutsche Bank Entities cannot demonstrate that the conditions precedent to additional insured status have been met. Zurich contends, *inter alia,* that there is no fully executed contract requiring Gilbane to procure additional insured coverage, and that Gilbane performed no qualifying work at the Liberty Street Building.

In opposition, the Deutsche Bank Entities contend that, at minimum, the Zurich policies impose upon Zurich a duty to defend them in the *WTC Litigations*, that the Access Agreement's insurance procurement provision is valid and enforceable, and that Gilbane and LVI performed "work," as that term is defined by the Zurich policies, at the Liberty Street Building.

A party moving for summary judgment has the initial burden of coming forward with admissible evidence to support the motion, so as to warrant the court directing judgment in the movant's favor; the burden then shifts to the opposing party to demonstrate, by admissible evidence, the existence of any factual issue requiring a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Sumitomo Mitsui Banking Corp. v. Credit Suisse*, 89 A.D.3d 561, 563 (1st Dep't 2011); CPLR 3212(b). Summary judgment is a drastic remedy and should not be granted where there are genuine material issues of disputed fact. *Sosa v. 46th Street Development LLC*, 101 A.D.3d 490, 492-93 (1st Dep't 2012).

With regard to insurance policies, where the provisions "are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement. The policy must, of course, be construed in favor of the insured, and ambiguities, if any, are to be resolved in the insured's favor and against the insurer." *United States Fid. & Guar. Co. v. Annunziata*, 67 N.Y.2d 229, 232 (1986) (internal citations omitted); *Breed v. Insur. Co. of N. Am.*, 46 N.Y.2d 351, 355 (1978). A policy should be read "in light of 'common speech' and the reasonable expectations of a businessperson." *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 383 (2003). Further, where "the terms and conditions of an insurance policy are clear and unambiguous, the construction of the policy presents a question of law to be determined by the court." *Slattery Skanska Inc. v. American Home Assur. Co.*, 67 A.D.3d 1, 13 (1st Dep't 2009).

"An insurer's duty to defend 'arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim.' This standard applies equally to additional insureds and named insureds." *Worth Constr. Co., Inc. v. Admiral Ins. Co.*, 10 N.Y.3d 411, 415 (2008) (internal citation omitted).

It is "the party claiming insurance coverage [that] bears the burden of proving entitlement, and . . . a party that is not named an insured or an additional insured on the face of the policy is not entitled to coverage." *Tribeca Broadway Assoc. v. Mount Vernon Fire Ins. Co.*, 5 A.D.3d 198, 200 (1st Dep't 2004) (*citing Moleon v. Kreisler Borg*

Florman Gen. Constr. Co., 304 A.D.2d 337, 339 (1st Dep't 2003)). *See also Tower Ins. of N.Y. v. Amsterdam Apts., LLC*, 82 A.D.3d 465, 467 (1st Dep't 2011).

Insured or Additional Insured

The Zurich policies do not specify any of the Deutsche Bank Entities as insureds or as additional insureds by name. Under the policies, however, there is "blanket" language regarding additional insured. The policies provide:

> It is agreed that Section II – *Who Is An Insured is amended to include as an additional insured any person or organization you [Gilbane] are required by written contract to include as an additional insured. Insurance* for these persons or organizations *shall be limited to the extent of coverage and limits of liability required by written contract and only with respect to liability arising out of 'your work', whether performed for that insured by or for you. The written contract must be executed prior to the occurrence of any loss.*

Mov Moriarty Aff, Exh F, bates numbered page ZURICHG 0022; Mov Moriarty Aff, Exh G, bates numbered page ZURICHG 00120 (each endorsement titled "Blanket Additional Insured") (emphasis added). Thus, to qualify as additional insureds under the Zurich policies, the Deutsche Bank Entities must demonstrate the fulfillment of two conditions precedent. The first is a written contract, executed prior to the occurrence of any loss. The second is that the liability must arise out of work performed by Gilbane, or on its behalf, at the Liberty Street Building.

