Travelers Prop. Cas. Co. of Am. v Burlington Ins. Co.
2018 NY Slip Op 30720(U)
April 23, 2018
Supreme Court, New York County
Docket Number: 156200/2015
Judge: Tanya R. Kennedy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, PLAZA-SCHIAVONE JOINT VENTURE and PLAZA CONSTRUCTION LLC f/k/a PLAZA CONSTRUCTION CORP., Plaintiffs, -against- THE BURLINGTON INSURANCE COMPANY, Defendant.	Index No. 156200/2015 Motion Seq. No. 001 **DECISION & ORDER**

Tanya R. Kennedy, J.:

This action involves a dispute over insurance coverage provided by defendant, the Burlington Insurance Company (Burlington), under a commercial general liability (CGL) insurance policy (Policy) issued to nonparty Sal-Vio Construction Corporation (Sal-Vio).

The complaint for declaratory judgment, dated June 19, 2015 (Complaint), contends that plaintiffs Plaza-Schiavone Joint Venture (the JV) and Plaza Construction LLC, formerly known as Plaza Construction Corporation (Plaza), are covered under the Policy as "additional insureds." Plaintiff Travelers Property Casualty Company of America (Travelers), together with the JV and Plaza (collectively, Plaintiffs), seek a declaration that Burlington must defend and indemnify the JV and Plaza on a

"primary and noncontributory basis" for the claims made against them in the personal injury action captioned *Seshadri v Plaza-Schiavone Joint Venture, Plaza Construction Corp. and Sal-Vio Construction Corp.*, (Sup Ct, Bronx County, index no. 306108/2013) (*Seshadri* Action). Plaintiffs also seek a declaration that Burlington must reimburse Travelers for all defense costs it has incurred on behalf of the JV and Plaza relating to that action.

In motion sequence number 001, Plaintiffs move for partial summary judgment against Burlington. They seek a declaration that Burlington must defend the JV and Plaza as additional insureds in the *Seshadri* Action. Plaintiffs also seek an order staying this action, pending an allocation of liability in the *Seshadri* Action, and awarding them reimbursement of defense costs incurred to date, to be determined as necessary in a separate hearing.

Burlington opposes Plaintiffs' motion. Burlington also cross-moves, seeking vacatur of Plaintiffs' note of issue and certificate of readiness, and an order directing Plaintiffs to produce witnesses for deposition.

THE PARTIES

Travelers is a Connecticut insurance corporation which maintains offices in the County, City, and State of New York. The JV's members are plaintiff Plaza, a Delaware limited

liability corporation, and nonparty Schiavone Construction Co. LLC, a New Jersey limited liability company.

Burlington, an insurance company domiciled in North Carolina, is authorized to issue excess and surplus line insurance policies in the State of New York through wholesale insurance brokers.

Nonparties Sal-Vio and Del Savio Masonry Corporation are affiliated New York business corporations. The JV served as general contractor at the project to construct the Fulton Street Transit Center in New York, New York (the Project), and initially hired Del Savio Masonry Corp. as its masonry subcontractor. Sal-Vio succeeded Del Savio Masonry Corp., upon its assignment of the JV's masonry subcontract.

RELEVANT POLICY PROVISIONS

The "COMMON POLICY DECLARATIONS" (Declarations Page) of the Policy (exhibit 4 to the affirmation in support of Adam R. Durst, Esq.) identifies Sal-Vio as the sole named insured. The Declarations Page also identifies the Policy's effective date of June 18, 2012 and the expiration date as June 18, 2013.

The Commercial General Liability Coverage Form (CGL Coverage Form) states that "'you' and 'your' refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy" (*id.*).

On that same page, in paragraph 1 (a) of Section I, "COVERAGES - COVERAGE A - BODILY INJURY AND PROPERTY DAMAGE LIABILITY," the CGL Coverage Form sets forth Burlington's insuring agreement with respect to claims like those asserted in the *Seshadri* Action. It provides, among other things: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages" (*id.*).

Section II of the CGL Coverage Form, captioned "WHO IS AN INSURED," at paragraph 1(d) (beginning at 9 of the CGL Coverage Form), provides that a corporation designated in the Declarations, such as Sal-Vio, is an insured, as are its "'executive officers' and directors . . . but only with respect to their duties as officers and directors. [Corporate] stockholders are also insureds, but only with respect to their liability as stockholders" (*id.*).

