SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

THE TRAVELERS INDEMNITY COMPANY and JRM CONSTRUCTION MANAGEMENT, LLC,

Plaintiffs,

—against—

PREFERRED CONTRACTORS INSURANCE COMPANY, DEL CONSTRUCTION MANAGEMENT CORP., ALEXSANDR LAGUTIN and MARINA LAGUTIN,

Defendants.

Action No.1

Index No.: 153919/2012
Subm. Date: Sept. 14, 2016
Motion Sequence: 003

PREFERRED CONTRACTORS INSURANCE COMPANY RISK RETENTION GROUP, LLC,

Plaintiffs,

—against—

JRM CONSTRUCTION MANAGEMENT, LLC, DEL CONSTRUCTION MANAGEMENT CORP., ALEXSANDR LAGUTIN and MARINA LAGUTIN, THE ISLAMIC CENTER OF NEW YORK and ICNY LAND OWNER CORPORATION,

Defendants.

Action No. 2

Index No.: 653298/2014
Subm. Date: Sept. 14, 2016
Motion Sequence: 001

INTERIM DECISION AND ORDER

Appearances:

For Travelers Indemnity Company/JRM:
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For Del Construction:
No Appearance

For Preferred Contractors:
Nicoletti Gonson Spinner LLP
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Papers on Motion for Default Judgment and Cross-Motion for Partial Summary Judgment:

Action No. 2	Notice of Motion with Supporting Exhibits.....1
Action No. 1	Notice of Cross-Motion with Supporting Exhibits.....2 Memorandum of Law in Opposition to Motion and in Support of Cross-Motion.....3 Affirmation and Memorandum of Law in Opposition to Cross-Motion and in Reply.....4 Affirmation and Memorandum of Law in Reply.....5

Ellen M. Coin, A.J.S.C.

The two related declaratory judgment actions concern the issue of disclaimer of insurance coverage by Preferred Contractors Insurance Company Risk Retention Group, LLC ("Preferred") to its insured, non-appearing defendant Del Construction Management Corp. ("DEL"), and to JRM Construction Management, LLC ("JRM") under an additional insured coverage endorsement for defense and indemnification of an underlying personal injury action, brought by DEL's employee to recover for a job site construction accident. In Action No. 2, Preferred moves pursuant to CPLR §3215 for a default judgment against DEL. In Action No. 1, JRM's Insurer, The Travelers Indemnity Company, JRM, The Islamic Center of New York and ICNY Landowner Corp. (collectively "Travelers") cross-move[1] against Preferred pursuant to CPLR 3212 for partial summary judgment, seeking declaration that (i) Preferred is "precluded from asserting its exclusion for claims 'involving or related to a school;'" that (ii) Preferred must defend and indemnify DEL; and that (iii) the "Action Over" endorsement is inapplicable, requiring Preferred to provide coverage for its insured or any additional insured up to its $5,000,000 policy limit.[2] The remainder of Travelers' claim for additional insured coverage is not the subject of its motion.

[1] The cross-motion in Action No. 2 was designation as a notice of motion (motion sequence 003) in Action No. 1.

[2] The Court will not address the "Action Over" endorsement part of the motion, as Preferred has withdrawn any reliance thereon.

Background

On June 2, 2010, Aleksandr and Marina Lagutin commenced the underlying personal injury action. On June 4, 2010 and September 27, 2010, Travelers notified Preferred of the accident and requested additional insured coverage for JRM and ICNY (Exhibits F and G to Affirmation of Andrew Premisler, dated April 8, 2016). By letter dated August 18, 2011, Preferred acknowledged that JRM and co-defendant ICNY Land Owner Corporation were additional insureds under Preferred's policy by reason of a contractual indemnification clause in the relevant subcontract and agreed to defend them subject to the $10,000.00 maximum limit based on the "Action Over" Endorsement, thereby disclaiming coverage above that limit. By letter dated December 19, 2011, Network Adjuster's Inc., Preferred's third-party administrator, informed JRM that the monetary limit had been reached and that Preferred would continue pay for the defense of the personal injury action while continuing to investigate coverage. The letter also contains a reservation of rights and expresses an intent not to waive, or be estopped from, asserting any coverage defenses that may apply (*id.*, Ex. I). Finally, Preferred disclaimed coverage by a letter from a different third-party claims administrator, Golden State Claims Adjusters, dated October 15, 2014 (*id.*, Ex. K). Preferred's disclaimer for the first time raised what is termed a "school construction" exclusion. The letter asserts that "Based on information obtained during discovery in the Lagutin action, PCIC [Preferred] has determined that the claim for bodily injury arose from or was related to a project involving or related to a school" (*id.* at 2).

