RJK Elec. Corp. v American Eur. Ins. Co.
2020 NY Slip Op 32393(U)
May 29, 2020
Supreme Court, Suffolk County
Docket Number: 01612/2015
Judge: Denise F. Molia

Index No.: 01612/2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice

RJK ELECTRIC CORP.,

Plaintiff,

-against-

AMERICAN EUROPEAN INSURANCE COMPANY,

Defendant.

CASE DISPOSED: YES
MOTION R/D: 10/1/19
SUBMISSION DATE: 1/17/20
MOTION SEQUENCE NO:002; MG;

MOTION R/D: 11/22/19
SUBMISSION DATE: 12/20/19
MOTION SEQUENCE NO:003; MD

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Upon the following papers read on the application by defendant American European Insurance Company for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and the cross-motion by plaintiff RJK Electric Corp. for an order pursuant to CPLR 3212 granting it summary judgment on its claims in the complaint: Notice of Motion and Supporting Affirmation dated August 30, 2019 together with exhibits A through P annexed thereto, Affidavit in Support sworn to on August 26, 2019 together with exhibits A through E annexed thereto, and memorandum of law in support dated August 30, 2019; Notice of Cross-Motion and Supporting Affirmation dated November 4, 2019 together with exhibit A annexed thereto; Reply Affirmation dated January 16, 2020 together with exhibits A and B annexed thereto and reply memorandum of law; it is

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted (CPLR 3212); and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied as academic.

Plaintiff RJK Electric Corp. ("plaintiff" or "RJK") commenced this declaratory judgment action by the filing of a summons and verified complaint on February 2, 2015, seeking a declaration that defendant American European Insurance Company ("defendant" or "American") must provide coverage to RJK under a certain commercial general liability policy issued by American to RJK under policy number SKP000221411 for the period February 18, 2013 through March 1, 2014 (the "subject policy"), concerning a personal injury action commenced by Michael Leighton ("Leighton") against RJK. Issue was joined on April 8, 2015 by the service of a verified answer and counterclaim. Plaintiff served a reply to counterclaim dated April 15, 2015. All discovery has been completed. Defendant now moves for an order granting it summary judgment dismissing the complaint and declaring that American has no duty to defend or indemnify RJK under the subject policy for the personal injury claim asserted by Leighton as a result of the accident that occurred on March 20, 2013 (the "personal injury action") and any cross-claims asserted against RJK in the personal injury action, as it asserts no coverage exists under the subject policy for the claims asserted by Leighton. Defendant argues that the exclusion of injury to employees, contractors and employees of contractors endorsement (the "employee exclusion") bars coverage for all claims asserted by Leighton against RJK in the personal injury action. Defendant argues that the admissible evidence, including admissions by RJK's principal, demonstrates that Leighton's personal injury claim falls within the exclusion endorsement. Defendant submits in support of its motion, *inter alia*, an attorney affirmation, the affidavit of Kevin J. Diggins, American's claims examiner, the subject policy, the employee exclusion, the pleadings in the personal injury action, the pleadings in this action, the deposition transcripts of Leighton and RJK's principal, Ray Kilcarr, from the personal injury action and the within action, and a memorandum of law. Plaintiff cross-moves for an order pursuant to CPLR 3212 granting it summary judgment on its declaratory judgment action, determining that defendant had a duty to defend the RJK in the personal injury action. Plaintiff refers to the exhibits submitted by defendant in support of its motion together with a decision issued in the personal injury action. Defendant replies through the submission of an attorney affirmation with exhibits and memorandum of law.

According to the employee exclusion of the subject policy, American did not provide coverage to RJK for the following:

> "Bodily injury" to any contractor or any "employee" of any contractor arising out of or in the course of the contractor or its employees performing services of any kind or nature whatsoever....

In the complaint in the personal injury action, Leighton alleges that on March 20, 2013, RJK "was contracted to perform electrical work as part of the construction and/or renovation of the premises leased by Starbucks Coffee Company and located at 2055A Jericho Turnpike, Commack, New York." Leighton further alleges that he "was present at the premises on March 20, 2013 as a project manager for general contractor Piece Management, Inc." and that he "was acting within the scope of his employment and in the performance of his duties as project manager when he was injured at the premises." Leighton confirmed in his verified bill of particulars that he was employed by Piece Management, Inc. ("PMI") at the time of the accident.

