

**Port Auth. of N.Y. & N.J. v Brickman Group Ltd.**

2018 NY Slip Op 31333(U)

June 26, 2018

Supreme Court, New York County

Docket Number: 451213/17

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

-----X  
THE PORT AUTHORITY OF NEW YORK AND NEW  
JERSEY,

Plaintiff,

-against-

Index No.

THE BRICKMAN GROUP LTD., LLC, ACE  
AMERICAN INSURANCE COMPANY and EVEREST  
NATIONAL INSURANCE COMPANY,

451213/17

Defendants.

-----X  
DAVID COHEN, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence number 001, defendant The Brickman Group Ltd., LLC (Brickman) moves for dismissal of the complaint. In motion sequence number 002, defendant Ace American Insurance Company (Ace) moves for dismissal of the complaint. Defendant Everest National Insurance Company (Everest) cross-moves for dismissal of the complaint. In motion sequence numbers 001 and 002, plaintiff The Port Authority of New York and New Jersey (Port Authority) cross- moves for leave to amend its complaint and for partial summary judgment.

This is a declaratory judgment action brought by Port Authority. The action is based on two personal injury actions that are still pending which involved Port Authority and Brickman as defendants.

**BACKGROUND OF THIS ACTION**

Port Authority contracted with Brickman to provide maintenance of the landscaping and irrigation systems at the John F. Kennedy Airport in Queens County, New York. Brickman subcontracted winterization of the irrigation system to nonparty Metro Irrigation and

Maintenance Corporation (Metro). On June 1, 2009, Pavel and Yeva Kandel, who were involved in a multi-vehicle accident on the Van Wyck Expressway near the airport on November 22, 2008, commenced an action for personal injury against Port Authority, Brickman and Metro in Supreme Court, Kings County, under Index No. 3625/09 (the Kandel Action). On October 27, 2009, Robert Favors, who was also involved in the accident, filed a similar action against the aforesaid entities as defendants in Supreme Court, Kings County, under Index No. 27151/09 (the Favors Action). In both actions, Port Authority brought cross claims against Brickman sounding in contractual indemnification, common law indemnification, contribution and breach of contract. The two actions were subsequently joined for trial in Supreme Court, Kings County.

The Kandel Action and Favors Action sought to recover damages for personal injuries allegedly sustained by the Kandals and Favors as a result of negligence on the part of Port Authority, Brickman and Metro. The joint trial occurred before Justice Edgar Walker.

On April 20, 2017, Justice Walker ruled that Port Authority was liable to plaintiffs as a matter of law and that Brickman was not negligent to plaintiffs as a matter of law. On April 21, 2017, the judge denied Metro's motion for a directed verdict. On April 25, 2017, the jury found Brickman and Metro not negligent, apportioning 100% liability to Port Authority. On May 3, 2017, Brickman submitted a motion by order to show cause to dismiss all cross claims against Brickman by Port Authority. Prior to this submission, Port Authority commenced this action against Brickman, as well as Ace and Everest. Ace is Brickman's primary insurer and Everest is Brickman's excess insurer. Accordingly, Brickman was contractually obligated to include Port Authority as an additional insured in both of its policies, in the course of its performance as Port Authority's contractor.

In this action, Port Authority alleges that defendants failed to carry out their obligations to defend and indemnify Port Authority while it was a defendant in the Kandel and Favors actions. Port Authority seeks a declaratory judgment declaring that defendants in this action violated their obligations to defend and indemnify Port Authority.

The three defendants in this action move separately for dismissal of the complaint. Brickman seeks dismissal on the grounds that the court order from Justice Walker, which, in response to Brickman's order to show cause, dismissed all of Port Authority's cross claims against Brickman with prejudice in the Kings County actions, must be given res judicata and collateral estoppel effect in this jurisdiction. Moreover, Brickman argues that the complaint should also be dismissed because Port Authority's claims have been asserted in a prior pending action.

Ace brings a motion for dismissal on the ground that, pursuant to its policy, coverage for Port Authority as an additional insured, with respect to the Kandel and Favors actions, ceased upon the Kings County Supreme Court finding its main insured, Brickman, 100% not liable for the accident. Ace contends that its policy would only cover Port Authority were Brickman to be found wholly or partially liable for the accident. Everest cross-moves for dismissal on the same grounds, contending that Brickman's lack of liability relieves Everest of providing coverage to Port Authority as an additional insured. Everest also contends that as an excess insurer, it would not extend any coverage to Port Authority until coverage provided by Ace had been exhausted.