In relevant part, the "school construction" exclusion provides:

VI. ADDITIONAL EXCLUSION

In addition to the exclusions referred to in other sections and endorsements of this **Policy,** the Risk Retention Group will not pay, is not liable for, and the **Policy** will not provide coverage for any claim related to or in any way involving:

... (F) Any claim for bodily injury, property damage or personal injury arising from or related to any project involving or relate to a school, playground, sports field or recreational facility [emphasis appearing in the original]

This exclusion lays the foundation for Preferred's legal argument in support of its motion for a default judgment and in opposition to Travelers' cross-motion. Preferred relies on the discovery exchanged in the underlying action to establish that the construction project on which Lagutin was injured was for the build out of a space to be used as a school at a community center. Specifically, Preferred cites to the deposition testimony of Lagutin, Lounces Taguemount, public relations representative of the Islamic Center, and James Smith, a project manager with JRM, all of whom averred that the purpose of the construction work was to erect a new building at 215 East 96th Street for use as a private school (Affirmation of Rachel E. Katz, Esq., dated January 11, 2016, Exhibit K [Lagutin Dep.] 63: 8-10); Affirmation of Rachel E. Katz, Esq., dated April 28, 2016, Exhibit C [Taguemount Dep.] 10: 2-11; Exhibit D [Smith Dep.] 18:23-25).

Cross-Motion for Summary Judgment

Travelers argues that Preferred's reliance on the "school construction" exclusion is barred under Insurance Law §3420(d)(2) due to its failure to give written notice of the disclaimer based on this exclusion as soon as was reasonably possible. According to Travelers, Preferred's underlying defense counsel became aware from the exchanged discovery that the claim involved school construction no later than November 19, 2012, nearly two years before Preferred's notice

of disclaimer. Travelers further argues that were Preferred to have overlooked documentary discovery, Lagutin in his deposition, conducted eleven months before issuance of the disclaimer, confirmed that he was injured on a school construction project. Travelers argues that this evidence establishes unreasonable delay by Preferred and precludes its reliance on the "school construction" exclusion in accordance with *Hartford Ins. Co. v Nassau County* (46 NY2d 1028 [1979] [absent explanation, delay of two months unreasonable as matter of law]).

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [citation omitted]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002] [citation omitted]).

Inapplicability of Section 3420(d)(2) to Foreign Risk Retention Groups

Preferred, in fact, does not dispute that its disclaimer would run afoul of Insurance Law §3420(d)(2) were it applicable, but instead argues that Section 3420 does not apply to foreign risk retention groups (RRGs). Article 59 of the Insurance Law regulates the formation and operation in this state of risk retention groups and purchasing groups formed pursuant to the

provisions of the Federal Liability Risk Retention Act of 1986, to the extent permitted by that law.

While domestic foreign risk retention groups are regulated by Section 5903, which specifies that they "shall comply with all of the laws, regulations and orders applicable to property/casualty insurers organized and licensed in this state," foreign RRGs face a far narrower set of provisions to comply with. Section 5904 of New York's Risk Retention Groups and Purchasing Groups Act limits compliance of a foreign RRG to statutory requirements governing notice of operations and designation of the Superintendent of Insurance as agent; the final condition of the risk retention group; taxation; compliance with unfair claims settlement practices law; deceptive, false or fraudulent acts or practices; examination regarding financial condition; injunctions; voluntary dissolution or dissolution proceedings commenced by the Superintendent; operation prior to the enactment of the statute; and penalties.

Among provisions remotely relevant to the issue of late disclaimer are "the unfair claims settlement practices provisions as set forth in section two thousand six hundred one" and "the deceptive, false fraudulent provisions set forth in article twenty-four" of the Insurance Law. The unfair claim settlement practices provisions of Insurance Law §2601 come closest to exposing RRG's operations to application of Section 3420(d). Section 2601(a)(6) provides:

> (a) No insurer doing business in this state shall engage in unfair claim settlement practices. Any of the following acts by an insurer, if committed without just cause and performed with such frequency as to indicate a general business practice, shall constitute unfair claim settlement practices:
>
> . . .
>
> (6) failing to promptly disclose coverage pursuant to subsection (d) or subparagraph (A) of paragraph two of subsection (f) of section three

thousand four hundred twenty of this chapter . . .

