

**Board of Mgrs. of the Schaefer Landing N.
Condominium v Continental Cas. Co.**

2011 NY Slip Op 33430(U)

December 16, 2011

Sup Ct, NY County

Docket Number: 104581/10

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PART 55

PRESENT: JANE S. SOLOMON Justice

INDEX NO. 04581/10
MOTION DATE 9/16/11
MOTION SEQ. NO. 02
MOTION CAL. NO.

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Leading North Corporation
Contracted with G.

The following papers, numbered 1 to 29 were read on this motion to/for summary judgment

PAPERS NUMBERED	
1-6	Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...
7-20	Answering Affidavits - Exhibits + Notices & motions
21-29	Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the attached memorandum decision, order, and the court's judgment and declaration.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

Dated: 12/16/11
JANE S. SOLOMON J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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THE BOARD OF MANAGERS OF THE SCHAEFER
LANDING NORTH CONDOMINIUM and SCHAEFER
LANDING NORTH CONDOMINIUM an
Unincorporated Association,

Index No. 104581/10

Plaintiff,

DECISION, ORDER,
PARTIAL JUDGMENT and
DECLARATION

-against-

CONTINENTAL CASUALTY CO., AGCS MARINE
INSURANCE CO. f/k/a INTERSTATE INDEMNITY
CO., STRATHMORE INSURANCE CO., AMERICAN
GUARANTEE & LIABILITY INSURANCE CO.,
PETER GRONTAS and VALENTINA SCHEMBRI,

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk
and notice of entry cannot be served hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

Defendants.

-----x

Jane Solomon, J.:

This is an insurance coverage action by plaintiffs The Board
of Managers of the Schaefer Landing North Condominium (Board) and
Schaefer Landing North Condominium (Condominium) deriving from an
underlying action brought by the owners of a condominium unit, for
defective design and construction of the building (Building) and
the unit, and for failure to make repairs.

Plaintiffs move for a declaratory judgment, stating that: 1)
certain policies issued by defendants Continental Casualty Co.
(Continental), AGCS Marine Insurance Co. (AGCS), Strathmore
Insurance Co. (Strathmore) and American Guarantee & Liability

Insurance Co. (American Guarantee) were in effect within the time period encompassed in the complaint in the underlying action (Underlying Complaint); 2) that such defendants are required to indemnify the Board and the Condominium for any verdict, judgment or settlement in the underlying action; and 3) that defendants Continental, Strathmore and AGCS are obliged to defend the Board and the Condominium and to reimburse them for any costs incurred in defending the underlying action.

Continental cross-moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and denying plaintiffs' motion. AGCS cross-moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and for a declaration that it is not required to provide plaintiffs with a defense in the underlying action.

Background

The Condominium is located at 440 Kent Avenue in Brooklyn, New York. Defendants Peter Grontas and Valentina Schembri purchased unit 22C (the Unit) in November of 2006. However, they allege that they soon began to experience significant water intrusion and leaks in their living room during periods of heavy rain. Underlying Complaint ¶ 64.

In November 2009, they commenced an action (Underlying Action) against, among others, the Board, the Condominium, Kent North Associates LLC, which was the sponsor, and Kent Waterfront Associates LLC, which was the developer of the building.

The Underlying Complaint alleges that the building was defectively designed and constructed. It also asserts that the Board failed to disclose to the underlying plaintiffs certain items that needed repair in order for the Unit to be free from such defects. It further asserts that the Board failed to cure the water infiltration problems despite numerous letters and phone calls from the underlying plaintiffs. Underlying Complaint, ¶¶ 1, 87, 138, 142, 157.

The Underlying Complaint sets forth causes of action for breach of contract, negligence and breach of fiduciary duty against the Board, as well as a derivative claim against the Board on behalf of the Condominium.

The Board and the Condominium commenced the instant action in April of 2010, against the defendant insurance companies which allegedly issued policies to the Condominium and the Board during the period from 2001 to 2010.

In a decision dated February 18, 2011, this court granted, in part, defendant American Guarantee & Liability Insurance Co.'s

motion to dismiss the complaint, to the extent of dismissing plaintiffs' claim for indemnification under the excess insurance portion of the policy. The court denied the part of the motion which sought dismissal of the claim under the umbrella liability portion of the policy. The court found that the plaintiffs had adequately pleaded that the property damage at issue was the result of an "occurrence," as defined in the policy.

