SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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HOUSTON CASUALTY COMPANY,

Plaintiff,

- against -

Index No. 651981/2014
(Mot Seq # 011, 012, 013)

CAVAN CORPORATION OF NY, INC., NEW PUCK, LLC, PUCK RESIDENTIAL ASSOCIATES, LLC and KUSHNER COMPANIES, LLC,

Defendants.

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CAVAN CORPORATION OF NY, INC.,

Third-Party Plaintiff,

- against -

Index No. 595609-2014

THE DUCEY AGENCY, INC.,

Third-Party Defendant.

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THE DUCEY AGENCY, INC.,

Third-Party Defendant/Second-Third Party Plaintiff,

- against -

Index No. 595182/2017

HOUSTON CASUALTY COMPANY,

Second-Third Party Defendant.

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HON. TANYA R. KENNEDY, J.S.C.:

In this action for declaratory relief, defendants New Puck, LLC, Puck Residential Associates, LLC, and Kushner Companies, LLC (collectively the Puck defendants), move for summary judgment, pursuant to CPLR 3212, declaring that plaintiff Houston Casualty Company (HCC) must defend and indemnify them in an underlying personal injury action pursuant to a commercial general liability policy issued to defendant Cavan Corporation of NY, Inc. (Cavan)

(Mot. Seq. No. 011). The Puck defendants also move, pursuant to CPLR 3126, to strike HCC's complaint or, in the alternative, to preclude the testimony of HCC's witnesses at trial, or to compel discovery pursuant to CPLR 3124 (Mot. Seq. No. 012). Similarly, the third-party defendant/second-third party plaintiff, Ducey Agency, Inc (Ducey), moves, pursuant to CPLR 3124, to compel HCC to produce an underwriting witness for deposition (Mot. Seq. No. 013).

FACTUAL AND PROCEDURAL BACKGROUND

In July 2012, Cavan entered into a Construction Management Agreement (CMA) with Puck Residential Associates, LLC (NYSCEF Doc. No. 4). The CMA listed Puck Residential Associates, LLC as the owner, and Cavan as the construction manager, of a project to construct six new residential condominium units in a building commonly referred to as the "Puck Building," located at 295 Lafayette Street in Manhattan. The CMA called for Cavan to provide commercial general liability insurance coverage naming the Puck defendants, among others, as additional insureds (*id.* at Article 14). Cavan thereafter secured a commercial general liability policy from HCC, which contained an additional insured endorsement adding as additional insureds: "Any person or organization for whom you are performing operations during the policy period when you and such person or organization have agreed in writing . . . that such person or organization be added as an additional insured on your policy" (NYSCEF Doc. No. 5).

In April 2013, Cavan hired J.D. Wilson Construction Corporation (J.D. Wilson) as the project's sidewalk restoration contractor (NYSCEF Doc. No. 3). In October 2013, Richard Wilson (Wilson), the principal of J.D. Wilson, was allegedly injured at the premises during his work on the project (NYSCEF Doc. No. 2). Wilson commenced an action, in Supreme Court, New York County under index no. 160849/2013 in November 2013, captioned *Wilson v New Puck LLC, et al.*, to recover damages for personal injuries against the Puck defendants, Cavan, and others (the

underlying action) (*id.*). The complaint alleged that the Puck defendants owned the premises where the accident occurred (*id.*).

The commercial general liability policy HCC issued to Cavan was in effect at the time of the accident (NYSCEF Doc. No. 5). On December 13, 2013, Cavan tendered a claim to HCC, and HCC disclaimed coverage on December 31, 2013, due to, among other things, an exclusion in the policy for bodily injury "arising out of construction management" (the construction management exclusion) (NYSCEF Doc. No. 103). HCC commenced the instant action on June 30, 2014 against Cavan, *inter alia*, for a judgment declaring that HCC is not obligated to defend or indemnify Cavan or any other party in the underlying action, claiming Cavan's operations as a "construction manager" under the CMA fell within the construction management exclusion of the policy (NYSCEF Doc. No. 1). Thereafter, Cavan commenced a third-party action against Ducey, its insurance broker, for negligence in procuring the policy (NYSCEF Doc. No. 32). Ducey then commenced a second-third party action against HCC (NYSCEF Doc. No. 430).

