

**Port Auth. of N.Y. & N.J. v Everest Natl. Ins. Co.**

2018 NY Slip Op 31795(U)

April 4, 2018

Supreme Court, New York County

Docket Number: 653659/13

Judge: Robert R. Reed

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 43

-----x  
THE PORT AUTHORITY OF NEW YORK AND NEW  
JERSEY and BOVIS LEND LEASE LMB, INC.,

Plaintiffs,

Index No. 653659/13

Mot Seq. No. 002

- against -

EVEREST NATIONAL INSURANCE CO.,

Defendant.  
-----x

**ROBERT R. REED, J.S.C.:**

Plaintiffs The Port Authority of New York and New Jersey ("Port Authority") and Bovis Lend Lease LMB, Inc. ("Bovis") move, by Order to Show Cause, for an order enforcing the terms of emails they exchanged with defendant, Everest National Insurance Co. ("ENIC"), as a settlement agreement.

**BACKGROUND**

Plaintiffs commenced this action seeking, among other things, a declaration that ENIC is obligated to defend and indemnify them in an underlying personal injury action, *Sutherland v The City of New York* (Sup Ct, NY County, index no. 401155/10) (the "underlying action"). The plaintiff in the underlying action, an employee of E.E. Cruz & Company, Inc. ("E.E. Cruz"), sought to recover damages for personal injuries she allegedly sustained while working on a construction project at the World Trade Center site ("WTC Project") on December 9, 2008. E.E. Cruz was a subcontractor of Bovis on the WTC Project. The *Sutherland* plaintiff alleged that the accident arose out of the work and negligence of E.E. Cruz.

Plaintiffs in the within action were covered as additional insureds under an automobile and general liability insurance policy issued by Arch Insurance Company ("Arch") to E.E. Cruz. The Arch policy provided liability coverage up to \$1,000,000. By letter dated 26, 2011, Arch agreed to defend and indemnify plaintiffs with respect to the underlying action (Order to Show Cause, Exh B).

Plaintiffs were also covered as additional insureds under an excess liability policy, policy No. 71C400056081, issued by ENIC to E.E. Cruz, covering the period June 1, 2008 to June 1, 2009. The "Other Insurance" provision of the ENIC policy states, in part:

"5. Other Insurance

- a. This insurance is excess over, and will not contribute with any 'other insurance', whether primary, excess, contingent or any other basis. This condition will not apply to insurance specifically written as excess over this insurance.
- b. When this insurance is excess over 'other insurance', we will pay only our share of the loss that exceeds the sum of:
  - (1) The total amount that all such 'other insurance' would pay for the loss in the absence of this insurance; and
  - (2) The total of all deductible and self insured amounts under all that 'other insurance'

(Attorney Affirm, Exh C).

The Complaint in this action seeks (1) a declaration that ENIC is obligated to defend and indemnify plaintiffs in the

underlying action (first cause of action); (2) damages from ENIC for breach of its obligation to defend and indemnify plaintiffs in the underlying action (second cause of action); and (3) damages from ENIC for breach of the implied covenant of good faith and fair dealing (third cause of action).

Defendant's answer includes general denials of the allegations in the Complaint and numerous affirmative defenses. For example, relying on the "Other Insurance" provision in the ENIC policy, defendant asserts that it has no obligation to defend or indemnify plaintiffs as additional insureds until the full limits of liability of all other insurance available to plaintiffs have been exhausted. In its Notice for Documents & Inspection, defendant requested, among other things, all insurance policies insuring Port Authority and Bovis on December 9, 2009 (Attorney Affidavit, Exh D).

Plaintiffs previously moved for, among other things, summary judgment declaring that the ENIC policy follows the form of the Arch policy; that ENIC is obligated to defend and indemnify plaintiffs in the underlying action; and that ENIC is obligated to defend and indemnify plaintiffs for any judgment or settlement against them in the underlying action that exceeds the limits of the Arch policy.

Counsel for ENIC offered to settle the action instead of opposing plaintiffs' motion for summary judgment, and the parties exchanged a series of emails. In an email dated September 23,

2014, then counsel for defendant stated, in part, that ENIC "is willing to accept the Port Authority and Bovis as additional insured but only for \$4 million of the \$10 million limits of its policy" (Attorney Affirm, Exh H). Plaintiffs' counsel replied in an email dated October 24, 2014, stating "[w]e accept [ENIC's] proposal to provide Port Authority and Bovis \$4 million of additional insured coverage on top of Arch's Insurance \$1 million. We will draft a settlement agreement" (Attorney Affirm, Exh I).

It appears that the parties did not notify the Court of their efforts to settle. Thus, by order entered April 8, 2015, this Court (Reed, J.) granted plaintiffs' summary judgment motion on default, and directed plaintiffs to submit a settled order to the Clerk of the Court. The submissions do not include a settled order from plaintiffs.

