East 111 Assoc. LLC v RLI Ins. Co.
2019 NY Slip Op 32932(U)
October 4, 2019
Supreme Court, New York County
Docket Number: 653890/2018
Judge: Jennifer G. Schecter
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER **PART** IAS MOTION 54EFM

Justice

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INDEX NO. 653890/2018

MOTION DATE 5/2/2019

MOTION SEQ. NOS. 001 002 003 004

EAST 111 ASSOCIATES LLC, EAST 111 MEZZANINE LLC, EAST 111 MANAGERS LLC, L&M DEVELOPMENT PARTNERS INC, L&M BUILDERS GROUP LLC,

Plaintiff,

- v -

RLI INSURANCE COMPANY A/K/A MT. HAWLEY INSURANCE COMPANY, AMERICAN EMPIRE INSURANCE COMPANY A/K/A AMERICAN EMPIRE SURPLUS LINES, BERKLEY INSURANCE COMPANY A/K/A ADMIRAL INSURANCE COMPANY, ENDURANCE AMERICAN INSURANCE COMPANY, HAMILTON INSURANCE COMPANY A/K/A VALIANT INSURANCE COMPANY, JAMES RIVER INSURANCE COMPANY, MERCHANTS MUTUAL INSURANCE COMPANY, NGM INSURANCE COMPANY A/K/A NATIONAL GRANGE MUTUAL INSURANCE COMPANY, NORTHFIELD INSURANCE COMPANY, PROSIGHT SPECIALTY INSURANCE, SCOTTSDALE INSURANCE COMPANY, SELECTIVE INSURANCE COMPANY OF AMERICA

Defendant.

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DECISION, ORDER AND JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 77, 105, 106, 107, 108, 132, 133, 134

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 78, 109, 110, 111, 112, 129, 137

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 79, 113, 114, 115, 116, 130

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 117, 118, 119, 120, 135, 138, 139, 140, 141, 142

were read on this motion to/for DISMISS DEFENSE.

Motions 001, 002, 003 and 004 are consolidated for disposition.

In this declaratory judgment action arising under commercial general liability (CGL) insurance policies, plaintiffs East 111 Associates LLC (Associates), East 111 Mezzanine LLC (Mezzanine), East 111 Managers LLC (Managers), L&M Development Partners Inc. (Partners), L&M Builders Group LLC (Builders) (collectively, Developers) seek a declaration that defendants (collectively, Insurers) have the duty to defend and indemnify Developers in *La Celia Owners Corp. v East 111 Associates, LLC*, Sup Ct, NY County, index No. 654485/2017 (Underlying Action). Defendant James River Insurance Company (James River) moves to dismiss Developers' complaint as against it (Seq. 001). Defendants RLI Insurance Company A/K/A Mt. Hawley Insurance Company (Mt. Hawley), Selective Insurance Company of America (Selective) and Admiral Insurance Company (Admiral) likewise move to dismiss (Seq. Nos. 002, 003 and 004, respectively). Developers oppose the motions. For the reasons stated below, the motions by James River, Admiral and Mt. Hawley are granted, and Selective's motion is denied.

The Underlying Action, filed on October 18, 2017, arose from Developers' development and sponsorship of a residential condominium project at 64 East 111th Street in Manhattan (the Condominium). Developers allegedly sold units in the Condominium pursuant to an offering plan declared effective on February 7, 2013. La Celia Owners Corp. (Owners) sought $881,450 in damages, alleging that the Condominium, completed in mid-2013, had numerous design and construction defects, and asserting causes of action for, among other things, breach of contract, specific performance and negligence (*see* Dkt. 2 [Owners' AC]).[1]

The complaint in this action (Dkt. 1) seeks a declaratory judgment that Insurers have a duty to defend Developers in the Underlying Action pursuant to a CGL policy issued to Developers by Mt. Hawley (Complaint ¶¶ 7-9) and CGL policies issued to Developers' subcontractors by the

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to the e-filed PDF.

other Insurers and under which Developers are allegedly covered as additional insureds (*id.* ¶¶ 10-12). The complaint asserts that "the Underlying Action alleges 'property damage' stemming from an 'occurrence' associated with work performed by Developers' subcontractors" (*id.* ¶ 12). Following dismissal in the Underlying Action of all but the breach of contract and specific performance causes of action (*see* Dkt. 100 at 3 [decision]), the Underlying Action settled for $350,000, which Developers now seek as damages from Insurers (Dkt. 166 [joint letter] at 2).