On June 15, 2015, the Puck defendants moved for leave to intervene in this action (NYSCEF Doc. No. 231), maintaining they were additional insureds under the policy and that HCC had a duty to defend and indemnify them in the underlying action (NYSCEF Doc. No. 233). By order, dated January 4, 2016, the court (Wooten, J.), granted the Puck defendants leave to intervene in this action, and directed them to submit responsive papers to pending motions by March 31, 2016 (NYSCEF Doc. No. 327). The pending motions included a motion by HCC for summary judgment declaring that it was not obligated to defend Cavan in the underlying action and a cross-motion by Cavan for summary judgment, declaring that HCC was obligated to defend (Mot. Seq. Nos. 002 & 003). The Puck defendants submitted papers in opposition to HCC's

motion, arguing that Cavan was entitled to a defense in the underlying action (NYSCEF Doc. No. 345).

On or about February 4, 2016, HCC filed an amended complaint naming the Puck defendants as defendants in this action (NYSCEF Doc. No. 330). The amended complaint sought, *inter alia*, a declaration that it had no obligation to defend or indemnify any of the defendants with respect to the underlying action based upon the construction management exclusion in the policy (*id.* at ¶¶ 15, 46, 52). The Puck defendants filed an answer to HCC's amended complaint on or about February 9, 2016, asserting as counterclaims their entitlement to a declaration that HCC was obligated to defend and indemnify them in the underlying action, and was required to reimburse them for attorneys' fees, costs and disbursements in the underlying action (NYSCEF Doc. No. 337 at ¶¶ 40-58).

By order, dated August 1, 2016, the court (Lebovits, J.), *inter alia*, denied summary judgment to both Cavan and HCC, finding triable issues of fact existed as to whether Cavan functioned as a construction manager so as to fall within the construction management exclusion under the policy (*Houston Cas. Co. v Cavan Corp. of NY, Inc.*, 2016 NY Slip Op 31532 [U] [Sup Ct, NY County 2016], *mod in part and affd in part* 158 AD3d 536 [1st Dept 2018] [NYSCEF Doc. No. 354]). On appeal from that order, the Appellate Division determined, in a decision and order dated February 20, 2018, that HCC was entitled to summary judgment "declaring that the policy does not afford Cavan coverage in the underlying action pursuant to the exclusion for construction management ..." (*Houston Cas. Co. v Cavan Corp. of NY, Inc.*, 158 AD3d 536, 538 [1st Dept 2018]). On August 16, 2018, the Appellate Division denied Cavan's and the Puck defendants' motions for reargument/clarification of, or in the alternative, leave to appeal from the February 20,

2018 order (*Houston Cas. Co. v Cavan Corp. of NY, Inc.*, 2018 NY Slip Op 80599[U], 2018 WL 3911238 [1st Dept 2018]).

On February 22, 2018, the Puck defendants moved for summary judgment in this action for an order declaring that HCC must defend and indemnify them in the underlying action (Mot. Seq. No. 011) (NYSCEF Doc. No. 587). On June 5, 2018, the Puck defendants moved, pursuant to CPLR 3126, to strike HCC's complaint or, in the alternative, to preclude the testimony of HCC's witnesses at trial, or to compel discovery pursuant to CPLR 3124 (Mot. Seq. No. 012) (NYSCEF Doc. No. 630). Thereafter, on July 6, 2018, Ducey moved, pursuant to CPLR 3124, to compel HCC to produce an underwriting witness for a deposition (Mot. Seq. No. 013) (NYSCEF Doc. No. 660).

DISCUSSION

Summary Judgment Standard

"On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'" (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Once this showing has been made . . ., the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, *supra* at 324; *see Zuckerman v City of New York*, *supra* at 562).

The Puck Defendants' Motion for Summary Judgment (Mot. Seq. No. 011)

The Puck defendants contend that while the Appellate Division determined that the subject policy does not afford Cavan coverage in the underlying action based upon the construction management exclusion, they are nevertheless entitled to summary judgment declaring that HCC must defend and indemnify them in the underlying action because they did not receive a timely notice of disclaimer from HCC which Insurance Law § 3420(d) mandates .[1] However, the Court disagrees with this contention.

