SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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VALLEY FORGE INSURANCE CO.,

Plaintiff,

- v -

ARCH SPECIALTY INSURANCE CO.,

Defendant.

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Index No.
654217/2015

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Valley Forge Insurance Co.'s ("VFI" or "Plaintiff") underlying complaint seeks a declaration that its named insured, Gordon H. Smith Corporation ("GHS") qualifies as an additional insured and is entitled to a defense under the policy defendant, Arch Specialty Insurance Co. ("Arch" or "Defendant"), issued to A. Best Contracting Co., Inc. ("Abestco") in underlying personal injury action ("Underlying Action" or "Gonzalez Action") commenced by Rafael Gonzalez ("Gonzalez")

Gonzalez was working for Arch's named insured, Abestco, at the time of the accident. Defendant Arch Specialty Insurance Company ("Arch") brings forth a Motion to Dismiss under CPLR 3211(a)(1) and (7) on the grounds that Plaintiff Valley Forge Insurance Company's ("VFI") Complaint "does not state a claim upon which relief can be granted because the documentary evidence submitted with Plaintiff's Complaint conclusively establishes that Plaintiff does not, and cannot qualify as an additional insured under the subject Arch policy."

VFI opposes and brings a cross-motion for summary judgment CPLR 3211(c) and 3212. Plaintiff seeks a declaration that Arch had an obligation to defend GHS in the Gonzalez Action as an additional insured under the policy

Defendant issued to Abestco and that Plaintiff VFI should be reimbursed for the sums it incurred in defending GHS as a result of Defendant's breach. VFI submits the attorney affirmation of Lisa Shreiber and the affidavit of Tami Harwood, the claims person handling the matter for VFI. Harwood avers to VFI's notice of the Gonzalez Action to Abestco and demand that Abestco and/or its insurer provide GHS with a defense as an additional insured in the Gonzalez Action, and Arch's subsequent denial of coverage and disclaimer.

Policies

VFI issued a commercial general liability policy to GHS for the policy period of November 11, 2008 to November 11, 2009. Arch issued a commercial general liability policy to Abestco for the policy period of May 31, 2008 to May 31, 2009 ("Arch Policy").

The Arch Policy contains a Blanket Additional Insured Endorsement which extends additional insured coverage to any entity Abestco was required to name as an additional insured "under a written contract" to which Abestco is a party, as follows:

> **SECTION II – WHO IS AN INSURED** is amended to include as an additional insured those persons or organizations who are required under a written contract with you [Abestco] to be named as an additional insured but only with respect to liability for "bodily injury", "property damage", or "personal and advertising injury" caused, in whole or in part, by any acts or omissions or the acts or omissions of your subcontractors.
>
> A. In the performance of your ongoing operations or "your work", including "your work" that has been completed
>
> B. In connection with your premises owned by or rented to you
>
> As used in this endorsement, the words "you" and "your" refer to the Named Insured

Contracts

By contract dated July 24, 2007, Rockefeller Group Development Corporation, as an agent for 1221 Avenue Holdings LLC ("1221"), contracted Abestco to perform construction work at 1221 Avenue of the Americas (the "Construction Site").

GHS, the named insured for VFI, was the project consultant for the construction work. Gonzalez was injured at the Construction Site while working for Arch's named insured, Abestco. GHS, the named insured for VFI, was the project consultant for the construction work and was sued by Gonzalez. Gonzalez brought an action to recover for personal injuries he allegedly sustained in the Gonzalez Action.

The "Service Purchase Agreement No, SOA-20-0099" between Rockefeller and Abestco ("Contract") states on the first page:

> Upon and subject to the TERMS OF AGREEMENT AND GENERAL CONDITIONS (the "Terms") attached hereto and made a part hereof, and for the Contract Price payable as herein set forth, Owner engages Contractor, and Contractor agrees, to perform and furnish all labor, materials, supplies, tools, apparatus, equipment, services, transportation, scaffolding, and processes required for the facade recaulking work as specified on Exhibit A attached hereto (the "Services"), in or for the building located at 1221 Avenue of the Americas, New York, New York (the "Premises"), during the period commencing on August l, 2007... (emphasis added).

Attached to the Contract are the following two documents: "Terms of Agreement and General Conditions" and "Aluminum and Glass Curtain Wall and Granite Joint Seal Restoration Project Manual and Specification Index" ("Project Manual").

