National Union Fire Ins. Co. v Arch Specialty Ins. Co.
2021 NY Slip Op 31645(U)
May 13, 2021
Supreme Court, New York County
Docket Number: 655122/2019
Judge: Louis L. Nock

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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NATIONAL UNION FIRE INSURANCE COMPANY, CLUNE CONSTRUCTION COMPANY, L.P., TISHMAN SPEYER PROPERTIES, INC., and 405 LEXINGTON OWNER, L.L.C.,

Plaintiffs,

- v -

ARCH SPECIALTY INSURANCE COMPANY, and DFL INTERIORS, INC.,

Defendants.

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INDEX NO. 655122/2019

MOTION DATE 11/08/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion of defendants Arch Specialty Insurance Company ("Arch") and DFL Interiors, Inc. ("DFL") (together, "Defendants") to dismiss the complaint is granted in part, in accord with the following memorandum decision.

Background

In this action, plaintiffs National Union Fire Insurance Company ("National Union"), Clune Construction Company, L.P. ("Clune"), Tishman Speyer Properties, Inc. ("Tishman"), and 405 Lexington Owner, L.L.C. ("405 Lexington") (together, "Plaintiffs") seek a declaratory judgment declaring that Plaintiffs are entitled to insurance coverage in connection with an underlying personal injury action pending in the Supreme Court of the State of New York, County of Queens, captioned *Michael Denisco v 405 Lexington Avenue LLC, et al.*, Index No. 712627/2016 (the "Underlying Action"). In the complaint filed in the underlying action, plaintiff

Michael Denisco ("Denisco") alleges that he sustained bodily injury on July 30, 2015 while performing construction and demolition work as an employee of DFL at a site located at 405 Lexington Avenue, New York, New York (the "Premises"), which is purportedly owned, operated, managed, and controlled by Tishman and 405 Lexington, and on which Clune was serving as contractor, as the result of the Defendants' negligence and violations of New York Labor Law. By a decision and order dated September 24, 2019, the court in the Underlying Action granted DFL, Clune, Tishman, and 405 Lexington summary judgment dismissing the claims against them and gave collateral estoppel effect to an earlier determination by a Workers' Compensation Board ("WCB") decision that found Denisco's injuries were not work-related or sustained in the course of his employment, but were instead the result of his jumping out of his girlfriend's car during an argument with her (NYSCEF Doc 26).

At issue on this motion is a Commercial General Liability Policy issued by Arch (AGL004655-01) to DFL with effective dates of October 3, 2014 to October 3, 2015, (the "Arch Policy") that contained limits of liability in the amount of $1,000,000 per occurrence and $2,000,000 aggregate (NYSCEF Doc 23). The Arch Policy contains the following Blanket Additional Insured Endorsement:

> **BLANKET ADDITIONAL INSURED ENDORSEMENT**
>
> **SECTION II - WHO IS AN INSURED** is amended to include as an additional insured those persons or organizations who are required under a written contract with you to be named as an additional insured, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of your subcontractors:
>
> a. In the performance of your ongoing operations or "your work", including "your work" that has been completed; or
>
> b. In connection with your premises owned by or rented to you.

(NYSCEF Doc 24.)

In a subcontract between DFL and Clune, dated July 7, 2015 (the "Subcontract"), DFL agreed to perform certain drywall and carpentry work at the Premises (NYSCEF Doc 28). The Subcontract contains three exhibits: Exhibit A – Contract Scope; Schedule F – Insurance Requirements; and Schedule G – General Requirements (NYSCEF Doc 28). The Subcontract and Exhibit A to the Subcontract are dated July 15, 2015 (*id.*). Schedule G to the Subcontract bears the following heading:

CLUNE CONSTRUCTION COMPANY
SCHEDULE G – STANDARD GENERAL REQUIREMENTS
FEBRUARY 1, 2012 – FEBRUARY 1, 2013

(*Id.*) Schedule F to the Subcontract bears the following heading:

