1000 Dean LLC v Bergen Projects, LLC

2020 NY Slip Op 32089(U)

June 29, 2020

Supreme Court, New York County

Docket Number: 652064/2019

Judge: Louis L. Nock

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 38

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1000 DEAN LLC,

Plaintiff,

- against -

BERGEN PROJECTS, LLC, and HOUSTON SPECIALTY INSURANCE COMPANY,

Defendants.

---x

DECISION AND ORDER

Index No. 652064/2019

LOUIS L. NOCK, J.:

Motion sequence nos. 001 and 002 are consolidated for disposition herein.

This insurance coverage dispute arises out of a personal injury action brought by Ricardo Caceres ("Caceres") against plaintiff 1000 Dean LLC, captioned *Caceres v 1000 Dean, LLC*, Sup Ct, Kings County, index No. 504666/2016 (the "*Caceres* Action"). In motion sequence no. 001, defendant Houston Specialty Insurance Company ("HSIC") moves, pursuant to CPLR 3211 (a) (1), (4) and (7), for pre-answer dismissal of the complaint against it. In motion sequence no. 002, defendant Bergen Projects, LLC ("Bergen"), moves, pursuant to CPLR 3211 (a) (1) and (4), for dismissal of the complaint against it. Plaintiff cross-moves for leave to replead its third cause of action alleging bad faith.

BACKGROUND

A. The Lease

On March 23, 2012, plaintiff, as "landlord," and Bergen, as "tenant," entered into a master lease agreement (the "Lease") for a 10-year term for the premises located at 897/917 Bergen Street, Brooklyn, New York (the "Premises") (NY State Courts Electronic Filing ["NYSCEF"] Doc No. 21, affirmation of Eric D. Suben ["Suben"], exhibit G at 2-3 [sections 1 (a) and 2]). Section 1 (a)

of the Lease defines the demised Premises as "those certain premises commonly known as the space within the building owned by Landlord" (*id.* at 2). Section 1 (b) provides, in relevant part, as follows:

> "Nothing herein contained shall be construed as a letting by Landlord to Tenant of (1) the outer faces of exterior walls of the Building, or (2) the land below, or air rights above, the Demised Premises. All space in or adjacent to the Demised Premises used for common areas, shafts, stacks, pipes, conduits, fan rooms, electric or other utilities or building equipment, sinks or other Building facilities, and the use thereof, as well as access thereto through the Demised Premises, for the purposes of operation, maintenance, decoration and repair, are reserved to Landlord, but nothing in such reservation obligates Landlord to operate, maintain, decorate or repair such facilities except as provided herein"

(*Id.*) Section 13 discusses Bergen's repair obligations, and partially reads:

> "Tenant will, at its sole cost and expense, maintain the Demised Premises in good working order and condition, and will make repairs, restorations, and replacements to the Demised Premises, including, without limitation … the fixtures and appurtenances to the Demised Premises (provided that Landlord shall be responsible for maintenance and repairs to the systems and utilities of the Building serving the Demised Premises up to and including the connection to the Demised Premises), as and when needed to preserve them in good working order and condition …."

(*Id.* at 11-12.) With regard to structural improvements, the Lease states that plaintiff shall:

> "[M]aintain in good working order the structural exterior of the building in which the Demised Premises is situated, except that Tenant shall be responsible for any repairs, restorations or maintenance that result from the use and occupancy of the Demised Premises by Tenant …. Except as specifically set forth herein, Landlord shall not be responsible to maintain or repair the Demised Premises, the Building or any other improvements whatsoever"

(*Id.* at 12 [section 14].)

