SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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WESCO INSURANCE COMPANY, Index No. 150732/2019

Plaintiff

- against - DECISION AND ORDER

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, CAPITAL ONE, N.A., and CAPITAL ONE FINANCIAL CORP.,

Defendants

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APPEARANCES:

For Plaintiff
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For Defendant
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LUCY BILLINGS, J.S.C.:

I. RELIEF SOUGHT

Plaintiff Wesco Insurance Company moves for summary judgment against defendant Travelers Property Casualty Company of America and for a default judgment against defendant Capital One Financial Corp. C.P.L.R. §§ 3212(b), 3215. Wesco seeks a declaratory judgment that Travelers is obligated to defend and indemnify Wesco's insured, Waldman Management Corp., in an underlying personal injury action, Irving v. Capital One Bank, Index Number 100546/2016 (Sup. Ct. Richmond Co.), under an insurance policy that Travelers issued to its insured, Capital

One Financial Corp., which named Waldman Management Corp. an additional insured. C.P.L.R. § 3001. Consequently, Wesco seeks reimbursement for Wesco's reasonable expenses in defending Waldman Management up to now. Wesco also seeks a declaratory judgment that Wesco owes no duty to defend and indemnify Travelers' insured, Capital One, in the underlying action. Id. Finally, Wesco seeks a declaratory judgment that the coverage of Waldman Management under the Travelers policy is primary over the coverage of Waldman Management under its own policy issued by Wesco and that, once Travelers is defending both Waldman Management and Capital One, the latter is barred from claiming against the former. Id. No party opposes this final declaratory relief. Only Travelers opposes the other relief Wesco seeks against Travelers. Travelers also cross-moves for summary judgment against Wesco, C.P.L.R. § 3212(b), seeking a declaratory judgment that Travelers owes no duty to defend or indemnify Waldman Management in the underlying personal injury action. C.P.L.R. § 3001.

II. UNDISPUTED FACTS

Aurelius Irving, the plaintiff on the underlying action, claims injury from falling on ice on the sidewalk outside Capital One's bank in Waldman Management's shopping center on Staten Island. Since Wesco presents the lease between the shopping center owner, Waldman Management, and the tenant of a unit in the shopping center, Capital One, even if no witness authenticates the lease on personal knowledge, Travelers may rely on the lease

to support Travelers' cross-motion. E.g., Mitchell v. Calle, 90 A.D.3d 584, 585 (1st Dep't 2011); Ayala v. Douglas, 57 A.D.3d 266, 267 (1st Dep't 2008); Navedo v. Jaime, 32 A.D.3d 788, 789-90 (1st Dep't 2006); Thompson v. Abbasi, 15 A.D.3d 95, 97 (1st Dep't 2005). See Joseph v. Board of Educ. of the City of N.Y., 91 A.D.3d 528, 529 (1st Dep't 2012); Dembele v. Cambisaca, 59 A.D.3d 352, 352 (1st Dep't 2009); Hernandez v. Almanzar, 32 A.D.3d 360, 361 (1st Dep't 2006).

A. The Lease

The lease defines "all walkways, sidewalks, driveways, stairways and parking lots which are part of the Shopping Center," including the sidewalks abutting the unit leased to Capital One, as "Common Areas." Aff. of Max W. Gershweir, Ex. B § 1.6. The sidewalks are not part of the "Demised Premises," which are limited to "the approximately 2,200 square feet . . . of the ground floor space . . . in the Building in the Shopping Center." Id.

Under the lease, the owner Waldman Management retained exclusive responsibility for "removal of . . . snow, ice . . . from the Common Areas," id. § 13.1, and otherwise to "maintain . . . the Common Areas, including the sidewalks in front of and behind the Demised Premises." Id. § 14.2. In fact, the court in the underlying action found Waldman Management responsible under the lease for maintenance of the sidewalk on which Irving fell, found a factual issue whether Waldman Management was liable for Irving's injury, and therefore denied Waldman Management's motion

for summary judgment dismissing Irving's claims against Waldman Management. The court in turn granted Capital One's motion for summary judgment dismissing all claims against Capital One, finding it not responsible for the icy sidewalk. The court did not determine whether the sidewalk was a public sidewalk owned by the City of New York or a private sidewalk within the shopping center owned by Waldman Management, but simply noted that, even if the lease did not expressly impose a duty on Waldman Management to remove the ice from the sidewalk and otherwise maintain it, New York City Administrative Code § 7-210(a) imposed a comparable duty.

