1267 Rogers Ave., LLC v First. Am. Title Ins. Co.
2020 NY Slip Op 32225(U)
July 6, 2020
Supreme Court, Kings County
Docket Number: 502465/19
Judge: Donald Scott Kurtz

At an IAS Part 26 of the Supreme Court of the State of New York, Kings County on the 6th day of July, 2020

Present: HON. DONALD SCOTT KURTZ
Justice, Supreme Court

Index No.: 502465/19

1267 ROGERS AVENUE, LLC,

Plaintiff,

DECISION/ORDER

-against-

FIRST AMERICAN TITLE INSURANCE COMPANY and NATIONAL GRANITE TITLE INSURANCE AGENCY, INC.,

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed	4, 6-23
Answering Affidavits/Affirmations	
Reply Affidavits/Affirmations	
Memoranda of Law	5, 26, 27
Other	24, 25

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendant First American Title Insurance Company ("First American") moves for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the complaint herein based upon documentary evidence and for failure to state a cause of action.

Background Facts and Procedural History

Plaintiff 1267 Rogers Avenue LLC ("1267 Rogers") commenced the instant action seeking damages for breach of contract and a duty to defend, and asserting a claim for contribution against First American. A review of the Court's record indicates that on or about April 18, 2014, 1267 Rogers entered into a memorandum of lease agreement with non-party Roman Catholic Church of St. Ignatius of Brooklyn ("RCC") with respect to the premises located at 1267 Rogers Avenue in Brooklyn, New York ("the subject premises") (Affidavit of Anthony F. Prisco ["Prisco Aff"], claims counsel for First American, Exhibit 1). Adjacent to and abutting the subject premises is a four-story building ("the school building") owned and/or occupied by non-parties Dormitory Authority of the State of New York and City University of New York ("the school"; Prisco Aff, Exhibit 2, Paragraph 14).

On or about September 3, 2014, 1267 Rogers obtained an insurance policy from First American for coverage of the subject premises ("the subject policy") (Complaint, Paragraph 7; Prisco Aff,

Exhibit 3). In the complaint, 1267 Rogers alleges, among other things, that defendant National Granite Title Insurance Agency, Inc. ("NGT") issued the subject policy and that NGT is identified as First American's "authorized agent" in Schedule A of the subject policy (Complaint, Paragraph 12; Prisco Aff, Exhibit 3).

Schedule B of the subject policy (Prisco Aff, Exhibit 2) provides, in relevant part, that:

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

1. Rights or claims of parties in possession.

...

4. Survey Reading Annexed.

...

The Survey Reading annexed to Schedule B of the subject policy (*id.*) provides, in relevant part, that:

State of facts shown on survey made by Vincent J. Dicce, L.S. and dated 5/23/13. Survey shows premises described on Schedule A. No variations, encroachments and/or projections except as follows:

--one story brick (attached to high one story brick) encroaches onto property to the east 3.0' and roof cap projects 0-2";
--bumpers located on and outside easterly line;
--chain link fence with gate on concrete retaining wall outside portion of easterly line;
--hand rail and roof cornice from building on premises to the east project 0-3½" and 1'9½" respectively onto premises herein; Door and windows on line; ...
--iron fence on 6" concrete retaining wall outside northerly line up to 6'4½" on Carroll Street, then continuing with gate outside westerly line up to 3'1" on Rogers Avenue, then continuing inside southerly line up to 2½", and then continuing inside portion of easterly line up to 6.1' and then continues and encroaches onto premises to the east;
--fence with gate at southeast corner from retaining wall and crossing easterly line onto premises to the east ...

Item 3 (a) of the Exclusions from Coverage of the subject policy (*id.*) provides that First American "will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of ... : 3. [d]efects, liens, encumbrances, adverse claims, or matters (a) created, assumed or agreed to by the Insured Claimant" (*id.*). Paragraph 15 (b) of the Conditions of the subject policy provides that "[a]ny claim of loss or damage that arises out of the status of the [t]itle or by any action asserting such claim shall be restricted to this policy" (*id.*).