In the personal injury action, RJK's principal, Ray Kilcarr testified that RJK does most of its work with PMI and that Leighton is one of the project managers he interacts with at PMI. Kilcarr further testified that PMI subcontracted with RJK for the project at the Commack Starbucks in March of 2013 and that the scope of the work was to move the electric and menu boards from one location to another. Kilcarr testified that he had a phone conversation with Leighton about using a particular tool for the project and that Leighton indicated he would go to the job site to perform the work. In this declaratory judgment action, Kilcarr testified that he considered PMI the general contractor for the Commack Starbucks project, that Leighton was an employee of PMI on the date of the accident, and that Leighton was paid by PMI for his work at the site on the date of the accident. Kilcarr further testified that he read the subject policy supplied by American and never had an issue with it.

Leighton testified in the personal injury action that he is a project manager for PMI and that there was a request that PMI perform certain work at the Commack Starbucks. Leighton further testified that he was at the Commack Starbucks on March 20, 2013, that RJK hired PMI to do electrical work in connection with moving the drive-thru location, and that he was requested by RJK to put connectors on camera wires at the subject job site. In this action, Leighton testified as a non-party witness that he was employed with PMI at the time of the accident. He further testified that RJK had been hired by Jim McQueen ("McQueen"), another project manager at PMI, and that McQueen and Kilcarr of RJK asked Leighton to put connectors on the camera wires at the job site due to Leighton's experience in that task, as it was work that RJK did not perform. Leighton further testified that he put the connectors on with equipment supplied by PMI. Leighton testified that on the date of his injury, he completed his task, collected his tools, and said goodbye to his colleagues who were working inside the Commack Starbucks. He further testified that after exiting the rear door and while he was in the parking lot, he observed another worker, known as Chad, operating a grinder and "within milliseconds" he was struck in the face by an object. He further testified that he was working for and paid by PMI on the date of the accident and that the Workers' Compensation Board identified PMI as his employer and determined that he had a work-related injury. As well, Leighton's report of the work-related injury identifies his employer as PMI. In a sworn affidavit submitted by Leighton in the personal injury action, Leighton alleges that he was acting within the scope of his employment and in the performance of his duties as a project manager when he was injured at the subject job site and that the accident took place in the rear of the Commack Starbucks.

The sworn affidavit of Kevin J. Diggins, claims examiner for American, avers that the subject policy contained the endorsement providing that bodily injury claims of any contractor or employee of a contractor arising from the performance of services of any kind or nature whatsoever were excluded from the subject policy and were not covered injuries. The term employee as used in the endorsement included a leased worker and a temporary worker. Diggins further averred that American received a claim from RJK on February 19, 2014 in connection with the injuries alleged by Leighton resulting from the work performed on March 20, 2013 at the subject Commack Starbucks. Diggins further stated that as a result of American's investigation of the incident, he was advised that RJK was hired by PMI, Leighton's employer, to work at the subject location and that RJK was at the site only one day, when one of its employees was outside cutting metal when something was caused to hit Leighton. According to Diggins, by letter dated March 13, 2014,

American disclaimed coverage to RJK pursuant to the exclusion found in the endorsement because Leighton sustained injuries while working on the job site as a contractor or employee of a contractor.

