New York Mar. Gen. Ins. Co. v Arch Specialty Ins. Co.
2019 NY Slip Op 31271(U)
April 15, 2019
Supreme Court, New York County
Docket Number: 656053/2017
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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INDEX NO. 656053/2017

NEW YORK MARINE GENERAL INSURANCE COMPANY, 133 EQUITIES, LLC, and ARTIMUS ASSOCIATES, LLC,

MOTION DATE 08/22/2018

Plaintiffs,

MOTION SEQ. NO. 001

- v -

ARCH SPECIALTY INSURANCE COMPANY and DO RIGHT CONSTRUCTION CORP.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for DEFAULT JUDGMENT.

Kennedys CMK LLP (Ann Odelson, of counsel), for plaintiffs.
Kelly & Curtis, PLLC (Adam B. Curtis, of counsel), for defendant Arch Specialty Insurance Co.

Gerald Lebovits, J.:

Plaintiffs 133 Equities LLC (133 Equities), Artimus Associates, LLC (Artimus) and New York Marine and General Insurance (NY Marine), their insurer, bring this action for breach of contract and for a judgment declaring that defendant Arch Specialty Insurance Company (Arch) must defend and indemnify 133 Equities and Artimus, in an underlying personal injury action (Underlying Action), as additional insureds under a commercial general liability policy that Arch issued to defendant Do Right Construction Corp. (Do Right).

The five-count complaint asserts claims for: (1) judgment declaring that Arch is obligated to provide 133 Equities and Artimus with a defense and indemnification in the Underlying Action on a primary and noncontributory basis; (2) judgment declaring that Arch is obligated to provide reimbursement for the defense costs incurred by or on behalf of 133 Equities and Artimus in the Underlying Action to date with interest; (3) indemnification and/or contribution from Arch in connection with any and all defense or indemnity costs that NY Marine has incurred or will incur on behalf of 133 Equities and Artimus in connection with the Underlying Action; (4) quantum meruit/unjust enrichment, based on Arch's refusal to meet its obligation to fund 133 Equities and Artimus's defense; and (5) breach of contract against Do Right for failure to procure additional insured coverage for 133 Equities and Artimus.

Plaintiffs commenced this action on September 26, 2017. Arch was served with the summons and complaint and, by stipulation dated November 9, 2017, the parties extended its time to answer or otherwise respond to the complaint to December 5, 2017. Arch failed to

appear. Plaintiffs now move for default judgment, pursuant to CPLR 3215, against Arch. Arch cross-moves to dismiss the complaint as against it, pursuant to CPLR 3211 (a) (1) and (7).

I. Background

On December 15, 2015, Do Right entered into a contract with 133 Equities, wherein Do Right agreed to perform work in connection with a construction project at 132 W. 133rd Street, New York, New York (Project). *See* Odelson affirmation, exhibit G. The contract required Do Right to name 133 Equities and Artimus as additional insureds on its general liability insurance policy and required coverage to "be primary and non-contributory to any coverage maintained by Artimus and [133 Equities]." *Id.* at 34.

NY Marine issued a comprehensive general liability insurance policy to 133 Equities and Artimus under policy number GL201400003237, for the policy period of August 27, 2014 to August 27, 2016. *Id.*, exhibit L. Arch issued a commercial general liability policy to Do Right, under policy number AGL0014898-01, for the period of June 30, 2015 to June 30, 2016 (Arch Policy). *Id.*, exhibit M. The Arch Policy includes a "Blanket Additional Insured Endorsement," which states, in pertinent part, as follows:

> "**SECTION II - WHO IS AN INSURED** is amended to include as an additional insured those persons or organizations who are required under a written contract with you to be named as an additional insured, but only with respect to liability for 'bodily injury', 'property damage', or 'personal and advertising injury' caused, in whole or in part, by your acts or omissions or the acts or omissions of your subcontractors:
>
> > "a. In the performance of your ongoing operations or 'your work', including 'your work' that has been completed; or
> >
> > "b. In connection with your premises owned by or rented to you."

Id., form number 00 AGL0100 00 02 13.

On May 5, 2016, while working on the Project, Jose Emmanuel Ramirez (Ramirez), an employee of Do Right, was injured when he tripped and fell on a defective or unfinished staircase. On or about May 17, 2016, Ramirez commenced the Underlying Action, entitled *Ramirez v 133 Equities, LLC and Artimus Associates, LLC*, under index No. 301861/2016, in the Supreme Court of the State of New York, Bronx County. *Id.*, exhibit E. On February 6, 2017, 133 Equities and Artimus filed a third-party complaint against Do Right in the Underlying Action, asserting causes of action for contractual indemnification, common law indemnification and contribution, and breach of contract for failure to procure insurance. *Id.*, exhibit H. On July 17, 2017, Do Right answered the third-party complaint. *Id.*, exhibit I.