Thereafter, on or about April 10, 2015, a related underlying action entitled *Dormitory Authority of the State of NY and City University of New York v Roman Catholic Church of Saint Ignatius and 1267 Rogers Avenue LLC*, Index No. 504285/15 ("the underlying action") was commenced in the Kings County Supreme Court in relation to 1257 Rogers' then ongoing construction and development project at the subject premises. In the underlying action, the school sought, among other things: a declaration that it enjoyed an easement by implication over the subject property with respect to a cornice and egress door on the western wall of the school building; a declaration that it enjoyed an easement by implication over the subject property so as to continue to enjoy light and air from the school windows on the west wall of the school building; a declaration that the school enjoys an easement by implication over the southeastern portion of the subject property so as to permit the

continued use of the right of way with respect to the driveway at the southwest portion of the school property to provide pedestrian egress and ingress; and a permanent injunction prohibiting 1267 Rogers and RCC "from blocking the [e]gress [d]oor on the western wall of the [s]chool [b]uilding" (Prisco Aff, Exhibit 4, Paragraph 49).

On or about April 22, 2015, 1267 Rogers sent a letter to First American notifying it of the underlying action and demanding that it undertake its defense against it (*id.*, Exhibit 5). By letter dated May 1, 2015, First American responded to the April 22, 2015 letter denying coverage and pointing to, among other things, the policy Exclusions, the Schedule B Exceptions and an attached Survey (*id.*, Exhibit 9). In response thereto, 1267 Rogers sent a letter dated June 16, 2015 contesting First American's denial of coverage (*id.*, Exhibit 10). By letter dated July 2, 2015, First American reiterated its denial of coverage and duty to defend 1267 Rogers against the underlying action (*id.*, Exhibit 11). Subsequently, on or about December 12, 2017, a stipulation of discontinuance was filed in the underlying action (*id.*, Exhibit 13). By letter dated November 12, 2018, 1267 Rogers advised First American that the underlying action had settled and again requested that First American cover the costs that it expended in defending against the underlying action (*id.*, Exhibit 14). First American again denied its request.

Thereafter, on or about February 4, 2019, 1267 Rogers commenced the instant action. In the first cause of action of the complaint, 1267 Rogers alleges, among other things, that "[d]efendants have breached the terms of the insurance policy by failing and refusing to defend and indemnify [1267 Rogers] in [the underlying action], and by not paying any part of the defense and resolution of [the underlying action]" (*id.*, Exhibit 3, paragraph 32). In the second cause of action of the complaint, 1267 Rogers alleges that it is "entitled to obtain a declaration of the contribution obligations of [d]efendants with respect to the defense and resolution of [the underlying action], together with the reimbursement of premiums paid by [1267 Rogers] to [d]efendants" (*id.*, paragraph 40). First American now moves for the relief requested herein.

Discussion

In support of its motion, First American contends that the complaint herein fails to state a claim for breach of the subject policy and that said claim against it is barred by the plain language of the subject policy. In support of this contention, First American, among other things, points to the provisions of paragraphs 1 and 4 of the Schedule B Exceptions from Coverage and Item 3 (a) of the Exclusions from Coverage under the subject policy.

First American asserts that the issues that formed the basis of the underlying action were all excepted from coverage under the subject policy. More specifically, First American argues that the five encroachment items at issue in the underlying action were all disclosed to 1267 Rogers on the Survey prior to its signing of the subject policy and that said items were described in the Survey Reading. First American also maintains that the five encroachment items at issue "all arose from an alleged possessory right of a neighboring owner that does not appear in the public land records" (Memorandum of Law in Support, page 7). According to First American, Item 3 (a) of the Exclusions under the subject policy precludes any coverage of 1267 Rogers' claims because it had actual knowledge of the five encroachment items at the time it signed the lease for the subject premises and obtained the subject policy and, as such, "agreed to accept its leasehold subject to those rights and interests" (Memorandum of Law in Support, page 8, page 11).