[* 8]

First Condition Precedent

The Deutsche Bank Entities rely on the Access Agreement as the basis for their claim of coverage as additional insureds under the Zurich policies. The Access Agreement does specify the Deutsche Bank Entities by name, and requires Gilbane to maintain comprehensive general liability insurance covering them as additional insureds. The Access Agreement provides:

> Prior to any entry into the Building by Contractor, its subcontractor, and their respective employees, *Contractor shall furnish the Bank with evidence satisfactory to the Bank of a policy or policies of comprehensive general liability insurance*, automobile liability insurance, worker's compensation and employers' liability insurance and professional liability insurance in the case of Contractors or Subcontractors which are architectural, engineering or similar firms, and pollution liability insurance in the case of other Contractors and subcontractors, *in full force and effect with the limits of coverage not less than the amounts shown on Schedule '1' hereto. Such policy* or policies (except workers' compensation insurance) *shall name Taunus Corporation, its subsidiaries and affiliates, including the Bank [Deutsche Bank Trust Company Americas]*, Deutsche Bank AG, DBE International Realty Management, LMDC, ESDC, and the Port Authority, *as additional insured.*

Access Agrmt, § 6 (b) (emphasis added).

However, the Deutsche Bank Entities failed to provide a fully executed copy of the Access Agreement. The Access Agreement includes signature lines for both Gilbane and the Deutsche Bank Entities. Gilbane appears to have executed the Access Agreement, but there is no evidence that the Deutsche Bank Entities ever executed that agreement. Access Agrmt, at 7.

The Deutsche Bank Entities argue that, although the Access Agreement contains a signature line for the Deutsche Bank Entities, that signature line "appears to be merely gratuitous." Opp Br, at 8. They argue that, above the Gilbane signature line, the Access agreement provides the "Contractor has executed this Agreement in the State of New York as of May 11, 2004." Access Agrmt, at 7. The Deutsche Bank Entities contend that a fair interpretation of the document is that only Gilbane needed to sign the Access Agreement, that the agreement did not require the signature of Deutsche Bank Entities and that not having countersigned it does not make it any less enforceable against Gilbane. The Deutsche Bank Entities further argue that the Zurich policies do not define what is meant by the term "executed." They argue that the policies do not specify who must sign the Access Agreement or whether it needs to be fully executed. The Deutsche Bank Entities, therefore, contend that the term "executed" is ambiguous and must be construed in their favor. Opp Br at 12.

The First Department has held that an insurance policy "was not ambiguous as to who was required to sign the agreement" where the agreement contained signature lines for two parties. *Cusumano v. Extell Rock, LLC*, 86 A.D.3d 448, 449 (1st Dep't 2011). Further, the First Department has held that a party was not afforded "additional insured status" where the only written document was never signed by that party. *Nicotra Group, LLC v. American Safety Indem. Co.*, 48 A.D.3d 253, 253-54 (1st Dep't 2008). There, the court found that the document did not qualify as a "written contract" that was "executed"

prior to the harm. *Id.* (In *Nicotra*, the document was a letter agreement, not signed by the party not afforded additional insured status, and the harm was "bodily injury").

Both of these cases involved questions of execution in the context of additional insured. These cases involve facts highly analogous to the instant case, and clearly support Zurich's position.[3]

The Deutsche Bank Entities further argue that, even without being fully executed, the Access Agreement was binding and enforceable. They argue that New York law provides that "an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound." Opp Br, at 9, *quoting Flores v. Lower E. Side Serv. Ctr.*, 4 N.Y. 363, 369 (2005).

However, *Flores* addressed the limited impact of legislative action, with regard to Workers Compensation Law § 11, on common law. *Flores* , 4 N.Y. at 369-71. In the instant dispute, the explicit language of the operative agreements is controlling. In this case, the language in the Zurich policies is clear that who is an additional insured is limited not just to a party with a written contract, but that the "written contract must be executed prior to the occurrence of any loss." Mov Moriarty Aff, Exh F, bates numbered page ZURICHG 0022; Mov Moriarty Aff, Exh G, bates numbered page ZURICHG 00120. "Interpreting the insurance contract under the same principles as any ordinary

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[3] The Court notes that, although not addressed by counsel, according to Kevin Fenton, the Deutsche Bank Entities' corporate designee witness, the Access Agreement signed by Gilbane and at issue was created by a Deutsche Bank entity. Mov Moriarty Aff, Exh E, at pages numbered 180-181 (excerpts of Fenton deposition transcript).

business contract," that language in the Zurich policies is "unambiguous, and reasonably susceptible to only one meaning." *National Abatement Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 A.D.3d 570, 571 (1st Dep't 2006). Moreover, the Appellate Division in *National Abatement* noted that the additional insured coverage in that case did not exist, and "the fact that an unsigned contract may be enforceable if there is objective evidence the parties intended to be bound or the eventual writing was intended to be valid retroactively has no bearing on whether there is a 'written contract' pursuant to the policy endorsement." *Id.* (internal citation omitted). Pursuant to the Zurich policies' terms, the Access Agreement must be executed by both Gilbane and the Deutsche Bank Entities before additional insured coverage under those policies can exist.