CLUNE CONSTRUCTION COMPANY
TISHMAN REBUILD
405 LEXINGTON AVENUE
NEW YORK, NY
SCHEDULE F – INSURANCE REQUIREMENTS
August 21, 2015

(*Id.*)

Defendants move to dismiss the complaint pursuant to CPLR 3211 (a)(7) for failure to state a cause of action and pursuant to CPLR 3211 (a)(1) on the basis of documentary evidence. In support of their motion to dismiss, Defendants argue that Plaintiffs are not entitled to coverage under the Arch Policy as a matter of law because the conditions set forth in the Blanket Additional Insured Endorsement, which determines who is an additional insured on the Arch Policy, are not satisfied. Defendants argue that a contract requiring DFL to name Clune, Tishman, and 405 Lexington did not exist at the time of the July 30, 2015 injury because the August 21, 2015 date in the heading of Schedule F of the Subcontract indicates that it was not effective until August 21, 2015, more than three weeks after the alleged incident. Defendants

next argue that Clune, Tishman, and 405 Lexington do not qualify as additional insureds under the Arch Policy because the operative language of the Blanket Additional Insured Endorsement provides that a party only qualifies as an additional insured if liability for the claims was caused by acts or omissions of DFL or those acting as its subcontractors in the performance of DFL's ongoing operations, which Denisco's injuries were not, as demonstrated by the WCB decision and the decision in the underlying Queens proceeding that "gave full force and effect" to that determination.

Plaintiffs oppose the motion to dismiss and argue that neither Schedule F nor the Subcontract indicate that August 21, 2015 was intended as an effective date, and the Subcontract expressly incorporates Schedule F by reference, making it effective on July 7, 2015. Alternatively, Plaintiffs contend that the Blanket Additional Insured Endorsement does not require that the "written contract" between the named insured and the parties seeking additional insured status must be executed or in effect prior to the date of loss, that any ambiguity in the Blanket Additional Insured Endorsement should be resolved against Arch, the drafter of the document, and that the course of dealing between Clune and DFL evidences an intent to name Clune, 405 Lexington, and Tishman as additional insureds on the Arch Policy. Finally, Plaintiffs argue that Arch has a duty to defend Plaintiffs in the Underlying Action regardless of whether Arch is ultimately obligated to indemnify them.

Standard of Review

On a motion to dismiss brought under CPLR 3211 (a) (7), 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] [citations omitted]). Ambiguous

allegations must be resolved in the plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of "bare legal conclusions" is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]) and "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]).

Dismissal under CPLR 3211 (a) (1) is warranted "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 NY2d 314, 326 [2002]). "To be considered 'documentary' under CPLR 3211 (a) (1), evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010] [internal citation omitted]). In effect, "the paper's content must be 'essentially undeniable and . . . assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [internal citation omitted]). Affidavits and deposition testimony do not qualify as documentary evidence for the purposes of CPLR 3211 (a) (1) (*Lowenstern v Sherman Sq. Realty Corp.*, 143 AD3d 562, 562 [1st Dept 2016]; *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 651 [1st Dept 2011]), but judicial records, mortgages, deeds and contracts

Fontanetta, 73 AD3d at 84), and email and letter correspondence (*Kolchins v Evolution Mkts, Inc.*, 31 NY3d 100, 106 [2008]) may be considered.

Discussion

In an insurance coverage dispute, "[t]he party claiming insurance coverage has the burden of proving entitlement. A party that is not named an insured or additional insured on the face of the policy is not entitled to coverage" (*see Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 339 [1st Dept 2003] [citations omitted]). Whether a party is a named an additional insured is determined by the parties' intention as expressed in the language of the policy (*see 140 Broadway Prop. v Schindler El. Co.*, 73 AD3d 717, 718 [2d Dept 2010]). When a third party seeks the benefit of insurance coverage, the policy terms must clearly evince the intent to provide such coverage (*see Hargob Realty Assoc., Inc. v Fireman's Fund Ins. Co.*, 73 AD3d 856, 857 [2d Dept 2010]; *Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, 388 [1st Dept 2006]).

