E.E. Cruz & Co., Inc. v Axis Surplus Ins. Co.
2017 NY Slip Op 32706(U)
December 20, 2017
Supreme Court, New York County
Docket Number: 152988/2012
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

E.E. CRUZ & COMPANY, INC.,

Plaintiff,

Index No. 152988/2012
Motion Seq: 2, 3, 4, 5, 6

-against-

AXIS SURPLUS INSURANCE COMPANY, NATIONAL CASUALTY COMPANY, ARCH INSURANCE COMPANY, EVEREST NATIONAL INSURANCE COMPANY,

DECISION & ORDER
ARLENE P. BLUTH, JSC

Defendants.

ARCH INSURANCE COMPANY, as real party in interest to E.E. CRUZ & COMPANY, INC.,

Third-Party Plaintiff,

-against-

AXIS SURPLUS INSURANCE COMPANY, NATIONAL CASUALTY COMPANY,

Third-Party Defendants.

Motion Sequence Numbers 002, 003, 004, 005 and 006 are consolidated for disposition. Plaintiff's motion (Mot Seq 002) for partial summary judgment against defendant Axis Surplus Insurance Company ("Axis") is granted. The motions by defendants Everest National Insurance Company ("Everest"), Axis and National Casualty Company ("National") (Mot Seq 003, 004 and

006) are denied. The motion by Arch Insurance Company ("Arch") (Mot Seq 005) is granted in part and denied in part.

Background

This action for a declaratory judgment arises out of a tremendous fire on the Throgs Neck Bridge on July 10, 2009. The conflagration occurred while the bridge was under construction to replace the roadway deck. Plaintiff served as the general contractor for this project and subcontracted some of the work to non-party Imperial Iron Works ("IIW"). IIW was insured by defendants Axis and National. Arch, plaintiff's insured, started a separate action alleging that plaintiff was entitled to additional insured status under an insurance policy issued to IIW. The Court, in an order signed by Justice Rakower, consolidated the actions brought by Arch and plaintiff.

Plaintiff (Mot Seq 002) moves for partial summary judgment against defendant Axis, the primary carrier for IIW. Plaintiff argues that its contract with IIW required IIW to obtain insurance, including a commercial general liability policy ("CGL") and excess/umbrella coverage to insure plaintiff as well as the Triborough Bridge and Tunnel Authority ("TBTA")– an agency affiliated with the MTA. The contract with IIW required plaintiff to be named as an additional insured.

During the course of the construction project, IIW would supply labor and materials for iron working tasks and provide fuel for cutting operations, including the use of methylacetylene-propadiene propane ("MAPP" gas). IIW's work on the job was performed on a separate temporary platform (called a Q-Decking platform) set below the bridge's main decking.

Plaintiff contends that IIW was required to remove flammable gas containers, such as the ones containing MAPP gas, and store them overnight in storage sheds or other safe sites. Plaintiff maintains that IIW failed to store the MAPP gas cylinders properly and left them unattended on the Q-Decking platform. These MAPP gas cylinders exploded.

The New York City Fire Marshal conducted an investigation into the cause of the fire and found that the fire started beneath the northbound lanes of the bridge (between Spans 10 and 11) and that two gas cylinders containing MAPP gas exploded, which exacerbated the damage. The damage to the bridge was extensive– plaintiff claims it was required to make immediate repairs costing $2.6 million and was later found liable to the TBTA for an additional $1.3 million in damages resulting from the fire. Plaintiff seeks $2.98 million in damages– this total includes nearly $1 million that was paid out by Travelers to plaintiff under a Builder's Risk policy obtained by plaintiff.

Plaintiff claims that it is entitled to coverage under IIW's policy with Axis as long as the damage arose in whole or in part from IIW's operations and that plaintiff is also entitled to defense and indemnity under the CGL policy because the fire damage was caused, at least in part, by IIW's acts or omissions.

In opposition, Axis claims that plaintiff is not entitled to coverage as an additional insured because the fire was caused by plaintiff's employees. Axis points to the fact that IIW had no employees working on the bridge when the fire began and claims there is no evidence IIW had anything to do with starting the fire. Axis maintains that plaintiff started the fire because plaintiff's employees were performing torch work on the bridge. Axis maintains that there was no property damage caused in whole, or in part, by IIW's acts or omissions.

Defendant National also opposes the motion because, as IIW's excess insurer, National might be affected if plaintiff is entitled to coverage under Axis' policy to IIW.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Plaintiff's Status as an Additional Insured

"An insurance agreement is subject to principles of contract interpretation. Therefore, as with the construction of contracts generally, unambiguous provisions of an insurance contract

must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 321, 2017 NY Slip Op 04384 [2017] [internal quotations and citations omitted]).