On a motion to dismiss, the facts alleged in the pleading are accepted as true, as are all reasonable inferences in non-movant's favor that may be gleaned from them (*see Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]; *Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*Skillgames*, 1 AD3d at 250). Dismissal must be denied if the pleading sets forth a viable cause of action (*see id.*). Deficiencies in the pleading, moreover, may be remedied by proper affidavits (*see Amaro*, 60 AD3d at 492; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]). Where dismissal is sought based upon documentary evidence under CPLR 3211(a)(1), the motion will succeed if "the documentary evidence utterly refutes [the party's] factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002], citing *Leon*, 84 NY2d at 88). When dismissing a complaint on the merits in a declaratory judgment action, the court should declare in defendant's favor (*Eurotech Const. Corp. v QBE Ins. Corp.*, 137 AD3d 605, 606 [1st Dept 2016]).

"A duty to defend exists whenever the allegations in the complaint in the underlying action, construed liberally, suggest a reasonable possibility of coverage, or where the insurer has actual knowledge of facts establishing such a reasonable possibility" (*DMP Contr. Corp. v Essex Ins. Co.*, 76 AD3d 844, 845 [1st Dept 2010]). "[T]he duty to defend is 'exceedingly broad' and an

insurer will be called upon to provide a defense whenever the allegations of the complaint 'suggest ... a reasonable possibility of coverage'" (*Auto. Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006], quoting *Continental Cas. Co. v Rapid-Am. Corp.*, 80 NY2d 640, 648 [1993]). "When an insurer seeks to disclaim coverage on the ... basis of an exclusion, ... the insurer will be required to provide a defense unless it can demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, *in toto*, are subject to no other interpretation" (*id.* [quotation marks omitted]; *see Continental Cas.*, 80 NY2d at 655 ["the duty to defend is broader than the duty to pay, requiring each insurer to defend if there is an asserted occurrence covered by its policy"]). Moreover, "exclusions are subject to strict construction and must be read narrowly" (*Cook*, 7 NY3d at 137).

Defendants James River and Admiral demonstrated that the claims in the Underlying Action fall entirely within the scope of the Residential Development Exclusion in James River policy number 00054538-0 (Dkt. 14)[2] and the Residential Construction Activities Exclusion in Admiral policy number CA000023783-01 (Dkt. 62).[3] These exclusions do not render these policies

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[2] The Residential Development Exclusion states, in relevant part:

> This insurance does not apply to ... "property damage" ... arising out of ... "your work" or "your product" related to any development, reconstruction, rebuilding, restoration, renovation, remodeling, repair, upgrading, improvement, refurbishing or construction of any "residential development";... "Residential development" means any structure(s) ... designed or intended for occupancy in whole or in part as a residence by any person or persons (Dkt. 14 at 60).

[3] The Residential Construction Activities Exclusion states, in relevant part:

> [T]his insurance does not apply to liability arising ... out of .... "residential construction activities" ... [which] means any work or operations related to any job or project involving the construction, repair, remodeling, renovation, maintenance, change or modification of ... condominiums .... [F]or any claim made or "suit" brought which is excluded under the terms of this endorsement, we will have no obligation to defend, adjust or investigate or pay any cost for investigation, defense, adjustment or attorney fees arising out of or related to such claims (Dkt. 62 at 36).

illusory, as Developers argue, because they do not defeat ***all*** coverage initially granted by the policies, which cover the insureds over a period of time, not just specific projects (*see Lend Lease (US) Const. LMB Inc. v. Zurich Am. Ins. Co.*, 28 NY3d 675, 685 [2017]).

Defendant Mt. Hawley has likewise demonstrated that the Underlying Action falls entirely within the scope of the Breach of Contract Exclusion endorsements in Mt. Hawley policies numbered MGL0170862 (Dkt. 37) and MGL0176939 (Dkt. 38). Those endorsements state, in relevant part:

> This insurance does not apply, nor do we have a duty to defend any claim or "suit" for … "property damage" … ***arising directly or indirectly out of*** the following:
> a. Breach of express or implied contract;
> b. Breach of express or implied warranty;
> c. Fraud or misrepresentation regarding the formation, terms or performance of a contract … (Dkt. 37 at 47; Dkt. 38 at 47).