There are several "Additional Insured" endorsements made part of the Policy. Plaintiffs argue that two of these endorsements (Additional Insured Endorsements) are material to their motion. The first is captioned "ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - AUTOMATIC STATUS WHEN REQUIRED

IN CONSTRUCTION AGREEMENT WITH YOU." It provides that the definition of "WHO IS AN INSURED" under Section II:

> "is amended to include as an additional insured any person or organization for whom you are performing operations 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 [the named insured's] policy. . ."

(*id.*).

The second is captioned "AMENDMENT - OTHER INSURANCE (PRIMARY AND NON-CONTRIBUTORY COVERAGE)." It modifies the CGL Coverage Form, in its "Schedule of Additional Insured(s)," to include:

> "Any person or organization named in an Additional Insured endorsement attached to this policy with whom you have agreed, in a written contract, that such person or organization should be provided primary and non-contributory coverage, but only when such written contract is fully executed prior to an 'occurrence' in which coverage is sought under this policy"

(*id.*).

BACKGROUND

By an agreement, dated May 13, 2010 (JV/Del Savio contract) (exhibit 2 to the affidavit in support of Erin DeCandio), the JV engaged non-party Del Savio Masonry Corp. as its subcontractor to perform masonry work at the Project (Complaint, ¶ 6). The JV/Del Savio contract provided, in Article 10.1, that Del Savio Masonry Corp., as "Subcontractor," was required, at its own expense, to provide to Sal-Vio insurance "policies and

certificates . . . indicating coverage from companies, in amounts and on such other terms as provided for hereafter and in the 'Insurance Schedule' attached . . . as Exhibit E . . ." (DeCandio aff, exhibit 2).

Among other things, the Insurance Schedule (DeCandio aff, exhibit 3) states that the Subcontractor is required to provide to the Contractor various forms of insurance coverage, including CGL insurance for bodily injury and property damage, with annual limits of at least $2 million per occurrence and $4 million in the aggregate. The Subcontractor is also required to provide coverage under as "additional insureds" on a "primary and non-contributory basis" (*see* Complaint, ¶ 9).

The Insurance Schedule states that the term "Contractor" refers to the JV but does not identify the "Subcontractor." The Insurance Schedule is undated, but is initialed on each of its four numbered pages on behalf of the JV and the Subcontractor.

A fifth sheet is attached to the Insurance Schedule, captioned "ACORD Certificate of Insurance." This Certificate names the JV as certificate holder and bears the issue date of June 15, 2010. The words "SAMPLE CERTIFICATE" appear in the field for INSURED. In the field for "Description of Operations/ Locations/Vehicles/Special Items," the Certificate indicates that it relates to work being performed for the Metropolitan Transportation Authority at the Project, and expressly names as

additional insureds several entities involved with the Project, including the JV and Plaza (*id.*).

At some date thereafter, but allegedly on or before August 20, 2012, Del Savio Masonry Corp. assigned all its rights and obligations under the JV/Del Savio contract to Sal-Vio (Complaint, ¶ 7). The "Agreement of Assignment" (Assignment) (DeCandio aff, exhibit 4), fully executed by representatives of Del Savio Masonry Corp., Sal-Vio, and the JV, is undated.

The Assignment provides that Del Savio Masonry Corp., as "Subcontractor," thereby assigned all of its rights and obligations under the JV/Del Savio contract to "Assignee" Sal-Vio, "effective as of the date of this Assignment." It also provides that Assignee:

> "accepts without limitation all of Subcontractor's rights, terms and obligations under the Agreement, including all rights, terms and obligations in favor of or for the benefit of the Owner and others to the extent set forth in the Agreement, and Assignee acknowledges that its obligation and liabilities under the Agreement are effective as of the date Assignor signed [t]he Agreement. . ."

(*id.*).