Insurance Law § 3420(d)(2) states:

> "If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage . . . it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant."

"Failure to comply with section 3420(d) precludes denial of coverage based on a policy exclusion" (*Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188 [2000]; *see Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648-649 [2001] ["a timely disclaimer pursuant to Insurance Law § 3420(d) is required when a claim falls within the coverage terms but is denied based on a policy exclusion"]). Additional insureds "are entitled to the same protections as a named insured, including timely notice of disclaimer" (*Valiant Ins. Co. v Utica First Ins. Co.*, 2018 NY Slip Op 32465[U], *4 [Sup Ct, NY County 2018], citing *Sierra v 4401 Sunset Park, LLC*, 101 AD3d 983,

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[1] HCC suggests that this argument was considered and rejected by the Appellate Division in denying the Puck defendants' motion for reargument/clarification of, or in the alternative leave to appeal from the February 20, 2018 order (*Houston Cas. Co. v Cavan Corp. of NY, Inc.*, 2018 NY Slip Op 80599[U]). However, the issue of whether HCC timely disclaimed coverage as to the Puck defendants was not before the Appellate Division on appeal of the February 20, 2018 order (*see Houston Cas. Co. v Cavan Corp. of NY, Inc.*, 158 AD3d 536, 538 [2018]). Therefore, the issue was not before the Appellate Division upon reargument of the February 20, 2018 order.

985 [2d Dept 2012], *affd* 24 NY3d 514 [2014]; *see BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714-715 [2007] [the well-understood meaning of the term "additional insured" "is an entity enjoying the same protection as the named insured"] [internal quotation marks and citations omitted]).

"Section 3420(d) was enacted to avoid prejudice to an injured claimant who could be harmed by delay in learning the insurer's position" (*Matter of Worcester Ins. Co. v Bettenhauser*, *supra* at 190). However, "[i]t was not intended to be a technical trap that would allow interested parties to obtain more than the coverage contracted for under the policy" (*Excelsior Ins. Co. v Antretter Contr. Corp.*, 262 AD2d 124, 127 [1st Dept 1999]).

Here, the Puck defendants assert that since HCC is denying coverage based on a policy exclusion, timely written notice of disclaimer was necessary. The Puck defendants maintained in their June 15, 2015 proposed answer they submitted in support of their motion for leave to intervene, that they tendered to HCC a claim for defense and indemnification (NYSCEF Doc. No. 243). Specifically, the Puck defendants relied upon the following statement in their proposed answer: "Upon information and belief, [HCC], has a duty to defend and indemnify the Defendants NEW PUCK, LLC, PUCK RESIDENTIAL ASSOCIATES, LLC, and KUSHNER COMPANIES LLC, jointly and severally, in [the underlying action]" (*id.* at ¶ FORTY-FOURTH, at page 11). As such, the Puck defendants maintained that such statement triggered HCC's obligation to timely disclaim under Insurance Law § 3420(d).

The Puck defendants maintain that HCC did not respond to their tender until on or about February 4, 2016, when HCC filed its amended complaint in this action (NYSCEF Doc. No. 330, at ¶¶ 46-47). The Puck defendants argue that since HCC did not issue its disclaimer as soon as reasonably possible, but rather waited for more than seven months, the disclaimer was untimely as

a matter of law, and therefore ineffective. As such, the Puck defendants assert that HCC cannot rely on the construction management exclusion to deny coverage.

In opposition, HCC argues that the Appellate Division's determination that the policy does not afford Cavan coverage in the underlying action because of the construction management exclusion resolves all of the claims against HCC in this case and warrants denial of the Puck defendants' motion for summary judgment. HCC contends, among other things, that the Puck defendants cannot rely on Insurance Law § 3420(d) to assert that they are entitled to coverage because "Insurance Law § 3420(d) does not apply to claims between insurers" (*J.T. Magen v Hartford Fire Ins. Co.*, 64 AD3d 266, 271 [1st Dept 2009]). According to HCC, Insurance Law § 3420(d) is inapplicable because the Puck defendants maintain their own insurance program, which is the real party in interest.

