Colony Ins. Co. v American Empire Surplus Lines Ins. Co.
2017 NY Slip Op 30990(U)
May 10, 2017
Supreme Court, Kings County
Docket Number: 501911/15
Judge: Debra Silber
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At an IAS Term, Part 9 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 10th day of May, 2017.

PRESENT:

HON. DEBRA SILBER,

Justice.

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COLONY INSURANCE COMPANY,

Plaintiff,

- against -

AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY and CHAMP CONSTRUCTION CORP.,

Defendants.

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DECISION / ORDER

Index No. 501911/15
Mot. Seq. # 2 and 3
Sub. 2/16/17

The following papers numbered 1 to 9 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2 5-6
Opposing Affidavit (Affirmation)	3 7
Reply Affidavit (Affirmation)	4 8
Defendant American's Memo of Law	9

Upon the foregoing papers in this insurance coverage dispute, defendant, American Empire Surplus Lines Insurance Company (American), moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing all claims asserted against it (Seq. #2).

Plaintiff, Colony Insurance Company (Colony), moves, pursuant to CPLR 3212, for an order granting it summary judgment declaring that: (1) American must defend Colony's insureds, CP & Associates Construction Corp. (CPA) and 57 Graham Corp. (57 Graham), against the underlying action as additional insureds on a primary, non-contributory basis under Commercial General Liability Policy No. 13CG0173946 (the American Policy) that American issued to Champ Construction Corp. (Champ); (2) there is contractual indemnity

coverage under the American Policy for CPA and 57 Graham's cross claims for contractual indemnification in the underlying action; (3) American must reimburse Colony for all defense costs, with interest, that Colony incurred in connection with its defense of CPA and 57 Graham in the underlying action until American assumes its duty to defend CPA and 57 Graham as additional insureds under the American Policy on a primary and non-contributing basis; and (4) American is estopped from asserting and/or waiving any coverage defenses as against CPA and 57 Graham (Seq. #3).

Background

The Construction Accident

This insurance coverage dispute arises out of an August 14, 2013 construction accident in which Devair Da Silva (Da Silva), a construction worker employed by Champ, was injured during the course of his employment at 57 Graham Avenue in Brooklyn. Specifically, Da Silva injured his hand when he was struck by the blade of a cement "helicopter" that was being hoisted. 57 Graham owns the real property and building under construction, CPA was the general contractor for the construction project and Champ was a subcontractor hired by CPA.

Subcontract #1324

The August 6, 2013 subcontract #1324 between CPA and Champ (Subcontract #1324) provides that "[i]nsurance must carry $5M and be submitted within three days of the date of this contract, or prior to start of work, whichever is sooner, otherwise contract is void." Subcontract #1324 further provides that "[t]his Subcontract is not valid without the Subcontractor General Conditions *Version 2012-003* signed and agreed to by all parties" and "[a]ll work under this Subcontract is pursuant and subject to the Subcontract General Conditions Version *2012-003*" (emphasis added). There is no evidence in the record that the

parties ever executed Subcontractor General Conditions Version 2012-003 or any other version of this document.

Importantly, Subcontract #1324 was executed by Champ on December 9, 2013 (months after Da Silva's injury), and Subcontract #1324 was never executed by CPA, although it is written on its stationery.

The Underlying Personal Injury Action

On November 5, 2013, Da Silva commenced a personal injury action against 57 Graham, CPA and Champ (Underlying Personal Injury Action),[1] alleging that he sustained personal injuries during the performance of his work for Champ due to defendants' alleged negligence and violations of the Labor Law. Da Silva also alleges that Champ failed to obtain Workers' Compensation insurance coverage.

On March 5, 2014, CPA answered Da Silva's complaint, denying the allegations therein and asserting cross claims against Champ for: (1) breach of contract based on Champ's failure to procure general liability insurance naming it as an additional insured; (2) common law indemnification; and (3) contractual indemnification.

On March 17, 2014, 57 Graham answered Da Silva's complaint, denying the allegations therein and asserting cross claims against Champ and CPA for: (1) common law indemnification; (2) breach of contract based on their failure to procure general liability insurance naming 57 Graham as an additional insured; and (3) contractual indemnification.