Accordingly, the Access Agreement provides no valid basis for the claim of coverage by the Deutche Banks Entities as additional insureds, because it was not fully executed. Thus, the Access Agreement does not fulfill the first condition precedent to qualify as providing additional insured coverage under the Zurich policies.

Second Condition Precedent

The second condition precedent is that the liability must arise out of work performed by Gilbane, or on its behalf, at the Liberty Street Building. The term "your work" is explicitly defined in the Zurich policies to include, in pertinent part, "Work or operations performed by you or on your behalf." Mov Moriarty Aff, Exh F, bates numbered page ZURICHG 0050; Mov Moriarty Aff, Exh G, bates numbered page

ZURICHG 00150.

To trigger a duty to defend, pursuant to an additional insured provision, the action must include allegations that the injuries arose from the work of the contractor, or on behalf of the contractor, who purchased the coverage. *See Worth Constr. Co., Inc. v. Admiral Ins. Co.*, 10 N.Y.3d 411, 415-16 (2008); *Bovis Lend Lease LMB Inc. v. Garito Contr., Inc.*, 65 A.D.3d 872, 874 (1st Dep't 2009).

The Deutsche Bank Entities argue that LVI worked under Gilbrane's direction, that plaintiffs in the *WTC Litigations* were employed by LVI and that it "logically follows" that liability arose from Gilbane's work. Opp Br at 7. They aver that this work continued after Gilbane signed the Access Agreement. Opp Br at 2. They contend that so long as they can demonstrate that any of the liability to any of the plaintiffs in the *WTC Litigations* arose from Gilbane's work, coverage is triggered. Opp Br at 7.

However, the Deutsche Bank Entities have not demonstrated that any of the liability arose from Gilbane's work under the Access Agreement. None of the approximately 327 plaintiffs in the *WTC Litigations* was, at any relevant time, employed by Gilbane. Rely Br at 5, 11. Gilbane is not joined as a defendant in the *WTC Litigations*, nor is it identified as a contractor that caused or contributed to the personal injuries or property damage allegedly sustained by any of the *WTC Litigations* plaintiffs. Mov Br at 17.

There is no evidence submitted that the Deutsche Bank Entities' potential liability

for injury to any of the *WTC Litigations* plaintiffs could arise under the Access Agreement out of work performed by Gilbane or on Gilbane's behalf at the Liberty Street Building.[4] The record demonstrates that, pursuant to the Access Agreement, Gilbane was permitted to inspect the building on behalf of LMDC. Gilbane performed no testing, cleaning or demolition, and did not supervise or control any activities there. Gilbane did not supervise or control the activities of any workers performing cleanup duties on behalf of the Deutsche Bank Entities. Mov Br at 9.[5] The Access Agreement, at best, provided Gilbane with access to 130 Liberty Street to perform inspection only.

As to LVI, the Deutsche Bank Entities further contend that Gilbane was the general contractor at the Liberty Street Building, overseeing the work of LVI. Opp Br at 2. However, this was unrelated to the work performed under the Access Agreement.

In 2002, Gilbane was hired by the Deutsche Bank Entities' property insurers as the project manager on the Test Cell Project. This project was undertaken to determine

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[4] Fenton, the Deutsche Bank Entities' corporate designee witness, stated that he knew of no determination that Gilbane's work caused an injury to any of the *WTC Litigations* plaintiffs, and that, because it was difficult to determine from the hundreds of complaints against the Deutsche Bank Entities which contractors were responsible, the Deutsche Bank Entities chose to put all insurance carriers on notice. Mov Moriarty Aff, Exh E, at pages numbered 190-92 (excerpts of Fenton deposition transcript). Fenton further stated that, in the years since, he knew of no additional information that emerged that would support a claim against Zurich. *Id.*, at pages numbered 191-92. He stated he knew of no investigation into what work Gilbane performed at the Liberty Street Building, nor was he aware of anything that might enable the Deutsche Bank Entities to obtain additional insured coverage under the Zurich policies. *Id.*, at pages numbered 192-93.

