Nationwide Mut. Ins. Co. v Century Surety Co.
2019 NY Slip Op 31777(U)
June 20, 2019
Supreme Court, New York County
Docket Number: 656681/2017
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY
PRESENT: HON. GERALD LEBOVITS PART 7
Justice

NATIONWIDE MUTUAL INSURANCE COMPANY and NORTH STAR PAINTING CO., INC. d/b/a K&K PAINTING CO.,

Plaintiffs,

- v -

CENTURY SURETY COMPANY,

Defendant.

INDEX NO. 656681/2017

MOTION DATE 5/29/2019 (001); 3/19/2019 (002)

MOTION SEQUENCE NO: 001, 002

The following papers were read on this motion (002 marked with *)

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits	24-30, *34-48
Answering Affidavits – Exhibits	49-51, *52-54
Replying Affidavits	58; *57

Lance Jon Kalik & Jeffrey A. Beer Jr., *Riker, Danzig, Scherer, Hyland & Perretti LLP* for Plaintiffs
Dan D. Kohane, *Hurwitz & Fine PC*, 1300 Liberty Building, Buffalo, NY 14202 for Defendant

Lebovits, J.:

Motion sequence 001, in which plaintiffs seek summary judgment, and motion sequence number 002, in which defendant seeks this relief, are consolidated here for disposition. For the reasons stated below, each party's motion for summary judgment is denied.

In December 2008, plaintiff North Star Painting Company d/b/a K&K Painting (North Star) was hired by the State of New York Department of Transportation (the State, or DOT)[1] to perform work on bridges in various locations in Cattaraugus and Chautauqua Counties. The State's general contract terms provided, at Section 107-06, that North Star was to "procure and maintain, at its own expense . . . , insurance for liability for damages imposed by law, for the work covered by the contract" (NYSCEF Doc. No. 2). North Star had to purchase, inter alia:

> 1) insurance which covered North Star's liability and a policy which covered North Star's subcontractors;
> 2) owners' and contractors' protective liability insurance (OCP), which covered the State's liability for damages incurred by the State and its municipalities and employees for all operations that the contract described;

[1] The State is the real party in interest, but at times has proceeded or been referred to as "DOT," the State agency directly involved in the project.

> 3) contractor's protective liability insurance for damages arising out of North Star and its subcontractors' work; and
> 4) commercial general liability insurance covering "liability for damages imposed by law upon . . . the State of New York . . . with respect to temporarily opening any portion of the State construction project under this contract agreement, until the construction or reconstruction . . . has been accepted by the State" (NYSCEF Doc. No. 2 at *7 [Contract § 107-06 (5)]).

Accordingly, North Star purchased OCP from Century Surety Company (Century) (NYSCEF Doc. No. 3). DOT is the only insured on this policy (NYSCEF Doc. No. 51). The policy provided that it would "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' . . . to which this insurance applies" and that Century had a duty to defend in such circumstances (NYSCEF Doc. No. 3 at *6). In addition, North Star obtained a contractor's liability policy and an excess coverage umbrella policy from plaintiff Nationwide Mutual Insurance Company (Nationwide) NYSCEF Doc. No. 50). These policies named North Star as the policy holder. The State is an "additional insured" in the policies (*see Valvo v State of New York, Ct Cl,* Moriarty, J., claim No. 118356, motion nos. M-81087, CM-81467, CM-81477, October 2, 2012 [NYSCEF Doc. No. 42]).

Philip J. Valvo, a North Star employee, is a painter and blaster who worked on the project at the I-76/Route 17 overpass. Mr. Valvo sustained injuries when, on June 12, 2009, the ladder on which he was standing kicked out from under him.[2] He commenced an action against the State in the Court of Claims (*Valvo v State of New York, Ct Cl,* Moriarty, J., claim No. 118356). The Nationwide and Century policies were in effect on the accident date. Therefore, the State commenced two third-party actions in the *Valvo* case, one against each of the insurers.

In *Valvo*, the State moved, and both Nationwide and Century cross-moved, for summary judgment on the issues of the insurers' duties to defend and to indemnify. The court's October 2, 2012 decision held that Century had a duty to defend the State, as DOT is the named insured on the policy (NYSCEF Doc. No. 42 at *8), but that it was premature to decide whether Century had a duty to indemnify, because "too many questions of fact remain which preclude an award to the State or to Century on the issue of indemnification" (*id.* at 10). The court did not determine whether Nationwide was responsible for primary or excess coverage because of its conclusion that the complaint did not set forth a prima facie case on coverage. Accordingly, the court could not "conclude, as a matter of law, that Nationwide is obligated to defend and indemnify" (*id.* at 11).

