Sea Breeze Holdings, LLC v Endurance Am. Specialty Ins. Co.
2020 NY Slip Op 30179(U)
January 23, 2020
Supreme Court, New York County
Docket Number: 452054/2017
Judge: Gerald Lebovits

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

---X

SEA BREEZE HOLDINGS, LLC,

Plaintiff,

- v -

ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY,

Defendant.

---X

INDEX NO. 452054/2017

MOTION DATE 10/25/2019, 10/31/2019

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 107, 108, 109, 110

were read on this motion to/for JUDGMENT - DECLARATORY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 98, 99, 100, 101, 102, 103, 104, 105, 106, 111, 112, 113, 114, 117

were read on this motion to/for JUDGMENT - SUMMARY.

Lerner, Arnold & Winston, LLP, New York, New York (Laura M. Maletta), for plaintiff.
Litchfield Cavo LLP, New York, New York (Dana M. Ricci), for defendant.

Gerald Lebovits, J.:

This insurance coverage dispute arises out of a personal injury action brought by Concepcion Guzman against plaintiff Sea Breeze Holdings, Inc. titled *Guzman v Sea Breeze Holdings, LLC*, Sup Ct, Bronx County, Index No. 300002/2011 (the *Guzman* Action). (NYSCEF Doc No. 55, affirmation of Laura M. Maletta, exhibit B at 1).

In motion sequence 002 plaintiff moves, pursuant to CPLR 3001, for a judgment declaring that it is entitled to coverage in the *Guzman* Action under the insurance policy issued by defendant Endurance American Specialty Insurance Company and that defendant has a duty to defend and indemnify plaintiff in that action. Plaintiff also seeks an order directing defendant to reimburse it for its past defense costs incurred in the *Guzman* Action. In motion sequence 003, defendant moves, pursuant to CPLR 3212, for summary judgment declaring that it has no duty to defend or indemnify plaintiff in the *Guzman* Action.

Motion sequences 002 and 003 are consolidated here for disposition.

Background

Plaintiff is the owner of real property located at 1329 Clinton Avenue, Bronx, New York (the Premises) (NYSCEF Doc No. 65, Maletta affirmation, exhibit L, ¶ 7). Defendant issued commercial general liability policy no. WKC10100 0778-00 to plaintiff in effect from November 7, 2007 through November 7, 2008, with a $1 million per occurrence limit of liability and a general aggregate limit of $2 million (the Policy) (NYSCEF Doc No. 54, Maletta affirmation, exhibit A at 2). Commercial General Liability Coverage Form CG 00 01 10 01 in the Policy provides, in relevant part:

> "**SECTION I – COVERAGES**
> **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> **1. Insuring Agreement**
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result.
>
> ...
>
> **2. Exclusions**
> This insurance does not apply to:
>
> ...
>
> **e. Employer's Liability**
> 'Bodily injury' to:
> (1) An 'employee' of the insured arising out of and in the course of:
> (a) Employment by the insured; or
> (b) Performing duties related to the conduct of the insured's business;
> (2) The spouse, child, parent, brother or sister of that 'employee' as a consequence of Paragraph (1) above.
> This exclusion applies:
> (1) Whether the insured may be liable as an employer or in any other capacity; and
> (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.
>
> This exclusion does not apply to liability assumed by the insured under an 'insured contract'"

(NYSCEF Doc No. 54 at 9-10). The Policy also contained the following endorsement (the Ongoing Operations Exclusion) on Form N263862.1 which reads, in pertinent part:

"EXCLUSION – DESIGNATED ONGOING OPERATION(S)
This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to paragraph 2., Exclusions of COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I – Coverages):

This insurance does not apply to 'bodily injury' or 'property damage' to (1) persons while performing or operating in the capacity of an independent contractor or an employee of a contract, or (2) the spouse, child, parent, brother or sister of such person while performing or operating in the capacity of an independent contractor or employee of a contractor and such 'bodily injury' or 'property damage[']' arises out of and in the course of the Designated Ongoing Operation(s) described in this endorsement, regardless of whether such operations are conducted by you or on your behalf or whether the operations are conducted for yourself or for others:

This exclusion applies:

(1) Whether the insured may be liable as an employer or in any other capacity; and
(2) To any obligation to share damages with or repay or indemnify someone else who must pay damages because of 'bodily injury' or 'property damage.'

Unless a 'location' is specified in this endorsement, this exclusion applies regardless of where such operations are conducted by you or on your behalf. If a specific 'location' is designated in this endorsement, this exclusion applies only to the described Designated Ongoing Operation(s) conducted at that 'location.'

...