Port Authority opposes any dismissal, argues that the court order from the Kings County court is not definitely final for res judicata and collateral estoppel effect, and that the insurance policies could be construed in a different manner. Port Authority cross-moves for summary

judgment against Ace and Everest, claiming that they have a duty to defend and indemnify it during the ongoing actions in the Kings County court. Port Authority also cross-moves for leave to amend its complaint to add a claim against Brickman for failure to adequately procure insurance for Port Authority after contracting with Port Authority. In opposition to this cross motion, Brickman argues that this claim is time-barred by the six-year statute of limitations. Ace and Everest, in response to the summary judgment cross motion, argue that Port Authority has misinterpreted the policies issued to Brickman.

#### THE BRICKMAN MOTION

Brickman argues that it should be dismissed from this action because it cannot remain liable to Port Authority regarding claims related to the underlying Kandel and Favors actions. According to Brickman, the claims in this action are similar to those raised in those actions, and said claims were dismissed with prejudice by the court order of the judge presiding over the actions. Brickman contends that this court order has res judicata and collateral estoppel effect on this action, precluding Port Authority from bringing the same claims and issues before this court.

CPLR 3211 (a) (5) provides that a party may move for judgment dismissing claims asserted against it on the ground of res judicata and/or collateral estoppel. A copy of the court order, dated June 28, 2017, is submitted by Brickman. The court order expressly provides that the cross claims brought against Brickman by Port Authority regarding the two joined actions were dismissed with prejudice.

Doctrines of res judicata or claim preclusion, and collateral estoppel or issue preclusion, generally deal with preclusion after a judgment: res judicata precludes a party from asserting a claim that was litigated in a prior action, while collateral estoppel precludes relitigating an issue

decided in a prior action (*see People v Evans*, 94 NY2d 499, 502 [2000], *reargument denied* 96 NY2d 755 [2001]).

The doctrine of collateral estoppel “precludes a party from litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . whether or not the tribunals or causes of action are the same [internal quotation marks and citation omitted]” (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]).

To apply, the issue in the second action must be identical to an issue which was raised, necessarily decided, and material in the first action, and plaintiff had a full and fair opportunity to litigate the issue in the earlier action (*Id.* at 349). “[O]nce a claim is brought to a final conclusion, *res judicata* bars all other claims arising out of the same transactions, . . . or series of transactions, even if based upon different theories or if seeking a different remedy” (*Schwartzreich v E.P.C. Carting Co., Inc.*, 246 AD2d 439, 441, [1<sup>st</sup> Dept 1998], quoting *O’Brian v City of Syracuse*, 50 NY2d 353, 357 [1981]).

Brickman argues that the court order represents the final determination of Port Authority’s claims with respect to the personal injury actions. Brickman contends that Port Authority had a full and fair opportunity to oppose Brickman’s motion in the Kings County court, and did oppose the motion. Since the court order stated that the dismissal of Port Authority’s claims against Brickman were with prejudice, Brickman claims that this would be the equivalent of a final judicial determination. Brickman argues that it has enough evidence to dismiss Port Authority’s claims against it in this action.

Brickman also seeks dismissal pursuant to CPLR 3211 (a) (4), prior action pending, where the claims brought in this action have already been brought as cross claims in the Kandal

and Favors actions. As the cross claims were set aside there, Brickman argues that where there are two pending actions involving the same parties and claims, the court in which the first action was commenced, Supreme Court, Kings County, is the one that should adjudicate this dispute.

In opposition to this motion, Port Authority argues that the motion is untimely because it was brought after issue was joined. Alternatively, Port Authority argues that the Court Order does not constitute a final determination on the merits which would have res judicata and/or collateral estoppel effect. Port Authority contends that there was no judgment rendered in the Kings County court, and thus, no final determination as to the cross-motion brought by Port Authority. Port Authority also contends that Brickman did not provide any evidence that Port Authority had the opportunity to respond to the post-trial motion. Port Authority notes that neither insurer was a party to the Kings County actions, unlike this action.