This provision, however, concerns only the requirement to disclose coverage pursuant to Section 3420 (d)(1)(B) or (C), and not the requirement to promptly disclaim coverage in writing under Section 3420(d)(2). Nor does Section 2402 touch upon untimely disclaimer as one of the defined violations of Article 24. Section 5904 in effect excludes foreign RRGs from compliance with the requirements of timely disclaimer pursuant to Section 3420(d)(2).

Therefore, by the very terms of New York Insurance Law, Preferred is not precluded from disclaiming coverage on the basis of the "school construction" exclusion in accordance with its October 15, 2014 disclaimer. This renders academic the fine points of the parties' discussion of whether the Federal Liability Risk Retention Act of 1986 preempts every provision of Section 3420 in line with the Second Circuit's ruling in *Wadsworth v Allied Professionals Insurance Company* (748 F3d 100, 105 [2d Cir 2014]).

Inapplicability of Doctrine of Waiver and Equitable Estoppel

Waiver is a voluntary and intentional relinquishment of a known right (*Albert J. Schiff Assoc., Inc. v Flack*, 51 NY2d 692, 698 [1980]). Unlike traditional common law waiver and estoppel defenses, Section 3420(d) (2) "creates a heightened standard for disclaimer that depends merely on the passage of time rather than on the insurer's manifested intention to release a right as in waiver, or on prejudice to the insured as in estoppel" (*KeySpan Gas E. Corp. v Munic Reins. Am., Inc.*, 23 NY3d 583, 590 [2014] [internal quotation marks and citations omitted]).

> The doctrine of [equitable] estoppel precludes an insurance company from denying or disclaiming coverage where the proper defending party relied to its detriment on that coverage and was prejudiced by the delay of the insurance company in denying or disclaiming coverage based on the loss of the right to control its own defense.

(*Liberty Ins. Underwriters, Inc. v Arch Ins. Co.*, 61 AD3d 482, 482 [1st Dept 2009]).

As a matter of law, an insurer is not estopped from denying coverage when it provides a defense subject to an explicit reservation of rights (*see Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 37 [1st Dept 2006]). The purpose of a reservation of rights is not only to fend off a defense of waiver, but also "to prevent an insured's detrimental reliance on the defense provided by the insurer" (*see id.*). In fact, such a course of action remains the most optimal legal option that an insurance carrier has if it wishes to preserve its rights until determination of coverage on a declaratory judgment action (*see K2 Inv. Group, LLC v Am. Guar. & Liab. Ins. Co.*, 22 NY3d 578, 586 [2014]).

Preferred has consistently inserted a reservation-of-rights provision in its communications with Travelers, which defeats both defenses of waiver and equitable estoppel. The fact that the Preferred's new claims administrator asserted the "school construction" exclusion for the first time in the final disclaimer letter is of no import. "The reservation is a sufficient preventative to reliance even if the insurer later disclaims on a basis different from the ground originally asserted in the reservation of rights" (*id.* at 38, citing *Village of Waterford v Reliance Ins. Co.*, 226 AD2d 887 [1996]).

Moreover, Travelers has not shown an iota of undue prejudice incurred as a result of the last disclaimer. Prejudice is not uniformly presumed in circumstances where an insurer merely provides for and controls the defense in the underlying action, but will lie only if the insured has demonstrated prejudice by the insurer's actions (*Federated Dept. Stores,* 28 AD3d at 39) "Prejudice is established only where the insurer's control of the defense is such that the character and strategy of the lawsuit can no longer be altered" (*id.*, citing *United States Fid. and Guar. Co.,*

v New York, Susquehanna and Western Ry. Corp., 275 AD2d 977, 978 [4th Dept 2000][absent reservation of rights, disclaimer six days before trial and on eve of settlement conference, jeopardizing favorable settlement]).[3] Here, the Court need not address the full chronology of the underlying litigation. It is apparent from the parties' submissions that although the October 15, 2014 disclaimer awaited completion of main depositions, it was not made on the eve of trial or at any point in the settlement negotiation process to exert undue financial pressure on Travelers.

Operation of "School Construction" Exclusion

"To be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision" (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]).