The Contract states, "On the insurance coverage required by Article 10, Rockefeller Group Development Corporation, 1221 Avenue Holdings LLC, Rock-Green, Inc., and Wachovia Bank, National Association, and such other designees as the Owner shall name from time to time, must be named as additional insureds." Article 10 of the Terms of Agreement and General Conditions provides,

"Insurance. Contractor... will procure and maintain... General Liability insurance ...[and] deliver to Owner ... certificates ...such insurance shall be primary ... without contribution from ... other insurance."

Section 00100 of Project Manual states, in relevant part: "At or prior to delivery of the signed Agreement, the bidder to whom the Contract is awarded shall deliver to the Manager a Certificate of liability Insurance in the amount of five (5) million dollar, with the Rockefeller Group Development Corporation, and Gordon H. Smith Corporation named as additional insureds, and evidence of Workers Compensation coverage." (See Section 00100, "Aluminum and Glass Curtain and Granite Joint Seal Restoration Instructions to Bidders," Paragraph 1.5(C), "Execution of Agreement").

Section 01010 of the Project Manual states, in relevant part: "The Contractor acknowledges that by submitting a Bid Proposal, the Contractor also agrees to include the Consultant as an additional insured and indemnify, defend, protect, and hold the Consultant harmless in all manners as stated in the Contract." (See Section 01010, "Specific Requirements, Part I-General," Paragraph 1.1(D), "General Requirements").

Abestco obtained from its insurance agent, Edwards and Company ("E&C"), and provided, a COI which states that GHS, and all of the other entities required by the contract, are additional insureds on the Arch Policy, as follows:

> The following are included as Additional Insureds with respects to General Liability on a primary and noncontributory basis as required under a written contract...1221... Rock Green...Rockefeller...Wachovia...Gordon H. Smith Corp. (Consultant)...

The Gonzalez Action and the DJ Action

On January 13, 2009, Gonzalez, an employee of Abestco, was allegedly injured when he slipped and fell "as a result of water on a staircase between the seventh and eighth floors" of the Project which he claims "was due to snow that...co-workers tracked in from the eighth floor." On December 14, 2011,

Gonzalez commenced the Gonzalez Action against GHS, among others. GHS, in turn, commenced a third party action seeking, in relevant part, contractual indemnification, against Abestco. "[B]y decision dated August 13, 2012," GHS was granted a default judgment on its third party indemnity action against Abestco. By decision dated November 13, 2015, GHS was granted summary judgment, and dismissed from the Underlying Action.

By summons and complaint filed December 16, 2015, VFI commenced the instant action seeking a declaration that Arch had an obligation to defend GHS in the Underlying Action, and a corresponding obligation to reimburse VFI for the amounts it incurred in defending GHS as a result of Arch's refusal to do so.

Pending Motion to Dismiss and Cross Motion

In determining whether dismissal is warranted for failure to state a cause of action under CPLR § 3211(a)(7), the court must "accept the facts alleged as true . . . and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't 2003] [internal citations omitted]; CPLR § 3211[a][7]).

On a motion to dismiss pursuant to CPLR § 3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 [2007] [internal citations omitted]). A movant is entitled to dismissal under CPLR § 3211(a)(1) when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dep't 2007] [citation omitted]). When evidentiary material is considered, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

Oral argument was held.

Central to the parties' dispute is the additional insured endorsement of the Arch Policy which extends additional insured coverage to "those persons or organizations who are required under a written contract with you [Abestco] to be named as an additional insured but only with respect to liability for 'bodily injury',

'property damage', or 'personal and advertising injury' caused, in whole or in part, by any acts or omissions or the acts or omissions of your subcontractors."

"[O]ur analysis begins with the well-established principles governing the interpretation of insurance contracts, which provide that the unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and that the interpretation of such provisions is a question of law for the courts." (*Broad Street, LLC v. Gulf Insurance Company,* 832 N.Y.S.2d 1 [1st Dept. 2006]. "A court, no matter how well-intentioned, cannot create policy terms by implication or rewrite an insurance contract. Nor should a court disregard the provisions of an insurance contract which are clear and unequivocal or accord a policy a strained construction merely because that interpretation is possible." (*Bretton v. Mutual of Omaha Ins. Co.*, 110 A.D. 2d 46, 49 [1st Dept 1985]). Rather, "[a]n insurer is entitled to have its contract of insurance enforced in accordance with its provisions and without a construction contrary to its express terms." (*Bretton*, 110 A.D. 2d at 49).

When an endorsement specifically requires contractual privity with the putative additional insured and states that additional insured coverage is extended to "only those persons or organizations required under a written contract with you," the absence of such an agreement precludes coverage. *Best Buy Co., Inc. v. Sage Electrical Contracting Inc.*, 2009 NY Slip Op 30208(U) [N.Y. Misc. 2009]; *Linarello v City of New York*, 6 A.D.3d 192, 774 N.Y.S.2d 517 [1st Dept 2004].

