Travelers Prop. Cas. Co. of Am. v Selective Ins. Co. of N.Y.
2013 NY Slip Op 32176(U)
September 11, 2013
Sup Ct, New York County
Docket Number: 101537/12
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice PART 7

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA and PLAZA CONSTRUCTION CORPORATION,

Plaintiffs,

-against-

SELECTIVE INSURANCE COMPANY OF NEW YORK and AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,

Defendants.

INDEX NO. 101537/12

MOTION SEQ. NO. 002

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ Yes ■ No

This declaratory judgment action arises from an underlying personal injury action entitled *Zunno v Gotham Constr. Corp., Marburt Holding Corp., f/k/a 1125 Assocs., Inc., and Plaza Constr. Corp.*, index no. 113242/2008 currently pending in the Supreme Court, New York County (the underlying action). In the underlying action, a journeyman electrician, Albert T. Zunno (Zunno), an employee of defendant Selective Insurance Company of New York's (Selective) named insured, Belway Electric (Belway), allegedly sustained injury on June 9, 2008, when he slipped and fell on a small piece of pipe while working at a demolition/renovation project (the project) at 250 Hudson Street, New York, New York (the premises).

In motion sequence number 002, Selective moves, pursuant to CPLR 3212(a), for conditional summary judgment declaring that, should a trier of fact in the underlying action render a factual determination that Zunno's accident "arose out" of the work of codefendant American International Specialty Lines Insurance Company's (American) named insured, Tri-

State Dismantling Corporation (Tri-State), then American must provide plaintiff Travelers Property Casualty Company of America's (Travelers) named insured, plaintiff Plaza Construction Corporation (Plaza), with a defense and indemnification on a primary and non-contributory basis.

BACKGROUND

On the date of the accident, Plaza owned the premises where the accident took place. That morning, Zunno, along with his coworkers, reported to their Belway foreman for their work assignment for that day. Belway served as the electrical subcontractor on the project underway at the premises. After they received their assignments, they all went to the sixth floor of the premises to retrieve their tools from the Belway gang box. Zunno testified that, as he began walking to the gang box, he "stepped with [his] left foot and the next thing [he] knew [he] was laying on the floor" (Notice of Motion, exhibit K, Zunno transcript [tr.] at 249-250).

Following his accident, one of Zunno's coworkers, who had witnessed the accident, pointed out to Zunno the approximately six-inch long and one-half-inch thick piece of used black iron or steel pipe (the pipe) that had caused Zunno to fall. Zunno testified that the pipe was not an electrical pipe or conduit, but the type of pipe typically used by "steamfitters or plumbers" (*id.* at 253).

Plaza's former job superintendent, Michael Walsh (Walsh), testified that Tri-State, which was hired by Plaza to perform demolition work at the premises, "was responsible for removing the demo debris" (Notice of Motion, exhibit L, Walsh tr. at 52). Tri-State's field supervisor, Andrew Scherel (Scherel), also testified that Tri-State was responsible for clearing up any and all debris created as part of its work. Scherel explained that, if there was not enough debris to fill up an open top container, Tri-State workers would center pile the debris for removal during the next shift. In addition, Tri-State was also responsible for the removal of the HVAC ducts, the bathroom plumbing and the sprinkler systems/piping throughout the various floors of the

building. The sprinkler pipes, which were dismantled and removed by Tri-State, were black in color. After dismantling the sprinkler pipes, Tri-State would "drop [them] to the floor" (Notice of Motion, exhibit M, Scherel tr at 95).

Belway's electrical foreman, Anthony Ferraro (Ferraro), testified that on the date of the accident, the project was still in the "beginning stages," with demolition actively going on at the premises (Notice of Motion, exhibit N, Ferraro tr. at 59). At this time, Tri-State was involved in the removal of debris "[a]ll over the building" (*id.* at 62). Ferraro, who witnessed Zunno's accident, testified that he examined the pipe which caused Zunno to fall immediately after the accident. Ferraro described the pipe as approximately one-half inch thick and black in color. Ferraro maintained that the pipe was part of the sprinkler system, which was dismantled and demolished by Tri-State (*id.* at 140). In addition, Ferraro observed Tri-State "dismantling, performing demolition work on the sprinkler system prior to Zunno's accident on the sixth floor" (*id.* at 141). Ferraro noted that on, and prior to the date of the accident, there were no onsite contractors using half-inch-thick pipe in the performance of their work.