HCC contends that even assuming section 3420(d) is applicable, the Puck defendants' submissions contradict their claim that HCC first disclaimed them coverage on February 4, 2016. In this regard, HCC maintains that while the Puck defendants characterize their proposed answer as tendering a claim for coverage, the Puck defendants stated in their proposed answer that:

> "FORTY-FIFTH: Upon information and belief, a tender was made on or about April 9, 2014, [on] behalf of Defendants, NEW PUCK, LLC, PUCK RESIDENTIAL ASSOCIATES, LLC, and KUSHNER COMPANIES LLC, to Cavan Corporation of NY that it, and its insurer, defend and indemnify the Defendants, NEW PUCK, LLC, PUCK RESIDENTIAL ASSOCIATES, LLC, and KUSHNER COMPANIES LLC, relative to the Wilson claim.
>
> FORTY-SIXTH: Upon information and belief, said tender was wrongfully rejected on or about May 8, 2014, by a representative of the Plaintiff, [HCC]
> (NYSCEF Doc. No. 243, at page 12).

HCC maintains that this constitutes an admission by the Puck defendants that HCC timely disclaimed coverage as a matter of law on May 8, 2014, within 30 days of the claim

tendered to HCC on April 9, 2014 (*see Mayo v Metropolitan Opera Assn., Inc.*, 108 AD3d 422, 425 [1st Dept 2013] [insurer's "disclaimer of coverage within 30 days of receiving notice of the claim was timely as a matter of law"]).

HCC relies upon the April 9, 2014 letter from York Risk Services Group (York) and the May 8, 2014 letter from Network Adjusters, Inc. (Network), which the Puck defendants referenced in their proposed answer as a tender and rejection. The letter from York identified itself as "the claims administrator for Kushner Companies/Federal Insurance Company handling the [underlying *Wilson* action] on their behalf" and stated that Cavan and its insurance company were required to "defend, indemnify and save harmless our insured" (*id.*) (NYSCEF Doc. No. 242). The letter from Network to York stated, *inter alia*:

> "Network ... is the third party administrator assigned to handle this claim on behalf of [HCC], which issued the above insurance contract to Cavan . . . .
>
> Please accept this letter on behalf of your clients Kushner Companies and their affiliates (together 'Kushner Companies'), as [HCC]'s statement of its position that there is no coverage for this claim (the '*Wilson* Claim'). Accordingly, [HCC] will not provide a defense or indemnity to Kushner Companies for the *Wilson* Claim (*id.*).

The Network letter also provided, among other things, that HCC disclaimed coverage based upon the construction management exclusion in the policy (*id.*). According to HCC; these letters establish that HCC timely disclaimed coverage as to the Puck defendants on May 8, 2014, which was within 30 days of receiving their tender.

In reply, the Puck defendants maintain that HCC's argument that Insurance Law § 3420(d) is inapplicable to claims between insurers is without merit because HCC is the sole insurer in this

action. According to the Puck defendants, the issue to determine is whether HCC failed to timely disclaim coverage to the Puck defendants as additional insureds, and not whether HCC failed to timely disclaim coverage to another insurer.

The Puck defendants also contend that while the April 9, 2014 and May 8, 2014 letters demonstrate a tender by Kushner and a disclaimer from HCC to Kushner Companies, LLC, the letters fail to establish that HCC disclaimed coverage to the remaining Puck defendants, New Puck, LLC and Puck Residential Associations, LLC. The Puck defendants maintain that since HCC did not issue a timely disclaimer to New Puck, LLC and Puck Residential Associations, LLC, those entities are entitled to summary judgment. However, this argument is not persuasive.

Similarly, without merit is the Puck defendants' argument that the submission of their proposed answer in June 2015 constituted a tender of their claim to HCC, which triggered an obligation to disclaim coverage. Their proposed answer identifies the April 9, 2014 letter as the tender for all of the Puck defendants and the May 8, 2014 letter as HCC's rejection of that tender (Proposed Answer, NYSCEF Doc. No. 243, at ¶ FORTY-FIFTH and FORTY-SIXTH). Further, counsel for the Puck defendants annexed the aforementioned letters to his supporting affirmation with respect to the motion to intervene (Matione Supporting Affirmation [NYSCEF Doc. Nos. 233 and 242]). As such, the Puck defendants previously acknowledged their receipt of HCC's May 8, 2014 disclaimer of coverage when they moved to intervene in this matter.