Developers argue that the Owners' cause of action for negligence—which was dismissed as duplicative of the breach of contract cause of action (*see* Dkt. 35 at 2 [order on motion to dismiss]; Dkt. 105 [Aff. in Opp. to Mots. to Dismiss] ¶ 35)—does not fall within the scope of the Breach of Contract Exclusion.[4] However, that negligence cause of action alleged—***as did the breach of contract***—that Developers constructed the building with design and construction defects and not in accordance with the offering plan (Dkt. 2 [Owners amended complaint] at 18-21; *see also* Underlying Action, Dkt. 29 [Developers' Reply Mem. Of Law in Supp. Of Mot. to Dismiss] at 19

[4] To support their position, Developers quote a ***different*** exclusion of coverage for damages "the insured is obligated to pay … by reason of the ***assumption of liability*** in a contract" (Dkt. 37 at 7 [emphasis added]; *accord* Dkt. 38 at 6). The case cited by Developers deals with a similar "assumption of liability" exclusion (*Am. Zurich Ins. Co. v Trans-Packers Services Corp.*, 2013 NY Slip Op 30331[U] [Sup Ct NY County 2013]).While Developers correctly quote the Mt. Hawley policies as stating that "[t]his [assumption of liability] exclusion does not apply" to liability "the insured would have in the absence of the contract" (Dkt. 37 at 7; Dkt. 38 at 6), no such carveout exists in the ***Breach of Contract Exclusion*** endorsement raised by the motion.

[admitting that Owners had "not alleged the violation of a legal duty independent of the contract"]). Since all the purported "'property damage' … ar[ose] directly or indirectly" from Developers' alleged breach of express or implied contract by way of their failure to deliver a building free of defects, the Underlying Action falls within the Breach of Contract Exclusion endorsements.[5]

By contrast, defendant Selective has ***not*** demonstrated its entitlement to dismissal. Selective argues that the damages in the Underlying Action either did not stem from an "occurrence" and/or otherwise fall entirely within the "damage to property" exclusion to policy S1889796 (Selective Policy, Dkt. 52)[6] issued to subcontractor Walsh Glass & Metal (Walsh). The policy describes Walsh as a "Glazier & Metal Worker" (Dkt. 52 at 11).

Selective concedes, solely for purposes of its motion to dismiss, that Developers are "insured" under the Selective Policy (Dkt. 130 [Selective's Reply Brief] at 9 n 1). The policy defines "you" and "your" as "the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy" (Dkt. 52 at 189). While Walsh is a Named Insured (*see e.g. id.* at 35, 66), none of Developers are named by or qualify as a "Named Insured" under the Selective Policy; thus, "you" and "your" do ***not*** include Developers. Instead, Developers are designated as additional insureds under provisions conferring such status on "any person or organization whom you [Walsh] have agreed in a written contract [or] written agreement … to add as an additional insured on your [Walsh's] policy" (Dkt. 52 at 225-226, 230).

Policy coverage for additional insureds, like Developers, is only available for certain damages caused by "you," i.e., Walsh (*e.g. id.* at 225-226 ["[y]our ongoing operations, 'your

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[5] The court has also considered Developers' cursory arguments under CPLR 3211(d) (*see* Dkt. 105 [Aff. in Opp. to Mots. to Dismiss] at 18-20) and finds them insufficient to bar dismissal of this action as against James River, Mt. Hawley and Admiral.

[6] Selective filed copies of the renewal policies issued to Walsh through 2018 (Dkts. 53-58). Selective attests that all the policies have the same terms and conditions (Dkt. 46 at 5 n 3).

product,' or premises owned or used by you"]; *id.* at 230 ["'your work" performed for that additional insured and included in the 'products-completed operations hazard'"]). The New York Court of Appeals has held that the duty to defend an additional insured for damages arising out of a named insured's activities does not require a determination of the named insured's liability, but requires only allegations giving rise to the ***possibility*** that damages arose from such activities (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 715 [2007]).

Under the Selective Policy, Selective agreed to "pay those sums that the insured becomes legally obligated to pay as damages because of ... 'property damage' to which this insurance applies" and that Selective has the "duty to defend the insured against any 'suit' seeking those damages" (Dkt. 52 at 189). The policy further provides that "[t]his insurance applies to ... 'property damage' ***only if***: (1) The ... 'property damage' is caused by an '***occurrence***'" (*id.* [emphasis added]). The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" (*id.* at 203).