Description of Designated Ongoing Operations(s): Any/All Construction Operations performed by or on behalf of the 'Insured'. Construction Operations under this endorsement include but are not limited to interior and exterior renovations, interior and exterior structural improvements, structural alterations, demolition, and additions to the existing structure"

(NYSCEF Doc No. 54 at 34).

In addition, the Policy included a section titled "**SECTION IV – COMMERCIAL GENERAL LIABILITY POLICY CONDITIONS**," which partially states:

"**2. Duties In The Event of Occurrence, Offense, Claim Or Suit**
a. You must see to it that we are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the 'occurrence' or offense took place;
(2) The names and addresses of any injured persons or witnesses; and
(3) The nature and location of any injury or damage arising out of the 'occurrence' or offense.

b. If a claim is made or 'suit' is brought against any insured, you must:
(1) Immediately record the specifics of the claim or 'suit' and the date received; and
(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or 'suit' as soon as practicable"

(NYSCEF Doc No. 54 at 18-19).

By letter dated April 4, 2008, Guzman's attorney notified plaintiff of an incident involving Guzman that occurred on January 11, 2008, and of his intent to pursue a personal injury claim (NYSCEF Doc No. 56, Maletta affirmation, exhibit C at 1).

On April 15, 2008, plaintiff, through CBS Coverage Group, Inc. (CBS), forwarded a copy of an "ACORD GENERAL LIABILITY NOTICE OF OCCURRENCE/CLAIM" dated April 14, 2008 to defendant, which indicated that on January 11, 2008, "GUZMAN, CONCEPCION WAS WORKING FOR RUBIN CABRERA CONTRACTING AT INSD [sic] LOCATION WHEN HE WAS HIT IN THE FACE WITH A PIPE," together with a copy of the April 4, 2008 letter received from Guzman's attorney (NYSCEF Doc No. 57, Maletta affirmation, exhibit D at 1). The following day, CBS forwarded a second copy of the April 4, 2008 letter to defendant (NYSCEF Doc No. 58, Maletta affirmation, exhibit E at 1).

Defendant subsequently retained R.M.G. Investigations, Inc. (RMG) to investigate Guzman's claim (NYSCEF Doc No. 60, Maletta affirmation, exhibit G at 1). RMG's initial report stated that plaintiff had retained a general contractor, Explorer New York Contracting Corp. (Explorer), to renovate the Premises (*id.* at 3). The report further stated that plaintiff's principal, Explorer's owner, and Explorer's subcontractors had never heard of Rubin Cabrera Contracting, Guzman or an incident involving someone having been struck in the face by a pipe (*id.* at 4-5). Both claimed Guzman never worked at the Premises, and Explorer's owner believed that Guzman may have been injured performing plumbing work at a neighboring property (*id.* at 5). RMG informed defendant that it would contact Guzman's counsel for additional information (*id.* at 7). When Guzman's attorney failed to respond to RMG's requests for information, RMG, acting upon defendant's direction, wrote to Guzman's attorney on May 30, 2008 and denied Guzman's claim on the ground that defendant was unable to confirm that an incident had occurred at the Premises on the date provided (NYSCEF Doc No. 76, affirmation of Dana M. Ricci [Ricci], exhibit D at 1).

Defendant also retained Rockville Risk Management Associates (Rockville) as its third-party administrator on Guzman's claim (NYSCEF Doc No. 61, Maletta affirmation, exhibit H at 1). By letter dated November 24, 2008, Rockville advised plaintiff that it "acknowledges receipt of the claim ... submitted under [the] Policy ... issued to Sea Breeze" and that the letter had been

sent "without prejudice and without waiver and with full reservation of all rights and defenses available ... under the [P]olicy" (*id.*).

On January 17, 2011, plaintiff, through a claims manager at Hirsch Wolf, forwarded an "ACORD GENERAL LIABILITY NOTICE OF OCCURRENCE CLAIM" dated January 17, 2008 along with the summons and complaint in the *Guzman* Action to defendant (NYSCEF Doc No. 62, Maletta affirmation, exhibit I at 2). The notice indicated that Guzman had tripped at a construction site on January 8, 2008 (*id.*). According to the complaint, Guzman had alleged that he was injured removing a boiler at the Premises on January 8, 2008 (NYSCEF Doc No. 77, Ricci affirmation, exhibit E at 10). Guzman subsequently amended his complaint to change the date of the incident to January 11, 2008 (NYSCEF Doc No. 55 at 26).