An insurance policy endorsement with the words "caused, in whole or in part" requires "proximate causation since 'but for' causation cannot be partial. An event may not be wholly or partially connected to a result, it either is or it is not connected. Stated differently, although there may be more than one proximate cause, all 'but for' causes bear some connection to the outcome even if all do not lead to legal liability" (*id.* at 322). The terms "caused, in whole or in part, by" and "solely caused by" are not synonymous (*id.*). "[C]overage for additional insureds is limited to situations where the insured is the proximate cause of the injury. Liability exists precisely where there is fault" (*id.* at 323).

The relevant provision in IIW's policy with Axis states that:

> "Who Is an Insured is amended to include as an additional insured any person or organization for whom you are performing operating 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,' 'property damage' or 'personal and advertising injury' caused, in whole or in part by: 1. Your acts or omissions; or 2. Your acts or omissions of those acting on your behalf" (NYSCEF Doc. No. 65 at 51).

Based on this contractual provision and the recent Court of Appeals decision in *Burlington*, this Court must consider whether IIW caused, in whole or in part, the property damage on the bridge– put another way, the Court must find that IIW was the proximate cause of the damage in order for plaintiff to receive coverage as the named insured. Plaintiff's claim that additional insured language does not require a finding of negligence is no longer the current state

of the law.[1] The record before this Court establishes, as a matter of law, that IIW was the proximate cause of the property damage.

The New York City Fire Marshal's report, admissible as a business record (*see Clark v New York City Tr. Auth.*, 174 AD2d 268, 274, 580 NYS2d 221 [1st Dept 1992]), establishes that IIW was the proximate cause of the fire. The report indicates that the fire originated under the north bound lanes of the bridge under span 11 in non-fire retardant wood planking installed by plaintiff (NYSCEF Doc. No. 67). Although plaintiff might have prevented the initial fire by installing fire treated wood (*id.*), the fact is that the severity of the fire and resulting damage was caused by the explosion of the MAPP gas. The improper storage of the MAPP gas by IIW caused the explosion and extensive damage; the small fire started by plaintiff did not. Accordingly, plaintiff's motion for partial summary judgment (Mot Seq 002) is granted. For the same reasons, the motion by Axis for summary judgment (Mot Seq 004) dismissing plaintiff's complaint is denied.

Plaintiff is entitled to coverage as an additional insured under IIW's policy with Axis because IIW was the proximate cause of the fire on the bridge. The policy cited above specifically states that Axis' policy applies to property damage and plaintiff is entitled to coverage for IIW's negligent acts.

Priority of Coverage

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[1]The Court called the parties in for further oral argument to explore the *Burlington* decision, which was issued after the parties had submitted all papers (NYSCEF Doc. No. 271). Plaintiff claimed it was entitled to coverage under *Burlington* while Axis claims that IIW as not a proximate cause of the accident (*id.*).

In order to resolve the remaining motions, the Court must determine the priority of coverage among the various insurance policies. "The anomaly involved in establishing a pecking order among multiple insurers covering the same risk arises from the fact that although the insurers contract not with each other but separately with one or more persons insured, each attempts by specific limitation upon the rights of its insureds to distance itself from the obligation to pay than have the others" (*State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369, 372, 492 NYS2d 534 [1985]).

Clearly, the Axis policy, which provides coverage to plaintiff as an additional insured, is first. Next, the Court must consider whether IIW's excess policy (provided by National) or plaintiff's primary policy (provided by Arch) applies. In the contract between plaintiff and IIW, IIW was instructed to obtain a CGL insurance policy in plaintiff's name with liability limits of at least $2 million for each occurrence on a combined single limit for bodily injuries and property damage (NYSCEF Doc. No. 135 at 6-3).

The policy IIW subsequently obtained from Axis had a limit of $1,000,000 for each occurrence (NYSCEF Doc. No. 132 at 1). That does not meet the threshold provided for in the contract between plaintiff and IIW. However, "the extent of insurance is governed not by the terms of the underlying trade contracts among the insureds but by the policy terms" (*New York State Ins. Fund v Everest Natl. Ins. Co.*,125 AD3d 536, 537 1 NYS3d 809 (Mem) [1st Dept 2015]). The National policy's 'other insurance' provision states that "This insurance is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis. This condition will not apply to insurance specifically written as excess over this Coverage Part" (NYSCEF Doc No. 183 at 21). The Arch policy's other

insurance section provides that "this insurance is primary except . . . This insurance is excess over: . . . [b] Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement" (NYSCEF Doc. No. 130 at EECAXIS004248).

