Bay Plaza Mall, LLC v Argonaut Ins. Co.
2022 NY Slip Op 33034(U)
September 9, 2022
Supreme Court, New York County
Docket Number: Index No. 161470/2015
Judge: David B. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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INDEX NO. 161470/2015

BAY PLAZA MALL, LLC, PRESTIGE PROPERTIES & DEVELOPMENT CO, INC., MALL 1-BAY PLAZA, LLC, and THE WHITING TURNER CONTRACTING COMPANY,

MOTION SEQ. NO. 007

Plaintiffs,

- v -

ARGONAUT INSURANCE COMPANY, COLONY SPECIALTY INSURANCE COMPANY, FAIRMONT INSURANCE BROKERS, LTD., B&G ELECTRICAL CONTRACTORS OF NEW YORK, INC.,HARLEYSVILLE INSURANCE COMPANY OF NEW YORK, HARLEYYSVILLE WORCHESTER INSURANCE COMPANY, AMERICAN EMPIRE SURPLUS LINES, AURORA CONTRACTORS, INC.,AURORA CONTRACTORS OF NY, INC.,FABIO FERNANDEZ, PETER PATRICK, NATIONAL UNION FIRE INS. CO., SCOTTSDALE INSURANCE COMPANY, CONSTRUCTION RESOURCES CORP. OF NEW YORK, ISLAND ACOUSTICS, LLC,RUTTURA & SONS CONSTRUCTION CO., INC.,

DECISION + ORDER ON MOTION

Defendants.

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FAIRMONT INSURANCE BROKERS, LTD.

Third-Party
Index No. 595125/2017

TP Plaintiff,

-against-

PARTNERS SPECIALTY GROUP, LLC and B&G ELECTRICAL CONTRACTORS OF NY INC.

TP Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 216, 217, 218, 219, 220, 221, 222, 223, 224, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 242, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254

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

Before the Court are (i) the motion for summary judgment by defendants Argonaut Insurance Company and Colony Specialty Insurance Company ("Argonaut" and "Colony", respectively), and (ii) the cross-motion for summary judgment by plaintiffs Bay Plaza Mall, LLC and Mall 1-Bay Plaza, LLC (together "Bay Plaza") against Fairmont Insurance Brokers, Ltd. ("Fairmont"). This is a dispute over insurance coverage for two personal injury claims filed in Supreme Court, Bronx County related to the construction of a shopping mall in the Baychester section of the Bronx. Argonaut and Colony rely on a policy exclusion for subcontractors, described below. In the event it is denied coverage for the claims, Bay Plaza cross-moves for summary judgment against its insurance broker for negligence and malpractice in the placement of the coverage.

A. Parties and Procedural Background

Through various motions and orders allowing amendment of pleadings and consolidation, which comprised the bulk of motions 001-006, the parties and claims, insofar as is relevant to these motions, came to be as follows. Bay Plaza brought an insurance coverage action against Argonaut and Colony, and an insurance brokerage negligence and malpractice action against Fairmont (Second Amended Complaint, Doc. 157). Bay Plaza also sued defendant B&G Electrical Contractors of New York ("B&G"), which is the company for which the plaintiffs in the personal injury actions at issue allegedly worked. (Id.) The two Harleysville insurance entities allegedly insured B&G and listed the plaintiffs as additional insureds. (Id.)

Defendant Construction Resources Corp. of New York ("Construction Resources") is alleged to have been a subcontractor on the Bay Plaza job, although its role is unclear. American Empire Surplus Lines, National Union Fire Insurance Co. and Scottsdale Insurance Company are alleged to have issued insurance policies to Construction Resources and plaintiffs claim they are

additional insureds on the same. Aurora Contractors, Inc. and Aurora Contractors of NY, Inc. (together "Aurora") are alleged to have been the construction manager (not the general contractor) for the shopping mall construction project. Defendants Fabio Fernandez and Peter Patrick are alleged to be the employees of B&G who were injured and who sued in the Bronx.

With respect to the remaining defendants, plaintiffs seek contribution from Island Acoustics, LLC and Ruttura & Sons Construction Co., Inc. ("Ruttura"). Ruttura is alleged to have been responsible for maintenance at the project, and according to the plaintiffs, should have been responsible for the ice that allegedly led to Fernandez's accident and the trash that allegedly led to Patrick's accident. The role of Island Acoustics is unclear.