By letter dated February 3, 2017, 133 Equities and Artimus tendered their defense and indemnification, in connection with the Underlying Action, to Arch and Do Right. *Id.*, exhibit N. By letter dated April 19, 2017, Arch disclaimed coverage, because the complaint in the Underlying Action did not allege that Ramirez was an employee of Do Right. *Id.*, exhibit O. On or about April 25, 2017, Ramirez served a supplemental bill of particulars in the Underlying Action that alleged he was employed as a laborer for Do Right at the time of his accident. *Id.*, exhibit F. By letter dated May 17, 2017, 133 Equities and Artimus requested that Arch reconsider its coverage position based on the supplemental bill of particulars. *Id.*, exhibit P. On July 19, 2017, Arch again rejected the tender. *Id.*, exhibit Q.

Plaintiffs commenced the instant action on September 26, 2017. Arch was served with the summons and complaint by personal service on October 16, 2017. *Id.*, exhibit B. By stipulation dated November 9, 2017, the parties extended Arch's time to answer or otherwise respond to the complaint to December 5, 2017. *Id.* exhibit C.

By a "Reservation of Rights" dated December 4, 2017, Arch agreed to undertake plaintiffs' defense in the Underlying Action, while "reserv[ing] the right to disclaim coverage and deny liability with respect to any indemnity obligation on the ground that 133 Equities and Artimus do not qualify as additional insureds on the policy in the event it is determined that their liabilities were not caused by Do Right's operations." *Id.*, exhibit R at 3. By email dated December 4, 2017, counsel for Arch asked plaintiffs' counsel to "[p]lease confirm if New York Marine will agree to dismiss the DJ against Arch (without prejudice)." Curtis affirmation, exhibit 8 at 1. By email dated December 19, 2017, counsel for Arch again asked that plaintiffs' counsel "confirm that you will be dismissing this [declaratory judgment action] now that Arch has agreed to provide coverage under an ROR." *Id.* at 4.

By letter dated December 19, 2017, plaintiffs' counsel asked that Arch confirm that its coverage in the Underlying Action would be on a primary and noncontributory basis and requested a copy of the Arch Policy. Odelson affirmation, exhibit S. The letter did not mention the instant declaratory judgment action.

By email dated January 29, 2018, Arch responded that it would provide a defense in the Underlying Action on a primary and noncontributory basis, subject to its reservation of rights, and once more requested "a stipulation of discontinuance of the declaratory judgment action." Curtis affirmation, exhibit 9 at 3. Counsel for Arch made an additional request for a stipulation discontinuing the instant declaratory judgment action in emails dated March 13 and April 19, 2018. *Id.* at 2.

By email dated April 24, 2018, plaintiffs' counsel finally responded to Arch's request for discontinuance. Plaintiffs' counsel requested that Arch accept the tender of defense and indemnification in the Underlying Action, without reservation, based on Ramirez's deposition testimony, indicating that the accident occurred while Ramirez was following a Do Right supervisor's instructions to carry plywood from the roof to the first floor. The email concluded that "[u]pon Arch's full acceptance of the Additional Insureds' tender, New York Marine [would] discuss resolving the pending declaratory judgment action." *Id.*; *see also* Odelson affirmation, exhibit T.

Counsel for Arch responded by email dated April 25, 2018, stating that he "was under the impression, based on our communications in January of this year, that you would be discontinuing the declaratory judgment action once Arch agreed to . . . provide a defense and that your failure to discontinue . . . was simply an oversight rather than a litigation strategy." Curtis affirmation, exhibit 9 at 1. In addition, Arch's counsel declined to withdraw its reservation of rights, reasoning that additional discovery may support an alternative proximate cause for the accident and suggesting that Arch may reconsider its position if plaintiffs' counsel provided copies of additional discovery and deposition transcripts from the Underlying Action. *Id.*

By letter dated June 27, 2018, plaintiffs' counsel notified Arch that it would not discontinue the instant declaratory judgment action, reiterated its request that Arch agree to indemnify 133 Equities and Artimus in the Underlying Action, advised Arch of its default status in this action, and requested that Arch immediately answer the Complaint. Odelson affirmation, exhibit D. Plaintiffs filed the instant motion for a default judgment on July 18, 2018.

II. Discussion

Plaintiffs contend that they are entitled to a default judgment on their declaratory judgment claim against Arch, because Arch was properly served and lacks a reasonable excuse for its default. In addition, plaintiffs contend that they have a meritorious claim for declaratory relief against Arch. They argue that Ramirez's testimony establishes that he was acting on Do Right's instructions and under its supervision when he fell and that, therefore, Do Right caused, at least in part, Ramirez's accident. Accordingly, plaintiffs argue, they are entitled to a declaration that Arch is required to indemnify 133 Equities and Artimus as additional insureds under the Arch Policy in connection with the Underlying Action.

