SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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TRICON CONSTRUCTION, LLC and GRANGE MUTUAL CASUALTY COMPANY,

Plaintiffs,

-against-

MAIN STREET AMERICA ASSURANCE and ARCH INSURANCE COMPANY,

Defendants.

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Index No. 156755/17
Motion Seq. No. 001

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In this insurance action seeking declaratory judgment, plaintiff Tricon Construction, LLC (Tricon) and Grange Mutual Casualty Company (Grange) move, pursuant to CPLR 3212, for summary judgment, declaring (1) that defendant Main Street America Insurance Company (MSA) is required to defend Tricon in an underlying action entitled *Deschaine v Tricon Construction, LLC* (index No. 161654/14); (2) that MSA is estopped, pursuant to Insurance Law § 3420 (d) (2), from relying on exclusions and conditions in the MSA policy to deny coverage to Tricon; (3) that MSA's additional insured coverage for Tricon is primary over coverage provide to Tricon by Grange; and (4) that MSA is obligated to reimburse all post-tender defense costs incurred by Grange to defend Tricon, plus statutory interest.

BACKGROUND

The plaintiff in the in the underlying action allegedly fell off a baker's scaffold after receiving an electrical shock while working on the construction of a Dollar Tree Store in Cobleskill, New York. The owner of the subject property, nonparty CP Plaza Limited Partnership (CP Plaza), hired Tricon as a general contractor on the Dollar Tree project. Tricon subcontracted with Boyle to perform work on the project. Boyle, in turn, sub-subcontracted with

nonparty AMZ Construction Services, Inc. (AMZ), the employer of the plaintiff in the underlying action, to perform work on the proect.

In November 2014, Robert Deschaine (Descahine), the plaintiff in the underlying action, brought the underlying complaint, alleging that Tricon, Boyle, C.P. Plaza and two other defendants, Dollar Tree Stores, Inc. (Dollar Tree) and National Realty & Development Corp., were liable under Labor Law §§ 240 (1) and 241 (6), as well as Labor Law § 200 and common-law neglignece. Boyle and Dollar Tree each brought third-party actions against AMZ. Aside from this declaratory judgment action, the underlying action also provided another offshoot declaratory judgment action entitled *Boyle v Cincinnati Indemnity Company*, index No. 655704/2017. In that action Boyle and MSA seek a judgment declaring that the insurer of plaintiff's employer owes Boyle additional insured coverage.

Grange first requested defense and indemity, on behalf of Tricon, by a letter dated December 13, 2013. Moreover, Tricon's counsel tendered to Boyle and MSA on February 3, 2015. MSA did not respond to either tender until it filed an answer in this matter on September 15, 2017. Faced with MSA's unresponsiveness, Grange has provided a defense to Tricon in the underlying matter.

DISCUSSION

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a

matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

Additional Insured Status

Plaintiffs submit the general general liability policy that MSA issued to Boyle. It provides a limit of $1,000,000 per occurence and a $2,000,0000 aggregate limit. As to additional insureds, it provides, in relevant part: "Any person(s) or organization(s) for whom you are performing operations is also an additional insured 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." The Tricon/Boyle contract provides that Boyle is to procure insurance

naming Tricon as an additional insured, stating that Tricon and Dollar Tree "shall appear as additional insureds on any such insurance policies maintained or procured by [Boyle] as required hereunder" (Tricon/Boyle agreement at § 8.1).

In opposition, MSA argues that the term "appear" in this provision is ambiguous. This argument fails as the provision plainly requires Boyle to make Tricon an additional insured on its insurance policy. As there is no ambiguity as to this point in either the Tricon/Boyle agreement, or the MSA policy, Tricon is clearly an additional insured under the policy and Tricon is entitled to a declaration to that effect.