On March 27, 2014, Champ answered Da Silva's complaint, denying the allegations therein and asserting cross claims alleging that: (1) Da Siva's injuries arose out of the negligence of CPA and 57 Graham, and (2) Champ is entitled to contribution and indemnification against Da Silva, in whole or in part, if Da Silva is found to be negligent.

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[1] *See Da Silva v Champ Constr. Corp., et al.*, Kings County Index No. 506852/13. The Note of Issue was recently filed.

The Colony Policy

Colony issued Commercial General Liability Policy No. AR3362335 to CPA, the general contractor, effective for the policy period June 1, 2013, through June 1, 2014.

The American Policy

American issued Commercial General Liability Policy No. 13CG0173946 to Champ, the subcontractor and plaintiff's employer, effective for the policy period January 17, 2013, through January 17, 2014.

Section I, Paragraph 1 (a) of the American Policy provides that:

> "[w]e will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. . . ."

Section I, Paragraph 2 of the American Policy excludes coverage for the following loss, claims, injuries and damages:

> "**2. Exclusions**
>
> This insurance does not apply to:
>
> * * *
>
> **b. Contractual Liability**
>
> 'Bodily injury' or 'property damage' 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 damage:
>
> (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' or 'property damage' 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' or 'property damage', 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.

* * *

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

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; or

(2) The spouse, child, parent, brother or sister of that 'employee' as a consequence of Paragraph (1) above.

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'."

Section V, Paragraph 9 (f) of the American Policy defines an "insured contract" as:

> "**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. . . ."

In addition, the American Policy contains Endorsement CG 20 10 07 04 with a "Schedule" identifying additional insureds as "[a]ll entities required by written contract to be included for coverage as additional insured's in respect to operations performed by the Named Insured or on their behalf." The endorsement further provides:

> "**A.** **Section II – Who is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for 'bodily injury', 'property damage' or 'personal and advertising injury' caused, in whole or in part, by:
>
> **1.** Your acts or omissions; or
>
> **2.** The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above. . . ."

American Denies Coverage Under The American Policy

On December 17, 2013, Colony tendered the defense and indemnification of CPA and 57 Graham in the Underlying Personal Injury Action to Champ, which was forwarded to American. American responded by issuing a February 11, 2014 letter denying coverage because Endorsement CG 20 10 07 04 to the American Policy "is triggered only for those entities required to be additional insured by written contract" and Colony "did not provide a copy of an executed contract between your insured and ours."

On August 25, 2014, Champ's counsel tendered defense and indemnification of Champ in the Underlying Personal Injury Action to American. American responded by issuing an August 29, 2014 letter denying Champ coverage under the American Policy based

on the exclusion relating to Workers' Compensation (Par. 2 [d]) and Employer's Liability (Par. 2 [e]).

This Declaratory Judgment Action

On February 19, 2015, Colony commenced this action against American and Champ, seeking a judgment declaring that American is obligated to provide CPA and 57 Graham with a defense and indemnification in the Underlying Personal Injury Action.

Colony asserted three causes of action: (1) for a declaration that American has a duty to defend and indemnify CPA and 57 Graham as additional insureds under the American Policy with respect to the Underlying Personal Injury Action and that Colony's obligations under the Colony Policy are solely as excess to those of American; (2) for a declaration that American must indemnify and hold CPA and 57 Graham harmless in the Underlying Personal Injury Action based upon Champ's obligations under Subcontract #1324; and (3) for a declaration that American must reimburse Colony for all defense costs incurred in connection with the defense of CPA and 57 Graham in the Underlying Personal Injury Action.

Colony's complaint annexed as exhibits: (1) Da Silva's February 18, 2014 complaint; (2) Subcontract #1324 and an unexecuted copy of "RIDER A – SUBCONTRACT GENERAL CONDITIONS – VERSION *2013-001*";[2] and (3) Da Silva's May 9, 2014 bill of particulars.

On April 2, 2015, American answered Colony's complaint, denying the material allegations therein and asserting several affirmative defenses, including that: (1) the complaint fails to state a cause of action; (2) waiver, estoppel, laches and/or unclean hands;

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2. Although Subcontract #1324 specifically incorporates Subcontract General Conditions Version *2012-003* by reference, Colony annexed an unsigned copy of Subcontract General Conditions Version *2013-001* to its declaratory judgment complaint.