The moving defendants, Argonaut and Colony, seek summary judgment dismissing the claims against them. Plaintiffs cross-move against Fairmont. Fairmont has brought third party claims against one of the two Harleysville insurance companies, and against B&G, as well as against Partners Specialty Group, LLC. Neither Fairmont nor the plaintiffs explain the role of third-party defendant Partners Specialty Group, but it appears to be B&G's insurance broker. Fairmont names B&G as a third-party defendant as well.

The role of plaintiff Prestige Properties & Development Co. Inc. ("Prestige") is unclear from the motion papers but it appears to be the principal of the two Bay Plaza entities. Plaintiff The Whiting Turner Contracting Company ("Whiting Turner") is alleged to have been the construction manager (not the general contractor) for the project, having replaced Aurora at some point in late 2013.

B. <u>The Fernandez and Patrick Complaints</u>

The two personal injury cases for which insurance coverage is sought herein were both filed in Supreme Court, Bronx County. In *Fabio Fernandez v. Prestige Properties &*

Development Co. Inc., et al., Index No. 305195/2014, plaintiff Fernandez alleges that, while employed by B&G, he slipped and fell on ice while going to get coffee in February 2014. In addition to Prestige, he names both Bay Plaza entities as well as Whiting Turner and Aurora. (Panayotou Aff., Ex. B, docket no. 220)

In the second action, *Peter J. Patrick v. Aurora Contractors, Inc., et al.,* Index No. 24135/2016, plaintiff Patrick alleges that, while employed by B&G, he tripped and fell over rocks and debris blocking an "unfinished roadway/walkway" in April 2014. Patrick names the same defendants, plus an entity named Riverbay Corporation which is alleged to have provided maintenance services at the project. (Id.)

C. Policy Exclusion

In their motion Argonaut and Colony place exclusive reliance on a policy exclusion, one of more than 40 exclusions, endorsements and policy changes attached to the basic policy form, which, they claim, excludes from coverage subcontractors such as B&G which are "direct contracted." The exclusion reads as follows:

EXCLUSION – DESIGNATED ONGOING OPERATIONS AND PRODUCTS – COMPLETED OPERATIONS HAZARD

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description of Designated ongoing Operation(s):

ALL WORK, ACTIVITIES AND WORK, OR THAT PART OF ANY WORK, PERFORMED BY SUBCONTRACTORS, IN WHICH THE INSURED DIRECTLY CONTRACTED, EXCEPT FOR THE FOLLOWING DIRECT CONTRACTED COMPANIES: AURORA CONSTRUCTION IS PENDING APPROVAL – U658 APPLIES UNTIL THE FINAL EXECUTED CONTRACT IS APPROVED WITH HIRED GC

> The following exclusion is added to paragraph 2., Exclusions of COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY (SECTION I – COVERAGES):
>
> This insurance does not apply to "bodily injury" or "property damage":
>
> (1) Arising out of the ongoing operations described in the SCHEDULE of this endorsement;
>
> (2) Included in the "products-completed operations hazard" and arising out of "your work" described in the SCHEDULE of this endorsement;
>
> regardless of whether such operations are conducted by you or on your behalf or whether the operations are conducted for yourself or for others.
>
> Unless a "location" is specified in the SCHEDULE, this exclusion applies regardless of where such operations are conducted by you or on your behalf. If a specific "location" is designated in the SCHEDULE of this endorsement, this exclusion applies only to the described ongoing operations conducted at that "location".
>
> For the purpose of this endorsement, "location" means premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way-of a railroad.
>
> ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

(Panayotou Aff., Ex. A, at p. 60, docket no. 219)

The average layman reading this exclusion would have difficulty figuring out precisely what this language excludes. Even parsing it the manner Argonaut and Colony seek to, there are potential problems and issues of fact precluding the grant of summary judgment on this record at this time in the case's present procedural posture.

D. <u>Standards for Summary Judgment</u>

It is well-settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material issues of fact. (*Alvarez v Prospect Hospital*, 68 NY2d 320

[1986]). If this prima facie showing is made, the burden shifts to the opposing party to produce evidence in admissible form that there is in fact a triable issue of fact. (*Id.; see also Gammons v City of New York*, 24 NY3d 562 [2014]). Because summary judgment deprives a litigant of his day in court, "evidence should be analyzed in the light most favorable to the party opposing the motion." (*Martin v Briggs*, 235 AD2d 192 [1st Dep't 1997]). Bare or conclusory allegations or assertions are insufficient to create genuine issues of material fact sufficient to defeat a motion for summary judgment. (*Zuckerman v City of New York,* 49 NY2d 557 [1980]; *see generally Taxi Medallion Loan Trust III v. D&G Taxi Inc.*, 2020 N.Y. Misc. LEXIS 508 [Sup Ct NY County 2020]).