Section 9, titled "Insurance," required Bergen to maintain a general liability insurance policy with a combined $1 million single limit of liability for personal injury or death and an

aggregate $2 million limit of liability (*id.* at 7-8 [section 9 (a) (ii)]). Further, "[s]uch insurance will be noncontributing with any insurance which may be carried by Landlord, will name Landlord … as an additional named insured and will contain a provision … that Landlord, although named as the insured, will nevertheless be entitled to recover under the policy for any loss, injury, or damage to Landlord …." (*id.* at 8). An indemnification clause in section 21 (a) partially reads:

> "(a) Indemnification by Tenant. Tenant will indemnify Landlord … and hold Landlord … harmless from, any and all demands, claims, causes of action, fines, penalties, damages (including consequential damages), losses, liabilities, judgments, and expenses (including, without limitation, attorneys' fees and court costs) incurred in connection with or arising from: (1) the use or occupancy of the Demised Premises by Tenant or any person claiming under Tenant; (2) any activity, work or thing, done or permitted or suffered by Tenant in or about the Demised Premises; (3) any acts, omissions, or negligence of Tenant or any person claiming under Tenant …; (4) any breach, violation, or nonperformance by Tenant, any person claiming under Tenant … of any term, covenant, or provision of this Lease or any law, ordinance, covenant, or provision of this Lease or any law, ordinance or governmental requirement of any kind; and/or (5) any injury or damage to the person, property or business of Tenant[,] its employees, agents, contractors, invitees, visitors, or any other person entering upon the Demised Premises under the express or implied invitation of Tenant. If any action or proceeding is brought against Landlord, its employees or agents by reason of any such claim, Tenant, upon notice from Landlord, will defend the claim at Tenant's expense with counsel reasonably satisfactory to Landlord. Tenant will be responsible for Landlord's reasonable attorneys' fees and court costs hereunder whether such are suffered as a result of the assertion of liability against Tenant by Landlord"

(*Id.* at 16.)

B. The Policy

HSIC issued commercial general liability policy no. HOSPK1000136-01 to Bergen, in effect from June 1, 2015, to June 1, 2016, with a $1 million per occurrence limit of liability and a $2 million general aggregate limit of liability (the "Policy") (NYSCEF Doc No. 76, Suben reply

affirmation, exhibit K at 1 and 39). Section I of the commercial general liability coverage form CG00 01 04 13 states, in part, as follows:

> "**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.
>
> …
>
> **b.** This insurance applies to 'bodily injury' and 'property damage' only if:
>
> **(1)** The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory';
> **(2)** The 'bodily injury' or 'property damage' occurs during the policy period; and
> **(3)** Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no 'employee' authorized by you to give or receive notice of an 'occurrence' or claim, knew that the 'bodily injury' or 'property damage' had occurred, in whole or in part. If such a listed insured or authorized 'employee' knew, prior to the policy period, that the 'bodily injury' or 'property damage' occurred, then any continuation, change or resumption of such 'bodily injury' or 'property damage' during or after the policy period will be deemed to have been known prior to the policy period"

(*Id*. at 41.)

Section II of the commercial general liability coverage form defines who is an insured. An "Additional Insured – Managers or Lessors of Premises" endorsement form CG 20 11 04 13 (the "Managers or Lessors Endorsement") amends Section II "to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the

Schedule," subject to certain exclusions (*id.* at 5). The schedule identifies plaintiff as an additional insured and "899 Bergen Street, Brooklyn, NY 11238" as the premises leased to Bergen (*id.*).

C. The *Caceres* Action

In March 2016, Caceres brought suit against plaintiff. Caceres claims that on January 18, 2016, while working as a porter, he fell from a ladder that had been placed on the sidewalk adjacent to 899 Bergen Street (NYSCEF Doc No. 15, Suben affirmation, exhibit A, ¶¶ 16-17; NYSCEF Doc No. 31, affirmation of Michael D. Kern ["Kern"], exhibit A at 12). Shortly after interposing an answer, plaintiff brought a third-party action against Bergen within the context of the Caceres Action (*1000 Dean LLC [Third-Party Plaintiff] v Bergen Projects LLC [Third-Party Defendant]*), Sup Ct, Kings County, for contribution, contractual and common-law indemnification, and breach of contract for Bergen's failure to procure insurance (NYSCEF Doc No. 17, Suben affirmation, exhibit C, ¶¶ 24-35). Bergen has answered the third-party complaint.

