Greater N.Y. Mut. Ins. Co. v New York Mar. & Gen. Ins. Co.
2020 NY Slip Op 33060(U)
September 16, 2020
Supreme Court, New York County
Docket Number: 654416/2019
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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GREATER NEW YORK MUTUAL INSURANCE COMPANY

Plaintiff,

- v -

NEW YORK MARINE AND GENERAL INSURANCE COMPANY D/B/A PROSIGHT SPECIALTY INSURANCE,

Defendant.

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INDEX NO. 654416/2019

MOTION DATE 09/14/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 71, 75, 76, 77

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

The motion by plaintiff for *inter alia* summary judgment and a declaration that defendant New York Marine and General Insurance Company d/b/a Prosight Specialty Insurance ("Prosight") has a primary and noncontributory duty to defend Mayflower Development Corporation and RCR Management ("Owner") in an underlying lawsuit is denied.

Background

This insurance dispute relates to an underlying personal injury action in which plaintiff Donald Pardew alleges that he tripped and fell while walking on the sidewalk at 425 Riverside Drive in Manhattan. In that case, Prosight is defending its insured (Rock Group NY Corp., the "Contractor") and plaintiff is defending the Owner. Plaintiff claims that the Owner is an additional insured under the Prosight policy and asserts that because the accident was caused by the Contractor's negligence, Prosight must defendant the Owner in Mr. Pardew's lawsuit. It also

contends that Prosight's policy applies on a primary and noncontributory basis and its policy is only excess.

In opposition, Prosight argues that while the Contractor was performing scaffolding work at the premises, Mr. Pardew did not allege that the dangerous condition that caused his fall was related to the scaffolding work. Prosight notes that Mr. Pardew was not an employee on the job site and was simply lawfully on the premises. Prosight argues that the contract submitted by plaintiff is inadmissible and claims that the contract does not specifically provide coverage for Mayflower as it only identifies RCR (apparently the real estate manager).

In reply, plaintiff contends that Prosight's opposition concedes that Prosight's policy names RCR as an additional insured and is primary. It also argues that the alleged liability in the underlying lawsuit falls within the scope of the additional insured coverage available to both RCR and Mayflower.

Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]).

"An insurance agreement is subject to principles of contract interpretation. Therefore, as with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 321, 2017 NY Slip Op 04384 [2017] [internal quotations and citations omitted]).

An insurance policy endorsement with the words "caused, in whole or in part" requires "proximate causation since 'but for' causation cannot be partial. An event may not be wholly or partially connected to a result, it either is or it is not connected. Stated differently, although there may be more than one proximate cause, all 'but for' causes bear some connection to the outcome even if all do not lead to legal liability" (*id*. at 322). The terms "caused, in whole or in part, by" and "solely caused by" are not synonymous (*id*.). "[C]overage for additional insureds is limited to situations where the insured is the proximate cause of the injury. Liability exists precisely where there is fault" (*id.* at 323).

Here, the contract required the Contractor to get insurance coverage naming the RCR and its affiliates as additional insureds to "defend against all claims, loss and liability arising from injury, death and damage to persons or property arising out of the performance or nonperformance of the 'Contracted Work'" (NYSCEF Doc. No. 58, § 1[a]). Although plaintiff contends that Mr. Pardew alleges that he tripped and fell upon scaffolding or sidewalk shed materials in its moving papers, it did not offer a pincite to any documents in its moving papers that support this contention. It did not, for instance, cite to or attach a bill of particulars explaining the nature of the alleged defective condition that purportedly caused Mr. Pardew's injuries.

Instead, it merely attaches the verified complaint from the underlying lawsuit (NSYCEF Doc. No. 64). This pleading contains only one reference to scaffolding and states that the Contractor "was contracted to construct scaffolding at the premises" (*id*. ¶36). There is no specific allegation that Mr. Pardew's trip and fall was caused by the scaffolding.

Moreover, there has been no finding of liability in the underlying lawsuit and, consequently, no ruling that Mr. Pardew was injured as a result of the Contractor's performance (or nonperformance) of work. The Court cannot issue a finding that Prosight must step in and cover the Owner simply because plaintiff desires that outcome. Plaintiff is certainly correct that Prosight is taking a chance that its insured might be held responsible and it might be liable for the Owner's defense and indemnity. But on the papers submitted here, it is not clear that the allegations fall under the terms of the contract.

As Prosight points out, many of the cases relied upon by plaintiff involve construction sites (*see e.g. Vargas v City of New York*, 158 AD3d 523, 71 NYS3d 415 [1st Dept 2018] [noting that the operative pleading alleged that all defendants controlled the job site]). There is no evidence submitted here that suggests the accident occurred at a construction site under the control of all defendants. Put another way, the vague allegations in the underlying lawsuit could support a finding that Mr. Pardew was simply a pedestrian who tripped and fell on the sidewalk near the premises. On these papers, the Court cannot tell whether the underlying accident happened because of the Contractor's work or because of something else (such as defective sidewalk). Therefore, the motion to compel the contractor's insurer to cover the owner is denied.

Accordingly, it is hereby

ORDERED the motion by plaintiff for summary judgment is denied.

Already-Scheduled Remote Conference: October 14, 2020 at 12:30 p.m.

9/16/2020
DATE

ARLENE P. BLUTH, J.S.C.

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