Plaintiffs also submit a document purportedly "confirming the assignment." That document (Confirmation) (DeCandio aff, exhibit 5) is signed by Arthur J. Del Savio, on behalf of Sal-Vio, and by Allen Kasden, vice president of Plaza. It asserts that the Assignment "was signed and executed by all parties on

or before August 20, 2012." It also asserts that the Assignment "was in full force and effect as of August 20, 2012 and it was Sal Vio's intent for the 'Assignment of Agreement' to be in effect as of that date." Like the Assignment, the Confirmation is also undated.

On December 11, 2012, while working as an inspector for MTA Capital Construction at the Project, Sosale Seshadri allegedly tripped and fell over a "ladder and/or tarpaulin," and suffered serious bodily injuries (*see* Complaint, ¶ 8). This occurrence led to the personal injury claims asserted against the JV, Plaza, and Sal-Vio in the *Seshadri* Action, which was commenced by filing of the summons and complaint with the County Clerk of Bronx County on October 8, 2013.

Travelers has defended the JV and Plaza in the *Seshadri* Action as named insureds under its own CGL policy. Plaintiffs, however, argue that, because the JV and Plaza are entitled to primary coverage as "additional insureds" under the Policy with Burlington, the Travelers policy only provides them excess coverage; therefore, Travelers has no duty to defend or indemnify them until Burlington's primary coverage has been exhausted (*see* Complaint, ¶¶ 9-13, 16-17).

As a result, Plaintiffs contend that they are entitled to partial summary judgment, declaring that Burlington is obligated to defend the JV and Plaza in the *Seshadri* Action, and directing

Burlington to reimburse Travelers for the defense costs it has already incurred. Plaintiffs also assert that this action should be stayed pending an allocation of liability in the underlying *Seshadri* Action.

In response, Burlington contends that the JV and Plaza cannot be additional insureds under its Policy. Among other things, Burlington asserts that the JV and Plaza are not covered because they are not actually named in the Policy, as insureds or additional insureds. Burlington also contends that it cannot be held liable because there is no written agreement between Sal-Vio, on the one hand, and the JV and Plaza, on the other, to satisfy the provisions of the Policy's Additional Insured Endorsements.

Burlington also asserts that summary judgment would be improper because material issues of fact exist as to the validity and timeliness of the Assignment. Burlington argues that the note of issue and certificate of readiness must be vacated because discovery is incomplete, due to Plaintiffs' alleged refusal to produce witnesses for deposition.

In reply, Plaintiffs deny that there are any questions of fact about the JV and Plaza's entitlement to coverage as additional insureds, or the validity or timeliness of the Assignment. Plaintiffs also contend that the cross motion to strike the note of issue must be denied because Burlington not

only waived its right to conduct depositions, by failing to move within the time required by court rule, but also failed to show any good-faith effort on its part, to resolve issues raised on the cross motion.

DISCUSSION

Plaintiffs' Motion for Partial Summary Judgment

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]] [internal citations omitted]).

To prevail at summary judgment, the movants must produce evidentiary proof in admissible form sufficient to warrant granting summary judgment in their favor (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). Once the movants have made their showing, the burden shifts to the opposing party to submit proof in admissible form sufficient to show a question of fact exists, requiring trial (*Kosson v Algaze*, 84 NY2d 1019, 1020 [1995]).

In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmovant (*Prine v Santee*, 21 NY3d 923, 925 [2013]). Party affidavits and

other proof must be examined carefully "because summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [citation and internal quotation marks omitted]). Still, "only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment" (*id.*).

"It is well settled that an insurance company's duty to defend is broader than its duty to indemnify. Indeed, the duty to defend is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage" (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [citation, internal quotation marks and alterations omitted]). "If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be" (*id.* [citation and internal quotation marks omitted]).

The party asserting a right to defense, however, must show that it is insured under the terms of the policy (*see BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007] ["The duty to defend an insured is derived from the allegations of the

complaint *and the terms of the policy*"] [citation, internal quotation marks and alterations omitted, emphasis added]).

In *BP A.C. Corp.*, the Court of Appeals determined that the defendant insurer owed a duty to defend plaintiff subcontractor because, among other reasons, it was "undisputed" that plaintiff was an "additional insured" under its sub-subcontractor's CGL policy (*id.* at 714). The Court also noted that the "'well-understood meaning of the term [additional insured] is an entity enjoying the same protection as the name insured" (*id.* at 714-15).