In any event, counsel for E.E. Cruz sought confirmation of insurance coverage for plaintiffs in the underlying action. In an email dated April 23, 2015, counsel for E.E. Cruz stated:

"We just received a settlement from plaintiff's counsel of \$4 million. Thus, our firm is coordinating with counsel for [Port Authority/Bovis] to substitute in as counsel and defend [Port Authority/Bovis], along with E.E. Cruz going forward so that one firm will be defending all of the defendants under the Arch/[ENIC] policies.

I just need direct confirmation from [ENIC] that it has agreed to defend [Port Authority/Bovis] up to \$4 million and request that with this email ..."

(Order to Show Cause, Exh G).

Counsel for ENIC replied in an email dated April 23, 2015, stating that "[t]he agreement among [ENIC], the Port Authority, Bovis and Arch is that [ENIC] accepts the Port Authority and Bovis as additional insureds under the excess policy issued to EE Cruz but only for limits of \$4 million with the [ENIC] policy applying after the Arch policy. Brian [Kalman] is preparing an agreement that embodies the foregoing, but we haven't received it yet. As to the [ENIC] rep, it is Bob Donovan ..." (Attorney Affirm, Exh J).

Thereafter, plaintiffs' counsel drafted a Settlement Agreement & Release, which states, in part:

"Agreement to defend and indemnify: Arch Insurance Company agrees to provide a defense and indemnity to [the Port Authority] and Bovis, as additional insureds for the Underlying Action on a primary, non-contributory basis up to \$1,000,000.00 which is the applicable limits of the Arch Policy. [ENIC] agrees that the [ENIC] Policy, up to an available limit of \$4,000,000, follows the form of the Arch Policy and will defend and indemnify [the Port Authority] and Bovis in the award and/or judgment and/or settlement that may be rendered against [the Port Authority] and Bovis in the Underlying Action on a primary non-contributory basis to the extent that the defense costs, award, judgment or settlement exceed the limits of the Arch Policy. None of [the Port Authority's] or Bovis' insurance policies are triggered until after the \$1,000,000 Arch Policy and \$4,000,000 of the [ENIC] Policy are exhausted"

(Attorney Affirm, Exh K).

Defendant substituted counsel. The new counsel proposed that the Settlement Agreement & Release be amended to state:

Coverage under [ENIC] Policy: [ENIC] acknowledges and accepts Port Authority and Bovis as additional insureds under the [ENIC] policy for the claims made against Port Authority and Bovis in the amount of FOUR MILLION DOLLARS (\$4,000,000) upon exhaustion of the limits of liability of the Arch Policy and any other insurance providing coverage to Port Authority and/or Bovis for the Underlying Action"

(Attorney Affirm, Exh L). The submissions do not include any further attempts by the parties to reach a final agreement.

As stated, plaintiffs now seek to enforce the terms of emails they exchanged with defendant as a settlement agreement.

#### **DISCUSSION**

In determining whether a contract exists, the Court must consider whether the plain language of the parties expressed the parties' intention to be bound (*see Bed Bath & Beyond Inc. V IBEX Constr., LLC*, 52 AD3d 413 [1<sup>st</sup> Dept 2008]), and whether there was a meeting of the minds regarding the material terms of the settlement of plaintiffs' claims (*see Henri Assocs. v Saxony Carpet Co., Inc.*, 249 AD2d 63, 66 [1<sup>st</sup> Dept 1998]).

The Court is not persuaded by plaintiffs' urging that the emails constitute a binding agreement. While the emails clearly demonstrate the parties' desire to settle the action, the emails also expressly state that a settlement agreement would be forthcoming.

Furthermore, as stated, the "Other Insurance" provision of the ENIC policy sets forth terms material to any agreement between the parties. The emails exchanged by the parties are silent with respect to any coverage afforded by plaintiffs' own liability insurance policies, despite defendant's discovery requests.

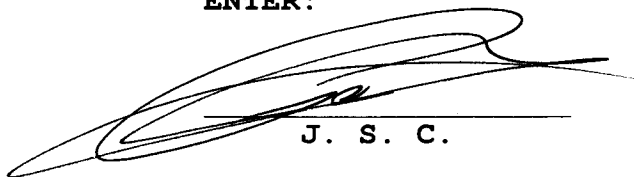
In addition, the competing proposed settlement agreement provisions make clear that there is no meeting of the minds as to the priority of coverage between ENIC and any of plaintiffs' other insurance carriers.

Accordingly, it is

ORDERED that plaintiffs' motion, by Order to Show Cause, for an order enforcing the terms of emails they exchanged with defendant as a settlement agreement is denied.

**Dated:** April 4, 2018

**ENTER:**

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end.

J. S. C.