The Relevant Agreements and Insurance Policies

Pursuant to a subcontractor agreement dated January 1, 2008, Plaza retained Tri-State to perform demolition work at the project (the Plaza/Tri-State agreement). An insurance procurement provision included in the Plaza/Tri-State agreement contractually obligated Tri-State to obtain and maintain additional insured coverage for Plaza, in the amounts of $1 million in primary coverage per occurrence and $10 million in umbrella coverage. At some point prior to the date of the underlying loss, under policy number PROP2189059, with effective dates of coverage of January 22, 2008 to January 22, 2009, American issued a Commercial General Liability (CGL) policy of insurance to Tri-State, providing it with $1 million in coverage per occurrence and $2 million in aggregate (the American policy a/k/a the Chartis policy).

Relevant to the present motion, the American policy contains the following additional

insured endorsement, which states, in pertinent part, as follows:

> "ADDITIONAL INSURED/PRIMARY COVERAGE ENDORSEMENT
>
> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY AND PROFESSIONAL LIABILITY POLICY
>
> In consideration of an additional premium of $INCLUDED it is hereby agreed that the following is included as an Additional Insured as respects Coverage A and B but only as respects liability arising out of **your work** for the Additional Insured by or for you.
>
> Additional Insured:
> ALL ENTITIES WHERE REQUIRED BY WRITTEN CONTRACT
>
> This does not apply to bodily injury or property damage arising out of the sole negligence or willful misconduct of, or for defects in design furnished by, the Additional Insured.
>
> As respects coverage afforded by the Additional Insured, this insurance is primary and non-contributory, and our obligations are not affected by any other insurance carried by such Additional Insured whether primary, excess, contingent or on any other basis.
>
> This endorsement does not increase the Company's limits of liability as specified in the Declarations of this policy.
>
> All other terms, conditions, and exclusions shall remain the same" (Notice of Motion, exhibit E, American policy, American policy additional insured endorsement number 7).

On May 8, 2008, Plaza and Belway entered into a construction contract, pursuant to which Belway was retained to perform electrical work at the project (the Plaza/Belway agreement). Pursuant to the Plaza/Belway agreement, Belway was required to obtain and maintain additional insured coverage for Plaza in the amounts of $1 million in primary coverage and $10 million in umbrella coverage per occurrence. In addition, such coverage was to be primary.

Prior to the date of the underlying loss, under policy number S 1731297, with effective dates of coverage of January 1, 2008 to January 1, 2009, Selective issued a CGL policy of insurance to Belway (the Selective policy). Contained within the Selective policy are two

additional insured endorsements, amending the policy to include as an additional insured any person or organization with whom Belway agreed, in a written contract or agreement entered into prior to the date of loss, to obtain insurance coverage (the Selective policy additional insured endorsements).

One of the two additional insured endorsements contained within the Selective policy applies to ongoing operations of the named insured (the ongoing operations endorsement), and the other applies to completed operations of the named insured (the completed operations endorsement).

The ongoing operations endorsement provides, in pertinent part, as follows:

"ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. SECTION II - WHO IS AN INSURED is amended to include as an additional insured any person or organization when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured. A person's or organization's status as an insured under this endorsement ends when your operations for that insured are completed.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to

A. 'Bodily injury', 'property damage' or 'personal and advertising injury' arising out of the rendering of, or failure to render, any professional architectural, engineering or surveying services.

* * *

B. 'Bodily injury' or 'property damage' occurring after:

(1) All work, including materials, parts or equipment furnished in connection with such work, on the project (other than services, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the site of the covered operations has

been competed; or
(2) That portion of 'your work' out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project" (Notice of Motion, exhibits G and H, Selective policy, ongoing operations endorsement).