Relying upon the provisions of paragraph 4 of the Schedule B Exceptions from Coverage and the items listed in the Survey Reading annexed thereto, First American contends that the encroachments alleged by the school in the underlying action are explicitly excepted from coverage. First America maintains that the Survey Reading, along with Schedule B Exceptions from Coverage, provided unambiguous notice to 1267 Rogers that all claims arising from physical "encroachments, variations and/or projections" (Prisco Aff, Exhibit 2, survey reading) are subject to the exceptions noted in the policy. First America asserts that the Survey Reading specifically refers to a "hand rail and roof **cornice** from building on premises to the east project 0-3 1/2" and 1'9 ½" respectively onto the subject premises herein; **Door** and **windows** on line" (*id.*; emphasis added). First America also claims that although the language used in the Survey Reading and Survey (Prisco Aff, Exhibit 6, Exhibit 7) is not specifically the same as that used by the school in its claim to a pedestrian right of way in the underlying complaint, said claim falls within the Schedule B Exceptions to the subject policy. In support of this claim, First America asserts that "an iron fence running north to south for approximately sixty feet that cuts into the eastern portion of the property line for the [subject premises] at a depth of approximately six feet. This is the only area over which there could conceivably be a claim to a pedestrian right of way to access Crown Street, as the remainder of the [subject premises] are blocked by an iron fence (which also appears on the [s]urvey and Survey Reading)" (*id.*, Exhibit 7 highlighted in pink; exhibit 8, #4). First American claims that the Survey Reading language referencing "the bumpers located on and outside easterly line", "iron fence on 6" concrete retaining wall outside northerly line up to 6'4 ½" on Carroll Street, then continuing with gate outside westerly line up to 3'1" on Rogers Avenue, then continuing inside southerly line up to 2 ½", and then continuing inside portion of easterly line up to 6.1' and then continues and encroaches onto premises to the east", "fence with gate at southeast corner from retaining wall and crossing easterly line onto premises to the east" (*id.*, Exhibit 2) describes and excepts the encroaching features claimed by the school in the underlying action (Memorandum of Law in Support, page 18).

The Court notes that First American points out that 1267 Rogers "does not address or seek damages relating to the [u]nderlying [p]laintiffs' allegations concerning its fence" (Memorandum of Law in Support, page 6, Footnote 2).

Additionally, citing to paragraph 1 of the Schedule B Exceptions from Coverage, First American argues the basis of the underlying action arose from the "alleged right of a party in possession" and amounted to the school's claim "to hold a possessory interest that extends across the lot line on to" the subject premises (Memorandum of Law in Support, page 18). First American also asserts that the " 'rights or claims of parties in possession' exception excludes coverage for encumbrances on title that arise from the rights of parties in actual possession of property whose claims are not reflected in the title record" (Memorandum of Law in Support, page 19). First American cites to the Appellate Division Second Judicial Department's holding in *Herbil Holding Co. v Commonwealth Land Title Ins. Co.*, 183 AD2d 219 [2d Dept 1992]) in support of its argument that "if the claim of possession arises out of a claimed right that appears of record in the chain of title, the 'rights of possession' exception does not exclude coverage" (Memorandum of Law, page 20). First American is of the opinion that "[i]f the claim of possession arises solely out of physical possession that does not appear in the land records – as is the case with the easement by implication claims advanced in the [u]nderlying [a]ction -then the 'rights of possession' exception will preclude coverage" (*id.*).

In addition, First American argues that 1267 Rogers was aware of the encroachments alleged in the underlying action at the time it entered into its leasehold for the subject property by virtue of the Survey, the Survey Reading and through visual inspections and, as such, cannot now seek indemnification for having to defend against the claims regarding same in the underlying action. Citing to Item 3 (a) of the Exclusions under the subject policy, First American asserts that 1267 Rogers can only be deemed to have "agreed" to the encroachments claimed in the underlying action and, as a result, its claim is "excluded from coverage" under the subject policy (id., exhibit 2, paragraph 3[a]; Memorandum of Law in Support of Motion, pages 23 and 24).

Lastly, First American argues that the complaint herein fails to state a cause of action for contribution because a claim for contribution will only lie where "the underlying liability for which contribution is sought sounds in tort" (*see Schottland v Brown Harris Stevens*, 137 AD3d 997, 998 [2d Dept 2016]; Memorandum of Law in Support, page 25). First American contends that a claim for contribution fails where, as here, it is based solely upon damages for a breach of contract. First American points to Paragraph 15(b) of the conditions of the subject policy which "codifies the economic loss doctrine by precluding [1267 Rogers] from advancing tort claims, or any other legal theories, against [First American] where the basis of its claim arises fundamentally out of its rights under the policy" (Prisco Aff, Exhibit 2; Memorandum of Law in Support, page 25). In this regard, First American contends that the complaint should be dismissed based upon documentary evidence and for failure to state a cause of action.