D. The Present Action

By letter dated April 19, 2016, Massachusetts Bay Insurance ("MBI"), plaintiff's general liability carrier, tendered a demand for defense and indemnification to HSIC in relation to Caceres's claim, and referred to numerous clauses in the Lease as the bases for the tender (NYSCEF Doc No. 37, Kern affirmation, exhibit G at 1-2). Tristar Risk Management ("Tristar"), HSIC's third-party adjuster, responded by letter on May 27, 2016, denying plaintiff's tender due to unspecified exclusions in the Policy (NYSCEF Doc No. 38, Kern affirmation, exhibit H at 1; NYSCEF Doc No. 40, Kern affirmation, exhibit J at 1). On July 18, 2018, MBI requested clarification from Tristar as to which exclusions applied to deny coverage, writing that "[t]he failure to disclose specifics to an additional insured within Section 3420d of the New York Insurance Law may prejudice your company position regarding the denial" (NYSCEF Doc No.

39, Kern affirmation, exhibit I at 1). MBI also added that the accident had occurred during the course of Caceres's employment at the Premises and repeated its prior request for defense and indemnification (*id.* at 3).

By separate letter dated August 8, 2018, MBI tendered a request for defense and indemnification to "Houston International Ins. Co." (NYSCEF Doc No. 39 at 5). HSIC responded on December 17, 2018. HSIC acknowledged that it had issued the Policy to Bergen and offered to assume plaintiff's defense in the *Caceres* Action "subject to the grounds for denying coverage and reserving rights to deny coverage" (NYSCEF Doc No. 40 at 1). HSIC acknowledged plaintiff's status as an additional insured under the Managers or Lessors Endorsement (*id.* at 2). Although the endorsement identified the leased premises as "899 Bergen Street," HSIC admitted that this address was the same location as the Premises identified in the Lease (*id.*). However, HSIC noted that the endorsement applied only to the extent the injury arose out of the ownership, maintenance or use of the Premises, and here, Bergen occupied only that "space within the Building owned by" plaintiff (*id.*). Because Caceres alleged that he fell on the public sidewalk, HSIC concluded that "to the extent the sidewalk area adjacent to the building is not part of the Demised Premises leased by 1000 Dean to Bergen Projects, 1000 Dean is not additionally insured, and HSIC reserves the right to disclaim coverage on this basis" (*id.*). Further, HSIC stated that the circumstances of Caceres's accident implicated the "Expected or Intended Injury Exclusion," and reserved the right to deny coverage on that ground (*id.* at 3). Lastly, HSIC expressly reserved the right to withdraw its defense at any time and seek to recoup its defense costs if it was later determined that there was no coverage (*id.* at 1).

Plaintiff initiated this action by filing a summons and complaint on April 9, 2019 (NYSCEF Doc No. 19, Suben affirmation, exhibit E at 1). The complaint pleads the following three causes

of action: (1) breach of contract against defendants for failing to defend and indemnify plaintiff in the *Caceres* Action; (2) a judgment declaring that HSIC is obligated to defend and indemnify plaintiff in in the *Caceres* Action; and (3) recovery of plaintiff's defense costs incurred in the *Caceres* Action based on defendants' bad faith failure to fulfill their contractual obligations. In lieu of serving an answer, HSIC moves for dismissal. Bergen moves separately for dismissal. HSIC and Bergen (together, defendants) rely on the same arguments in support of dismissal. Plaintiff opposes both applications and cross-moves for leave to replead its bad faith claim.

DISCUSSION

On a motion to dismiss brought under CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[I]f from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law," the motion will be denied (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). However, "allegations consisting of bare legal conclusions … are not entitled to any such consideration" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017] [internal quotation marks and citation omitted]). Additionally, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). "When documentary evidence is submitted by a defendant 'the standard morphs from whether the plaintiff stated a cause of action to whether it has one'" (*Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [citations omitted]).

"A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration" (*Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2d Dept 2011] [internal quotation marks and citation omitted]; *Red Robin Stores, Inc. v Rose*, 274 App Div 462, 467 [1st Dept 1948] [same]). Thus, to sustain a cause of action for declaratory relief, the plaintiff must show that the "cause of action is sufficient to invoke the court's power to 'render a declaratory judgment … as to the rights and other legal relations of the parties to a justiciable controversy'" (*Matter of Tilcon N.Y., Inc.*, 87 AD3d at 1150, quoting CPLR 3001]).