The completed operations endorsement provides, in pertinent part, as follows:

"ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - COMPLETED OPERATIONS - AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

B. SECTION 11 - WHO IS INSURED is amended to include as an additional insured any person or organization when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for 'bodily injury' or 'property damage' caused, in whole or in part, by 'your work' performed for that additional insured and included in the 'products-completed operations hazard'.

C. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to:

'Bodily injury,' 'property damage' or 'personal and advertising injury' arising out of the rendering of, or failure to render, any professional architectural, engineering or surveying services.

* * *

This coverage shall be excess with respect to the person or organization included as an additional insured by its provisions; any other valid and collectible insurance that person or organization has shall be primary and not contributory in the contract or agreement referred to above" (Notice of Motion, exhibits G and I, Selective policy, completed operations endorsement).

Plaza's Right to Additional Insured Coverage Under the American Policy

Under the additional insured endorsement contained in the American policy, an entity (such as Plaza in this case), is entitled to additional insured coverage where required by written contract and where the bodily damage or property damages arises out of the named insured's

(Tri-State) work for the additional insured (Plaza). This additional insured coverage does not apply to bodily injury or property damages "arising out of the sole negligence or willful misconduct of, or for defects in design furnished by, the Additional Insured [Plaza]" (Notice of Motion, exhibit E, American policy, American policy additional insured endorsement number 7).

Further, the American policy's additional insured endorsement also provides that "[a]s respects coverage afforded by the Additional Insured, this insurance is primary and non-contributory, and our obligations are not affected by any other insurance carried by such Additional Insured whether primary, excess, contingent or on any other basis" (*id.*).

Here, as an insurance procurement provision included in the Plaza/Tri-State agreement contractually obligated Tri-State to obtain and maintain additional insured coverage for Plaza, should the trier of fact determine that the accident in the underlying action arose out of the work of American's named insured, Tri-State, Plaza would be entitled to additional insured coverage under the American policy's additional insured endorsement.

Plaza's Right to Additional Insured Coverage Under the Selective Policy

Initially, as it is undisputed that the project was in its early stages and ongoing at the time of the accident, regarding additional insured coverage for Plaza, the Selective policy's ongoing operations endorsement regarding additional insured coverage for Plaza, and not the completed operations endorsement, applies in this matter.

The ongoing operations endorsement recognizes, as an additional insured, persons or organizations which Belway agreed in writing in a contract or agreement to be additional insureds "with respect to liability arising out of [Belway's] ongoing operations performed for that insured" (Notice of Motion, exhibits G and H, Selective policy, ongoing operations endorsement). Thus, pursuant to the Plaza/Belway agreement, as Belway was required by the Plaza/Belway agreement to obtain and maintain additional insured coverage for Plaza, should the trier of fact determine that the accident in the underlying action arose out of Belway's

ongoing operations performed for Plaza, Plaza would be entitled to additional insured coverage from Selective.

Priority of Policies

"In order to determine the priority of coverage among different policies, a court must review and consider all of the relevant policies at issue" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 716 [2007]). "This determination 'turns on consideration of the purpose each policy was intended to serve as evidenced by both its stated coverage . . . as well as the wording of its provision concerning excess insurance'" (*Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co*, 53 AD3d 140, 148 [1st Dept 2008], quoting *State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369, 374 [1985]).

Selective argues that comparison of the specific language of the subject policies demonstrates that Plaza's additional insured coverage under the American policy should be deemed primary, with the additional insured coverage under the Selective policy being excess and noncontributory. In support of this argument, Selective puts forth that the Selective policy contemplates co-insurance, in that it provides for a method of sharing additional insured coverage in the event that both policies are primary. On the other hand, the American policy's additional insured endorsement states that "[a]s respects coverage afforded by the Additional Insured, this insurance is primary and noncontributory, and our obligations are not affected by any other insurance carried by such Additional Insured whether primary, excess, contingent or on any other basis" (Notice of Motion, exhibit E, American policy, American policy additional insured endorsement number 7).