Here, the Blanket Additional Insured Endorsement determines who is an additional insured on the Arch Policy. The Blanket Additional Insured Endorsement designates additional insureds as "those persons or organizations who are under a written contract with you [DFL] to be named as an additional insured, but only with respect to liability for bodily injury' required, 'property damage' or 'personal and advertising injury' caused, in whole or in part, by your acts or omissions or the acts or omissions of your subcontractors" (NYSCEF Doc 24). As pled in the complaint, a written agreement, the Subcontract dated July 5, 2015, was executed by DFL on July 7, 2015 and Clune on July 10, 2015 and was in effect on July 30, 2015, the date of the purported injury (Complaint ¶ 13; Subcontract [NYSCEF Doc 28]). However, the parties dispute whether Schedule F to the Subcontract became effective beginning on July 7, 2015, the

date that the Subcontract was executed, or beginning on August 21, 2015, the date included in the heading to Schedule F. Paragraph 9 of Schedule F provides a list of entities that "shall be listed as additional insureds and indemnificatees on the Subcontractor's certificate of insurance" (Subcontract [NYSCEF Doc 28] Schedule F ¶ 9). The list includes Clune, 405 Lexington, and Tishman (*id.*).

Page one of the Subcontract is dated July 5, 2015, as indicated by the notation "Date 07-Jul-205" in the top right corner of the page. The "Description of Work" section on that page states the following:

> Provide all labor, material, equipment and supervision necessary to complete the Drywall and Rough Carpentry work at the above referenced project in accordance with the following:
>
> 1. Exhibit A - Contract Scope dated 07-Jul-2015
> 2. Schedule F - Insurance Requirements
> 3. Schedule G - General Requirements

(*Id.* at 1.) Thus, the Subcontract and Exhibit A are unequivocally dated July 7, 2015. The reference to Schedule F in the Description Work also demonstrates that the parties intended to incorporate Schedule F into the Subcontract. This is further evidenced by a list of "Contract Attachments" included in the Exhibit A – Scope of Contract, which also includes Schedule F and Schedule G (*id.* at 2). However, these items are not without ambiguity. First, the Contract Attachments also include Schedule E – Trade Milestone Dates, which was not attached to the Subcontract (*id.*). Additionally, the Contract Attachments list includes a designated space for "Orig Date" and "Rev Date" for each document, but those spaces are blank, and no dates are listed (*see id.*). Also, in contrast to the Subcontract and Scope of Work, which were clearly dated contemporaneous with execution of the Subcontract, the document headings to Schedule G and Schedule F contain, respectively and without explanation, the dates February 1, 2012,

February 1, 2013, and August 15, 2015 (*see* Subcontract [NYSCEF Doc 28] Schedule F ¶ 9). Neither document offers any explanation why Schedule D appears to be dated more than two years before the Subcontract and Schedule F appears to be dated three weeks after the Subcontract.

Moreover, Schedule F contains a section titled "Insurance and Indemnity" that states, "[p]rior to Subcontractor commencing any work on the project site, and as a condition for payment, the Subcontractor shall provide the proof of insurance which meets (Clune Construction Company's) minimum requirements as outlined herein" (Subcontract Schedule F at 1). It is unclear at this stage whether such proof of insurance was timely provided, but Schedule F is internally inconsistent if, as Defendants argue, it was not effective until August 21, 2015, three weeks after the purported injury when DFL had already begun work on the Project. Contrary to Defendants' assertions that the Subcontract "clearly" or "expressly" indicates Schedule F was not effective until August 15, 2015, these are ambiguities that are susceptible to more than one reasonable interpretation (*see City of New York v Evanston Ins. Co.*, 39 AD3d 153, 156 [2d Dept 2007] ["Where the language of a policy of insurance is ambiguous and susceptible of more than one reasonable interpretation, the parties may submit extrinsic evidence as an aid in construction"]). On a motion to dismiss, where the plaintiff is to be accorded the benefit of all favorable inferences, the mere circumstance of the August 21, 2015 date at the top of Schedule F is not sufficient to support dismissal of the complaint. The court has considered this and the remainder of the parties' arguments with respect to this portion of the motion and finds them unpersuasive or inapplicable. To the extent that the parties have submitted affidavits in support of their respective positions, this non-documentary evidence may not be considered for evidentiary purposes on a motion to dismiss (*Correa v Orient-Express Hotels, Inc.*, 84 AD3d

651, 651 [1st Dept 2011]; *see also Nonnon v City of New York*, 9 NY3d 825, 827 [2007] ["While affidavits may be considered, if the motion has not been converted to a CPLR 3212 motion for summary judgment, they are generally intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims"]).