Finally, the lease obligated Capital One to procure commercial general liability insurance naming Waldman Management an additional insured, with which the tenant complied. A reciprocal provision obligated Waldman Management to procure insurance naming Capital One an additional insured. The lease obligates Capital One to indemnify Waldman Management, however, only for lawsuits and expenses, including reasonable attorneys' fees, in connection with bodily injury either caused by the tenant's negligence or arising from its failure to perform its obligations under the lease. Neither provision, the tenant's negligence nor its failure to perform its lease obligations, applies here.

B. Travelers' Insurance Policy

Wesco presents a certified copy of the insurance policy that Travelers issued to its insured, adding Waldman Management as an

additional insured, which Travelers does not dispute and on which it relies to support its cross-motion. The endorsement to the policy that adds the lessor of premises as an additional insured designates the premises covered as the premises leased to Capital One. The additional insured is any "lessor of premises with whom you have agreed in a written contract executed prior to loss to name as an additional insured, . . . but only with respect to liability arising out of that part of the premises leased to you." Gershweir Aff. Ex. A, at CGD1311095.

III. THE MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

Parties to a commercial lease are free to allocate the risk of loss to third parties through insurance. Great N. Ins. Co. v. Interior Constr. Corp., 7 N.Y.3d 412, 418-19 (2006); Hogeland v. Sibley, Lindsay & Curr Co., 42 N.Y.2d 153, 157, 160-61 (1977); Reynoso v. Global Mgt. Enters., LLC, 154 A.D.3d 446, 447 (1st Dep't 2017); Berger v. 292 Pader Inc., 84 A.D.3d 461, 462 (1st Dep't 2011). Although there are limits on the extent to which a party may contract away liability and insulate itself from damages caused by its own culpable conduct, Abacus Fed. Sav. Bank v. ADT Sec. Servs., Inc., 18 N.Y.3d 675, 681 (2012); Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 554 (1992), a contractual provision that requires one party to insure another is distinct from a provision that exempts a party from liability. Abacus Fed. Sav. Bank v. ADT Sec. Servs., Inc., 18 N.Y.3d at 681; Board of Educ., Union Free School Dist. No. 3, Town of Brookhaven v. Valden Assoc., 46 N.Y.2d 653, 656-57 (1979); Great Am. Ins. Co.

of N.Y. v. Simplexgrinnell LP, 60 A.D.3d 456, 456-57 (1st Dep't 2009).

New York General Obligations Law § 5-321 prohibits contracts that free an owner of real property from all liability to a tenant for the owner's own negligence, leaving the tenant with no recourse for losses incurred from the owner's acts or omissions. 159 MP Corp. v. Redbridge Bedford, LLC, 33 N.Y.3d 353, 361 (2019); Hogeland v. Sibley, Lindsay & Curr Co., 42 N.Y.2d at 160-61; Munsey v. Sindone, 147 A.D.3d 687, 688 (1st Dep't 2017); Berger v. 292 Pader Inc., 84 A.D.3d at 462. The insurance procurement provisions in the lease here, however, do not exempt the owner from liability or contract away its liability for its own culpable conduct in violation of General Obligations Law § 5-321, but permissibly require each party to obtain insurance and assign the risk of loss from any culpable conduct to the parties' respective insurers. Great N. Ins. Co. v. Interior Constr. Corp., 7 N.Y.3d at 418-19; Hogeland v. Sibley, Lindsay & Curr Co., 42 N.Y.2d at 161; Berger v. 292 Pader Inc., 84 A.D.3d at 462; Insurance Co. of N. Am. v. Borsdorff Services, Inc., 225 A.D.2d 494, 494 (1st Dep't 1996). See Mahon v. David Ellis Real Estate, L.P., 165 A.D.3d 600, 601 (1st Dep't 2018). Since the parties' assignment of their risk of loss to their respective insurers provided Capital One an avenue for recovery through the tenant's insurer, Travelers, General Obligations Law § 5-321 is not implicated, Great N. Ins. Co. v. Interior Constr. Corp., 7 N.Y.3d at 418-19; Hogeland v. Sibley, Lindsay & Curr Co., 42

N.Y.2d at 161, especially since the lease imposes a mutual obligation on the parties to obtain insurance. See A to Z Applique Die Cutting v. 319 McKibbin St. Corp, 232 A.D.2d 512, 512-13 (2d Dep't 1996). Both parties to the lease agreed to procure insurance and seek compensation for their losses through their respective insurers.

