Tri State Dismantling Corp. v Robo Breaking Co., Inc.
2017 NY Slip Op 30859(U)
April 24, 2017
Supreme Court, Kings County
Docket Number: 500183/15
Judge: Bernard J. Graham
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At an IAS Term, Part 36 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of April, 2017.

PRESENT:

HON. BERNARD J. GRAHAM,
Justice.

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TRI STATE DISMANTLING CORP.,

Plaintiff,

- against -

Index No. 500183/15

ROBO BREAKING CO., INC., et al.

Defendants.

-------------------------------------X

The following papers numbered 1 to 11 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-5, 6-7, 8-9
Opposing Affidavits (Affirmations)	10, 11
Reply Affidavits (Affirmations)	
______ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant Scottsdale Insurance Company (Scottsdale) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff Tri State Dismantling Corp. (Tri State). Defendant Robo Breaking Co., Inc. (Robo) moves for an order, pursuant to CPLR 3211 (a) (1), (4) and (7) dismissing Tri State's complaint, pursuant to CPLR 3211 (a) (1) dismissing all cross claims asserted against Robo, pursuant to CPLR 3212 granting summary judgment dismissing Tri State's

complaint and all cross claims asserted against Robo or, alternatively, compelling Tri State's compliance with outstanding discovery demands and appearance for deposition.[1] Defendant Endurance American Specialty Insurance Company (Endurance) cross-moves for an order, pursuant to CPLR 3212, granting summary judgment declaring that Endurance has no obligation to provide additional insured coverage, defense or indemnity to Tri State in an underlying personal injury action and dismissing Tri State's complaint. Tri State moves for an order, pursuant to CPLR 3212, granting summary judgment to Tri State and ordering all defendants to defend and indemnify Tri State in the personal injury action.

Tri State commenced this action seeking a declaratory judgment that Endurance and Scottsdale are obligated to defend and indemnify Tri State in a personal injury action and a declaratory judgment that Robo is liable to Tri State inasmuch as it failed to procure proper liability insurance covering Tri State against the personal injury claim as required in a general services agreement. The underlying personal injury action was commenced by Tri State's employee, Miguel Llivigany, to recover damages for an injury sustained on July 7, 2011 while working on a construction project at 795 11th Avenue in Manhattan. BMW of Manhattan, Inc. (BMW), the owner of the subject property and a defendant in the underlying personal injury action, had retained general contractor Hunter Roberts Construction Group, LLC (HRC), another underlying defendant, to perform demolition and renovation work. HRC subcontracted certain demolition work to Tri State. Under the subcontract, Tri State

[1]No cross claims against Robo are interposed in any of defendants' answers.

agreed to "indemnify, defend, save and hold harmless [HRC], [BMW] . . . and any other required indemnitee under the General Contract . . . from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with or are claimed to arise out of or be connected with the performance of Work by [Tri State], or any act or omission of [Tri State])." In conjunction with the project, Tri State entered into a general services agreement with Robo whereby Robo agreed to perform certain demolition work for Tri State using a robotic device.

Under article 4 of the general services agreement, Robo ("Vendor") agreed to indemnify Tri State ("Purchaser"), to the fullest extent permitted by law, for claims "arising out of or in connection with or as a result of the performance of the Work by [Robo] under this Agreement. . ." Article 5 of the general services agreement, which sets forth Robo's obligation to procure insurance, provides, in part:

> A. Vendor specifically agrees to maintain the following insurance coverage in the limits provided below:
>
> > a. Vendor shall provide Commercial General Liability Insurance on an occurrence basis with a combined limit for bodily injury, personal injury and property damage of at least $6 million per occurrence and in the aggregate. The limit may be provided through a combination of primary and umbrella/excess liability policies. The insurance shall be written with a "per location" aggregate endorsement.
> >
> > b. Vendor shall provide Worker's Compensation and Employer's Liability Insurance which includes statutory workers' compensation (including occupational disease) and employers' liability coverage with limits in accordance with the law but in no event less than $1,000,000 on an occurrence basis.

* * *

B. Vendor shall, by specific endorsements to its primary commercial general liability and umbrella/excess liability policies, name Purchaser and Indemnitees as Additional Insureds thereunder.

a. The additional insured endorsements shall be on a form at least as broad as ISO Form CG2010 (1985) and shall not include any exclusions that limit the scope of coverage beyond that provided to the named insured.

b. This requirement applies to all policies under which the above parties are required to be named as Additional Insureds.

* * *

d. Vendor shall, by specific endorsement to its primary commercial general liability policy and automobile liability policy, cause the coverage afforded to the Additional Insureds to be primary to and not concurrent with any other valid and collectible insurance available to the Additional Insureds.

e. Vendor shall, by specific endorsement to its umbrella/excess liability policy, cause the coverage afforded to the Additional Insureds thereunder to be first tier umbrella/excess coverage above the primary coverage afforded to the Additional Insureds as set forth in paragraph (d) above and not concurrent with or excess to any other valid and collectible insurance available to the Additional Insureds whether provided on a primary or excess basis.