[5] Fenton stated that he understood that Gilbane did not perform the actual testing, clean-up or demolition, or supervise or control any of the activities at the building. Mov Moriarty Aff, Exh E, at pages numbered 186-88 (excerpts of Fenton deposition transcript).

whether the toxic dust in the Liberty Street Building could be cleaned from that building. Opp Scordo Aff, Exh A, at 111-14 (Peter Demeropoulos deposition transcript); Reply Br at 3-4; Reply Moriarty Aff, Exh A, WTC-LV10005764. Significantly, while citing to Gilbane's work as the Test Cell Project construction manager, the Deutsche Bank Entities do not contend that any of the produced written agreements relating to that project entitle them to additional insured coverage under the Zurich policies. Instead, the Deutsche Bank Entities rely solely on the Access Agreement executed by Gilbane in May 2004.

Zurich is correct that the Deutsche Bank Entities have identified nothing in the testimony or documentation relating to the Test Cell Project or the Access Agreement that would raise a triable issue regarding a possible link between the work performed under the two projects. *See* Reply Br at 12. *See generally*, Opp Br. Instead, they demonstrate that the Test Cell Project is completely separate from the pre-bid walk-through and inspection work performed on behalf of LMDC under the Access Agreement. *See* Reply Moriarty Aff, Exh A, WTC-LV10005750-72. Therefore, any work performed by Gilbane, LVI or any other contractor on the Test Cell Project provides no basis for finding liability under the Access Agreement.

The Deutsche Bank Entities have articulated no specific assertions, much less established facts, that would support Zurich's liability. See Opp Br at 7-8. To defeat a motion for summary judgment, there must be evidence put forth that, if true, is sufficient to raise triable issues. *Zuckerman v City of New York*, 49 NY2d 557 (1980). "[M]ere

conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Id.* at 562.

Thus, the Access Agreement does not fulfill the second condition precedent to qualify as providing additional insured coverage under the Zurich policies.

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Even if only one of the conditions precedent in the Access Agreement had not been met, the Deutsche Bank Entities would not qualify as additional insureds under that agreement. In fact, neither condition precedent has been met here. As such, the Deutsche Bank Entities are not additional insureds under the Zurich policies, and summary judgment is warranted as a matter of law.

The Court has considered the parties' other arguments, and finds them to be unavailing.[6]

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[6] For example, Zurich made this motion, originally citing both Zurich policies. *See* Mov Br at 10, 22. However, in their reply papers, Zurich argues that the earlier of the policies is inapplicable, because it was in effect from June 30, 2000 through June 30, 2003, expiring approximately 11 months prior to the May 11, 2004 Access Agreement. Reply Br at 7; Mov Moriarty Aff, Exh F. They argue, therefore, that at the time that policy was purchased, and expired, Gilbane was under no obligation imposed by the Access Agreement to maintain insurance on behalf of the Deutsche Bank Entities, and any claim stemming from this policy "must be dismissed outright." Reply Br at 7. The Court need not, and is not, addressing this argument, which appears to be raised for the first time in the reply.

Accordingly, it is

ORDERED that summary judgment is granted in favor of third-party defendant Zurich Insurance Company and against third-party plaintiffs Taunus Corp., n/k/a DB USA Corporation, Deutsche Bank Trust Company Americas, and DBAB Wall Street LLC, and this Court declares that Zurich has no duty to defend or indemnify the Deutsche Bank Entities in the *WTC Litigations* arising out of Zurich insurance policies bearing policy numbers GLO 3495312-00 and GLO 3495312-01 issued to Gilbane Building Company; and it is further

ORDERED that all claims and/or cross-claims asserted against Zurich arising out of those policies are dismissed.

This constitutes the Decision and Order of the Court.

Dated: September 19, 2016

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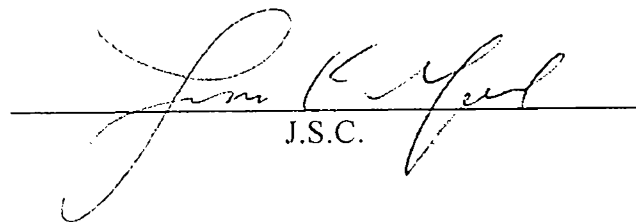

J.S.C.