A. The Lease, the Policy and the Premises

Defendants argue that the Lease, the Policy and the allegations in Caceres's complaint refute plaintiff's contention that it is entitled to coverage. Section 1 of the Lease states that Bergen leased "space within the building owned by Landlord and situated at 897/917 Bergen Street" (NYSCEF Doc No. 21 at 2). Under the Managers or Lessors Endorsement, the Policy afforded additional insured coverage only for liability arising out of the ownership, maintenance or use of the Premises. Defendants submit that Caceres fell on the public sidewalk, and that under the Lease, Bergen's repair and maintenance obligations did not extend to the sidewalk. Thus, defendants posit that additional insured coverage is unavailable to plaintiff because the accident did not occur within the leased Premises.

Plaintiff rejects defendants' assertion that the sidewalk adjacent to the Premises is not part of the space leased to Bergen. It also argues that the Managers or Lessors Endorsement affords coverage for accidents that occur outside the Premises. In addition, plaintiff contends that the Lease and the Policy are not authenticated and cannot be considered.

Preliminarily, the court rejects plaintiff's assertion that the documents upon which defendants rely cannot be examined because they are not properly authenticated. Dismissal under CPLR 3211 (a) (1) is warranted "where the documentary evidence utterly refutes plaintiff'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]). "A paper will qualify as 'documentary evidence' only if it satisfies the following criteria: (1) it is 'unambiguous'; (2) it is of 'undisputed authenticity'; and (3) its contents are 'essentially undeniable'" (*VXI Lux Holdco S.A.R.L. v Sic Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86-87 [2d Dept 2010]). "[A]n insurance policy is a contract between the insurer and the insured" (*Westchester Fire Ins. Co. v Schorsch*, — AD3d —, 2020 NY Slip Op 02895, *4 [1st Dept 2020] [internal quotation marks and citation omitted]). Likewise, a written lease is a contract (*see Farrell Lines v City of New York*, 30 NY2d 76 82 [1972]). A contract constitutes documentary evidence for purposes of CPLR 3211 (a) (1) (*see Madison Equities, LLC v Serbian Orthodox Cathedral of St. Sava*, 144 AD3d 431, 431 [1st Dept 2016]). As such, the Lease and the Policy shall be considered. Moreover, the copies of the Lease and the Policy submitted on the motions had been attached to the complaint. In any event, HSIC has cured these purported deficiencies in reply. HSIC has submitted a certified copy of the Policy (NYSCEF Doc No. 76 at 1), and an affidavit from an employee of plaintiff's managing agent who avers that the Lease was a "complete fair and accurate copy" (NYSCEF Doc No. 79, Suben reply affirmation, exhibit N, ¶ 3).

"[A]n 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]). Where there is a dispute over coverage, the court

must "first look to the language of the applicable policies" (*Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264 [2011] [internal quotation marks and citation omitted]). "[W]here the provisions of the policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement" (*Government Empls. Ins. Co. v Kligler*, 42 NY2d 863, 864 [1977]). Thus, 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]).

A party seeking coverage under an insurance policy bears the burden of demonstrating its entitlement to coverage, since "a party that is not named an insured or an additional insured on the face of the policy is not entitled to coverage" (*Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]). Here, defendants do not dispute that plaintiff is a named additional insured under the Managers or Lessors Endorsement. In addition, defendants have shown that the Lease does not expressly include the public sidewalk as part of the demised Premises. Nevertheless, defendants have not established that the Lease, the Policy and the complaint in the *Caceres* Action utterly refute plaintiff's allegations (*see Paramount Ins. Co. v Federal Ins. Co.*, 174 AD3d 476, 476-477 [1st Dept 2019]).