Pursuant to the general services agreement, Robo procured a commercial general liability policy from Endurance and an excess liability policy from Scottsdale, which followed the terms, conditions, exclusions, definitions and endorsements of the Endurance policy as per its "following form" provision. The underlying action, *Miguel Lliviganay v 801*

11th Avenue, LLC, 801 11th Avenue Tenant, LLC, Garage Management Corp., BMW of Manhattan, Inc. and Hunter Roberts Construction Group, LLC, Index No. 110811/11, was commenced in Supreme Court, New York County on or about September 22, 2011. On or about May 9, 2012, the defendants in the underlying action, 801 11th Avenue, LLC, 801 11th Avenue Tenant, LLC, Garage Management Corp., BMW and HRC commenced a third-party action against Tri State seeking common law and contractual indemnification and contribution. Consequently, Tri State sought defense and indemnification under the Endurance and Scottsdale policies.

By letter dated December 4, 2012, Endurance (through its third-party administrator) notified Tri Sate that it was denying coverage based on the employer's liability and contractual liability exclusions stated in the policy. Tri State thereafter impleaded Robo in the underlying personal injury action seeking contribution, common law and contractual indemnification and damages for breach of contract based on the alleged failure of Robo to procure proper insurance covering Tri State as required in the general services agreement. Based on the exclusions relied on by Endurance for denial of coverage, Scottsdale likewise denied coverage to Tri State under the excess liability policy by letter dated March 4, 2013.

The exclusions cited by Endurance are set forth in Section I (2) of the commercial general liability coverage form in the Endurance policy and provide, in relevant part:

This insurance does not apply to:

* * *

b. Contractual Liability

"Bodily injury" ... for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" . . . occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" ..., provided:

> (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same 'insured contract'; and
>
> (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

* * *

e. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

> (a) Employment by the insured; or
>
> (b) Performing duties related to the conduct of the insured's business; . . . .

* * *

> This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.
>
> This exclusion does not apply to liability assumed by the insured under an "insured contract."

The policy also contains the following Separation of Insureds provision, which states:

> 7. Separation of Insureds
>
> Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:
>
> a. As if each Named Insured were the only Named Insured; and
>
> b. Separately to each Insured against whom claim is made or "suit" is brought.

Motion of Robo For Dismissal/Summary Judgment

Turning first to Robo's motion to dismiss Tri State's complaint pursuant to CPLR 3211 (a) (4), "a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same" (*DAIJ, Inc. v Roth*, 85 AD3d 959, 959 [2d Dept 2011]; *see* CPLR 3211 [a] [4]; *Whitney v Whitney*, 57 NY2d 731, 732 [1982]; *Cherico, Cherico & Assoc. v Midollo*, 67 AD3d 622, 623 [2d Dept 2009]; *Liebert v TIAA-CREF*, 34 AD3d 756, 757 [2d Dept 2006]). The cause of action in the underlying action and the cause of action in this action are similar

insofar as both contain allegations that Robo breached its obligation to procure proper liability insurance covering Tri State for certain liability. Moreover, the relief sought in this action, a judgment declaring that Robo is liable to Tri State for breach of contract is essentially the same as the relief sought in the underlying action, to wit, a judgment assessing damages against Robo for breach of contract. Further, Robo's motion to dismiss is not addressed in Tri State's papers in opposition.

As a result, that part of Robo's motion to dismiss the complaint pursuant to CPLR 3211 (a) (4) is granted. In light of this disposition, the court need not consider Robo's alternate grounds for dismissal.

Motions Of Endurance And Scottsdale For Summary Judgment

"As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning . . . and the interpretation of such provisions is a question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007] [citation omitted]; *see Sanabria v American Home Assur. Co.*, 68 NY2d 866, 868 [1986]; *Essex Ins. Co. v Laruccia Constr., Inc.*, 71 AD3d 818, 819 [2d Dept 2010]). Courts must examine the language of the policy and "construe [it] in a way that 'affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect' " (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221–222 [2002], quoting *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 493 [1989]; *see Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264 [2011]).

An insurer's duty to defend an insured or an additional insured, is exceedingly broad, and is triggered by allegations in the complaint suggesting a reasonable possibility of coverage irrespective of the apparent lack of merit of the supporting allegations (*Stout v 1 E. 66th St. Corp.*, 90 AD3d 898 [2d Dept 2011]), However, no duty arises where the underlying complaint contains "no possible factual or legal basis on which the insurer might eventually be held to be obligated to indemnify" (*Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424 [1985]).