The question before this court is whether the Assignment, executed by Del Savio Masonry Corp., as assignor, Sal-Vio, as assignee, and the JV, as general contractor, entitles the JV and Plaza to coverage as "additional insureds" under the terms of the Policy (*see City of New York v Philadelphia Indem. Ins. Co.*, 54 AD3d 709, 709 [2d Dept 2008] [party seeking such coverage must "demonstrate, as a matter of law, that it is an additional insured as this term is defined by the subject policy, and that the allegations in the underlying complaint fall within the scope of coverage"]).

Plaintiffs argue that the JV and Plaza are owed coverage as additional insureds as a matter of law because, by offering the JV/Del Savio contract and the Assignment, with their allegation that both "were fully executed prior to the underlying

accident," they satisfy the terms of the Additional Insured Endorsements.

Assuming, without deciding, that the Assignment and the JV/Del Savio contract may be construed together as the one "written contract" required by the Additional Insured Endorsements,[1] Plaintiffs have still not carried their burden. Neither the Assignment and JV/Del Savio contract, nor the other evidence Plaintiffs have submitted, show that the JV and Plaza were named as additional insureds in a written agreement that they entered into with the Policy's named insured, Sal-Vio, *prior* to the occurrence for which coverage is sought.. Accordingly, summary judgment must be denied (*see* Additional Insured Endorsement providing coverage "only when such written contract is fully executed prior to an 'occurrence' in which coverage is sought. . ." [Durst affirmation, exhibit 4); *see also* 70 NY Jur 2d Insurance § 1628, citing *National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570 [1st Dept 2006] ["Additional insured coverage does not exist under a liability insurance policy when the policy provides for such coverage only if required by written contract, and no such

[1] Plaintiffs, without argument or citation to authority, apparently assume that the Assignment incorporates the JV/Del Savio contract by reference.

contract exists at the time of the accident giving rise to the personal injury action against the claimants"]).

In her affidavit in support of Plaintiffs' motion, Plaza's Corporate Risk Manager, Erin DeCandio, swore that "Del Savio assigned all of its rights and obligations under the JV/Del Savio contract" to Sal-Vio "[o]n or before August 20, 2012" (DeCandio aff, ¶ 5). This averment, however, does not satisfy the Additional Insured endorsements, as it is not a sworn statement that the written Assignment had been fully executed "on or before August 20, 2012," or even before the December 11, 2012 occurrence at the Project, in which MTA inspector Seshadri was allegedly injured.

Likewise, neither the Assignment nor the Confirmation show when the Assignment was fully executed. As noted, the Assignment is undated. The Confirmation attempts to fill this void by declaring that the Assignment had been "signed and executed by all parties on or before August 20, 2012 . . ." (DeCandio aff, exhibit 5), but this declaration does not fix this problem. The Confirmation is an unsworn statement and so it does not constitute the "evidentiary proof in admissible form" needed to support Plaintiffs' summary judgment motion (*Rodriguez v Goldstein*, 182 AD2d 396, 397 [1st Dept 1992] [citation omitted]).

Other evidence Plaintiffs submit on this point is similarly flawed. On reply, Plaintiffs present a copy of a chain of emails exchanged among the signatories to the Assignment. In the first email, dated August 17, 2012, Rose Melendez of Plaza, "on Behalf of Allen Kasden," forwards a copy of the Assignment to Mr. Del Savio, and requests that he "sign the attached in the appropriate place(s) and return [the] original" to her (*see* reply affidavit of Erin DeCandio, exhibit 2).

The second email in the chain, dated August 20, 2012, is from Carol Alba of Del Savio Masonry Corp. to Ms. Melendez, Mr. Kasden and others. Ms. Alba attaches the Assignment signed by Mr. Del Savio, requests instructions on how she should send the original to them, and asks that they "[p]lease let [her] know what else is needed for all this to happen" (*id.*). Plaintiffs assert that the assignment occurred "on or before August 20, 2012" (Complaint, ¶ 7), but this email shows that the written Assignment was still not fully executed on that date.