Defendants next argue that Clune, Tishman, and 405 Lexington do not qualify as additional insureds on the Arch Policy because DFL's acts or omissions were not the cause of any potential liability to Denisco. Plaintiffs counter that regardless of whether Arch is ultimately obligated to indemnify Plaintiffs, it is nonetheless obligated to defend them in the Underlying Action. It is well established that an insurer's duty to defend is broader than its duty to indemnify (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]). As the duty to defend is "exceedingly broad," an insurer must defend whenever the allegations within the four corners of the underlying complaint may give rise to coverage (*id.*), or where the insurer "has actual knowledge of facts establishing a reasonable possibility of coverage" (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997][(internal quotations and citations omitted]). "It is irrelevant that any judgment ultimately entered against the insured might be based on claims not covered and, as such, might not be subject to the duty to indemnify" (*Port Authority of New York and New Jersey v Brickman Group, Ltd., LLC*, 181 AD3d 1, 20 1st Dept 2019]). By contrast, the duty to indemnify "is determined by the actual basis for the insured's liability to a third person," rather than the mere allegations in the pleadings (*Servidone Const. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424 [1985]). In this case, Denisco's allegations in the Underlying Action that he sustained bodily injury while performing construction and demolition work as an employee of DFL at the Premises were sufficient to trigger the duty to defend. This remains unaffected by the summary judgment

determination in the Underlying Action, which is only relevant to the question of indemnification. Therefore, this is not a ground for dismissal of the complaint.

Finally, Defendants seek to dismiss the complaint as against DFL for failure to state a claim. Defendants correctly note that Plaintiffs only seek relief against Arch and no causes of action are asserted against DFL. The only cause of action interposed in the complaint is a cause of action for a declaratory judgment seeking a declaration that Plaintiffs are additional insureds under the Arch Policy. Plaintiffs are unquestionably not entitled to such a declaration against DFL, the named insured of the Arch Policy. To the extent that Plaintiffs seek recovery in this action of any covered loss under the Arch Policy, they are necessarily only entitled to such recovery from Arch. Thus, Plaintiffs do not seek any affirmative relief against DFL in this action and have not stated a cause of action for which relief may be granted as against DFL. Under these circumstances, dismissal as to DFL is appropriate. As such, the motion to dismiss is granted as to DFL and denied as to the remainder.

Accordingly, it is

ORDERED that the motion to dismiss is granted in part, and the complaint is dismissed as against defendant DFL Interiors, Inc.; and it is further

ORDERD that the remainder of the motion is denied; and it is further

ORDERED that the action is severed and continued against the remaining defendants, who shall file an answer to the complaint within 20 days of entry of this order; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption, as follows:

"NATIONAL UNION FIRE INSURANCE COMPANY, CLUNE CONSTRUCTION COMPANY, L.P., TISHMAN SPEYER PROPERTIES, INC., and 405 LEXINGTON OWNER, L.L.C.,

Plaintiffs,

- v -

ARCH SPECIALTY INSURANCE COMPANY,

Defendant."; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry, in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases,* upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the parties are directed, within 30 days of the filing of an answer to the complaint, to meet and confer regarding discovery and submit a proposed preliminary conference order, in a form that substantially conforms to the court's form Commercial Division Preliminary Conference Order located at https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-CD.pdf, to the Principal Court Attorney of Part 38 at lfurdyna@nycourts.gov.

This constitutes the decision and order of the court.

ENTER:

5/13/2021
DATE

LOUIS L. NOCK, J.S.C.

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