The insurer has the burden of proving the applicability of an exclusion (*see Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]). To rely on an exclusion to deny coverage, an insurer must demonstrate that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 653 [1993]; *Rego Park Holdings, LLC v Aspen Specialty Ins. Co.*, 140 AD3d 1147, 1148 [2d Dept 2016]). However, as it is the insured's burden to establish coverage, where coverage depends entirely on the applicability of an exception to the exclusion, the insured bears the burden of demonstrating that the exception has been satisfied (*Platek v Town of Hamburg*, 24 NY3d 688, 694 [2015]).

The preamble of the Endurance policy defines the "insured" as "any person or organization qualifying as such under Section II - Who Is An Insured." There is no genuine dispute that Tri State is covered under the Endurance and Scottsdale policies as an "insured" pursuant to Section II and an Additional Insured endorsement. Thus, under the Separation

of Insureds provision, the exclusions set forth in the policy are applicable to both Robo, the "Named Insured" and Tri State as an Additional Insured. There is also no palpable dispute that the claims against Tri State in the underlying personal injury action stem from bodily injury to an employee of Tri State and involve the assumption of liability by Tri State in its subcontract with HRC, making the employer's liability and contractual liability exclusions applicable. The essential argument raised by Tri State in opposition is that despite any applicability of the employer's liability and contractual liability exclusions, Tri State is entitled to the "insured contract" exceptions to the exclusions on account of the indemnification provision in its subcontract with HRC.

The term "insured contract" is defined in the commercial general liability coverage form, in pertinent part, as follows:

SECTION V - DEFINITIONS

* * *

> 9. "Insured contract" means:
>
> a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract"; .
>
> b. A sidetrack agreement;
>
> c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

> d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
>
> e. An elevator maintenance agreement;
>
> f. That part of any other contract or agreement pertaining to *your* business (including an indemnification of a municipality in connection with work performed for a municipality) under which *you* assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement. (Emphasis added).

Tri State maintains that the indemnification provisions in its subcontract with HRC constitute an "insured contract" under the aforesaid section V (9) (f) of the commercial general liability coverage form. However, the Endurance policy unequivocally states that the terms "you" and "your" as used throughout the policy refer "to the Named Insured shown in the Declarations, or, any other person or organization qualifying as a Named Insured under this policy. . ." Robo is the only Named Insured in the Endurance policy. Accordingly, under the plain and unequivocal terms of the policy, section V (9) (f) applies only to contracts wherein liability is assumed by Robo. Contrary to the argument of Tri State, the Separation of Insureds provision does not make section V (9) (f) applicable to Tri State's subcontract. The Separation of Insureds provision "primarily highlights the named insured's separate rights and duties, as well as makes clear that the limits of the policy are to be shared by all of the insureds, i.e., that they are not each able to exhaust the limits of coverage but must share that limit equally; it does not negate bargained-for exclusions, or otherwise

expand, or limit, coverage" (*see DRK, LLC v Burlington Ins. Co.*, 74 AD3d 693, 694 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011]). Endurance and Scottsdale both agree with Tri State's argument insofar as the Separation of Insureds provision and the language of the employer's liability and contractual liability exclusions make the exclusions inapplicable where liability is assumed in an "insured contract" as defined in the policy, whether entered into by Robo or by Tri State. For example, if liability was assumed by Tri State under a lease, sidetrack agreement or elevator maintenance agreement (which constitute insured contracts under the policy), then the exception would apply to Tri State as it would to Robo. However, Tri State's subcontract with HRC does not qualify as an "insured contract" under any of the policy's stated definitions. Interpreting section (V) (9) (f) of the commercial general liability coverage form as encompassing Tri State's subcontract would be in contravention of the plain and unequivocal language of the policy, which states that the terms "you" and "your" refer only to the Named Insured (i.e. Robo).

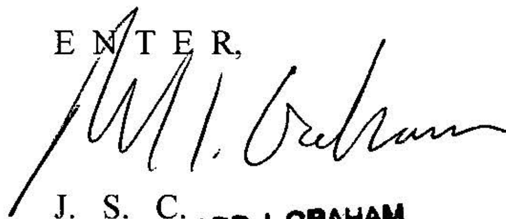
Endurance and Scottsdale therefore have established as a matter of law that coverage to Tri State is properly denied under the employer's liability exclusion, while Tri State has not established that it is entitled to an exception to the exclusion for liability assumed under an insured contract.

As a result, Tri-State's motion for summary judgment is denied and the motion of Scottsdale and cross motion of Endurance for summary judgment dismissing the complaint

are each granted. The complaint is hereby dismissed in its entirety without prejudice to Tri State's pursual of any and all claims against Robo in the underlying action.[2]

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.
HON. BERNARD J. GRAHAM

Clerk

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[2]While Lliviganay is named as a defendant herein, no direct claim or cause of action is brought against him in Tri State's complaint.