However, Selective has misinterpreted the language of the American policy's additional insured endorsement. In fact, a close review of the American policy's additional insured endorsement reveals that the subject provision actually refers to *coverage afforded by the Additional Insured*, and that American's obligations are not to be affected by any other

insurance *carried by such Additional Insured,* clearly meaning that American's obligations are not to be affected by any other insurance carried by Plaza itself, the putative additional insured.

Here, the issue is not whether the American and Selective policies have priority of coverage vis-a-vis an insurance policy carried by Plaza, but rather, whether the American policy, which may owe coverage to Plaza on a primary basis, or the Selective policy, which may owe coverage to Plaza on a primary basis, has priority of coverage in the event that Plaza is held liable in the underlying action.

"Where the same risk is covered by two or more policies, each of which is sold to provide the same level of coverage . . ., priority of coverage . . . among the policies is determined by comparison of their respective 'other insurance' clauses" (*Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 18 [1st Dept 2009]; *Jefferson Ins. Co. of N.Y. v Travelers Indem. Co.*, 92 NY2d 363, 372 [1998]). To that effect, when deciding which policies are primary and which are excess, courts will examine the language of the various "other insurance" provisions (*id.*).

In this case, the American policy contains an "[o]ther [i]nsurance" clause which is identical to that one contained in the Selective policy. These "[o]ther [i]nsurance" clauses provide that the policies are to be considered primary, and, if the other insurance policy at issue permits, the coverage obligation is to be shared between the two policies.

Specifically, the "[o]ther [i]nsurance" clauses contained in the Selective and American policies both state, in pertinent part, as follows:

> "SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS
>
> 4. Other Insurance
> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:
>
> a. Primary Insurance
> This insurance is primary except when b. below applies. If this insurance is

> primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.
>
> * * *
>
> c. Method of Sharing
>
> If all other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limits of insurance or none of the loss remains, whichever comes first.
>
> If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurer" (Notice of Motion, exhibit G, section IV - Commercial Liability Conditions, 4. Other Insurance; and exhibit E, American policy, section IV - Conditions, 6. Other Insurance).

Therefore, to the extent that it is determined that Selective and American owe additional insured coverage to Plaza on behalf of their named insureds, pursuant to the identical "[o]ther [i]nsurance" clauses contained in the Selective and American policies, each insurer would be required to contribute on a co-primary basis, with each insurer contributing equal amounts until the obligation has paid its applicable limits of insurance or none of the loss remains, whichever comes first.

Thus, Selective is not entitled to conditional summary judgment declaring that, should a trier of fact in the underlying action render a factual determination that the accident "arose out" of the work of American's named insured, Tri-State, then American must provide plaintiff Travelers' named insured, Plaza, with a defense and indemnification on a primary and non-contributory basis.

Finally, contrary to American's argument, Selective's motion for declarative judgment should not be denied on the ground that it is premature. In support of this argument, American puts forth the case of *McLean v 405 Webster Ave. Assoc.* (28 Misc. 3d 1219[A], *27 [Sup Ct, Kings County 2010], *affd* 98 AD3d 1090 [2d Dept 2012]), wherein the court declined to issue a declaration as to the priority of coverage as to certain policies "[u]ntil a determination [was]

made [as to] whether or not the National Grange policy affords coverage to 405 Webster" (*id.*). American argues that, likewise, in this matter, until a determination is made as to whether or not the Selective and American policies owe additional insured coverage to Plaza, in the first place, any ruling on the priority of coverage would be premature.

However, the facts of the *McLean* case can be easily distinguished from the facts of the case at bar. In finding that a determination regarding the issue of primary and excess coverage was premature, the *McLean* court considered that 405 Webster's liability carrier was not yet a party to the action, stating that "it should be prior to any ruling on the priority of coverage" (*id.*). In contrast, in this case, Selective and American are both parties to the subject action.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendant Selective Insurance Company of New York's motion, pursuant to CPLR 3212(a), for conditional summary judgment, is denied; and it is further,

ORDERED that defendant Selective Insurance Company of New York is directed to serve a copy of this Order with Notice of Entry upon all parties, within 45 days of entry.

This constitutes the Decision and Order of the Court.

Dated: Sept. 11, 2013

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**