Arch responds that the motion should be denied, because it had a good faith belief that the instant action would be voluntarily dismissed, without prejudice, when it agreed to provide a defense in the Underlying Action under a reservation of rights. Arch also argues that the motion for default judgment should be denied, because Arch is now appearing by way of its cross motion to dismiss and because plaintiffs, in filing a request for judicial intervention (RJI), represented to the court that issue had been joined. *See* NYSCEF document number 5.

Finally, Arch contends that plaintiffs' motion should be denied and its cross motion to dismiss should be granted, because plaintiffs' claim for defense is moot and any claim for indemnity is premature, pending a determination of liability in the Underlying Action. As such, Arch argues, there is no justiciable controversy before the court.

On a motion for a default judgment, "the applicant shall file proof of service of the summons and the complaint, . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party." CPLR 3215 (f); *see also Loughran v Giannoti*, 160 AD3d 709, 710 (2d Dept 2018). "In order to successfully oppose a [motion for] default judgment, a defendant must demonstrate a justifiable excuse for his default and a meritorious defense." *Johnson v Deas*, 32 AD3d 253, 254 (1st Dept 2006) (internal quotation marks and citation omitted). "A determination of the sufficiency of the proffered excuse and the statement

of merits rests within the sound discretion of the court." *Marquez v 171 Tenants Corp.*, 161 AD3d 646, 647 (1st Dept 2018) (internal citation omitted)

"[A] declaratory judgment action requires an actual controversy between parties having a stake in the outcome, and is routinely used to resolve coverage issues with respect to claims against insureds." *Mt. McKinley Ins. Co. v Corning Inc.*, 33 AD3d 51, 57 (1st Dept 2006) (internal citation omitted). "However, the policy in this State has been to deny the declaratory judgment where the matter in dispute can be determined in the [underlying] negligence action but to permit the action when the dispute is such that it depends on matters outside of the negligence action or will not arise in the negligence action as a part of the lawsuit." *Allstate Ins. Co. v Santiago*, 98 AD2d 608, 608 (1st Dept 1983) (internal quotation marks and citation omitted).

Here, plaintiffs submit an affidavit of service, demonstrating that Arch was properly served with the summons and complaint. Odelson affirmation, exhibit B. By stipulation, Arch had until December 5, 2017 to answer or otherwise respond to the complaint. *Id.*, exhibit C. It failed to do so.

Arch claims that it reasonably believed that plaintiffs would voluntarily discontinue the instant action following Arch's acceptance of the defense in the Underlying Action. However, nothing in Arch's submissions demonstrates that it had any basis for such belief. Its repeated requests for a discontinuance of the instant action—made on December 4 and 19, 2017 as well as on January 29, March 19 and April 19, 2018—were met with silence or a request that Arch first provide indemnification in the Underlying Action. *See* Curtis affirmation, exhibits 8, 9; Odelson affirmation, exhibits S, T.

Additionally, on June 27, 2018, plaintiffs made their position unequivocal: they would not discontinue the instant declaratory judgment action unless Arch agreed to indemnify 133 Equities and Artimus in the Underlying Action. Odelson affirmation, exhibit D. Furthermore, plaintiffs advised Arch that it was in default and requested that it immediately answer the complaint. *Id.* Arch, nonetheless, failed to act and plaintiffs filed the instant motion for default judgment.

Arch never secured a promised of discontinuance from plaintiffs. Its unfounded belief to the contrary, therefore, does not excuse its failure to appear. *See General Elec. Tech. Servs. Co. v Perez*, 156 AD2d 781, 784 (3d Dept 1989) ("[m]inimal effort[s] to settle a lawsuit do not excuse delay in answering"). Plaintiffs' mistaken representation on an RJI, that issue had been joined (*see* NYSCEF document number 5), did not release Arch of the obligation to timely respond to the complaint. The filing of an RJI merely "cause[s] the assignment of the action to a judge . . . ." 22 NYCRR 202.6.

Nor does Arch's cross motion to dismiss the complaint cure its default. The motion was made almost seven months after Arch's time to answer or otherwise respond to the complaint expired and, as discussed above, Arch fails to offer a reasonable excuse for its failure to act in a timely manner. In addition, Arch fails to make any showing of "good cause" in its application

for an extension of time in which to make the motion, pursuant CPLR 2004.[1] Therefore, the motion is denied as untimely. *See Manhattan Real Estate Equities Group LLC v Pine Equity NY, Inc.*, 2005 WL 5351322, *1 (Sup Ct, NY County, Apr. 01, 2005, index No. 603259/2003) (denying motions to dismiss as untimely, where defendants served the motions "more than nine months after the time when service of [their] answers was required" and "failed to either offer any reasonable excuse for their failure to move in a timely manner or to show any 'good cause' [CPLR 2004] for an extension of time in which to move"), *affd* 27 AD3d 323 (1st Dept 2006).