"A motion for summary judgment, irrespective of by whom made, invites a court . . . to search the record and to award judgment where appropriate" (*Fertico Belgium, S.A. v Phosphate Chems. Export Assn*, 100 AD2d 165, 171 [1st Dept 1984]; *see* CPLR 3212 [b]). Upon a search of the record pursuant to CPLR 3212(b), HCC is awarded summary judgment declaring that it is not

obligated to defend or indemnify the Puck defendants in the underlying action since there are no factual issues necessitating a trial.

The Puck Defendants' Motion to Strike and/or to Preclude, or to Compel (Mot. Seq. No. 012) and Ducey's Motion to Compel (Mot. Seq. No. 013)

The Puck defendants move, pursuant to CPLR 3126, for an order striking HCC's complaint, or precluding HCC from offering testimony or other evidence from an HCC claims adjuster and underwriter at trial, based upon HCC's failure to produce these witnesses for deposition. In the alternative, the Puck defendants move, pursuant to CPLR 3124, to compel HCC to produce the two witnesses for deposition. Third-party defendant/second-third party plaintiff Ducey also moves, pursuant to CPLR 3124, to compel HCC to produce an underwriting witness for deposition.

"[T]he drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order or request is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith" (*McGilvery v New York City Tr. Auth.*, 213 AD2d 322, 324 [1st Dept 1995]; *see Michaluk v New York City Health & Hosps. Corp.*, 169 AD3d 496 [1st Dept 2019]; *Pesce v Fernandez*, 144 AD3d 653, 654 [2d Dept 2016]). Likewise, "[t]o invoke the drastic remedy of preclusion, the Supreme Court must determine that the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious" (*Assael v Metropolitan Tr. Auth.*, 4 AD3d 443, 443 [2d Dept 2004], quoting *Pryzant v City of New York*, 300 AD2d 383 [2d Dept 2002]). In this case, the Puck defendants failed to make a clear showing that any failure to disclose was willful, contumacious, or in bad faith.

CPLR 3101(a) provides that a party is entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." As to the

Puck defendants' alternative request and Ducey's request for an order to compel HCC to produce an HCC claims adjustor and underwriter for deposition, both movants fail to explain how their testimony is material and necessary in the Puck defendants' defense of this action; the prosecution of the Puck defendants' prosecution of their counterclaims against HCC; or the prosecution of Ducey's second-third party action against HCC.

Therefore, it is

ORDERED that the motion of defendants New Puck, LLC, Puck Residential Associates, LLC, and Kushner Companies, LLC for summary judgment seeking a declaration that plaintiff Houston Casualty Company is obligated to provide a defense to, and provide coverage or indemnification for said defendants in the action of *Wilson v New Puck LLC*, Index No. 160849/2013, Supreme Court, New York County (motion sequence 011), is denied; and it is further

ORDERED that the motion of defendants New Puck, LLC, Puck Residential Associates, LLC, and Kushner Companies, LLC to strike and or to preclude, or to compel (motion sequence 012) is denied; and it is further

ORDERED that the motion of third-party defendant/second-third party plaintiff The Ducey Agency Inc to compel (motion Seq. No. 013) is denied; and it is further

ORDERED that summary judgment is granted to the plaintiff Houston Casualty Company in its favor as against defendants New Puck, LLC, Puck Residential Associates, LLC, and Kushner Companies, LLC; and it is further

ADJUDGED and DECLARED that plaintiff Houston Casualty Company has no obligation to provide a defense to, or provide coverage for, or indemnify defendants New Puck, LLC, Puck

Residential Associates, LLC, and Kushner Companies, LLC in the action of *Wilson v New Puck LLC*, Index No. 160849/2013, Supreme Court, New York County; and it is further

ORDERED that the action is severed as against the remaining parties, which are directed to appear for a status conference on August 7, 2019 at 2:15 p.m.

This constitutes the Decision and Order of the Court.

New York, New York
Dated: June 27, 2019

ENTER:

HON. TANYA R. KENNEDY, J.S.C.

HON. TANYA R. KENNEDY