The Managers or Lessors Endorsement provides coverage "arising out of the ownership, maintenance or use of that part of the premises leased to [Bergen]" (NYSCEF Doc No. 76 at 5). Although Caceres's accident occurred on the sidewalk, "the additional insured endorsement would give the landlords coverage for accidents occurring outside the demised premises, including on abutting public sidewalks" (*Tower Ins. Co. of N.Y. v Leading Ins. Group Ins. Co., Ltd.*, 134 AD3d 510, 510 [1st Dept 2015] [collecting cases]). In this regard, the court takes note of *ZKZ Assocs. v*

CNA Ins. Co. (224 AD2d 174 [1st Dept 1996], *affd* 89 NY2d 990 [1997]). The plaintiff landlord owned a building in which the defendant garage operator managed a parking garage (224 AD2d at 175). After the landlord was sued for an accident that occurred on the sidewalk abutting the garage, the landlord sued the garage operator and its insurer for a judgment declaring that the insurer was obligated to defend the landlord in the underlying action (*id.*). The Appellate Division, First Department, reasoned that the garage operator's patrons could not access the garage without traversing the sidewalk (*id.* at 176) and determined that the garage operator's "special use of the sidewalk for that purpose is an inextricable, indivisible part of the use of the garage and any liability arising from such use clearly comes within the additional insured's coverage" (*id.*). On appeal, the Court of Appeals stated that the additional insured endorsement of the operator's policy covered the landlord "only for liability arising out of the ownership, maintenance and use of that part of the described premises which is leased to" the garage operator (89 NY2d at 991 [internal quotation marks omitted]). Because use of the sidewalk was necessary to access the garage, the sidewalk "was thus, by implication, 'part of the … premises" occupied by the garage operator (*id.*).

The Lease in this action states, in relevant part, that the "Premises under this Lease shall be [used] solely as an eating and drinking establishment, event space, live music venue, movie theater, pool hall, photography studio, food production facility and/or general retail store and any other use for which Tenant shall have obtained the prior written consent of the Landlord …." (NYSCEF Doc No. 21 at 9 [section 10]). At his deposition in the underlying action, Caceres testified that the Premises housed a "bar/restaurant" and that there were three or four entrances into the restaurant along Bergen Street (NYSCEF Doc No. 31 at 12 and 24). Therefore, "[t]he part of the sidewalk where the alleged accident occurred was necessarily used for access in and out of the [Premises] … and was thus, by implication, 'part of the … premises'" (*ZKZ Assoc. LP*, 89

NY2d at 991). Because plaintiff's allegations implicate the "reasonable possibility of coverage" under the Policy (*BP A.C. Corp.*, 8 NY3d at 714; *Frank v Continental Cas. Co*., 123 AD3d 878, 881 [2d Dept 2014]), those parts of both motions for dismissal predicated on CPLR 3211 (a) (1) are denied.

B. Plaintiff's Bad Faith Claim

The third cause of action alleges that defendants' failure to fulfill their contractual obligations and defend and indemnify plaintiff constitutes bad faith (NYSCEF Doc No. 19, ¶ 49).

Defendants contend that this allegation is redundant of the first cause of action for breach of contract. Assuming that the third cause of action is not duplicative, defendants argue that plaintiff failed to adequately plead a claim for bad faith. In response, plaintiff moves for leave to replead its bad faith claim.

Plaintiff's bad faith claim as alleged in the original complaint fails on two grounds. First, "[a]llegations that an insurer had no good faith basis for denying coverage are redundant to a cause of action for breach of contract based on the denial of coverage, and do not give rise to an independent tort cause of action, regardless of the insertion of tort language into the pleading" (*Royal Indem. Co. v Salomon Smith Barney*, 308 AD2d 349, 350 [1st Dept 2003] [collecting cases]). Here, the third cause of action for defendants' bad faith refusal to fulfill its contractual obligations is redundant of its first cause of action for breach of contract. Although "a claim for breach of contract and one for bad faith handling of an insurance claim are not necessarily duplicative," the complaint must plead different conduct by the defendant as the bases for each claim (*D.K. Prop., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa*., 168 AD3d 505, 507 [1st Dept 2019]). Such is not the case here, where the bad faith claim is predicated upon the same factual allegations as the breach of contract claim.

Second, "[t]here is no independent cause of action for bad faith breach of insurance contract arising from an insurer's failure to perform its obligations under an insurance contract" (*Head v Emblem Health*, 156 AD3d 424, 425 [1st Dept 2017]; *Acquista v New York Life Ins. Co*., 285 AD2d 73, 82 [1st Dept 2001]). The allegation that defendants' failure to fulfill their contractual obligations constitutes bad faith is plainly deficient.