The aim of the court when interpreting a contract is to arrive at a construction that gives fair meaning to all of its terms and provisions, and to reach a "practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (*see* ***Pellot v. Pellot***, 305 AD2d 478, 759 NYS2d 494 [2d Dept 2003]; ***Gonzalez v. Norrito***, 256 AD2d 440, 682 NYS2d 100 [2d Dept 1998]; ***Joseph v. Creek & Pines, Ltd.***, 217 A.D.2d 534, 535, 629 N.Y.S.2d 75 [2d Dept], *lv dismissed* 86 N.Y.2d 885, 635 N.Y.S.2d 950 [1995], *lv denied* 89 N.Y.2d 804, 653 N.Y.S.2d 543 [1996]; ***see also Matter of Matco-Norca, Inc.***, 22 A.D.3d 495, 802 N.Y.S.2d 707 [2d Dept 2005]; ***Tikotzky v. City of New York***, 286 A.D.2d 493, 729 N.Y.S.2d 525 [2d Dept 2001]; ***Partrick v. Guarniere***, 204 A.D.2d 702, 612 N.Y.S.2d 630 [2d Dept], *lv denied* 84 N.Y.2d 810, 621 N.Y.S.2d 519 [1994]). As it is a question of law whether or not a contract is ambiguous (***W. W. W. Assoc. v. Giancontieri***, 77 N.Y.2d 157, 565 N.Y.S.2d 440 [1990]), a court must first determine whether the agreement at issue on its face is reasonably susceptible to more than one interpretation (***see Chimart Assoc. v. Paul***, 66 N.Y.2d 570, 498 N.Y.S.2d 344 [1986]). Where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language and given its "'plain and ordinary' meaning" (***Scottsdale Indem. Co. v. Beckerman,*** 120 AD3d 1215, 1219, 992 NYS2d 117 [2d Dept. 2014]; *see also* ***R/S Assocs. v. N.Y. Job Dev. Auth.***, 98 N.Y.2d 29, 32 [2002]). It is well settled that "[e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (***W.W.W. Assoc.***, 77 N.Y.2d at 162, 565 N.Y.S.2d 440, 566 N.E.2d 639; *see* ***Alt v. Laga***, 207 A.D.2d 971, 971, 617 N.Y.S.2d 84 [4th Dept. 1994]). When a contract term or clause is ambiguous, and the determination of the parties' intent depends on the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the interpretation of such language is matter for trial (*see* ***Ashland Management v. Janien***, 82 N.Y.2d 395, 401-402 [1993]; ***Amusement Bus. Underwriters v. American Intl. Group***, 66 N.Y.2d 878, 880, 498 N.Y.S.2d 760 [1985]; ***Mallad Constr. Corp. v. County Fed. S&L Ass'n,*** 32 N.Y.2d 285, 290-91 [1973]; ***Brook Shopping Ctrs. v. Allied Stores Gen. Real Estate Co.***, 165 A.D.2d 854, 560 N.Y.S.2d 317 [2d Dept 1990]). It is well established that any ambiguity in a contract is to be construed against the party who drafted such contract (*see* ***Guardian Life Ins. Co. of Am. v. Schaefer***, 70 N.Y.2d 888, 524 N.Y.S.2d 377 [1987]).

The right to contractual indemnification depends upon the specific language of the contract between the parties (*see* ***Sovereign Bank v. Biagioni***, 115 AD3d 847, 982 NYS2d 322 [2d Dept 2014]; ***Kielty v. AJS Constr. of L.I., Inc.***, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]; ***Bellefleur v. Newark Beth Israel Med. Ctr.***, 66 AD3d 807, 888 NYS2d 81 [2d Dept 2009]; ***Kader v. City of NY. Hour. Preserv. & Dev.***, 16 AD3d 461, 791 NYS2d 634 [2d Dept 2005]; ***Gillmore v. Duke/Fluor Daniel***, 221 AD2d 938, 939, 634 NYS2d 588 [4th Dept 1995]). Indemnification provisions are "strictly construed" (***Davis v. Catsimatidis***, 129 AD3d 766, 768, 12 NYS3d 141 [2d Dept 2015]). Thus, "[t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (***Shaughnessy v. Huntington Hosp. Assn.***, 147 AD3d 994, 999-1000, 47 NYS3d 121 [2d Dept 2017] [internal quotation marks and citations omitted]; ***LaRosa v.Internap Network Servs. Corp.***, 83 AD3d 905, 921 NYS2d 294 [2d Dept 2011] *quoting* ***George v. Marshalls of MA, Inc.***, 61 AD3d 925, 930. 878 NYS2d 143 [2d Dept 2009]; *see also* ***Drzewinski v. Atlantic Scaffold & Ladder Co.***,

70 NY2d 774, 521 NYS2d 216 [1987]; ***Blank Rome, LLP v. Parrish***, 92 AD3d 444, 938 NYS2d 284 [1st Dept 2012]; ***Torres v. LPE Land Dev. & Constr. Inc.***, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008]; ***Canela v. TLH 140 Perry St.***, 47 AD3d 743, 849 NYS2d 658 [2d Dept 2008]).