Plaintiffs have provided proof of service of the summons and complaint, Arch's default and the absence of a justifiable excuse for such default. Nonetheless, plaintiffs' motion for a default judgment must be denied, because they fail to provide proof of facts constituting a claim for a declaratory judgment.

Plaintiffs seek a declaration that Arch has a duty to indemnify 133 Equities and Artimus in the Underlying Action. They point to Ramirez's depositions, in which he testified that he was working under Do Right's direction and supervision when he tripped and fell (*see* Odelson affirmation, exhibit J at 13:13-21, 26:11-15, 31:10-15, 32:8-13, 36:3-11, 29:2-16, 36:3-11; exhibit K at 96:9-98:15, 187:12-188:14). Plaintiffs contend that this satisfies the Blanket Additional Insured Endorsement's requirement that injury be "caused, in whole or in part" by Do Right and triggers additional insured coverage. *Id.*, exhibit M form number 00 AGL0100 00 02 13. This court disagrees.

Plaintiffs rely on *Kel-Mar Designs, Inc. v Harleysville Ins. Co. of N.Y.*, 127 AD3d 662 (1st Dept 2015). There, as here, the subcontractor's insurance policy provided additional insured coverage to the general contractor "only for 'liability caused, in whole or in part, by the acts or omissions of [the subcontractor] . . . in the performance of [the subcontractor's] ongoing operations for the additional insured.'" *Id.* at 663. And the First Department held that the loss in that case triggered the additional insured coverage and required thesubcontractor's insurer to defend and indemnify the general contractor in the underlying personal injury action "regardless of whether the [subcontractor's] employee was negligent or otherwise at fault" for the loss. *Id.*

The *Kel-Mar Designs* line of cases, however, is no longer good law on this point. Instead, the Court of Appeals' recent decision in *Burlington Insurance Co. v. New York City Transit Authority* makes clear that additional-insured coverage of the type at issue here is not triggered merely because acts of the named insured were a but-for cause of the loss.

In particular, the Court of Appeals held that where an additional insured policy's scope is limited to "liability for 'bodily injury', 'property damage,' or 'personal and advertising injury' caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf," the policy extends coverage only when the loss is *proximately* caused by the named insured — that is by the negligence of the named insured. *See* 29 NY3d 313, 321-24 (2017).

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[1] Notably, its reply is the first time Arch seeks an extension of time, which is sufficient reason to deny the application. *See Matter of Leewen Contr. Corp. v Department of Sanitation of City of N.Y.*, 272 AD2d 246, 247 (1st Dept 2000) (declining to address an issue "improperly raised for the first time by petitioner in its reply papers").

Thus, where a declaratory judgment proceeding regarding indemnification and a negligence action for the underlying injury are proceeding in parallel, the declaration of whether or not an insurer must indemnify a party as an additional insured must await the determination of the named insured's liability in the underlying personal-injury action.[2] *See Vargas v City of New York*, 158 AD3d 523, 525 (1st Dept 2018).

Plaintiffs' claim for a declaratory judgment turns on whether Do Right is liable in the Underlying Action. That issue, however, has not yet been determined. Absent that determination, it is premature to decide whether Arch has a duty to indemnify 133 Equities and Artimus as additional insureds. Plaintiffs therefore have failed to provide proof of facts constituting their claim, as needed to obtain a default judgment.

Accordingly, it is hereby

ORDERED that the motion of plaintiffs 133 Equities LLC, Artimus Associates and New York Marine and General Insurance is denied; and it is further

ORDERED that the cross motion of defendant Arch Specialty Insurance Company is denied; and it is further

ORDERED that defendant Arch Specialty Insurance Company shall serve and file its answer by May 17, 2019;

ORDRED that counsel are directed to appear for a preliminary conference in Part 7 of this court, Room 345, 60 Centre Street, on June 5, 2019, at 11 a.m.

4/15/2019
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

[2] Thus, to the extent plaintiffs rely on *E.E. Cruz & Co., Inc. v Axis Surplus Ins. Co.*, 2017 NY Slip Op 32706(U) (Sup Ct, NY County 2017), *aff'd as mod* 165 AD3d 603 (1st Dept 2018) as an example of a court determining proximate cause in a declaratory judgment action regarding whether additional insured coverage was available, the case is inapposite. Unlike the present action, the *E.E. Cruz* case did not proceed in parallel to an underlying negligence action.