As to plaintiff's cross motion, "the standard to be applied on a motion for leave to replead pursuant to CPLR 3211 (e) is consistent with the standard governing motions for leave to amend pursuant to CPLR 3025" (*Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, 27 [2d Dept 2008]). A motion for leave to amend the pleadings should be freely granted unless there is prejudice or surprise from the delay or if the amendment is "palpably insufficient or patently devoid of merit" (*see JPMorgan Chase Bank, N.A. v Low Cost Bearings NY Inc*., 107 AD3d 643, 644 [1st Dep't 2013], quoting *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). "An amendment is devoid of merit where the allegations are legally insufficient" (*Reyes v BSP Realty Corp*., 171 AD3d 504, 504 [1st Dept 2019]). As such, the court must examine the sufficiency of the merits of the proposed amendment and is not required to accept plaintiff's allegations as true (*see Bag Bag v Alcobi*, 129 AD3d 649, 649 [1st Dept 2015]). The party moving to amend the pleadings need not prove the facts (*see Fairpoint Cos., LLC v Vella*, 134 AD3d 645, 645 [1st Dept 2015]), but must tender an affidavit of merit or offer of evidence similar to that used to support a motion for summary judgment (*see Velarde v City of New York*, 149 AD3d 457, 457 [1st Dept 2017]). The party opposing the motion bears a heavy burden of showing prejudice (*see McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]), or demonstrating that the facts as alleged are unreliable or insufficient to support the motion (*see Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [1st Dept 2007]).

"[I]n order to establish a prima facie case of bad faith, the plaintiff must establish that the insurer's conduct constituted a 'gross disregard' of the insured's interests – that is, a deliberate or reckless failure to place on equal footing the interests of its insured with its own interests" (*see Pavia v State Farm Mut. Auto. Ins. Co*., 82 NY2d 445, 453 [1993], *rearg denied* 83 NY2d 779 [1994]). "In other words, a bad-faith plaintiff must establish that the defendant insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable for a large judgment" (*id*. at 453-54).

As applied herein, plaintiff has not cured the pleading deficiencies with respect to the bad faith claim. In the proposed amended complaint, plaintiff alleges that HSIC's denial of coverage was knowingly and willfully false, and though HSIC has agreed to assume plaintiff's defense in the *Caceres* Action, HSIC has refused to indemnify plaintiff despite the Policy terms stating that plaintiff is entitled to a full defense and indemnity (NYSCEF Doc No. 42, Kern affirmation, exhibit L, ¶¶ 53-57). These allegations relate to the performance of HSIC's duties under the Policy, and are insufficient to infer that defendants "breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations" (*New York Univ. v Continental Ins. Co*., 87 NY2d 308, 316 [1995]). Nor are these new allegations sufficient to plead that defendants acted in gross disregard of plaintiff's interests (*see Pavia*, 82 NY2d 453). The denial letters show that HSIC reviewed the facts surrounding Caceres's accident and the terms of the Lease and the Policy before concluding that there was no coverage (NYSCEF Doc No. 40 at 2-3). Under these circumstances, plaintiff's bad faith claim is not supportable (*see JLS Indus., Inc. v Delos Ins. Co*., 127 AD3d 645, 645-646 [1st Dept 2015] [dismissing the plaintiff's bad faith claim where the defendants disclaimed coverage based on the facts learned after carrying out an investigation and applicable

case law]; *DMP Contr. Corp. v Essex Ins. Co*., 76 AD3d 844, 847 [1st Dept 2010] [same]). And while "using economic duress to deprive the insured of the very insurance coverage for which plaintiff contracted" may constitute bad faith conduct (*Ansonia Assoc. Ltd. Partnership v Public Serv. Mut. Ins. Co*., 257 AD2d 84, 91 [1st Dept 1999]), plaintiff's bare assertion that it has been forced to expend time and resources to defend itself in the *Caceres* Action is insufficient to plead that defendants' conduct "was part of a deliberate strategy to avoid payment on the claim" (*id*. at 90). Accordingly, those branches of the motions seeking dismissal of the third cause of action are granted, and the third cause of action is dismissed. Plaintiff's cross motion for leave to replead the third cause of action is denied.