In reply, Brickman argues that this court should determine this motion despite the its timing. Brickman states that the court order was made after Brickman served its answer here, and that, in the interest of justice, the court should determine its motion on its merits.

Brickman argues that the court order, with its “with prejudice” language, is a final determination on the merits, and that a subsequent judgment based on the order was scheduled to be issued by Justice Walker. Brickman argues that Port Authority raised arguments in opposition to its motion before the Kings County court, and had a fair and full opportunity to litigate the matter there. Brickman avers that the absence of the insurers in the Kings County actions has no relevance here, since it is moving for its own dismissal. Brickman notes that Port Authority failed to address the prior pending action ground raised in the motion to dismiss, which is an alternative ground for the dismissal of the complaint.

Regarding the issue of timeliness, Port Authority contends that the motion is untimely, since it has been raised after the time the answer could be served. As Brickman stated, the court order was made after the issue was joined, and though belated, the motion should be decided in the interest of justice. The court shall determine this motion, since such a determination could preclude a lengthy and unnecessary relitigation of the same legal matters.

The court finds that the court order at issue to be final and on the merits with respect to Port Authority's counterclaims against Brickman. That the judge granted dismissal with prejudice constituted a dismissal on the merits (*see Aard-Vark Agency, Ltd. v Prager*, 8 AD3d 508, 509 [2d Dept 2004]). Brickman provided sufficient proof that Port Authority had an ample opportunity to oppose and challenge Brickman's post-trial motion to dismiss the counterclaims in that court. The identical nature of the counterclaims in the Kings County actions and the claims brought against Brickman in this declaratory judgment action, which include breach of contract and indemnification, warrants the application of res judicata and collateral estoppel. Therefore, Brickman's motion for dismissal is granted.

#### THE INSURERS' MOTIONS

The two insurers in this action, Ace and Everest, move separately for dismissal of the complaint based on the same grounds: documentary evidence and failure to state a cause of action. Ace, Brickman's primary insurer, argues that even though Port Authority, as an additional insured on Brickman's policy, would ordinarily be subject to Ace's defense and/or indemnification in the event of a lawsuit brought against Port Authority, its policy excludes such obligations if Brickman is judged to be not wholly liable in an action. Submitting a copy of its policy with Brickman, and a copy of the underlying Kings County litigation, specifically the jury



verdict form on Brickman's liability and the court order dismissing Brickman's cross claims, Ace argues that it had no obligation to defend or indemnify Port Authority, at least upon the date of the jury verdict, when its coverage allegedly ended. Brickman's excess insurer, Everest, in its cross motion, makes the same arguments involving the policy terms.

In opposition, Port Authority argues that the policy issued to Brickman by both insurers included Port Authority as an additional insured. The policy provided for coverage based on suits brought against Brickman's operations. In this case, Port Authority states that the two aforesaid personal injury suits alleged that Brickman's operations during the course of its irrigation work at the Kennedy Airport were at least partially responsible for injuries in a subsequent multi-car accident. Port Authority argues that this triggered the insurance coverage for the named and additional insureds in the policies. Port Authority contends that the insurers' duty was evident regardless of the actual liability of Brickman, as long as Brickman's operations were inextricably linked to the event of the accident.

Port Authority cross-moves for partial summary judgment declaring Ace and Everest to have a contractual duty to defend and indemnify Port Authority in the Kings County actions.

On a motion to dismiss for failure to state a cause of action, the court "must accept as true the facts as alleged in the complaint ..., accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). Moreover, if documentary evidence conclusively establishes a defense to a claim, it will be dismissed as a matter of law pursuant to CPLR 3211 (a) (1) (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Regarding Ace's motion, Ace submits a copy of its policy with Brickman. As set forth in

the policy's preamble, the terms "you" and "your" refer to Brickman in its capacity as the named insured. The policy includes an additional insured endorsement, Endorsement No.75- Additional Insured - Owners, Lessees or Contractors-Scheduled Person or Organization. This endorsement provides as follows:

"Section II- Who is an Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but 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. The acts or omissions of those acting on your behalf;

In the performance of your ongoing operations for the additional insured (s) at the location(s) designated above."