Selective argues that there was no "property damage" caused by an "occurrence" because the damage alleged in the Underlying Action arose from ***faulty work*** performed by Developers or their subcontractors and not "an accident." Developers respond that the complaint in the Underlying Action alleges that Developers failed to remediate defects, such as entry points for water infiltration, causing water damage to portions of Owners' building and the units of the constituent owners (*see e.g.* Dkt. 2 [Owners' AC] ¶¶ 44, 55[a] 55[c]).[7] Selective cites *Baker Residential Ltd. Partnership v Travelers Ins. Co.*, 10 AD3d 586 [1st Dept 2004]; *George A. Fuller Co. v United States Fidelity & Guar. Co.*, 200 AD2d 255 [1st Dept 1994]; *Eurotech*, 137 AD3d at

[7] On reply, Selective objects to Developers' assertions that water damaged something other than the relevant "work product" as "not supported by any admissible evidence" (Dkt. 130 [Selective's Reply Brief] at 11). Such evidence, however, is not required to oppose a motion to dismiss where the Underlying Action's ***allegations*** support the duty to defend (*see DMP*, 76 AD3d at 845).

605; and others for the proposition that there is no covered "occurrence" because the damage occurred solely to the building—i.e., ***Developers'*** work. None of the cases, however, addressed whether property damage to ***other*** work of a plaintiff additional insured caused by its ***subcontractor's*** faulty work was an "occurrence" under a policy issued to ***that subcontractor***.[8]

As the Underlying Complaint carries the possibility that ***Walsh's*** allegedly faulty workmanship damaged ***other*** parts of the building—which was not, as a whole, ***Walsh's*** work—an "occurrence" giving rise to "property damage" may exist under the Selective Policy issued to Walsh (*see Fuller*, 200 AD2d at 259 [liability policy insures against "faulty workmanship in the work which creates a legal liability by causing … property damage to ***something other than the work product***"]; *I.J. White Corp. v Columbia Cas. Co.*, 105 AD3d 531, 532 [1st Dept 2013] [damage to third party's cakes by freezer defectively constructed by insured was an "occurrence" under CGL policy]; *see also QBE Ins. Corp. v Adjo Contr. Corp.*, 121 AD3d 1064, 1077 [2d Dept 2014] [noting that mold growth in third party's property due to insured's faulty workmanship was "occurrence" under New York law]). "[I]n the absence of unambiguous contractual language to the contrary," Developers, as additional insured under the Selective Policy, have "the same protection as the named insured" (*BP A.C. Corp. v One Beacon Ins. Group,* 33 AD3d 116, 117 [1st Dept 2006], modified in non-relevant part, 8 NY3d 708 [2007]). Accordingly, the alleged water damage triggers Selective's duty to defend Developers.

Selective also argues that the claims in the Underlying Action fall within exclusions (j)(1), (j)(5) and (j)(6) of the policy, which state that the insurance does not apply to damage to:

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[8] Selective also cites *Exeter Bldg. Corp. v Scottsdale Ins. Co.*, 79 AD3d 927 [2d Dept 2010]; *Structural Bldg. Prods. Corp. v Business Ins. Agency, Inc.*, 281 AD2d 617 [2d Dept 2001]; and *J.Z.G. Res., Inc. v King*, 987 F2d 98 [2d Cir 1993]. In these cases, plaintiffs sought indemnification to repair faulty work of the ***policyholder*** or its ***sub***contractors. Here, by contrast, it is reasonably possible that the policyholder (Walsh) caused "property damage" to Developers' ***other*** work.

> (1) Property ***you*** own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property; ...
>
> (5) That particular part of real property on which ***you or any contractors or subcontractors*** working directly or indirectly on ***your*** behalf are performing operations, if the "property damage" arises out of those operations; or
>
> (6) That particular part of ***any property*** that must be restored, repaired or replaced because "***your*** work" was incorrectly performed on ***it*** (Dkt. 52 at 193 [emphasis added]).

As noted above, "you" and "your" means ***Walsh*** and ***not*** Developers. At least some of the allegedly water-damaged portions of Owners' building and individual units thereof were not "property you [***Walsh***] own, rent, or occupy" or a "particular part of real property on which you [***Walsh***] or any contractors or subcontractors working ... on your [***Walsh's***] behalf are performing operations"; thus, exceptions (j)(1) and (j)(5) do not apply. Similarly, insofar as the water intrusion possibly harmed ***other*** building components besides those on which, allegedly, "'your [***Walsh's***] work' was incorrectly performed," exception (j)(6) does not apply.