In opposition, 1267 Rogers maintains that First American has failed to demonstrate that its documentary evidence refutes the allegations in the complaint herein or to conclusively establish that the claims therein are expressly excluded from coverage under the subject policy. 1267 Rogers claims that First American's July 2, 2015 denial of coverage letter indicates First American's acknowledgement that the underlying action involved an easement dispute because in said letter, First American states that "[a]n easement by implication, whether for light and air or encroachments, is based on use and/or possession. The easement by implication allegations involve matters the [subject policy] excepts from coverage" (Memorandum of Law in Opposition, page 5; Prisco Aff, Exhibit). In response to First American's reliance upon the exceptions delineated in paragraph 1 of Schedule B of Exceptions from Coverage and the referenced Survey Reading to disclaim coverage of the defense against the underlying action, 1267 Rogers counters that the language of said provisions does not clearly and unambiguously exclude easements by implication from coverage. 1267 Rogers also asserts that the language of the subject policy makes no reference to same. In the event there is any ambiguity in the language of the referenced provisions, 1267 Rogers argues that the ambiguity should be construed in its favor, as the insured, and against First America, as the insurer. In this regard, 1267 Rogers argues that First American has failed to satisfy its burden of demonstrating that the referenced exclusions are clear and unambiguous and contends that its broad duty to defend requires it to cover 1267 Rogers' defense against the underlying action. Additionally, 1267 Rogers contends that First American has failed to demonstrate that the complaint herein should be dismissed based upon documentary evidence.

Also, 1267 Rogers argues that it has a cause of action for breach of contract based upon its allegations in the complaint and that First American breached its duty to defend the underlying action

against it. Lastly, with respect to its claim for contribution, in opposition, 1267 Rogers argues that the claim was plead merely as an alternative form of relief.

In reply, First American contends that although the language of the subject policy does not specifically include the words "easement by implication" to describe adverse claims, the basis for the claims in the underlying action (*ie.*, five encroachments on the subject property) is specifically referenced as an exception and excluded from coverage under the terms of the subject policy. First American maintains that while 1267 Rogers responded to its arguments regarding paragraph 1 of the Schedule B Exceptions from Coverage and the Survey Reading made in support of the motion, 1267 Rogers failed to address its arguments based upon the language of Item 3(a) of the Exclusions under the subject policy. First American reiterates its argument that the policy provisions clearly except and exclude coverage for defending against the underlying action and rejects 1267 Rogers' contention that it has a broad duty to defend in such an instance. First American insists that 1267 Rogers had actual knowledge of the subject encroachments at the time it entered into its lease agreement through visual inspections and the disclosure of said items on the Survey and Survey Reading. First American again argues that the encroachments, "easement by implication", that formed the basis of the underlying action were disclosed and disclaimed and that 1267 Rogers is not entitled to coverage for claims arising as a result of alleged "rights or claims of parties in possession" as is referenced in paragraph 1 of the Schedule B Exceptions from Coverage under the subject policy. First American again argues that 1267 Rogers is "not entitled to coverage under the policy where it accepted its leasehold interest subject to the rights and interests for which it now seeks indemnity as listed under Exclusion 3(a) of the subject policy. Finally, First American points out that 1267 Rogers has failed to submit any opposition to its arguments regarding its claim for contribution.

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*MJK Bldg. Corp. v Fayland Realty, Inc.*, 181 AD3d 860, 861 [2d Dept 2020], internal citations and quotation marks omitted). When considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(1), "the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Gould v. Decolator*, 121 A.D.3d 845, 847 [2d Dept 2014]). A motion to dismiss on the basis of CPLR 3211(a)(1) may be granted "only 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 N.Y.2d 314, 326 [2002]; *see Graphic Arts Mut. Ins. Co. v Pine Bush Cent. School Dist.*, 159 AD3d 769, 771 [2d Dept 2018]).