Ms. DeCandio states that the October 25, 2012 email at the end of the chain reflects her receipt of Ms. Alba's August 20, 2012 email, which "provided a copy of the assignment executed by Mr. Del Savio on behalf of both Del Savio [Masonry Corp.] and Sal-Vio" (DeCandio reply aff, ¶ 6). The forwarding of this partially executed Assignment to Plaza's Corporate Risk Manager at this stage suggests that the Assignment had still not been

signed by the JV, and so did not yet satisfy the requirement that it be "fully executed prior to an 'occurrence' in which coverage is sought" under the Policy's Additional Insured Endorsements.

Ms. DeCandio also fails to address the body of the October 25, 2012 email. It states:

> "Hi Erin, Agreement is attached as discussed. Mike Laurenti said to ask Lester who is out 'til Monday. I'll try him then and hopefully get this resolved. p.s. please note on line 4 . . . 'the Project located at Fulton Street Transit Center . . .'"

(DeCandio reply aff, exhibit 2).

This indicates that Ms. DeCandio had an unresolved problem or question regarding the Assignment, which she had discussed with the email's sender, Henna Cohen. It also suggests that the wording of the Assignment was still being revised at that time (*cf.* fourth line of fully executed Agreement, which includes the phrase "the Project located at Fulton Street Transit Center"]).

Taken together, Plaintiffs' submissions do not demonstrate that the Assignment was fully executed before the occurrence underlying the *Seshadri* Action. At best, they indicate that, as late as October 25, 2012, the signatories were still working to finalize the Assignment. Accordingly, a material question of fact exists as to when the Assignment was fully executed, which requires denial of Plaintiffs' motion for partial summary judgment.

Burlington's Cross Motion for Vacatur

Burlington cross-moves to vacate Plaintiffs' note of issue and certificate of readiness, asserting that Plaintiffs failed to provide party witnesses for deposition. Burlington also requests, in the alternative, notwithstanding the filing of the note of issue and certificate of readiness, and without citation to any authority, that the "allowable period" for discovery be extended and that Plaintiffs be ordered to produce witnesses for deposition.

Motions to vacate notes of issue are governed by Rule 202.21 of the Uniform Rules for Trial Courts, which states, in pertinent part:

> "**(e) Vacating Note of Issue.** Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. . . . *After such period, . . . no such motion shall be allowed except for good cause shown*"

(Uniform Rules for Trial Cts [22 NYCRR] § 202.21 [emphasis added]).

A motion to vacate a note of issue and certificate of readiness is properly denied where the movant fails to make the motion within 20 days after service of the note and certificate,

and fails to show good cause for delay (*Allen v Hiraldo*, 144 AD3d 434, 434-35 [1st Dept 2016]).

Plaintiffs e-filed their note of issue and certificate of readiness on May 31, 2017. Burlington, however, failed to seek vacatur of the note and certificate until July 24, 2017, 54 days later, when it filed its opposition to Plaintiffs' motion for partial summary judgment and cross motion to vacate the note of issue. Its untimely cross motion offers no excuse for its delay, let alone a showing of good cause.

The language of Rule 202.21(e) leaves no room for interpretation. After the 20-day period has passed, no motion to vacate "shall be allowed except for good cause shown." Burlington's failure to show good cause for its delay in seeking vacatur requires denial of its application.

Burlington's alternative request must also be denied. The only "other method of obtaining post-note of issue disclosure is found in 22 NYCRR 202.21(d)" (*Schroeder v IESI NY Corp.*, 24 AD3d 180, 181 [1st Dept 2005]). That subsection of the rule "permits the court to authorize additional discovery '[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness' that would otherwise cause 'substantial prejudice'" (*id.*). Burlington does not raise any such argument on its cross motion.

Burlington's cross motion to vacate the note of issue and certificate of readiness must, therefore, be denied.

CONCLUSION AND ORDER:

For the foregoing reasons, it is hereby

ORDERED that plaintiffs' motion for partial summary judgment is DENIED; and it is further

ORDERED that defendant's cross motion to vacate the note of issue and certificate of readiness, pursuant to Rule 202.21 of the Uniform Rules for Trial Courts, is DENIED; and it is further

ORDERED that counsel shall appear for a status conference in Part 63 of this court on May 23, 2018, at 2:15 p.m.

Dated: April 23, 2018

Signed: Hon. Tanya R. Kennedy
J.S.C.

TANYA R. KENNEDY
J.S.C.