See Exhibit 5, Affirmation in support of Ace's Motion to Dismiss

Port Authority is listed as an additional insured on the policy and John F. Kennedy Airport is one of the locations of covered operations in this endorsement. Ace contends that whether Port Authority qualifies for coverage is based on the following limited provision:

but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. [The Named Insured's] acts or omissions; or
  2. The acts and omissions of those acting on [The Named Insured's] behalf... ."
- Id.*

Ace contends that Port Authority's coverage is based on an insured's degree of liability. According to Ace, if Port Authority is found to be solely liable for acts of negligence, it cannot recover from the policy, and if Brickman is found partially or wholly liable, Port Authority could recover. Addressing the Kings County actions, Ace argues that the jury verdict found Port

Authority 100% liable for negligence and Brickman not negligent. Since Port Authority was the sole negligent party in these actions, Ace contends that it was not obligated to defend or indemnify Port Authority.

Everest argues that as an excess insurer, it provides coverage which will follow the terms, definitions, conditions and exclusions contained in the “first underlying insurance,” which is Ace. Thus, Ace’s Additional Insured Endorsement addressing Port Authority as an additional insured is incorporated into Everest’s policy. Since Everest contends that its policy coverage cannot be broader than that provided by Ace, Everest cannot provide coverage to Port Authority if Ace cannot. Everest assents to Ace’s argument that if Brickman, as the main insured, is deemed not negligent in a suit, coverage is not provided to Port Authority, which is deemed 100% negligent in the Kings County actions. Moreover, Everest argues that, in New York, an excess insurer’s duty to defend and indemnify is not triggered until coverage under the primary policy has been exhausted or otherwise terminated. As Ace never paid any amounts towards a settlement or judgment and could not have been exhausted by payment of same, Everest claims that it has no obligation to reimburse Port Authority for any costs incurred in the Kings County actions.

In opposition, Port Authority argues that Ace failed to mention another endorsement, No. 17. This endorsement provides as follows:

“ADDITIONAL INSURED- DESIGNATED PERSON OR ORGANIZATION

WHO IS AN INSURED (Section II) is amended to include as an insured the person (s) or organization (s) shown in the Schedule as an insured but only with respect to liability arising out of your operations or premises owned or rented by you.”

*Id.*

In applying the endorsement to the circumstances here, Port Authority contends that since the actions before the Kings County court arose from Brickman's operations, this triggered Ace's duty to defend, regardless of liability. Moreover, Port Authority contends that, despite the jury verdict, there is no determination of proximate cause at this time, and that it is entitled to indemnification from the insurers for losses it has paid in these actions.

“‘[T]he primary obligation of an insurer is to provide its insured with a defense,’ an obligation that is incurred ‘if facts alleged in the complaint fall within the scope of coverage intended by the parties at the time the contract was made [citations omitted]’” (*Greenwich Ins. Co. v City of New York*, 122 AD3d 470, 471 [1<sup>st</sup> Dept 2014]). “By contrast, the duty to indemnify requires a determination of liability” (*Id.* at 471). The duty to defend arises as a matter of contractual obligation to insure, whereas liability for indemnification rests on principles of basic negligence (*see New Hampshire Ins. Co. v Jefferson Ins. Co. of New York*, 213 AD2d 325, 326 [1<sup>st</sup> Dept 1995]).

There is sufficient evidence that Brickman has been absolved of liability in the underlying Kings County actions. The jury verdict, affirmed by the judge, has clearly found Port Authority solely liable in the aforesaid actions, rendering the duty to indemnify moot. The policies of the insurers expressly preclude insurers from indemnifying Port Authority unless Brickman is liable in some degree. The question as to whether Brickman's operations were negligent and the cause of the traffic accident has been resolved.

The remaining issue concerns the duty to defend Port Authority in these actions. The primary insurer would have the broader responsibility here. “[A]n excess carrier may protect its interest by participating in the defense, but, unlike a primary insurer, has no obligation to do so”

(see *Purdue Frederick Co. v Steadfast Ins. Co.*, 40 AD3d 285, 286 [1<sup>st</sup> Dept 2007], citing *Gen. Motors Acceptance Corp. v Nationwide Ins. Co.*, 4NY3d 451, 456 [2005]). In this case, Everest provides in its policy a right but not a duty to defend or associate in the defense of an insured. (see Section I-Coverage, A. Insuring Agreement, 2. Defense).