The issue now is whether Wesco, which has defended its insured Waldman Management, may have recourse against Capital One's insurer, Travelers, and recover from the tenant's insurer payments for the owner's defense. Wesco insists that, even though Irving's injury did not arise from the ownership, maintenance, or use of the premises leased to Capital One, Waldman Management Corp.'s liability arises from its ownership of the leased premises, which is all that the Travelers policy's additional insured provisions require. If the sidewalk on which Irving fell was a private sidewalk, however, Waldman Management's liability does not arise from its ownership of the premises leased to Capital One, but arises from its ownership of the entire shopping center including its common areas, which include the sidewalk. If the sidewalk was a public sidewalk owned by the City, Waldman Management's liability arises from its ownership of the abutting real property. N.Y.C. Admin. Code § 7-210(a); Sangaray v. West Riv. Assoc., LLC, 26 N.Y.3d 793, 796 (2016); Vucetovic v. Epsom Downs, Inc., 10 N.Y.3d 517, 520 (2008); Kellogg v. All Sts. Hous. Dev. Fund Co., Inc., 146 A.D.3d 615, 616 (1st Dep't 2017). While on one side the premises leased to

Capital One may abut the sidewalk on which Irving fell, on the other side other shopping center premises, whether a driveway, parking lot, or another unit, abut the sidewalk. Therefore, even if Wesco establishes conclusively that the City, not Waldman Management, owned the sidewalk, Waldman Management's liability does not only arise from its ownership of the premises leased to Capital One.

To construe the Travelers policy as providing coverage to the additional insured in the event that the sidewalk was owned by the City, moreover, would entitle the additional insured to more coverage than if it were the named insured, Capital One. An additional insured is entitled to the same overage as the named insured, but not more. BP A.C. Corp. v. One Becaon Ins, Group, 8 N.Y.3d 708, 715 (2007); Pecker Iron Works of N.Y. v. Traveler's Ins. Co., 99 N.Y.2d 391, 393 (2003); Chappaqua Cent. Sch. Dist. v. Philadelphia Indem. Ins. Co., 148 A.D.3d 980, 982 (2d Dep't 2017). The risks that the named insured Capital One sought to cover when it procured its insurance, that Travelers bargained to provide, and for which it would cover Capital One are injuries arising from a condition on the leased premises. Worth Constr. Co., Inc. v. Great Am. Ins. Co., 10 N.Y.3d 411, 415 (2008); Maroney v. New York Cent. Mut. Fire Ins. Co., 5 N.Y.3d 467, 473 (2005); Seneca Ins. Co., Inc. v. Cimran Co., Inc., 106 A.D.3d 166, 170 (1st Dep't 2013); Chappaqua Cent. Sch. Dist. v. Philadelphia Indem. Ins. Co., 148 A.D.3d at 983. The additional insured Waldman Management is not entitled to more: to coverage

for an injury arising from a condition outside the leased premises. After all, Waldman Management agreed to procure insurance and indemnify Capital One for lawsuits and expenses, including reasonable attorneys' fees, in connection with bodily injury either caused by the owner's negligence or arising from its failure to perform its obligations under the lease, which encompass the sidewalk and other areas outside th leased premises.

Coverage of the additional insured depends on the lease between the additional insured and the insured. Where the lease obligates the tenant to indemnify the owner for damages arising from the leased premises or adjacent sidewalks or obligates the tenant to maintain the adjacent sidewalks, then the provision covering the additional insured's liability arising from the ownership, maintenance, or use of the leased premises covers a claim arising from the sidewalk's condition. Yu Yan Zheng v. Fu Jian Hong Guan Am. Unity Assn., Inc., 168 A.D.3d 511, 514 (1st Dep't 2019); Donato Realty, LLC v. Utica First Ins. Co., 146 A.D.3d 481, 482 (1st Dep't 2017); Tower Ins. Co. of N.Y. v. Leading Ins, Group Ins. Co, Ltd., 134 A.D.3d 510, 510 (1st Dep't 2015). Where, as here, the lease obligates the tenant to indemnify the owner for damages arising only from the leased premises and obligates the owner to maintain the adjacent sidewalks, then the same provision covering the additional insured does not cover a claim arising from the sidewalk's condition. Only if the lease imposed no duty on the owner to

maintain the sidewalk, and the part of the sidewalk where Irving fell (1) "was necessarily used for access in and out" of the leased premises and (2) was part of the premises that Capital One was licensed to use under the lease, would the owner be entitled to coverage. ZKZ Assoc. v. CNA Ins. Co., 89 N.Y.2d 990, 991 (1997); Jenel Mgt. Corp. v. Pacific Ins. Co., 55 A.D.3d 313, 313 (1st Dep't 2008); Frank v. Continental Cas. Co., 123 A.D.3d 878, 881 (2d Dep't 2014). See 1515 Broadway Fee Owner, LLC v. Seneca Ins. Co., Inc., 90 A.D.3d 436, 437 (1st Dep't 2011); New York Convention Ctr. Operating Corp. v. Cerullo World Evangelism, 269 A.D.2d 275, 276 (1st Dep't 2000). Wesco does not claim that Irving was injured in connection with his use of the leased premises and does not claim coverage for liability arising from the use of the leased premises. Second, the lease expressly provides that no part of the sidewalk was part of the leased premises, licensed to Capital One for its use, or within its control. 625 Ground Lease Lessor LLC v. Continental Cas. Co., 131 A.D.3d 898, 899 (1st Dep't 2015); Seneca Ins. Co., Inc. v. Cimran Co., Inc., 106 A.D.3d at 170; Prestige Props. & Dev. Co., Inc. v. Montefiore Med. Ctr., 36 A.D.3d 471, 472-73 (1st Dep't 2007); Axelrod v. Maryland Cas. Co., 209 A.D.2d 336, 336 (1st Dep't 1994).