By letter dated February 16, 2011, Rockville disclaimed coverage, citing the Ongoing Operations Exclusion and/or two other exclusions in the Policy (NYSCEF Doc No. 63, Maletta affirmation, exhibit J at 6). The letter indicated that defendant first learned of Guzman's incident on January 19, 2011, when it received a copy of the pleadings in the *Guzman* Action, and that defendant reserved the right to disclaim coverage based on plaintiff's failure to provide timely notice of the claim (*id.*). Rockville further noted that defendant retained the right to deny the obligation to provide a defense to plaintiff based on the "Other Insurance" provision in the Policy (*id.*). Rockville repeated defendant's denial of coverage position in a second letter addressed to plaintiff dated April 13, 2011 (NYSCEF Doc No. 64, Maletta affirmation, exhibit K at 1).

Plaintiff sued, asserting causes of action for a declaratory judgment and for breach of contract. Defendant interposed an answer, asserting 23 affirmative defenses. The parties now move separately for summary judgment.

Discussion

The movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The movant's "failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013], citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

A. The First Cause of Action for a Declaratory Judgment

Plaintiff advances three arguments in support of its motion. First, plaintiff submits that the Ongoing Operations Exclusion is ambiguous. The form on which the endorsement appears, Form N263862.1, and the title on the endorsement differ from the form number and title listed in the schedule of endorsements appearing in the front pages of the Policy. The Ongoing

Operations Exclusion does not designate a location to which it applies. The Ongoing Operations Exclusion also references "demolition" as an excluded activity, but fails to specify whether demolition applies to interior or exterior work or both.

Next, plaintiff posits that the allegations in the *Guzman* Action's complaint fail to set forth any facts identifying Guzman as an employee, contractor, or independent contractor such that the incident falls with the Ongoing Operations Exclusion or any other exclusion in the Policy. In any event, defendant was assertedly aware as early as May 2008 that the Ongoing Operations Exclusion is inapplicable because RMG had determined that Guzman was not plaintiff's employee or an employee of its general contractor, Explorer.

Lastly, plaintiff claims that it first provided defendant with notice of the claim in April 2008 through an ACORD dated April 14, 2008.[1] Defendant failed, however, to issue a timely disclaimer under Insurance Law § 3420 (d), thereby waiving its right to disclaim coverage. Plaintiff also submits that it furnished defendant with notice of the commencement of the *Guzman* Action shortly after it received the summons and complaint, as evidenced by a second ACORD dated January 17, 2011.

Defendant, in opposition and in support of its own motion, rejects plaintiff's assertion that the Ongoing Operations Exclusion was not included in the Policy. The certified copy of the Policy on which plaintiff relies, as well as the copy of the Policy mailed to plaintiff as shown in defendant's underwriting file, contain the Ongoing Operations Exclusion on Form N263862.1.

Defendant submits that the Ongoing Operations Exclusions applies because Guzman confirmed in his complaint that he was injured in the course of his employment while performing construction work at the Premises, and that the endorsement was cited in its disclaimer of coverage letter dated February 16, 2011. Defendant asserts the disclaimer was timely, having been issued less than one month after it received the complaint in the *Guzman* Action. In addition, defendant contends that the results from RMG's investigation in 2008 did not trigger its duty to disclaim coverage because defendant did not learn of the additional details necessary to disclaim coverage until it received Guzman's complaint. Additional support for this position is found in a transcript of a March 11, 2009 hearing before the Workers' Compensation Board which resulted in a finding of an employer/employee relationship between Guzman and Explorer (NYSCEF Doc no. 97, exhibit I at 40). As such, defendant urges the court to issue a judgment declaring that there is no coverage for the Guzman claim.

Addressing the timeliness of defendant's disclaimer first, an insurer wishing to "disclaim liability or deny coverage for death or bodily injury ... shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage ..." (Insurance Law § 3420 [d] [2]). A disclaimer is "unnecessary when a claim falls outside the scope of the policy's coverage portion" because coverage "never existed" in the first place (*Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188 [2000]). An exclusion provision in an insurance policy,

[1] Plaintiff submits that it forwarded a letter dated April 22, 2010 it had received from Guzman's attorney advising plaintiff to contact its insurer (NYSCEF Doc No. 59 at 1). Plaintiff, though, offered no proof that this document had been transmitted to defendant.

though, "subtract[s] from rather than grant[s] coverage" (*Jacobson Family Invs., Inc. v National Union Fire Ins. Co. of Pittsburgh, PA*, 129 AD3d 556, 560 [1st Dept 2015], *lv denied* 27 NY3d 901 [2016]). Thus, when coverage is denied "based on a policy exclusion without which the claim would be covered," then a disclaimer under Insurance Law § 3420 (d) is required (*Matter of Worcester Ins. Co.*, 95 NY2d at 189]). The "[f]ailure to comply with section 3420 (d) precludes denial of coverage based on a policy exclusion" (*id.*).