Estoppel Under Insurance Law § 3420 (d) (2)

In opposition, MSA does not argue that any exclusions or conditions justify a denial of coverage to Tricon. Accordingly, and as the court has already held that Tricon is entitled to coverage from MSA, the branch of Tricon's motion seeking a declaration estopping MSA from relying on exclusions and conditions in its policy, pursuant to Insurance Law § 3420 (d) (2), is denied as moot.

Order of Coverage

As Tricon is covered by the MSA policy as well as a Grange policy, the court must decide the question of the order of covereage. The policy which Grange issued to Tricon contains an "Other Insurance" provision that states that the Grange policy "is primary except when Paragraph b below applies" (Grange policy No. CUP 2642240--00, § IV [4] [a]). The Grange policy provides that it is excess over "[a]ny other primary insurance available to [Tricon] covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsemant" (*id.* at IV [4] [b]).

The MSA policy also contains provisions making that policy excess in certain circumstances (policy no. MPU 5010H, §§ III [H] [1] and III [H] [2]). However, the MSA policy includes a "Contractors Extension Endorsement," which provides, in relevant part, that:

> "[i]f a written contract or agreement ... requires this insurance to be primary for any person or organization, with whom you agree to include in paragraph C ... this Other Insurance provision is applicable. This insurance is primary. This insurance is also noncontributory which means we will not seek contribution from other insurance available to the person or organization with whom you agree to include [in paragraph C]."

Plaintiffs argue that there is an implication of primacy in the Tricon/Boyle agreeement's requirement that Boyle procure additional insured coverage for Tricon. In support of this reading of the agreement, plaintiffs cite to *Pecker Iron Works of NY v Travelers Ins. Co.* (99 NY2d 391 [2003]). *Pecker Iron Works* held that coverage for additional insureds is primary unless the parties unambiguously state otherwise (*id.* at 393). The Court of Appeals' holding was based on the meaning of "additional insured," which, the Court noted, was "well-understood" to be "an entity enjoying the same protection as the named insured" (*id.* at 393 [internal quotation marks and citation omitted]).

Thus, plaintiffs are clearly correct that, as the parties have not explicitly made Tricon's additional insurance excess, the agreement between Tricon and Boyle requires the MSA policy to be primary for Tricon. Thus, the "Contractors Extension Endorsement" in the MSA policy is applicable, as is "Other Insurance" provision in the Grange policy. Both point to the conclusion that Grange's policy is excess over the primary coverage provided to Tricon by the MSA policy.

Attorney's Fees

As MSA's obligation to defend Tricon is clear, and as that obligation is primary to Grange's obligation to defend Tricon, plaintiffs are entitled not only to a defense from MSA, but

also to recoup reasonable attorney's fees expended defending Tricon to this point in the litigation.

CONCLUSION

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is granted to the extent that it is

ORDERED, ADJUDGED, and DECLARED that defendant Main Street America Insurance Company is required to defend plaintiff Tricon Construction, LLC in an underlying action entitled Deschaine v Tricon Construction, LLC (index No. 161654/14); and it is further

ORDERED, ADJUDGED and DECLARED that defendant MSA's insurance policy is primary over excess coverage provided by plaintiff Grange Mutual Casualty Company; and it is further

ORDERED, ADJUDGED and DECLARED that defendant Main Street America Insurance Company is required to reimburse plaintiff Grange Mutual Casualty Company for all reasonable attorney's fees expended on defending Tricon Construction, LLC; and it is further

ORDERED that the issue of reasonable attorney's fees is hereby severed and referred to Hon. Ira Gammerman to hear and determine; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee.

This constitutes the decision and order of the Court.

Dated: July 23, 2018

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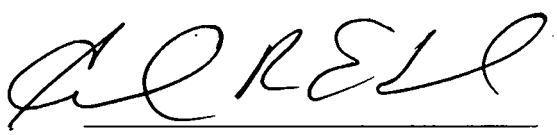

Hon. CAROL R. EDMEAD, JSC

HON. CAROL R. EDMEAD
J.S.C.