The court views the perimeters of additional coverage under the Travelers policy "not in strictly territorial terms but rather in operational terms covering the extent of control over the premises" that the lease vested in the tenant Capital One.

ZKZ Assoc. v. CNA Ins. Co., 224 A.D.2d 174, 175 (1st Dep't 1996), aff'd, 89 N.Y.2d at 991; Maldonado v. Kissm Realty Corp., 18 A.D.3d 627, 628 (2d Dep't 2005). Here, in contrast to the authority on which Wesco relies, the lease did not define Capital One's leased premises or its operations to encompass the means of access that adjoined the leased premises or operations necessary to the bank's business, such a drive-in banking facility or a parking lot exclusively for the bank's customers. Seneca Ins. Co., Inc. v. Cimran Co., Inc., 106 A.D.3d at 170; Prestige Props. & Dev. Co., Inc. v. Montefiore Med. Ctr., 36 A.D.3d at 472; Axelrod v. Maryland Cas. Co., 209 A.D.2d at 336. See QBE Ins. Corp. v. Hudson Specialty Ins. Co., 82 A.D.3d 595, 596 (1st Dep't 2011); New York Convention Ctr. Operating Corp. v. Cerullo World Evangelism, 269 A.D.2d at 276. Nor did the tenant assume a maintenance obligation for an area not part of the leased premises. See Zurich Ins. Co. v. Lumbermen's Cas. Co., 233 A.D.2d 186, 187 (1st Dep't 1996); Maldonado v. Kissm Realty Corp., 18 A.D.3d at 628. These examples are the only types of contexts that might fall within the coverage afforded.

For the reasons explained above, the court grants Travelers' cross-motion for summary judgment, C.P.L.R. § 3212(b), declaring that Travelers owes no duty to defend or indemnify Waldman Management in the underlying personal injury action. C.P.L.R. § 3001. For the same reasons, the court denies Wesco's motion for summary judgment declaring that Travelers is obligated to defend and indemnify Waldman Management in the underlying action and to

reimburse Wesco's expenses in defending Waldman Management. 625 Ground Lease Lessor LLC v. Continental Cas. Co., 131 A.D.3d at 899.

IV. WESCO'S MOTION FOR A DEFAULT JUDGMENT AGAINST CAPITAL ONE

The lease obligates Waldman Management to indemnify Capital One for lawsuits and expenses, including reasonable attorneys' fees, in connection with bodily injury caused by the owner's negligence or arising from its failure to perform its lease obligations. As demonstrated in the underlying action, and absent any further evidence presented in this action, Waldman Management has failed to establish that neither its negligence in removing ice from sidewalk where Irving fell nor its nonperformance of its lease obligations to remove the ice caused his injury. Wesco in turn has not shown that it owes no obligation to its insured, Waldman Management, to provide that indemnification, including defense expenses, that Waldman Management owes to Capital One. Absent a showing of merit to Wesco's claim against Capital One, the court denies Wesco's motion for a default declaratory judgment that Wesco owes no duty to defend and indemnify Capital One in the underlying action. C.P.L.R. §§ 3001, 3215(f); Tertiary, Inc. v. Liberty Mut. Fire Ins. Co., 158 A.D.3d 482, 482 (1st Dep't 2018).

V. CONCLUSION

In sum, the court grants defendant Travelers Property Casualty Company of America's cross-motion for summary judgment. C.P.L.R. § 3212(b). The court declares and adjudges that

Travelers Property Casualty Company of America owes no duty to defend or indemnify Waldman Management Corp. in Irving v. Capital One Bank, Index Number 100546/2016 (Sup. Ct. Richmond Co.), under insurance policy 660-8F213882-TIL. C.P.L.R. § 3001. The court denies plaintiff's motion for summary judgment, for a default judgment, and for declaratory relief. C.P.L.R. §§ 3001, 3212(b), 3215(f). This decision constitutes the court's order and judgment in favor of Travelers Property Casualty Company of America.

DATED: December 6, 2019

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.