"The timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage" (*Matter of Allcity Ins. Co. [Jimenez]*, 78 NY2d 1054, 1056 [1991], *rearg denied* 79 NY2d 823 [1991]; *First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 66 [2003] [stating that "[o]nce the insurer has sufficient knowledge of facts entitling it to disclaim, or knows that it will disclaim coverage, it must notify the policyholder in writing as soon as is reasonably possible"]). "An insurer who delays in giving written notice of disclaimer bears the burden of justifying the delay" (*First Fin. Ins. Co.*, 1 NY3d at 69). If the grounds for denying coverage are "readily apparent before the onset of the delay," then "an insurer's explanation [for the delay] is insufficient as a matter of law" (*id.*). Thus, if an insurer is aware of a valid ground to disclaim coverage, then the insurer cannot delay issuing the disclaimer "while investigating other possible grounds for disclaiming" (*Endurance Am. Specialty Ins. Co. v Utica First Ins. Co.*, 132 AD3d 434, 436 [1st Dept 2015], *lv dismissed* 27 NY3d 1119 [2016], quoting *George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104, 106 [1st Dept 2012]). Likewise, an insurer must "rapidly" disclaim coverage where "justification for disclaimer is 'readily ascertainable from the face of the complaint in the underlying action' ... or 'all relevant facts supporting ... a disclaimer [are] immediately apparent ... upon ... receipt of notice of the accident'" (*Country-Wide Ins. Co. v Preferred Trucking Servs. Corp.*, 22 NY3d 571, 576 [2014] [internal citations omitted]).

However, where the grounds for a disclaimer are "not readily apparent, [then] the insurer has the right, albeit the obligation, to investigate, but any such investigation must be promptly and diligently conducted" (*Those Certain Underwriters at Lloyds, London v Gray*, 49 AD3d 1, 4 [1st Dept 2007]). Therefore, to find that a delay is reasonable, the insurer "must establish as a matter of law that (1) it was not 'readily apparent' from the content of the verified complaint that grounds for the disclaimer in fact existed; and (2) the investigation ... was promptly and diligently conducted" (*id.* at 4-5).

The court finds that defendant was not under a duty to disclaim coverage in 2008, as plaintiff suggests. The April 4, 2008, letter from Guzman's attorney advised that Guzman intended to pursue a claim for negligence, but offered no additional information describing the type or location of the incident. Thus, the letter, by itself, did not implicate an exclusion so as to immediately trigger the issuance of a disclaimer. The ACORD dated April 14, 2008, stated that Guzman was injured working for a contractor at the Premises, but this statement alone does not readily implicate one of the Policy's exclusions. In this instance, defendant properly and promptly retained RMG to investigate and verify the claim (*see Plotkin v Republic-Franklin Ins. Co.*, 177 AD3d 790, 794 [2d Dept 2019]). RMG's investigation, completed within two months of receiving the ACORD, revealed that Guzman was not an employee of either plaintiff or Explorer. As such, Guzman was not authorized to perform construction work at the Premises. Consequently, if Guzman was not an employee or contractor permitted to work at the Premises

for or on behalf of plaintiff, then there would have been no reasonable basis to invoke the Ongoing Operations Exclusion as a bar to coverage based on the information available to plaintiff at that time.

Further, the RMG investigation revealed that RMG suspected the alleged incident did not occur at the Premises, as noted in RMG's May 30, 2008 letter to Guzman's attorney denying the claim. In that event, defendant would not have been required to disclaim coverage under Insurance Law § 3420 (d) because there was no coverage to begin with (*see Matter of Worcester Ins. Co.*, 95 NY2d at 188). Plaintiff complains that RMG delivered a declination letter to Guzman's attorney, but defendant failed to inform its insured, even though Rockville issued a reservation of rights letter six months thereafter. However, as discussed earlier, defendant was not required to deliver a disclaimer to plaintiff because RMG's investigation revealed that Guzman's incident had occurred on a neighboring property.

Plaintiff's argument that defendant cannot now disclaim coverage based on the broad reservation of rights language in Rockville's November 24, 2008 letter is unpersuasive. "A reservation of rights letter has no relevance to the question whether the insurer has timely sent a notice of disclaimer of liability or denial of coverage" (*Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1029 [1979], *rearg denied* 47 NY2d 951 [1979]). Rather, "a reservation of rights [letter] allows the insurer the flexibility of fulfilling its obligation to provide its insured with a defense, while continuing to investigate the claim further" (*Law Offs. of Zachary R. Greenhill P.C. v Liberty Ins. Underwriters, Inc.*, 128 AD3d 556, 559 [1st Dept 2015]).