Selective argues that many cases interpreted these and similar exclusions to bar recovery by plaintiffs for their own or their subcontractor's defective work (*Eurotech*, 137 AD3d at 605; *Fuller*, 200 AD2d 255; *National Union Fire Ins. Co. of Pittsburgh, Pa. v Turner Constr. Co.*, 119 AD3d 103 [1st Dept 2014]; *Kay Bee Builders, Inc. v Merchant's Mut. Ins. Co.*, 10 AD3d 631, 632 [2d Dept 2004]; *Nash v Baumblit Constr. Corp.*, 72 AD3d 1037 [2d Dept 2010]; *Erie Ins. Co. v Radtke*, 126 AD3d 757 [2d Dept 2015]). None of those decisions confronted the contractual language here—"you" and "your"—that exempts from coverage damage to the work of only the ***subcontractor*** to whom the policy was issued, not all work of the ***plaintiff*** additional insured whose ***other*** work was damaged.

Having shown allegations of at least one "occurrence" causing "property damage," Developers sufficiently allege that the complaint in the Underlying Action, construed liberally, bore a "reasonable possibility" of coverage under the Selective Policy (*see DMP*, 76 AD3d at 845). Selective, moreover, has not demonstrated that the allegations in the Underlying Action "cast that pleading solely and entirely within the policy exclusions" and "are subject to no other interpretation" (*Cook*, 7 NY3d at 137 [quotation marks omitted]). Accordingly, it is

ORDERED that the motion of James River Insurance Company to dismiss the complaint (Seq. No. 001) is granted; and it is further

ORDERED that the motion of RLI Insurance Company A/K/A Mt. Hawley Insurance Company to dismiss the complaint (Seq. No. 002) is granted; and it is further

ORDERED that the motion of Selective Insurance Company of America to dismiss the complaint (Seq. No. 003) is denied; and it is further

ORDERED that the motion of Admiral Insurance Company to dismiss the complaint (Seq. No. 004) is granted; and it is further

ADJUDGED and DECLARED that James River Insurance Company has no obligation pursuant to policy number 00054538-0 to defend or indemnify plaintiffs East 111 Associates LLC, East 111 Mezzanine LLC, East 111 Managers LLC, L&M Development Partners Inc and L&M Builders Group LLC in connection with *La Celia Owners Corp. v East 111 Associates, LLC*, Sup Ct, NY County, index No. 654485/2017; and it is further

ADJUDGED and DECLARED that RLI Insurance Company A/K/A Mt. Hawley Insurance Company has no obligation pursuant to policies numbered MGL0170862 and MGL0176939 to defend or indemnify plaintiffs East 111 Associates LLC, East 111 Mezzanine LLC, East 111 Managers LLC, L&M Development Partners Inc and L&M Builders Group LLC

in connection with *La Celia Owners Corp. v East 111 Associates, LLC*, Sup Ct, NY County, index No. 654485/2017; and it is further

ADJUDGED and DECLARED that Admiral Insurance Company has no obligation pursuant to policy number CA000023783-01 to defend or indemnify plaintiffs East 111 Associates LLC, East 111 Mezzanine LLC, East 111 Managers LLC, L&M Development Partners Inc and L&M Builders Group LLC in connection with *La Celia Owners Corp. v East 111 Associates, LLC*, Sup Ct, NY County, index No. 654485/2017; and it is further

ORDERED that the cause of action by plaintiffs against Selective Insurance Company of America and the other remaining defendants is hereby severed and shall continue; and it is further

ORDERED that within 14 days of entry of the decision on this motion in NYSCEF, defendant Selective Insurance Company of America shall serve its answer to the complaint and plaintiffs shall respond in accordance with the CPLR; and it is further

ORDERED that demands for a bill of particulars, demands for discovery and inspection and interrogatories shall be served by all parties on or before October 24, 2019; and it is further

ORDERED that written responses and non-ESI (electronically stored information) documents shall be served by all parties on or before November 14, 2019; and it is further

ORDERED that a teleconference with chambers will be held on November 19, 2019 at 3:00pm to set the schedule for the remainder of fact discovery, including a date for the in-person compliance conference to take place in December 2019.

10/4/2019
DATE

JENNIFER G. SCHECTER, J.S.C.