(3) documentary evidence; (4) failure to mitigate damages; (5) American is under no obligation to provide coverage to CPA and 57 Graham under the American Policy; (6) failure to comply with the terms, conditions and provisions of the American Policy; and (7) the American Policy is solely as excess to other primary coverage.

On December 7, 2015, Champ answered Colony's complaint, denying the material allegations therein and asserting a cross claim against American, alleging that American's denial of coverage is in contravention of the law and in breach of the American Policy and seeking a judgment "declaring the rights and other legal relations of the parties hereto . . ."

The Instant Summary Judgment Motions

1. American's Summary Judgment Motion

On or about October 21, 2016, American moved for summary judgment: (1) dismissing Colony's first cause of action and declaring that American has no duty to defend or indemnify CPA and 57 Graham in the Underlying Personal Injury Action as additional insureds under the American Policy; (2) dismissing Colony's second cause of action and declaring that there is no coverage for contractual indemnity under the American Policy; (3) dismissing Colony's third cause of action and declaring that American has no obligation to reimburse Colony for the costs of defending CPA and 57 Graham in the Underlying Personal Injury Action; (4) dismissing Champ's cross claims and declaring American has no obligation to defend and indemnify Champ in the Underlying Personal Injury Action; and (5) declaring that American is not obligated to pay any portion of any settlement or judgment awarded against CPA, 57 Graham or Champ in the Underlying Personal Injury Action.

American argues that it has no duty to defend or indemnify CPA or 57 Graham as additional insureds under the American Policy "because the written contract entered into between Champ, CP[A] and 57 Graham is invalid and, therefore, the additional insured

endorsement to the American Empire Policy is not triggered."[3] According to American, Subcontract #1324 is not valid, by its terms, unless Subcontractor General Conditions Version 2012-003 is signed and agreed to by all parties. American contends that Colony's reliance on an unsigned copy of Subcontractor General Conditions Version *2013-001* (attached to the complaint) is misplaced.

American contends that Da Silva's direct claims against Champ and CPA as well as 57 Graham's cross claims against Champ in the Underlying Personal Injury Action "are excluded under the American Empire Policy pursuant to the Workers' Compensation, Employer's Liability and Contractual Liability exclusions."[4] American also argues that Colony has no right to assert a claim for coverage on behalf of Champ.

Colony, in opposition, argues that CPA and 57 Graham are additional insureds under the American Policy because "American Empire's insured, Champ, admitted that it entered into a contract with CP[A] pursuant to which it agreed to obtain insurance naming both CP[A] and 57 Graham as additional insureds."[5] Colony argues that "[t]he fact that the rider to the subcontract appears to be unsigned is also of no moment at this juncture of the case" because "[d]iscovery is still in its infancy and as such, it is entirely likely . . . that a fully executed rider will be uncovered . . ."[6]

Colony also contends that American is obligated to defend and indemnify Champ because "[t]he exclusions to coverage relied upon by American Empire in support of its putative disclaimer are either inapplicable, negated by an exception to the exclusion and/or

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[3] *See* ¶ 11 of the October 21, 2016 affirmation of John D. McKenna, Esq., submitted in support of American's summary judgment motion (McKenna Affirmation).

[4] McKenna Affirmation at ¶ 13.

[5] *See* ¶ 4 of the January 19, 2017 affirmation of James A. Roth, Esq. submitted in opposition to American's summary judgment motion (Roth Opposition Affirmation).

[6] Roth Opposition Affirmation at ¶ 29.

American Empire has waived same and is now estopped from raising them at this late juncture."[7]

2. Colony's Summary Judgment Motion

On or about January 30, 2017, Colony moved for summary judgment for the relief sought in its declaratory judgement complaint. Colony and American asserted the same arguments that they previously asserted regarding American's summary judgment motion.

Discussion

(1)

Summary judgment is a drastic remedy and should be granted only when it is clear that no triable issues of fact exist (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The moving party bears the burden of prima facie showing its entitlement to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]). A failure to make that showing requires denying the motion, regardless of the adequacy of the opposing papers (*see Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a prima facie showing has been made, then the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*see Alvarez*, 68 NY2d at 324).