C. The Prior Pending *Caceres* Action

Defendants also argue that the complaint should be dismissed because plaintiff commenced an earlier action in which it asserted identical claims as those alleged in this action. The third-party complaint in the *Caceres* Action asserted causes of action for breach of contract for failure to procure insurance, contractual and common-law indemnification, and contribution.

Plaintiff submits that its third-party action is predicated upon the specific indemnification and insurance procurement provisions in its Lease with Bergen, whereas the present declaratory judgment action is predicated upon plaintiff's status as an additional insured under the Policy. Plaintiff also argues that the relief sought in both actions – monetary damages as opposed to declaratory relief – demonstrates they are not duplicative. Furthermore, with regard to Bergen, plaintiff maintains that Bergen waived its right to move for relief under CPLR 3211 (a) (1) and (4) because it failed to raise either as an affirmative defense in its answer and failed to move for dismissal before service of its answer.

CPLR 3211 (a) (4) permits the court to dismiss a complaint where "there is another action pending between the same parties for the same cause of action." A primary concern where two simultaneous actions are pending is the "potential for conflicts that might result from rulings issued by courts of concurrent jurisdiction" (*White Light Prods. v On Scene Prods*., 231 AD2d 90, 93 [1st Dept 1997]). The prior action must have been commenced earlier in time (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Jordache Enters*., 205 AD2d 341, 343 [1st Dept 1994]), though this factor is not necessarily dispositive (*see Certain Underwriters at Lloyd's, London v Hartford Acc. & Indem. Co*., 16 AD3d 167, 168 [1st Dept 2005]).

Key elements for invoking CPLR 3211 (a) (4) are "sufficient identity as to both parties and the causes of action asserted in the respective actions" (*White Light Prods.*, 231 AD2d at 93). "With respect to the parties, the requirement is that there be substantial identity" (*id*. at 93-94). Substantial identity "generally is present when at least one plaintiff and one defendant is common in each action" (*Morgulas v J. Yudell Realty*, 161 AD2d 211, 213 [1st Dept 1990]). As such, complete identity between the parties is not required (*see PK Rest., LLC v Lifshutz*, 138 AD3d 434, 436 [1st Dept 2016], citing *Syncora Guar. Inc. v J.P Morgan Sec. LLC*, 110 AD3d 87, 96 [1st Dept 2013]). The relief sought in both actions must also be "the same or substantially the same" (*White Light Pros.*, 231 AD2d at 94 [internal quotation marks and citation omitted]). "It is not necessary that the precise legal theories presented in the first action also be presented in the second action [so] long as the relief … is the same or substantially the same" (*JPMorgan Chase Bank, N.A. v Luxama*, 172 AD3d 1341, 1341-1342 [2d Dept 2019] [internal quotation marks and citation omitted]; *accord Jadron v 10 Leonard St., LLC*, 124 AD3d 842, 843 [2d Dept 2015] [stating that "[t]he critical element is whether both suits arise out of the same subject matter or series of alleged wrongs"]; *Shah v RBC Capital Mkts. LLC*, 115 AD3d 444, 445 [1st Dept 2014] [same]).

At the outset, the court finds that Bergen waived the CPLR 3211 (a) (4) defense when it failed to move for dismissal on this ground prior to serving its answer and by failing to raise it as an affirmative defense. CPLR 3211 (e) provides, in pertinent part, that:

> "At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading."

Here, Bergen answered the complaint without pleading the affirmative defense that there was a prior action pending (NYSCEF Doc No. 70, Kern affirmation, exhibit L). Its waiver of this defense cannot be overlooked, despite Bergen's attempt to reframe its fourth affirmative defense of estoppel and seventh affirmative defense of lack of standing (*id.*, ¶¶ 8 and 11) as a prior pending action defense (*see* CPLR 3013 and 3014). Accordingly, insofar as Bergen seeks dismissal under CPLR 3211 (a) (4), that part of its motion is denied (*see Green Point Sav. Bank v Clarke*, 220 AD2d 384, 385 [2d Dept 1995]).