Discussion

Policy Periods

As a threshold matter, plaintiffs seek a declaratory judgment stating that the various policies issued by Continental, AGCS, Strathmore and American Guarantee were in effect within the time period encompassed in the Underlying Complaint. However, the moving papers do not address this issue or attempt to demonstrate that the policies were in effect during the relevant period of time. Therefore, this portion of the motion is denied.

Indemnification

Plaintiffs seek a declaration stating that Continental, AGCS, Strathmore and American Guarantee are required to indemnify the Board and the Condominium for any verdict, judgment or settlement

in the underlying action. Plaintiffs argue that they are entitled to coverage because the allegations set forth in the Underlying Complaint, i.e. the persistent water leaks, constituted an "occurrence" under the terms of the various policies.

Strathmore, AGCS and American Guarantee argue that any such declaration would be premature, because a determination of an insurer's obligation to indemnify its insured should not be made in advance of the trial of the underlying action. Continental argues that the motion should be denied as to itself, because the Continental policy is not an "occurrence" policy.

AGCS and Continental also cross-move for summary judgment dismissing the complaint on the ground that the allegations in the Underlying Complaint do not fall within the terms of their respective policies. A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Grob v Kings Realty Assoc.*, 4 AD3d 394 (2d Dept 2004). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

As a threshold matter, plaintiffs' motion is denied with

respect to Continental, and Continental's cross-motion for summary judgment dismissing the complaint is granted on the ground that the allegations in the Underlying Complaint do not fall within the terms of the Continental policy.

Continental issued a claims-made Directors and Officers liability policy to the Condominium for the period of April 30, 2008 to April 30, 2009, with a one million dollar limit of liability. In an Endorsement titled "Not For Profit Community Associations," the Continental policy provides, in relevant part, that:

The Insurer shall not be liable to pay any Loss in connection with any Claim:

B. based upon, directly or indirectly arising out of, or in any way involving any:

* * *

- (ii) Construction Defect;
- (iii) damage to tangible property; loss of use, or destruction or deterioration of, any tangible property; or failure to supervise, repair or maintain tangible property...

Here, the underlying action arises directly from property damage, resulting from alleged construction defects and failure to repair or maintain the building. Therefore, Continental has made a prima facie showing that there is no coverage under the policy. See *Scharf v Federal Ins. Co.*, 261 AD2d 257, 257 (1st Dept 1999);

Board of Mgrs. of Yardarm Condominium II v Federal Ins. Co., 247 AD2d 499, 500 (2d Dept 1998).

Plaintiffs argue that certain causes of action fall outside the scope of the exclusion, specifically, the claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty and violation of General Business Law §§ 349 and 350. However, examination of the complaint reveals that even these claims arise from the underlying plaintiff's assertion that their damages were caused by, among other things, defective construction of the building and the failure to repair such defects. The Continental policy clearly was written to exclude coverage for such damages. Therefore, Continental's cross motion for summary judgment dismissing the complaint is granted.

As to the remaining defendants, the main issues are: 1) whether the allegations in the Underlying Complaint constituted an "occurrence" as defined in the policies; and 2) whether coverage is barred by any exclusions.

Strathmore, AGCS and American Guarantee each issued commercial general liability policies, covering the plaintiffs for various periods of time. Each policy defined an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

In the February 18, 2011 decision, this court noted that the Underlying Complaint specifically alleges that the property damage suffered by the underlying plaintiffs was the result of continuous and repeated exposure to the same harmful condition, i.e., the persistent water leaks in the apartment. Based on such allegations, the court found that plaintiffs had adequately pleaded that the property damage was the result of an occurrence, as defined by the policy.

Plaintiffs now argue that this finding is law of the case and cannot be contested by any of the defendants. Defendants argue that the law of the case doctrine does not apply when a summary judgment motion follows a motion to dismiss.

"The doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding. The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision." *Brownrigg v New York City Hous. Auth.*, 29 AD3d 721, 722 (2d Dept 2006), internal citation omitted.