"The duty of the insurance carrier to defend, which is exceedingly broad, is triggered whenever the four corners of a complaint, liberally construed, suggest a reasonable possibility of coverage, or when the insurance carrier has actual knowledge of facts establishing such a reasonable possibility. The insurance carrier may be relieved of its duty to defend only if it can establish as a matter of law

that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured, or by proving that the claim falls within a policy exclusion. For denials based on claimed policy exclusions, the insurance carrier bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision. If any claim arguably arises from a covered event, the insurance carrier must defend the entire action, and assumes the risk and the consequences of making its own decision as to what is alleged or what might be proven against its insured" (*Conrad R. Sump & Co. v Home Ins. Co.*, 267 AD2d 415, 417 [2d Dept 1999]; internal citations and quotation marks omitted).

Based upon a review of the record submitted by the parties and the relevant law, the Court grants that portion of First American's motion seeking to dismiss the first cause of action of the complaint herein based upon documentary evidence. The Court notes that the language "easement by implication" appears nowhere in the subject policy. However, the provisions of paragraph 1 of Schedule B of the Exceptions from Coverage provides that the "[r]ights or claims of parties in possession" are excepted from coverage under the subject policy. A policy exception of this type has been held to exclude claims for easements implied by law (*see generally Scaglione v Commonwealth Land Tit. Ins. Co.*, 303 AD2d 671, 671-672 [2d Dept 2003]; *see also Herbil Holding Co. v Commonwealth Land Title Ins. Co.*, 183 AD2d 219 [2d Dept 1992]). In the underlying action, the school's claims were based upon easements by implications related to certain encroachments which were disclosed in the Survey Reading annexed to Schedule B of the Exceptions from Coverage (referenced in paragraph 4) under the subject policy. In addition, the school's claims related to the cornice, the windows and door referenced in the underlying action are all listed in the Survey Reading. Indeed, Item 3 (a) of the Exclusions under the subject policy excludes any claims for reimbursement for any "...loss or damage, costs, attorneys' fees, or expenses that arise by reason of ... : 3. [d]efects, liens, encumbrances, adverse claims, or matters (a) created, assumed or agreed to by the Insured Claimant" (Prisco Aff, Exhibit 2). The Court finds that First American has demonstrated as a matter of law that these provisions clearly except and exclude the claims in the underlying complaint from coverage under the subject policy and that said exceptions and "exclusion [are] subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision" (*Conrad R. Sump & Co.*, 267 AD2d at 417). In this regard, First American has demonstrated that 1267 Rogers does not have a cause of action for breach of contract and a duty to indemnify. As such, the Court hereby grants that portion of First American's motion to dismiss the first cause of action of the complaint based upon documentary evidence and for failure to state a cause of action.

With respect to 1267 Rogers' claim for contribution, the Court grants that portion of First American's motion to dismiss said claim based upon documentary evidence and for failure to state a cause of action. It is well settled that a claim for contribution "... arise[s] when 'two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owed to the injured person'" *Garrett v Holiday Inns, Inc.*, 58 NY2d 253, 258 [1983], quoting *Smith v Sapienza*, 52 NY2d 82, 87 [1981]). In the underlying action, the school sought declaratory relief related to alleged easements by implication. Here, 1267 Rogers seeks damages related to First American's alleged breach of the subject policy and duty to defend it against the underlying action. As such, the damages

sought herein do not sound in tort. Moreover, paragraph 15 (b) of the Conditions of the subject policy provides that "[a]ny claim of loss or damage that arises out of the status of the [t]itle or by any action asserting such claim shall be restricted to this policy" (Prisco Aff, Exhibit 2). Notably, apart from asserting that its claim for contribution was merely plead as an alternative form of relief, 1267 Rogers fails to submit any arguments in opposition to that portion of First American's motion seeking to dismiss the second cause of action. In light of the foregoing, the Court hereby grants that portion of First American's motion seeking to dismiss the second cause of action based upon documentary evidence and for failure to state a cause of action.

Conclusion

Accordingly, it is

ORDERED that the portion of First American's motion seeking to dismiss the first cause of action of the complaint for breach of contract and a duty to indemnify is hereby granted; and it is further

ORDERED that the portion of First American's motion seeking to dismiss the second cause of action for contribution is hereby granted.

The foregoing shall constitute the Decision and Order of the Court.

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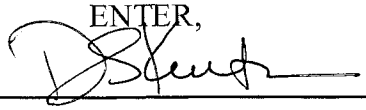

DONALD SCOTT KURTZ
Justice, Supreme Court