Century had assumed the State's defense in *Valvo* while reserving its rights (*see, e.g., First Jeffersonian Assoc. v Insurance Co. of N. Am.*, 262 AD2d 133, 134 [1st Dept 1999]), and, Nationwide states, the third-party complaint was dismissed without prejudice (*see* NYSCEF Doc. No. 25 at *3). In November 2015, the State commenced an action against North Star for contractual and common law indemnification (NYSCEF Doc. No. 43 [*DOT* complaint]). In a March 23, 2017 decision, the court granted the State's summary judgment motion based on the contract and common law, and declared that the State was entitled to conditional indemnification by North Star

[2] There already has been a judgment on the issue of liability under the scaffold law.

along with conditional payment of its past and future defense costs and any sums the State paid to Mr. Valvo in the underlying case (*New York State Dept. of Transp. v North Star Painting Co., Inc.*, Ct Cl, Moriarty, J., Index No. 84237, April 20, 2017 [NYSCEF Doc. No. 44], *affd* 163 AD3d 1416 [4th Dept 2018]). The Fourth Department affirmed the determination, as the contract between the State and North Star acknowledged that North Star's purchase of the OCP policy did not eliminate or limit its duty to indemnify (*New York State Dept. of Transp. v North Star Painting Co., Inc.*, 163 AD3d 1416, 1417-1418 [4th Dept 2018] [*Dept of Transportation*]).

The day after Judge Moriarty's decision, Century sent an email to Nationwide which stated that Nationwide was responsible for 100% of any judgment plus attorney's fees (NYSCEF Doc. No. 7). In its responsive letter dated April 4, 2017 (NYSCEF Doc. No. 8), Nationwide stated that because the trial court order granted conditional indemnity only it was not responsible for indemnification. On November 1, 2017, plaintiffs commenced this declaratory judgment action (NYSCEF Doc. No. 1 [summons and complaint]).

In support of their current motion, plaintiffs argue that North Star paid $9,659 for the Century policy, and the policy would be valueless if North Star were obliged to reimburse Century for any claim the latter covered (NYSCEF Doc. No. 25 at *5-6 [citing *Lend Lease [US] Constr. LMB Inc. v Zurich Am. Ins. Co.*, 28 NY3d 675, 685 (2017)]). The policy states that Century's coverage

> "is primary insurance and we will not seek contribution from any other insurance available to you and we will not seek contribution from any other insurance available to you unless the other insurance is provided by a contractor other than the designated 'contractor for the same operation and job location designated in the Declarations"

(NYSCEF Doc. No. 3 at *24 [Century policy, Section IV, ¶ 8]). By this language, plaintiffs assert, Century expressly waived any right it may have had to seek contribution from Nationwide (NYSCEF Doc. No. 25 at 6; NYSCEF Doc. No. 58 at *6-10).

Plaintiffs also cite *Arch Ins. Co. v Harleysville Worcester Ins. Co.* (US Dist Ct, SD NY, No. 13 Civ. 7350 [DLC], Cote, J., 2014 [*Arch*]) in support of its position that Century's obligation was primary as to the first million dollars. In *Arch*, an employee of Erie Painting (Erie) commenced a labor law action due to injuries he allegedly sustained while he worked on a New York Thruway Authority (Authority) project. Erie had purchased an OCPL policy from Arch which contained provisions similar to the ones at issue here (*id.* at **1-2). Erie also had a general commercial policy from Illinois Union and a policy from Harleysville which covered automobile-related incidents (*id.* at *2). The court found that the express terms of the OCP policy barred Arch, as the OCP insurer, from seeking either contribution or indemnification from the other insurers (*id.* at **6-7).

In addition, plaintiffs argue that the Court in *Dept of Transportation* only found that North Star had to indemnify the State on the condition that the State incurred any out-of-pocket expenses. Thus, according to plaintiff, the Court did not rule that North Star had any duties with respect to Century (NYSCEF Doc. No. 25 at 8-9; NYSCEF Doc. No. 58 at *7 [citing *New York State Thruway Auth. v Erie Painting and Maintenance, Inc.*, Sup Ct, Queens County, Aug. 20, 2014,

Weiss, J., Index No. 27722/2001 (filed as NYSCEF Doc. No. 30) (finding that indemnification was not triggered because OCP policy fully covered the State's costs)]). Plaintiffs also stress that the Fourth Department's order in *Dept of Transportation* granted conditional indemnification only.