Here, defendant has demonstrated that it was not aware until 2011, when plaintiff forwarded the complaint in the *Guzman* Action confirming that Guzman was injured performing demolition work at the Premises, that the Ongoing Operations Exclusion precluded coverage. Rockville, acting for defendant, disclaimed coverage less than 30 days after it received the complaint. Although the Workers' Compensation Board ultimately concluded that an employer/employee relationship existed between Guzman and Explorer (NYSCEF Doc No. 97, Ricci affirmation, exhibit I at 40), defendant was entitled to rely on plaintiff's and Explorer's representations made in 2008 that Guzman was not an employee or contractor (*see e.g. Nationwide Mut. Ins. Co. v Graham*, 275 AD2d 1012, 1013 [4th Dept 2000]).

Moreover, defendant has demonstrated that Guzman's incident falls squarely within the Ongoing Operations Exclusion. "[I]t is well settled that an insurer's duty to defend [its insured] 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" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007] [internal quotation marks and citation omitted]). To that end, an insurer must provide a defense when the facts and allegations in the complaint "bring the claim even potentially within the protection purchased" (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 37 [2010] [internal quotation marks and citation omitted]; *Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63 [1991] [stating that an insurer has a duty to defend even though "facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered"]).

Whereas it is incumbent upon an insured to prove its entitlement to coverage (*see Platek v Town of Hamburg*, 24 NY3d 688, 694 [2015] [citations omitted]), an insurer seeking to invoke a policy exclusion as a bar to coverage must "demonstrate that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case" (*Lend Lease [US] Constr. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 59 [1st Dept 2015], *affd* 28 NY3d 675 [2017] [internal quotation marks and citation omitted]). "[A]n ambiguity in an exclusionary clause must be construed ... against the insurer" (*DMP Contr. Corp. v Essex Ins. Co.*, 76 AD3d 844, 846 [1st Dept 2010] [internal quotation marks and citation omitted]).

Counter to plaintiff's position, the Ongoing Operations Exclusion is not ambiguous. The exclusion clearly and plainly excludes from coverage any and all construction operations, including demolition, performed by or on behalf of plaintiff whether those operations were conducted for plaintiff or for others. While the Ongoing Operations Exclusion does not refer to a specific location, the exclusion reads that it shall apply "regardless of where such operations are conducted" (NYSCEF Doc No. 54 at 34).

Plaintiff's contention that the Ongoing Operations Exclusion is inapplicable because Guzman was not an "employee," as the term is defined in the Policy (NYSCEF Doc No. 54 at 21), is unconvincing. Although Guzman testified that he was self-employed (NYSCEF Doc No. 104, Maletta affirmation, exhibit 6 at 96), the Ongoing Operations Exclusion applies to independent contractors as well as employees and contractors (*see ACC Constr. Corp. v Tower Ins. Co. of N.Y.*, 83 AD3d 443, 443 [1st Dept 2011]), irrespective of Guzman's testimony that he did not receive Workers' Compensation benefits (NYSCEF Doc No. 104 at 92).

Additionally, the fact that the Policy contains two separate designated ongoing operations endorsements does not render the Ongoing Operations Exclusion inapplicable. The first endorsement, the Ongoing Operations Exclusion cited in the disclaimer letter, specifically refers to construction operations at the Premises. The second endorsement, titled "**EXCLUSION – DESIGNATED ONGOING OPERATIONS**" on Form CG 21 53 01 96, excludes from coverage "Any/All occupancy at any time for any purpose during the policy period" (NYSCEF Doc No. 54 at 42). The latter endorsement is inapplicable as Guzman alleges he was injured while performing demolition work. Consequently, that part of defendant's motion for summary judgment dismissing the first cause of action is granted, and plaintiff's motion for summary judgment in its favor on this cause of action is denied.

B. The Second Cause of Action for Breach of Contract

In view of the foregoing, defendant is also entitled to summary judgment dismissing the second cause of action seeking damages for breach of contract.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment in its favor on the first cause of action of the complaint and a declaratory judgment with respect to the subject matter of that cause of action (motion sequence no. 002) is denied; and it is further

ORDERED the motion of defendant for summary judgment dismissing the complaint (motion sequence no. 003) is granted; and it is further

ADJUDGED and DECLARED that defendant herein is not obliged to provide a defense to, and provide coverage for, plaintiff Sea Breeze Holdings LLC in the action *Guzman v Sea Breeze Holdings, LLC*, index No. 300002/2011, Sup Ct, Bronx County.

1/23/2020
DATE

GERALD LEBOVITS, J.S.C.

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