"When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (***Hooper Assoc. v. AGS Computers***, 74 N.Y.2d 487, 491, 549 N.Y.S.2d 365 [1989]; ***see Heimbach v. Metropolitan Transp. Auth.***, 75 N.Y.2d 387, 553 N.Y.S.2d 653 [1990]). Stated differently, "[t]he language of an indemnity provision should be construed so as to encompass only that loss and damage which reasonably appear to have been within the intent of the parties. It should not be extended to include damages which are neither expressly within its terms nor of such character that it is reasonable to infer that they were intended to be covered under the contract" (***Niagra Frontier Trans. Auth. v. Tri-Delta Constr. Corp.***, 107 A.D.2d 450, 453, 487 N.Y.S.2d 428 [4th Dept], *affd.* 65 N.Y.2d 1038, 494 N.Y.S.2d 695 [1985]).

The party claiming the existence of insurance coverage has the burden of proving its entitlement (***Fork Restoration Corp. v. Softy's Const., Inc.***, 79 AD3d 861, 914 NYS2d 178 [2d Dept 2010]; ***Stillwater Cent. School Dist. v. Great Am, E & S Ins. Co.***, 66 AD3d 1260, 887 NYS2d 719[3d Dept 2009]; ***National Abatement Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.***, 33 AD3d 570, 824 NYS2d 230 [1st Dept 2006); ***Kidalso Gas Corp. v. Lancer Ins. Co.***, 21 AD3d 779, 802 NYS2d 9 [2005]; ***Moleon v. Kreisler Borg Florman Gen. Constr. Co.***, 304 AD2d 337, 758 NYS2d 621 [1st Dept 2003]). A party that is not covered under the terms of the policy is not entitled to coverage (***Stainless, Inc v. Employers' Fire Ins. Co.***, 49 NY2d 924, 428 NY S2d 675 [1980]); ***Superior Ice Rink, Inc. v. Nescon Contr, Corp.***, 52 AD3d 688, 861 NYS2d 362 [2d Dept 2008]; ***Catholic Health Servs. of Long Is., Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.***, 46 AD3d 590, 847 NYS2d 638 [2d Dept 2007]; ***Tribeca Broadway Assoc. v. Mount Vernon Fire Ins. Co.***, 5 AD3d 198, 774 NYS2d 11 [1st Dept 2004]; ***Moleon v. Kreisler Borg Florman Gen. Constr. Co., Inc.***, *supra*). Policy exclusions are strictly construed, interpreted narrowly and any ambiguities are construed against the insurer (***Scottsdale Indem. Co. v. Beckerman,*** 120 AD3d 1215, 1219, 992 NYS2d 117 [2d Dept. 2014]).

An insurer's duty to defend, is broader than its duty to indemnify, such that an insurer may be obligated to defend its insured even if, at the conclusion of an underlying action, it is found to have no obligation to indemnify its insured (*see* ***Automobile Ins. Co. of Hartford v. Cook***, 7 NY3d 13 1, 818 NYS2d 176 [2006]; ***Global Constr. Co., LLC v. Essex Ins. Co.***, 52 AD3d 655, 860 NYS2d 614 [2d Dept 2008]; ***City of New York v. Evanston Ins. Co.***, 39 AD3d 153, 157, 830 NYS2d 299 [2d Dept 2007]). An insurer's duty to defend arises whenever "the allegations within the four corners of the underlying complaint potentially give rise to a covered claim" (***Worth Constr. Co. v. Admiral Ins. Co.,*** 10 NY3d 411, 415, 859NYS2d 101 [2008], *quoting* ***Frontier Insulation Contrs v. Merchants Mut. Ins. Co.***, 91 NY2d 169, 667 NYS2d 982 [1997]).

A policy exclusion denying coverage for injuries sustained by an employee or an employee of contractors arising out of or in the course of his or her employment have been upheld and found to relieve the insurer of liability when the circumstances fall within the exclusion (*see* ***Northfield Ins. Co. v. Fancy Gen. Constr. Inc.,*** 167 AD3d 916, 918, 91 NYS3d 250, 252 [2d Dept. 2018];

Bayport Constr. Corp. v. BHS Ins. Agency, 117 AD3d 660, 661, 985 NYS2d 143, 145 [2d Dept. 2012]; ***Bassuk Bros. v. Utica First Ins. Co.*** , 1 AD3d 470, 471, 768 NYS2d 479, 481 [2d Dept. 2003]; *see also* ***United States Underwriters Ins. Co. v. Affordable Hous. Foundation, Inc.,*** 256 F.Supp.2d 176 [S.D.N.Y. 2003]). The phrase "arising out of" as used in employee exclusions, has been deemed unambiguous and "interpreted broadly to mean "originating from, incident to, or having connection with" (***Scottsdale Indem. Co. v. Beckerman,*** 120 AD3d 1215, 1219, 992 NYS2d 117 [2d Dept. 2014]; *see also* ***Country-Wide Ins. Co. v. Excelsior Ins. Co.,*** 147 AD3d 407, 46 NYS3d 96 [1st Dept. 2017]).