For the reasons set forth below, this Court finds that Argonaut and Colony have failed to satisfy these standards prior to advancing discovery more substantially. There are too many potential issues of fact and insufficient evidence for this Court to grant summary judgment based on the motion papers submitted, especially given the awkwardly phrased policy exclusion.

E. Legal Analysis

As Argonaut and Colony argue, relying on *Breed v Ins. Co. of North Am.*, 46 NY2d 351 (1978), insurance policies are contracts to be enforced in accordance with their terms where they are clear and unambiguous. It is also well settled that any ambiguities in an insurance policy are to be construed against the insurance carrier. (*See, e.g., Mostow v State Farm Insurance Co.*, 88 NY2d 321 [1996]; *Vigilant Insurance Co. v V.I. Technologies*, 253 AD2d. 401 [1st Dep't 1998], *appeal dismissed*, 93 NY2d 999 [1999]). Here the Court finds a number of ambiguities in the policy exclusion that preclude summary judgment at this time.

First, it is not clear that B&G was in fact a subcontractor, in which case the exclusion might not apply. The parties plead that B&G entered into four direct contracts, which they attach

to prior motion papers (Docs. 100-103), but it is not clear that there was in fact a general contractor on this project. Both Aurora and its replacement, Turner Whiting, are described as construction managers, who presumably play a role different than a general contractor. Here, since the movants fail to establish the relationships between the various parties, including the contractors which worked on this job, including B&G, this Court is unable to determine why this policy exclusion might or might not apply.

Second, there is a logical inconsistency in the language of the exclusion, since the "subcontractors in which the insured directly contracted" are arguably not "subcontractors" when acting pursuant to a direct contractual relationship with the owner or developer. This inconsistency creates a potential ambiguity which the Court is unable to resolve from the papers submitted. As noted above, ambiguities in an insurance policy are to be construed against the insurance carrier which drafts and issues the policy. This ambiguity also relates in part to that noted above regarding whether Aurora or Turner Whiting or any other entity served as a general contractor or a construction manager.

Third, Argonaut and Colony assert that the policy exclusion requires contracting of all subcontractors through Aurora, and the policy indeed seems to provide as much. However, Aurora was replaced by Turner Whiting, the motion papers do not reflect whether the policy exclusion was ever amended to reflect that change. This creates further ambiguity regarding how the exclusion should be applied, if at all, following this change. Plaintiffs allege there was an agreement in December 2013 to substitute Turner Whiting for Aurora, but there is no evidence proffered to support this allegation by plaintiffs, or by Argonaut or Colony, and it is unclear in the absence of such an agreement how, if at all, this policy exclusion may apply after Aurora's involvement in the project ended. (Second Amended Complaint, ¶¶ 15-19, Doc. 157).

Fourth, it is not apparent on this record that Fernandez's and Patrick's accidents arose from the four direct contracts, or out of other work that B&G may have rendered pursuant to actual subcontracts. Although it is evident that B&G entered into four direct contracts (Docs. 100-103), it is unclear whether these agreements encompassed all of the work which B&G performed on the project. If the accidents occurred as a result of other work which was subcontracted out, the policy exclusion may not apply.

Fifth, it is not clear from the motion papers whether the injuries sustained by Fernandez and Patrick were in fact related to, or arose from, the project. Fernandez testified that he slipped on ice while going to get coffee from a truck. If the truck was on the street and off the job site, and that is where the ice was too, then the accident may not have been related to the work on the project (*See generally, Garland v Zelasko Constr.*, 241 AD2d 953 [4th Dept 1997]). Similarly, although Patrick testified he slipped and fell on trash it is unclear whether the trash was present as a result of work on the project or was on the street having come from a neighboring building. Argonaut and Colony, relying on *Regal Construction Corp. v National Union Fire Insurance Co. of Pittsburgh, PA,* 15 NY3d 34 (2010) and *Maroney v New York Central Mutual Fire Insurance Co.*, 5 NY3d 467 (2005) assert that the "arising out of" language in an insurance policy is to be construed broadly and, thus, that Fernandez's and Patrick's accidents arose out of their work for B&G on the job site and that their accidents therefore fall within the policy exclusion. However, given that the movants failed to establish this fact, the relief sought cannot be granted.