Arch relies on the cases *Best Buy Co., Inc. v. Sage Electrical Contracting, Inc.* and *Linarello v. City University of New York* to support its argument that GHS is not an additional insured under the Arch Policy because there is no contractual privity between Abestco, the insured, and GHS. However, the language of the additional insured endorsement provision in the Arch Policy differs from the additional insured endorsement provisions in the insurance policies at issue in those cases relied upon Defendant.

In *Best Buy Co., Inc. v. Sage Electrical Contracting, Inc.*, at issue was a commercial general liability policy obtained from Utica by Sage ("the Utica Policy") which affords additional insured coverage to "[a]ny person or organization with whom you have entered into a written contract, agreement or permit requiring you to provide insurance such as is afforded by this Commercial

General Liability Coverage Form..., but only: (a) To the extent that such additional insured is held liable for your acts or omissions arising out of and in the course of ongoing operations performed by you or your subcontractors for such additional insured." (emphasis added).

Linarello v City of New York, 6 A.D.3d 192 [1st Dept 2004], involves an additional insured endorsement which only extends additional coverage to the entity in privity of contract with the named insured, as follows: "Who Is An Insured is amended to include as an additional Insured any...organization...when you and such ... organization have agreed in writing in a contract... that such ...organization be added as an additional insured on your policy..." (emphasis added).

Similarly, in *AB Green Gansevoort v. Peter Scalamandre & Sons, Inc.*, 102 A.D. 3d 425, 426 [1st Dept 2013]), at issue was an insurance policy that afforded additional insured coverage to an organization "when you and such ... organization have agreed in writing in a contract or agreement that such ... organization be added as an additional insured on your policy." (emphasis added). In interpreting this provision and applying it to the facts before the Court, the Court stated:

> It [the additional insured endorsement provision] specifically provides that there must be a written agreement between the insured and the organization seeking coverage to add that organization as an additional insured. No such agreement exists here. Absent such an agreement, the plain terms of the policy have not been met and Green cannot seek coverage from Liberty as an additional insured. Although policies containing broader language have been found to allow for an agreement naming an additional insured without an express contract between the parties, the language at issue here is restricted to its plain meaning.

(*AB Green Gansevoort*, 102 A.D. 3d at 426).

Unlike the policies at issue in the above case, on its face, the Arch Policy affords additional insured coverage to all "organizations who are required under a written contract with you [Abestco] to be named as an additional insured." As such, it extends additional insured coverage to any entity Abestco is required to

name as an additional insured in a written contract to which Abestco is a party. It does not require the additional insured also be a party to the contract or restrict additional insured coverage to an entity that is in contractual privity with Abestco as distinguished from the *Linarello*, *Best Buy*, and *AB Green Gansevort* cases.

Here, as VFI argues, based on the terms of the additional insured endorsement language contained in the Arch Policy, the argument can be made that Abestco is a party to the Abestco-Rockefeller Contract, and the Contract requires Abestco to name GHS as an additional insured based on the language contained in the Project Manual, as incorporated by the Contract.

Here, accepting all allegations of the Complaint as true, the Verified Complaint states a claim that Arch had an obligation to defend GHS in the Gonzalez Action as an additional insured under the Arch Policy. Arch has failed to submit documentary evidence that flatly contradicts the Complaint or conclusively establishes a defense to the asserted claims as a matter of law.

Turning to VFI's cross motion for summary judgment, CPLR 3211(c) states:

> (c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, *after adequate notice to the parties*, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion. (emphasis added).

Here, as raised in the oral argument before the Court, Plaintiff claims the Project Manual was attached to the Contract as Exhibit A. Arch asserts the "contract doesn't say that at all. That's a leap of some sort." (Oral argument, page 11, line 22). Clearly, discovery must proceed before the Court can consider the motion for summary judgment on the instant record. Therefore, Defendant is directed to file and serve an answer within 20 days.

Wherefore, it is hereby

ORDERED that defendant Arch Specialty Insurance Co.'s motion to dismiss is denied; and it is further

ORDERED that defendant Arch Specialty Insurance Co. shall file and serve an answer within 20 days of receipt of this Order with Notice of Entry thereof; and it is further

ORDERED that plaintiff Valley Forge Insurance Co.'s cross motion for summary judgment is denied as premature.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: November 22 2016

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EILEEN A. RAKOWER, J.S.C.