Defendant opposes the motion and also moves for a declaration that plaintiffs owe defendant full indemnification (*see* NYSCEF Doc. No. 34 [Notice of Motion]). In support, it points to the trial court and Fourth Department orders in the underlying action, which found that North Star owes the State a duty of indemnification. Rather than starting a new action and attempting to distinguish this precedent or to show that it is inapplicable, defendant states, plaintiffs should have challenged the Fourth Department decision. Moreover, defendant states, plaintiffs "had every opportunity to make those arguments before the trial court and before the Fourth Department in the underlying action" (NYSCEF Doc. No. 51 at *10).

Further, defendant argues that priority of coverage is not the issue and that plaintiffs conflate the concepts of tort liability and priority of coverage. Here, defendant states, it seeks to enforce both its indemnification claim in the underlying lawsuit (NYSCEF Doc. No. 49, ¶ 9) and the conditional order of indemnification in *DOT* (*id.* ¶¶ 9-11). Defendant states that plaintiffs misinterpret "the 'other insurance' language in the Century Policy" (NYSCEF Doc. No. 35, ¶¶ 24), as it only applies to contributions from any other insurers of the State, not to insurers of North Star (*id.* ¶ 26).

Defendant additionally points out that to satisfy DOT's standard contract requirement, North Star also acquired contractor's liability insurance for itself and its subcontracts, and commercial general liability insurance (*id.* ¶¶ 18-19). North Star's obligation to indemnify the State, moreover, applied to "suits, claims, actions, damages and costs, of every name and description resulting from the work under its contract" (*id.* ¶ 20). In response to plaintiffs' reference to the $9,659 cost of the Century OCP policy, defendant notes that the cost of the Nationwide Commercial General Liability policy was $91,847. While not dispositive, "[t]his large disparity in premiums tends to illustrate that the [commercial general liability] policy was intended to cover the majority of the risk associated with the construction project and that indemnification was contemplated" (NYSCEF Doc. No. 51 at *6 [citing *North Star Reinsurance Corp. V Continental Ins. Co.*, 82 NY2d 281, 292 [1993] [*North Star Reinsurance*]).

Defendant cites *Harleysville Ins. Co. v Travelers Ins. Co.* (38 AD3d 1364 [4th Dept 2007] [*Harleysville*], *lv denied* 9 NY3d 811 [2007]), for the principle that its right to indemnification exists notwithstanding the "other insurance" provision on which plaintiffs rely. Defendant points to a Michigan case, *Wausau Underwriters Ins. Co. v Ajax Paving Indus.* (256 Mich App 646, 652 [Ct App, Michigan 2003] [*Wausau*], *lv denied* 469 Mich 970 [Sup Ct, Michigan 2003]), which found that the purchase of an OCP policy does not "effectively extinguish[] an express contractual right to indemnification contained within the same contract" (*see also* NYSCEF Doc. No. 48 at **17-19 [relying on *Wallace v National R.R. Passenger Corp.*, 5 F Supp 3d 452 [SD NY 2014]). Further, defendant distinguishes *Arch* on the ground that in *Arch*, the court examined the insurer's right to common law indemnification. Here, on the other hand, it is the State itself that seeks relief, and it relies on a conditional order of indemnification in its favor (NYSCEF Doc. No. 51 at **9-10).

Analysis

"As a rule, an insurer that has paid a claim on behalf of an insured who is only vicariously liable for the loss is entitled to recover the amount paid by way of indemnity from the wrongdoer" (*North Star Reinsurance*, 82 NY2d at 291). Where the owner is liable only under Labor Law § 240, for strict liability, it is appropriate to direct conditional indemnification should plaintiff in the underlying lawsuit prevail (*Lopez v Markos*, 245 AD2d 54, 55 [1st Dept 1997] [citing *Rice v PCM Dev. Agency Co.*, 230 AD2d898 [2d Dept 1996]; *see Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 272-273 [1st Dept 2007]). Therefore, the Fourth Department in *Dept of Transportation* affirmed the trial court's conditional order granting indemnification to the State. Although *Dept of Transportation* involved the parties in the underlying action rather than their insurers, the court finds the determination highly persuasive as it interprets the same policies and liabilities at issue here. Accordingly, it adopts the Fourth Department's conclusion that Century is conditionally entitled to indemnification.

