

Tishman Tech. Corp. v Travelers Indem. Co. of Am.
2017 NY Slip Op 30122(U)
January 18, 2017
Supreme Court, New York County
Docket Number: 155013/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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TISHMAN TECHNOLOGIES CORPORATION and BP
MECHANICAL CORP., a/k/a THE BPAC GROUP,
INC.

Plaintiff

Index No. 155013/2015

v

TRAVELERS INDEMNITY COMPANY OF AMERICA
and ADRIA INFRASTRUCTURE, LLC

DECISION AND ORDER

Defendant.

MOT SEQ 001

-----X
NANCY M. BANNON, J.:

I. INTRODUCTION

In this action, the plaintiffs seek a judgment declaring that the defendant Travelers Indemnity Company of America (Travelers) is obligated to defend and indemnify one of the plaintiffs herein, BP Mechanical Corp., a/k/a The BPAC Group, Inc. (BPAC), in an underlying property damage action entitled 1301 Properties Owner, L.P. v Tishman Technologies Corp., pending the Supreme Court, New York County, under Index No. 151750/15 (the property damage action), pursuant to a policy of insurance issued to the defendant Adria Infrastructure, LLC (Adria), and to recover damages from Adria for breach of an insurance procurement agreement. BPAC moves for summary judgment on the complaint and declaring that Travelers is so obligated, and for leave to amend the caption to remove Tishman Technologies Corporation (Tishman)

as a plaintiff on the ground that Tishman was only named as a plaintiff due to clerical error. Travelers cross-moves for summary judgment declaring that it is not so obligated. Adria separately cross-moves for summary judgment dismissing the complaint as against it, based on the pendency of a prior action for the same relief.

II. BACKGROUND

1301 Properties Owner, L.P. (1301) commenced the property damage action against its general contractor Tishman, subcontractor BPAC, and sub-subcontractor Adria, alleging that BPAC and/or Adria negligently removed two water pumps from the mechanical room on the 45th floor of its building by failing to provide any horizontal support for the remaining pumps. 1301 asserted that this led to the failure of a spool coupling device attached to the remaining pumps, and the consequent release of large amount of water that flooded the building. BPAC cross-claimed against Adria, alleging breach of an insurance procurement provision in the sub-subcontract. Although Travelers agreed to defend and indemnify Adria in the property damage action, it disclaimed as to BPAC.

Tishman and BPAC commenced this action against Travelers and Adria, seeking a judgment declaring that Travelers is obligated to defendant and indemnify them under the Adria policy and to

recover damages from Adria for failure to procure insurance. Less than 20 days after Travelers answered the complaint, BPAC filed an amended complaint as of right (see CPLR 3025[a]) omitting Tishman as a plaintiff in the action on the ground that it was named as a plaintiff due to a clerical error.

III. DISCUSSION

A. BPAC's MOTION

In support of its motion, BPAC submits the pleadings in this action, the pleadings in the property damage action, an affidavit of its president, Steven Heiderstadt, the Tishman/BPAC subcontract, the BPAC/Adria sub-subcontract, an insurance certificate naming it as an additional insured, the subject insurance policy, a "blanket additional insured" endorsement, Travelers' disclaimer, Department of State printouts with respect to the status of Travelers' registered agents, Travelers' response to BPAC's notice to admit concerning those agents, and an attorney's affirmation. The sub-subcontract obligated Adria to procure insurance for BPAC as an additional insured in connection with 1301's project. It is undisputed that Adria secured the Travelers policy, effective from June 15, 2012, to June 15, 2013, and that Travelers' agent issued certificates of insurance naming BPAC as an additional insured. The Travelers' policy defines an additional insured as "any person or organization" that Adria "is

required to include as an additional insured ... by a written contract or written agreement in effect during th[e] policy period ... The person or organization does not qualify as an additional insured with respect to independent acts or omissions of such person or organization. The person or organization is only an 'additional insured' with respect to liability caused by 'your [i.e., Adria's] work' for that additional insured."

BPAC's submission of the policy and insurance certificates reveals the existence of triable issues of fact as to whether Adria procured appropriate general commercial liability insurance naming it as an additional insured. It thus failed to make a prima facie showing of entitlement to judgment as a matter of law on the breach of contract cause of action against Adria.

BPAC did, however, establish its prima facie entitlement to judgment as a matter of law against Travelers on the issues of defense and indemnification by submitting Heiderstadt's affidavit, in which he asserted that BPAC sub-subcontracted all of the plumbing and mechanical work to Adria, BPAC performed no physical work whatsoever, and the loss claimed by 1301 was attributable solely to Adria. BPAC thus demonstrated, prima facie, that it is properly characterized as an additional insured under the policy, as the condition necessary to trigger coverage, i.e. that the loss sought to be covered was caused by Adria's work, was satisfied.

Relying in part on the affidavit of Adria's vice president for construction, Borko Radan, in which he asserted that the failure of the spool coupling arose from its long-term deterioration, and that Adria did not perform any work at or near the coupling, Travelers argues that any liability in the property damage action was not caused by Adria's work, a prerequisite to coverage. This proof, however, is insufficient to raise a triable issue of fact on the issue of its obligation to defend BPAC, since an insurer's duty to defend is exceedingly broad and triggered by the allegations in the underlying complaint. See BP A.C. Corp. v One Beacon Ins. Group, 8 NY3d 708, 714 (2007). An insurer's duty to defend is liberally construed and is broader than the duty to indemnify, "in order to ensure [an] adequate...defense of [the] insured", without regard to the insured's ultimate likelihood of prevailing on the merits of a claim (General Motors Acceptance Corp. v Nationwide Ins. Co., 4 NY3d 451, 456 [2005]; see also Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131, 137 [2006])." Fieldston Property Owners Assoc., Inc. v Hermitage Ins. Co., Inc., 16 NY3d 257, 264-256 (2011). Thus, where, as here, the allegations in the property damage complaint are "potentially within the language of the insurance policy" (Town of Massena v Healthcare Underwriters Mut. Ins. Co., 98 NY2d 435, 443 [2002]), a duty to defend will be found. See Pinon v 99 Lynn Ave., LLC, 124 AD3d 746, 748 (2nd Dept. 2015).