Because the National policy expressly provides that it is excess and not intended to contribute with other insurance, this Court must find that Arch's policy should apply next. Arch's policy purports to act as an excess policy where other *primary* insurance is available; that is the case here since Axis provides plaintiff primary insurance as an additional insured. And Arch's policy does not state that it will apply as excess to *other excess insurance coverage arising out of plaintiff's status as an additional insured.* Without this language, the Court cannot find that National's policy should come before Arch's policy (*see Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 855 NYS2d 459 [1st Dept 2008] [holding that an excess policy should be treated as a true excess policy rather than as another layer of primary coverage unless the terms of the policy specifically provide for a different result]). This conclusion is also supported by the fact that First Department cases addressing this issue have stressed that horizontal exhaustion of primary policies should apply prior to the inclusion of excess policies (*see e.g., id.*).

The remaining policies, from National and Everest, shall share any remaining coverage on a pro rata basis after the exhaustion of the Arch policy (*see id.* at 155). The Everest policy's other insurance clause provides that "This insurance is excess over, and will not contribute with any 'other insurance', whether primary, excess contingent or on any other basis. This condition

will not apply to insurance specifically written as excess over this insurance" (NYSCEF Doc. No. 131 at 8). Because the language in the 'other insurance' clause of policies written by National and Everest are nearly identical, these two polices cancel each other out and each must contribute, sharing ratably, up to the limit of coverage (*Bovis Lend Lease*, 53 AD3d at 156; *see also LiMauro*, 65 NY2d at 373-374).

After determining the priority coverage among the four defendants, National's argument that it need only pay up to $1 million (instead of the $10 million limit in its policy) is moot. Plaintiff seeks $2.98 million– therefore, there should be enough coverage to satisfy that demand (assuming plaintiff is entitled to all of it). Axis must contribute $1 million, Arch will contribute $1 million and then National and Everest will share the remaining $0.98 million.

The Arbitration Award issued to TBTA

The Court rejects the arguments made by defendants that the damages award, issued after an arbitration, in favor of TBTA for $1.34 million cannot be included as part of their insurance policies. Although the policies clearly provide that an insured may not enter into an arbitration without the consent of the insurers, these provisions were not intended to frustrate an insured's participation in a mandatory arbitration.

As plaintiff points out, it received a report from TBTA's engineer on July 5, 2010 and plaintiff had 10 days to invoke mandatory arbitration to contest the report or plaintiff would waive any further right to contest the matter. Plaintiff correctly contends that its letter on July 13, 2010 merely preserved its right to contest the ultimate award of damages, which was not issued until February 2012. Plaintiff claims that after receiving the damages total, it requested coverage

from the carriers in this action– but that request was denied and the arbitration began in June 2013.

Even if Axis and National did not get notice of a request for coverage until March 2012, no submissions were required in the arbitration for more than a year. The situation presented was obvious– if plaintiff did not appear in the arbitration (which was provided for in the contract between plaintiff and TBTA), then TBTA would get all the damages it sought. Insurers may not withhold coverage relating to participation in an arbitration that could reduce the amount of damages owed simply to avoid having to provide any coverage at all.

The instant action is distinct from instances where an insurer was found to breach this a 'consent provision' in a policy, such as where an insured entered into a settlement agreement without the insurer's consent (*see e.g., Vigilant Ins. Co. v Bear Sterns Companies, Inc.*, 10 NY3d 170, 855 NYS2d 45 [2008]). Clearly, if an insured is voluntarily settling a matter (or voluntarily entering into an arbitration), then it must comply with a provision in its policy requiring consent of the insurer. Here, the insurers knew about the accident and the mandatory arbitration and refused to participate. Axis, National and Everest are not entitled to summary judgment on the ground that the TBTA award is not part of the insurance policies.

Remediation

Defendants (National, Axis and Everest) claim that they do not have to cover plaintiff's remediaton costs (fixing the bridge after the fire). Plaintiff seeks, for example, $150,000 in labor and overhead costs relating to the remediation work and $494,000 for safety monitoring. Everest

insists that there are no reported New York decisions on this issue and that of the $1.64 million in remediation expenses that plaintiff seeks, $646,000 are not covered under Everest's policy.

Axis claims that its policy should not cover for damage to plaintiff's work completed before the fire and that, instead, coverage for plaintiff should arise from a property insurance policy. Axis argues that liability insurance covers liability to others for property damages while property insurance covers damage to one's own property.