By its very language, the "school construction" exclusion covers Lagutin's accident. Travelers' argument that the mixed-use nature of the project as being a build out of a school as part of a community center is misplaced. Travelers cites the Appellate Division, First Department's decision in *Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 94 [1st Dept 2005]) in support of its argument. However, the "new residential work or

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[3] "If an insurer assumes the defense of an action and controls its defense on behalf of an insured with knowledge of facts constituting a defense to the coverage of the policy without reserving its right to deny coverage, the insurer is estopped from denying coverage at a later time, even if mistaken on the requirement of coverage" (*Utica Mutual Ins. Co. v 215 West 91st Street Corp.*, 283 AD2d 421, 422-23 [2d Dept 2001]). In such a circumstance, equitable estoppel is triggered as long as the coverage existed at the time of the loss, albeit not for the type of the loss (*Federated Dept. Stores,* 28 AD3d at 38, distinguishing *Gen. Acc. Ins. Co. of Am. v. Metropolitan Steel Indus.*, 9 A.D.3d 254, 780 N.Y.S.2d 128 [2004]).

products exclusion" at issue in that action specifically listed the categories of residential construction covered by the exclusion ("'new residential property' shall include the original construction of apartments, single family and multi-family dwellings, condominiums and townhouses [*id.* at 93]), without including the mixed commercial and residential developments. What Travelers characterizes as a "mixed-use" exception to the exclusion is not a legal principal, but merely an analysis of the specific language of the exclusion. Here, no such restrictive sublist of the types of "school, playground, sports field or recreational facility" covered by the exclusion exists.

However, in its unauthorized surreply, Travelers raises for the first time the issue of the application of "Endorsement to Policy No. 32/Deletion of Recreational Facility Exclusion," attached as the last page of Exhibit A to Preferred's initial supporting affirmation and Bates stamped "PCIC 773 01 08." This endorsement creates an exception to what it terms "Recreational Facility Operations Exclusion," which is identical in language to the "school construction" exclusion in accordance with the following condition:

> It is a condition of this endorsement that any claim reported under the Policy has a maximum occurrence limit of $50,000.00 for any claim for property damage, bodily injury, or products and completed operations arising out of, resulting from, caused by, contributed to, or in any way related to school, playground, sports field or recreational facility work, and that any projects related to school, playground, sports field or recreational facility must be scheduled with a maximum aggregate limit of $50,000.00; if project is not scheduled there is no coverage.

Although the Court may ignore a new argument raised for the first time on reply, let alone a surreply, in the interests of resolving matters on the merits, the Court will hold in abeyance its determination of Travelers' cross-motion, pending submission from Preferred of additional

briefing on the issue of the effect of this endorsement on the "school construction" exclusion. Travelers will not receive an opportunity to submit responsive briefing.

Motion for Default Judgment

CPLR 3215 requires proof of service of the summons and complaint or summons with notice, proof of the facts constituting the claim, and proof of the default (CPLR § 3215(f); *see also* Siegel, New York Practice, § 295 [4th ed. 2005]). A party's failure to file a responsive pleading does not give rise to a mandatory ministerial duty for the Court to enter a default judgment (*McGee v Dunn*, 75 AD3d 624, 624 [2d Dept 2010][citations omitted]). Rather, plaintiff must support its motion with enough facts and proof of its claim to enable the Court to determine that a viable cause of action exists. (*Id.*). Preferred's application against Del lacks the requisite affidavit of facts from a party with first-hand knowledge of the allegations contained in the complaint, a necessary requirement pursuant CPLR 3215(f). Preferred's unverified complaint may not act in lieu of an affidavit (CPLR § 105[u]). Preferred tentatively acknowledged its omission when raised by Travelers in opposition. Therefore, the application for a default judgment is denied.

Accordingly, it is hereby

ORDERED the motion of plaintiff Preferred Contractors Insurance Company Risk Retention Group, LLC pursuant to CPLR 3215 for a default judgment against defendant Del Construction Management Corp. (motion sequence 001 in Action No. 2) is denied without prejudice to renewal; and it is further

ORDERED that the cross-motion pursuant to CPLR 3212 for partial summary judgment shall be held in abeyance, pending submission of additional briefing from Preferred Contractors Insurance Company Risk Retention Group, LLC no later than August 20, 2017.

This constitutes an Interim Decision and Order of the Court;

Dated: 7/21/17

ENTER:

Ellen M. Coin, A.J.S.C.