Inasmuch as the First Department had held that "[t]he phrase 'caused by' 'does not material differ from ... the phrase 'arising out of'" (W&W Glass Sys., Inc. v Admiral Ins. Co., 91 AD3d 530, 531 [1st Dept. 2012]), the "caused by" language in the subject policy should be accorded a liberal interpretation.

Since Travelers' submission nonetheless raises a triable issue of fact as to whether the loss was caused by Adria's work, there remains a triable issue as to whether Travelers is obligated to indemnify BPAC. See Larry E. Knight, Inc. v OBE Ins. Corp., 60 AD3d 498, 498 (1st Dept. 2009).

BPAC demonstrated that Tishman was improperly joined as a plaintiff due to a clerical error, and that the caption should thus be amended to reflect its withdrawal from the action, in accordance with the amended complaint.

In light of the foregoing, those branches of BPAC's motion which are to amend the caption and for summary judgment declaring that Travelers is obligated to defend it in the property damage action must be granted, and the motion must otherwise be denied.

B. TRAVELERS' CROSS MOTION

In support of its cross motion, Travelers submits the affidavit of its Claim Professional, Pamela L. Burke, an attorney's affirmation, the policy, its disclaimer, and correspondence. Travelers adopts Adria's argument that no loss

was occasioned by Adria's work, and asserts that the loss arose solely from BPAC's "independent acts or omissions," thus defeating coverage. Since Burke had no personal knowledge of whether BPAC actually performed any physical work, Travelers failed to show that BPAC fell outside of the policy definition of additional insured. In any event, BPAC raised a triable issue of fact with Heiderstadt's affidavit as to whether any of its independent acts or omissions led to the claimed loss, or, conversely, whether Adria's work alone gave rise to the loss so as to trigger coverage.

Traveler's cross motion must thus be denied.

C. ADRIA'S CROSS MOTION

In support of its cross motion, Adria relies upon BPAC's submissions, Radan's affidavit, an attorney's affirmation, and correspondence. It argues that, inasmuch as BPAC cross-claimed against Adria in the property damage action for breach of contract based on failure to procure insurance, the existence of a prior action pending for the same relief warrants dismissal of BPAC's claims in this action. To warrant dismissal on the ground that a prior action is pending for the same relief, "the two actions must be 'sufficiently similar' and the relief sought must be the same or substantially the same." Kent Dev. Co. v Liccione, 37 NY2d 899, 901 (1975); Montalvo v Air Dock Systems, 37 AD3d

567, 567 (2nd Dept. 2007). There must also at least be a "substantial identity of parties 'which generally is present when at least one plaintiff and one defendant is common in each action.'" Proietto v Donohue, 189 AD2d 807, 807-808 (2nd Dept. 1993), quoting Morgulas v. J. Yudell Realty, 161 AD2d 211, 213 (1st Dept. 1990). Adria established its prima facie entitlement to judgment as a matter of law dismissing the breach of contract cause of action by showing that the identical cause of action was asserted against it as a cross claim in the property damage action, and that a related cross claim for contractual indemnification was also pending in that action. In opposition to this showing, BPAC failed to raise a triable issue of fact, inasmuch as its submissions did not point to any distinction between the cross claim in the property damage action and the cause of action asserted here against Adria, and it presented no persuasive argument that an alternative remedy, such as severance of the cause of action for the purpose of consolidation with the cross claim, was warranted.

Therefore, Adria's cross motion must be granted.

IV. CONCLUSION

Accordingly, it is

ORDERED and ADJUDGED that the branches of BPAC's motion which are for leave to amend the caption and for summary judgment

declaring that Travelers is obligated to defend it in the action entitled 1301 Properties Owner, L.P. v Tishman Technologies Corp., pending the Supreme Court, New York County, under Index No. 151750/15, are granted, BPAC's motion is otherwise denied, and it is declared that Travelers is obligated to defend BPAC in the action entitled 1301 Properties Owner, L.P. v Tishman Technologies Corp., pending the Supreme Court, New York County, under Index No. 151750/15; and it is further,

ORDERED that Travelers' cross motion for summary judgment declaring that it is not obligated to defend or indemnify BPAC in the action entitled 1301 Properties Owner, L.P. v Tishman Technologies Corp., pending the Supreme Court, New York County, under Index No. 151750/15, is denied; and it is further,

ORDERED that Adria's cross motion for summary judgment dismissing the complaint insofar as asserted against it is granted, and the cause of action asserted against it is dismissed; and it is further,

ORDERED that the caption is amended to read as follows:

BPAC MECHANICAL CORP., a/k/a THE BPAC GROUP,
INC.,

v

TRAVELERS INDEMNITY COMPANY OF AMERICA and
ADRIA INFRASTRUCTURE, LLC

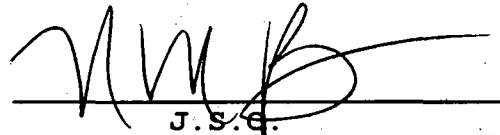
and it is further,

ORDERED that the Clerk of the court shall revise his records accordingly.

This constitutes the Decision and Order of the court.

Dated: January 18, 2017

ENTER:



A handwritten signature in black ink, appearing to read 'NMB', is written over a horizontal line. Below the line, the initials 'J.S.G.' are printed.

HON. NANCY M. BANNON