As for Ace, the primary insurer, its policy with Brickman and Port Authority includes this provision, Defense, Investigation, Settlement, Legal Expenses and Interest on Judgments, which provides as follows:

“This insurance does not apply to defense, investigation, settlement or legal expenses, or prejudgment interest arising out of any “occurrence” or offenses, but we shall have the right and opportunity to assume from the insured the defense and control of any claim or “suit”, including any appeal from a judgment, seeking payment of damages covered under this policy that we believe likely to exceed the “retained limit.” In such event we and the insured shall cooperate fully.”

*Id.*

“Retained limit” is defined in this policy as the monetary limit shown in its declarations.

Pursuant to this provision, Ace has a right and not a duty to defend Brickman and /or Port Authority in lawsuits alleging them as defendants. The insurer’s duty to defend is a purely contractual obligation under New York law. Thus, parties to a policy have the discretion to modify such a duty. In some cases, an insurer can rule out a duty to defend certain claims in its policy (see *Henderson v Aetna Cas. & Sur. Co.*, 55 NY2d 947, 948 [1982]). Therefore, while in this case, the allegations in the underlying Kings County actions do relate to a covered occurrence in Ace’s policy with Brickman, thus triggering a duty to defend, regardless of the ultimate outcome, the language in the policy confines Ace to a right to assume the defense of its

insureds.

The court finds that, in analyzing the policies of the two insurers, the insurers have no duty to defend or indemnify Port Authority with respect to the two personal injury actions pending in Kings County, and that the motion and cross motion to dismiss of Ace and Everest shall be granted.

#### PORT AUTHORITY'S CROSS MOTIONS

In motion sequence number 001, Port Authority cross-moves for leave to amend its complaint against Brickman to include a declaration that Brickman failed to procure adequate insurance for Port Authority upon entering its contractor's agreement. While acknowledging that motions to amend a pleading pursuant to CPLR 3025 (b) are freely granted, Brickman, in its reply papers, argues that the motion is devoid of merit and untimely. According to Brickman, the failure to procure insurance sounds in breach of contract, which is governed by the six-year statute of limitations (*see* CPLR 213[2]). Assuming that the statute began to accrue on the dates that Brickman's counsel at the time of the Kings County actions rejected Port Authority's tenders, based on two letters dated August 5, 2009 and December 7, 2009, Brickman contends that the proposed claim would have been time-barred by 2015.

This court agrees with the above argument. The six-year statute of limitations would be applicable in this case. Alternatively, this additional claim would be precluded on *res judicata* grounds, in light of the aforesaid Kings County court order. Thus, the motion for leave to amend is denied.

In motion sequence number 002, Port Authority also cross-moves for partial summary judgment in its declaratory claims against Ace and Everest. As this court has granted the

insurers' motion and cross motion to dismiss, based on the language of the policies and the jury verdict and court rulings in the Kings County actions, the court shall deny the cross motion, and dismiss this action in its entirety.

Accordingly, it is

ORDERED and ADJUDGED in motion sequence number 001, that defendant Brickman Group, LTD., LLC's motion to dismiss the complaint is granted; and it is further

ORDERED and ADJUDGED in motion sequence number 002, that defendant Ace American Insurance Company's motion to dismiss the complaint is granted; and it is further

ORDERED and ADJUDGED in motion sequence number 002, that defendant Everest National Insurance Company's cross motion for dismissal of the complaint is dismissed; and it is further

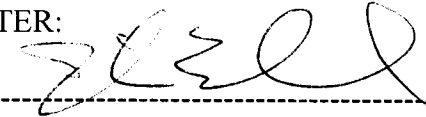
ORDERED and ADJUDGED in motion sequence number 001, that plaintiff Port Authority of New York and New Jersey's cross motion for leave to amend its complaint is denied; and it is further

ORDERED and ADJUDGED in motion sequence number 002, that plaintiff Port Authority of New York and New Jersey's cross motion for partial summary judgment is denied; and it is further

ORDERED and ADJUDGED that the complaint is dismissed in its entirety as against defendants, with costs and disbursements to said defendants as taxed by the Clerk of this Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

Dated: 6-26-2018

ENTER:



A handwritten signature in black ink, appearing to read 'D. B. Cohen', is written over a horizontal dashed line.

J.S.C.

**HON. DAVID B. COHEN**  
**J.S.C.**