An examination of the third-party complaint and the complaint in this action reveals that both involve "similar issues, and parties with aligned interests" (*Liberty Surplus Ins. Corp. v Harleysville Ins. Co. of N.Y.*, 140 AD3d 621, 621 [1st Dept 2016]). Additionally, plaintiff pleads similar causes of action and seeks similar relief. In the first two causes of action in the third-party complaint, plaintiff asserted claims for contractual indemnification and reimbursement of its defense costs based on the indemnification clause in the Lease, and for breach of contract based on the Lease provision requiring Bergen to procure insurance (NYSCEF Doc No. 17, ¶¶ 24-31). Significantly, the "wherefore" clause demands a "judgment directing Bergen to defend, indemnify and hold Dean harmless in connection with the underlying suit" (*id.* at 9). In the present action,

the complaint describes Bergen's contractual obligations under the Lease to indemnify plaintiff for any accidents that arise out of Bergen's use and occupation of the sidewalk, and its obligation to procure an insurance policy naming plaintiff an additional insured. It alleges as a first cause of action that defendants' failure to defend and indemnify plaintiff in the *Caceres* Action constitutes a breach of contract (NYSCEF Doc No. 19, ¶ 42). The second cause of action seeks a judgment declaring that HSIC is obligated to defend and indemnify plaintiff in the *Caceres* Action (*id.*, ¶ 47). Plaintiff in the "wherefore" clause also demands an order directing defendants to reimburse its defense costs incurred in the underlying action (*id.* at 11).

Nevertheless, the court declines to exercise its discretion toward dismissal of the complaint. The court is vested with broad discretion in deciding a motion brought under CPLR 3211 (a) (4) (*see Whitney v Whitney*, 57 NY2d 731, 732 [1982]). CPLR 3211 (a) (4) states, in relevant part, that "the court need not dismiss upon this ground but may make such order as justice requires." As such, dismissal is not mandatory. Given the similarities between the two actions, consolidation may be a more appropriate resolution (*see Roberts v 112 Duane Assoc. LLC*, 32 AD3d 366, 368 [1st Dept 2006], *lv denied* 8 NY3d 815 [2007] [reinstating a third-party claim for tortious interference and consolidating the third-party claim with a prior pending action]; *Gutman v Klein*, 26 AD3d 464, 465 [2d Dept 2006] [concluding that consolidation, not dismissal, was appropriate]; *Fay Estates v Toys "R" Us, Inc.*, 22 AD3d 712, 714 [2d Dept 2005] [declining to grant dismissal under CPLR 3211 (a) (4) and directing consolidation "since the two actions involve common questions of law or fact"]). Thus, the court denies HSIC's motion "without prejudice to the parties seeking relief in Kings County for a transfer of venue and consolidation and/or to have this action joined with the pending Kings County action" (*Liberty Surplus Ins. Corp.*, 140 AD3d at 621).

Accordingly, it is

ORDERED that the motion of defendant Houston Specialty Insurance Company to dismiss the complaint (motion sequence no. 001) is granted to the extent of dismissing the third cause of action, and the third cause of action is dismissed, and the part of the motion brought under CPLR 3211 (a) (4) is denied without prejudice to the parties seeking relief in Kings County for a transfer of venue and consolidation and/or to have this action joined with the pending actions titled *Caceres v 1000 Dean, LLC*, Sup Ct, Kings County, index No. 504666/2016, and the third-party action titled *1000 Dean LLC v Bergen Projects LLC*, Sup Ct, Kings County, and the balance of the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross motion for leave to replead the third cause of action is denied; and it is further

ORDERED that the motion of defendant Bergen Projects, LLC to dismiss the complaint (motion sequence no. 002) is granted to the extent of dismissing the third cause of action, and the third cause of action is dismissed, and the balance of the motion is otherwise denied; and it is further

ORDERED that defendant Houston Specialty Insurance Company shall serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall keep this court apprised of any application made to transfer venue and consolidate or join this action to *Caceres v 1000 Dean, LLC*, Sup Ct, Kings County, index No. 504666/2016, and *1000 Dean LLC v Bergen Projects LLC*, Sup Ct, Kings County.

This shall constitute the decision and order of the court.

Dated: New York, New York
June 29, 2020

ENTER:

Hon. Louis L. Nock, J.S.C.