Courts have applied a "but for" test in determining whether the accident falls within such an employee exclusion. As was stated by the Second Department in ***Scottsdale Indem. Co. v. Beckerman,*** 120 AD3d 1215, 992 NYS2d 117 [2d Dept. 2014]:

> A "but for"' test applies to determine the applicability of an "arising out of" exclusion (*see* ***Mount Vernon Fire Ins. Co. v. Creative Hous.,*** 88 NY2d at 350-352; ***U.S. Underwriters Ins. Co. v. Val-Blue Corp.,*** 85 NY2d 821). In other words, if the plaintiff in an underlying action or proceeding alleges the existence of facts clearly falling with such an exclusion, and none of the causes of action that he or she asserts could exist but for the existence of the excluded activity or state of affairs, the insurer is under no obligation to defend the action.

Id.. at 1219, 992 NYS2d at 121. The Court of Appeals has determined that injuries sustained by an employee upon arriving or leaving a job site are deemed as a matter of law to have arisen out of such work (***O'Connor v. Serge El. Co.,*** 58 NY2d 655, 658, 458 NYS2d 516 [1982]; *see also* ***Longwood Cent. School Dist. v. American Empls. Ins. Co.,*** 35 AD3d 550, 827 NYS2d 194 [2d Dept. 2006]; ***Chelsea Assoc. LLC v. Laquila-Pinnacle,*** 21 AD3d 739, 801 NYS2d 15 [1st Dept. 2005]; ***Turner Constr. Co. v. Pace Plumbing Corp.,*** 298 AD2d 146, 748 NYS2d 356 [1st Dept. 2002]). Similarly, the Second Department has ruled that injuries sustained by a contractor's employee while traversing the parking lot of the job site was an accident that arose out of the contractor's work (***Longwood Cent. School Dist. v. American Empls. Ins. Co.,*** 35 AD3d 550, 827 NYS2d 194 [2d Dept. 2006]).

Here, the employee exclusion in the subject policy applies to injuries "arising out of or in the course of a contractor or its employees performing services of any kind or nature whatsoever." There is no dispute that the exclusion unambiguously excludes coverage for bodily injuries of a contractor or its employee performing services of any kind or nature whatsoever. Further, there is no dispute that Leighton was employed by PMI on the date of the accident, he was at the job site on the date of the accident, he was in the parking lot of the job site when he was injured, he was injured when an RJK worker was operating a grinder at the work site, he had worked on a connector located outside of the building first and then worked on a connector located inside of the building just prior to the accident, and that the Workers' Compensation Board found he was injured during the course of his employment for PMI. There also is no dispute as to Leighton's description of how the accident occurred and that it occurred when he exited the back door of the Commack Starbucks and started walking to his car located in the parking lot.

Plaintiff argues that the employee exclusion does not apply to the personal injury action because Leighton was not actually working at the time of the accident but was in the parking lot of the subject Commack Starbucks and he was injured by an RJK employee. However, this position is contrary to the "but for" test that has been applied to determine the applicability of an employee exclusion containing the "arising out of" language. Here, the accident occurred in the parking lot, which was the work site where the RJK employee was operating the grinder that is said to have caused Leighton's injuries. Indeed, the only reason that Leighton was in the parking lot at the job site was as a result of the work he was performing there. Applying the applicable test, "but for" Leighton performing work at the job site, his injury would not have occurred. Thus, Leighton's injuries arise out of the performance of his services and the employee exclusion applies. Being that the employee exclusion applies, defendant has no duty to defend or indemnify RJK for the injuries sustained by Leighton for injuries arising out of his performance of services at the subject job site (***Scottsdale Indem. Co. v. Beckerman,*** 120 AD3d 1215, 992 NYS2d 117 [2d Dept. 2014]).

Accordingly, defendant's motion for summary judgment dismissing the complaint is granted and plaintiff's cross-motion for summary judgment is denied as academic.

Dated: May 29, 2020

HON. DENISE F MOLIA

HON. DENISE F. MOLIA, A.J.S.C.

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HON. DENISE F MOLIA