Accordingly, issue-finding rather than issue-determination is the key in deciding a summary judgment motion (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, [1957], *rearg denied* 3 NY2d 941 [1957]). Evidence presented by the non-moving party "must be viewed in the light most favorable to the non-moving party" (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Denial thus occurs "where the facts are in dispute, where conflicting inferences may be

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[7] *Id.* at ¶ 5.

drawn from the evidence, or where there are issues of credibility" (*Benetatos v Comerford*, 78 AD3d 750, 752 [2010] [internal quotation marks and citations omitted]; *see also Peerless Ins. Co. v Allied Bldg. Prods. Corp.*, 15 AD3d 373, 374 [2005] [denial of summary judgment required upon developing "any doubt as to the existence of a triable issue, or where the material issue of fact is arguable"] [internal quotation marks and citations omitted]).

(2)

An insurer's duty to defend is triggered whenever the allegations in a complaint, liberally construed, suggest a reasonable possibility of coverage, or when the insurer has actual knowledge of facts establishing such a reasonable possibility (*Rhodes v Liberty Mut. Ins. Co.*, 67 AD3d 881, 882 [2009]). "However, to be relieved of [this] duty to defend on the basis of a policy exclusion, the insurer bears the burden of demonstrating that the allegations of the complaint in the underlying claim cast the pleadings wholly within that exclusion, that the exclusion is not subject to any other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer might be eventually obligated to indemnify its insured" (*Exeter Bldg. Corp. v Scottsdale Ins. Co.*, 79 AD3d 927, 929 [2010]; *City of New York v Ins. Corp. of New York*, 305 AD2d 443, 443-444 [2003] ["(a)n insurer may be relieved of its duty to defend only if it can establish, as a matter of law, that there is no possible factual or legal basis upon which it might eventually be obligated to indemnify its insured, or by proving that the allegations fall wholly within a policy exclusion"]).

"Generally, it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage" (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 218 [2002]; *see also Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984] ["before an insurance company is permitted to avoid policy coverage,

it must satisfy the burden which it bears of establishing that exclusions or exemptions apply in the particular case"]).

Here, American has no duty to defend or indemnify CPA and 57 Graham in the Underlying Personal Injury Action as additional insureds under the American Policy. Endorsement CG 20 10 07 04 to the American Policy defines "additional insureds" as "[a]ll entities required by written contract to be included for coverage as additional insured's in respect to operations performed by the Named Insured or on their behalf." However, Colony has failed to demonstrate the existence of a valid contract requiring CPA or 57 Graham to be named as additional insureds.

Subcontract #1324 between CPA and Champ was never fully executed and is invalid since Subcontractor General Conditions Version 2012-003 was not "signed and agreed to by all parties." While Subcontract General Conditions Version 2013-001 provides that "[a]dditional insured coverage to be provided on a primary and non-contributory basis," it too was never signed. In any event, Subcontract #1324 explicitly references Subcontract General Conditions Version *2012-003* and not Version *2013-001*. Accordingly, dismissal of Colony's first, second and third causes of action is plainly warranted.

Similarly, Champ's cross claims seeking coverage from American for Da Silva's direct claims against Champ are also subject to summary dismissal because the Employer's Liability exclusion to the American Policy excludes coverage for bodily injury to Champ's employee arising out of, and in the course of, his employment. There is no dispute that Da Silva, a Champ employee, sustained personal injuries during the scope of his employment by Champ. Da Silva's personal injury is, therefore, excluded from coverage under the plain terms of the American Policy.

Accordingly, it is

ORDERED that the branch of American's summary judgment motion for an order dismissing Colony's complaint as against it is granted; and it is further

ORDERED that the branch of American's summary judgment motion for an order dismissing Champ's cross claims is granted; and it is further

ORDERED, ADJUDGED and DECLARED that: (1) American has no duty to defend or indemnify CPA and 57 Graham in the Underlying Personal Injury Action as additional insureds under the American Policy; (2) there is no coverage for contractual indemnity of CPA and 57 Graham under the American Policy; (3) American has no obligation to reimburse Colony for the costs of defending CPA and 57 Graham in the Underlying Personal Injury Action; (4) American has no obligation to defend or indemnify Champ in the Underlying Personal Injury Action; and (5) American is not obligated to pay any portion of any settlement or judgment awarded against CPA, 57 Graham or Champ in the Underlying Personal Injury Action; and it is further

ORDERED that Colony's summary judgment motion is denied in its entirety.

This constitutes the decision, order and judgment of the court.

E N T E R,

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court