Here, this court's previous order was based on a motion to dismiss, which assumed the truth of the facts alleged in the complaint. It was not a determination of the ultimate merits of plaintiffs' claims for indemnification. See *191 Chrystie LLC v*

Ledoux, 82 AD3d 681 (1st Dept 2011); *Riddick v City of New York*, 4 AD3d 242, 245 (1st Dept 2004). Thus, at this stage, the court has only determined that the allegations in the Underlying Complaint of persistent water leaks, if true, would constitute an occurrence as defined in the policies. Defendants are not, however, precluded from contesting whether the facts that are ultimately adduced at the trial of the underlying action constitute an occurrence under the policy.

Defendants correctly assert that it is premature, at this point, for the court to declare whether or not plaintiffs are entitled to indemnification from any of the remaining defendant insurers. In *Chunn v New York City Housing Authority* (55 AD3d 437 [1st Dept 2008]), the Appellate Division, First Department, found that issues of fact as to liability in an underlying personal injury action rendered premature a determination of whether certain insurers had a duty to indemnify the insured. See *79th Realty Co. v X.L.O. Concrete Corp.*, 247 AD2d 256 (1st Dept 1998).

Here, numerous factual disputes exist which preclude a determination as to whether, and to what extent, the defendant insurers are obligated to indemnify either the Board or the Condominium. Among other things, questions exist as to when the water leaks began and whether such leaks were caused by defective

design or construction, defective repairs, a failure to repair the leaks or a combination of factors.

The parties also sharply dispute when plaintiffs first had notice of the leaks. Resolution of that issue will determine which policies were in effect during the relevant period of time and whether coverage was properly denied under any of the exclusions set forth in the various policies. Therefore, plaintiffs' motion for a declaratory judgment on the issue of indemnification is denied, and AGCS's cross motion to dismiss this claim is denied.

Duty to Defend

Plaintiffs seek a declaration stating that Continental, Strathmore and AGCS are obliged to defend the Board and the Condominium and to reimburse them for any costs incurred in defending the underlying action.¹ As a threshold matter, this claim is dismissed as to Continental, for the reasons set forth above.

As to the remaining defendants, it is well settled that an insurer's duty to defend its insured is far broader than its duty to indemnify the insured. See *Fieldston Prop. Owners Assn., Inc.*

¹ Plaintiffs do not seek a declaration regarding American Guarantee's obligation to defend.

v Hermitage Ins. Co., Inc., 16 NY3d 257 (2011); *General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 NY3d 451 (2005). The insurer must provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage. *Stranz v New York State Energy Research & Dev. Auth. (NYSERDA)*, 87 AD3d 1279 (4th Dept 2011). Thus, where the underlying complaint sets forth any facts or allegations which bring the claim potentially within the terms of the policy, the insurer is obligated to provide a defense. *Id.*

Here, the allegations in the Underlying Complaint set forth facts which demonstrate a reasonable possibility of coverage for the instant plaintiffs under some or all of the policies. As described above and in this court's earlier decision, some of the damages allegedly incurred in the Underlying Action resulted from persistent water leaks in the Unit, which may constitute an occurrence under the policies at issue here. Given such a possibility, the defendant insurers have a duty to defend plaintiffs in the Underlying Action.

Accordingly, it is

ORDERED, ADJUDGED and DECLARED that plaintiffs' motion for declaratory judgment is granted to the extent that defendants AGCS Marine Insurance Co. and Strathmore Insurance Co. are obligated to

defend plaintiffs in the Underlying Action, and plaintiffs are entitled to reimbursement of costs and reasonable attorneys fees they incurred in defending the Underlying Action, and otherwise plaintiffs' motion is denied; and it further is

ORDERED that defendant AGCS Marine Insurance Co.'s cross motion for summary judgment dismissing the complaint is denied; and it further is

ORDERED that defendant Continental Casualty Co.'s motion for summary judgment is granted and the complaint is severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant, with costs and disbursements as taxed by the Clerk; and it further is

ADJUDGED and DECLARED that defendant Continental Casualty Co. is not obligated to defend or indemnify plaintiffs in connection with the Underlying Action; and it further is

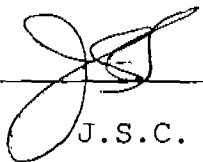
ORDERED that the remainder of the action shall continue, to include a determination of the amount of damages plaintiffs are entitled to recover as reimbursement for costs and reasonable attorneys fees incurred in defending the Underlying Action.

DATED: December 16, 2011

ENTER:

UNFILED JUDGMENT

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J.S.C.

TANE G. SOLOMON