In *Dept of Transportation*, moreover, the Court rejected the argument that plaintiffs propound here: that the OCP policy barred the State from seeking indemnification. Instead, the Court expressly found that because "the specifications incorporated into the contract provide that [North Star's] obligation to indemnify and hold harmless" was not discharged by the purchase "of any insurance for liability for damages imposed by law upon [defendant]," North Star's procurement of the OCP policy did not discharge its indemnification obligations (*Dept of Transportation*, 163 AD3d at 1418-1419). Plaintiffs' contention that this only applied to the State's out-of-pocket expenses contradicts the language and spirit of the order. Furthermore, as defendant suggests, plaintiffs should have appealed from or sought clarification of that order, rather than starting a new action before a different court.

Plaintiffs argue that there is caselaw that supports their position, and the law on this issue is not altogether consistent. However, the court finds ample support in decisions issued in this State. In addition to *Dept of Transportation*, the reasoning in *North Star Reinsurance*[3] is especially instructive. In *North Star Reinsurance*, the Court of Appeals rejected the notion that when the contractor purchases an OCP policy for the owner, it automatically "preindemnifies" the owner and waives the owner's right to indemnification. Instead, where, as here, the language of the underlying contract "explicitly reserve[s] the owners' right to indemnification from the contractor," the right exists notwithstanding the existence of the OCP policy (82 NY2d at 292). A contrary determination would eviscerate the right to indemnification by barring such claims "wherever a wrongdoer procured insurance on another's behalf" (*id.* at 293). *North Star* also expressly rejected another argument of plaintiffs here: that as long as the owner itself is not out-of-pocket, indemnification cannot lie (*see id.* at 294). *Wausau* (256 Mich App at 652), a Michigan case, also points out the inherent illogic in "the contention that a contractual obligation to procure insurance effectively extinguishes an express contractual right to indemnification contained within the same contract." Here, too, the contract which mandated that North Star purchase an OCP policy

[3] *North Star* examined the issue in the context of the anti-subrogation rule, as both policies were issued by the same insurer.

also directed it to obtain general policies on its own behalf which included indemnification coverage.

Plaintiffs' other arguments are similarly unpersuasive. Their references to the cost of the OCP policy are unavailing, as the Nationwide policy cost around ten times as much. The amount a party pays for the insurance policy, while not dispositive, is "an important factor" (*U.S. Fire Ins. Co. v Federal Ins. Co.*, 858 F2d 882, 885 [2nd Cir 1988] [regarding priority of coverage], *cert denied*, 490 US 1010 [1989]; *see North Star Reinsurance*, 82 NY2d at 292). Plaintiffs' position that a decision allowing indemnification would render the OCP policy valueless ignores the facts that the OCP policy is triggered in other circumstances in which the State incurs liability and that a portion of the Nationwide policy's value rests with its obligation to indemnify.

For all of these reasons, plaintiffs' motion, sequence number 002, is denied. To obtain summary judgment, defendant must show that the State's liability was only vicarious and also that North Star's negligence caused the accident that injured the underlying plaintiff (*see Travelers Ins. Co. v Nory Const. Co., Inc.*, 184 Misc 2d 366, 368 [Sup Ct, Monroe County 2000] [finding, however, that no duty to indemnify exists where insurer makes a "voluntary" payment which it was not obliged to pay, such as a payment in addition to its policy limit]). Absent such a showing, plaintiffs are not entitled to indemnification (*id.*).

Here, defendant has not yet shown that its right to indemnification has ripened. Between October 17, 2017 and October 19, 2017, a trial on the liability portion of *Valvo*, the underlying case, took place before Judge David Sampson. Judge Sampson's February 5, 2018 decision granted judgment on liability under Labor Law § 240 (1), and denied defendant's prior motion for dismissal under Labor Law § 241 (6) as moot (*Valvo v State of New York,* Ct Cl, Feb 5, 2018, Sampson, J., claim No. 118356, UID No. 2018-053-001). Further, as Mr. Valvo had submitted no evidence on the issue of common law or statutory negligence by the State, Judge Sampson dismissed the causes of action based on common-law negligence and Labor Law § 200. Because Mr. Valvo could not proceed against his employer, North Star, and the third-party action had been discontinued, there was no ruling as to North Star's negligence. Defendant must make this showing before it can receive the declaratory relief it seeks.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment (motion sequence 001) is denied with prejudice; and it is further

ORDERED that defendant's motion for summary judgment (motion sequence 002) is also denied without prejudice.

6/20/2019
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