Similarly, National argues that plaintiff had no legal obligation to remediate and that plaintiff repaired any construction-related damage to the bridge pursuant to a contractual obligation with TBTA. National also contends that plaintiff did not obtain National's consent to incur the expenses associated with remediation.

Plaintiff argues that its remedial costs were not "voluntary" and that it was required to perform the work or face imminent legal action from TBTA.

This Court denies defendants' summary judgment on this issue. Although there is case law suggesting that remedial work on one's *own property* may not be covered (*see e.g., Castle Village Owners Corp. v Greater New York Mut. Ins. Co.*, 64 AD3d 44, 878 NYS2d 311), the bridge was not plaintiff's own property– it was TBTA's property. And plaintiff had a contractual obligation to remediate the damage. Should plaintiff have waited to start repairing the bridge until TBTA obtained a judgment (a clear legal obligation) against plaintiff? That result, especially in a situation where the 'property' is a major public thoroughfare, is unconscionable. The bridge would not have required such extensive repairs if the MAPP canisters were not left unattended and stored improperly.

Defendants' position, that plaintiff should bear the burden, as a matter of law, to pay all remedial costs for the actions of a third-party is without merit. That is the point of obtaining a CGL policy and gaining status as an additional insured on a subcontractor's policy. Defendants failed to sufficiently explain why the remediation work would not constitute liability plaintiff had to pay as a result of IIW's wrongdoing. If plaintiff waited to fix the bridge and TBTA got a judgment against plaintiff for failure to comply with the contractual provision to make repairs, then those expenses would be liability arising out of IIW's wrongdoing. There is no reason in this instance to hold that the mere passage of time– i.e., waiting until TBTA took legal action– should change the analysis.

The Court is merely denying the branches of defendants' motions for summary judgment seeking to reduce the amount of damages that plaintiff might recover at trial. It does not mean that plaintiff *is* entitled to its requested damages. It may be that the safety monitoring costs are not covered if plaintiff already had some obligation to perform this task while working on the bridge before the fire. But the Court will not create a situation where plaintiff's proper course of action is to wait for TBTA to impose a legal obligation on plaintiff (such as a judgment) to make repairs while the bridge remains impassable.

Timely Notice

The Court rejects the branches of the motions by Axis and National that seek dismissal of plaintiff's complaint on the ground that these defendants were not given timely notice of plaintiff's claim. Plaintiff sent notice of its claim to IIW, who was specifically requested to inform Axis and National about plaintiff's claim. That was sufficient to inform these carriers about plaintiff's potential claim since IIW named plaintiff as an additional insured.

And, even if these insurers were not given timely notice, they failed to show any prejudice from the delay (*see* Insurance Law § 3420[a][5]). The fact is that although the arbitration with TBTA may have started in July 2010, the actual submission of documents did not begin until June 2013– well after Axis and National knew about plaintiff's claim. This is not a situation where the insurer had no idea about an event that might give rise to potential claims– this was a major fire where IIW (Axis' and National's insured) was directly involved.

Arch's Motion (Mot Seq 005)

Because the Court has found the IIW was a proximate cause of the accident and that plaintiff is entitled to additional insured status under Axis' policy, the Court also finds that Arch is entitled to the amount Arch paid on behalf of plaintiff from Axis under the doctrine of equitable subrogation. "It is well established that when an insurer pays for losses sustained by its insured that were occasioned by a wrongdoer, the insurer is entitled to seek recovery of the monies it expended under the doctrine of equitable subrogation" (*Fasso v Doerr*, 12 NY3d 80, 86, 875 NYS2d 846 [2009]). Arch is also entitled to defense costs from Axis.

Although it may be helpful, Arch's request that Axis provide the amount of indemnification that Axis has already paid in other matters under the subject insurance policy is denied. This Court cannot require to Axis turn over that information. It might be more efficient to know if the Axis policy has been exhausted (and National's excess policy is triggered), but that is not a basis to compel those documents to be turned over.[2]

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[2]Arch also seeks the Court's assistance with changing the caption on the Court's e-filing system. Arch may submit a stipulation, signed by all parties, to this Court reflecting this requested relief.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for partial summary judgment (Motion Sequence 002) is granted; and it is further

ORDERED that the motions by defendants Everest, Axis and National (Motion Sequence 003, 004 and 006) for *inter alia* summary judgment dismissing plaintiff's complaint are denied. The priority of coverage is resolved as stated above; and it is further

ORDERED that the motion by Arch (Motion Sequence 005) is granted in part and denied in part in accordance with this decision and order.

This is the Decision and Order of the Court.

Dated: December 26, 2017
New York, New York

HON. ARLENE P. BLUTH, JSC