Sixth, it is not clear how Colony is bound by the same policy language as Argonaut. Colony and Argonaut assert in their motion papers that the policy was issued by Argonaut, but the exact contractual connection between Argonaut and Colony is unclear.

(Second Amended Complaint, ¶¶ 6-9, Doc. 157). Plaintiff alleges that Argonaut and Colony are affiliates, and also that Colony succeeded Argonaut. (*Id.*) Although there may be documents, such as an assignment, merger agreement or purchase agreement imposing successorship obligations on Colony, such documentation has not been submitted in support of the instant motion so this Court cannot determine if the exclusion applies to Colony.

Finally, Bay Plaza claims that Argonaut and Colony have covered at least 12 other claims for injuries on this same job site, suggesting that is an admission of coverage or an estoppel against denying coverage for these two claims. In support of this argument, plaintiffs cite *Brooklyn Hospital Center v Centennial Insurance Co.,* 258 AD2d 491 (2d Dep't 1999) and *Touchette Corp. v Merchants Mutual Insurance Co.,* 76 AD2d 7 (4th Dep't 1980) and a delay in denying coverage or reserving rights or covering one related claim but not another can lead to an estoppel. However, it is unclear from the motion papers why those 12 other claims have been covered and those arising from the Fernandez and Patrick accidents have not.

Plaintiff also cites to New York Insurance Law 3420(d), which provides that if an insurer wishes to "disclaim liability or deny coverage" for personal injuries "it shall give written notice as soon as is reasonably possible." Plaintiff asserts this as an additional reason that there should be an estoppel to deny coverage. Here the Fernandez and Patrick accidents occurred in February and April 2014, respectively. The suits in those cases were filed in 2014 and 2016, the tenders of defense were on November 5, 2014 and July 5, 2016, and the coverage denial letters were sent on November 10, 2014 and July 25, 2016, less than a week later in the case of the Fernandez claim and a month in the case of the Patrick claim. Given the necessity of affording the carriers a reasonable time to investigate, this Court declines to find that the coverage denials were tardy or that any estoppel could exist based on such timing.

The two Harleysville insurers join in plaintiffs' opposition to the Argonaut and Colony motion. The two Harleysville defendants insured B&G, which agreed to indemnify Bay Plaza, and named Bay Plaza and Prestige as additional insureds. The Harleysville defendants largely repeat the same arguments made by plaintiffs. One additional argument they make is that Prestige is a named plaintiff and it did not directly contract with B&G. Given this Court's resolution of the motions by Argonaut and Colony at this time, it unnecessary to decide how the policy exclusion might apply to Prestige, especially since the parties do not explain Prestige's role at the site.

Argonaut and Colony have requested the deposition of Edward Farmer, Prestige's Controller, who received the denial or no coverage letters at issue here (Exhs. E and F, Docs. 223 and 224; Farmer Aff., Doc. 237; and Doc. 238 at 9). That deposition should proceed and the parties should meet and confer to determine what other discovery remains outstanding. If the parties are unable to agree to a discovery schedule, they shall contact Special Master Richard Swanson for the purposes of resolving any discovery disputes. Mr. Swanson's contact information is set forth below.

Accordingly, Argonaut's and Colony's motion for summary judgment is denied, without prejudice to renew upon the completion of discovery.

Plaintiffs also cross-move against Fairmont for its alleged failure to procure proper coverage. However, plaintiffs offer no facts to in support of their position, seemingly assuming that any denial of coverage for the Fernandez and Patrick accidents should give rise to a claim against their insurance broker. Given this Court's resolution of the motion by Argonaut and Colony, it is unnecessary to decide the cross motion at this time because plaintiffs only cross-move against Fairmont to the extent that the motion by Argonaut and Colony is granted.

Conclusion

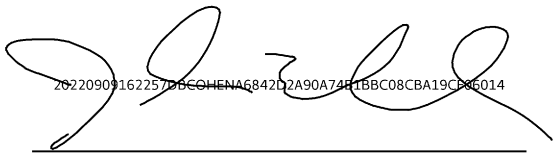
Accordingly, it is hereby:

ORDERED, that the motion for summary judgment by defendants Argonaut Insurance Company and Colony Specialty Insurance Company is denied without prejudice to renew the application upon the completion of discovery; and it is further

ORDERED, that the cross motion for summary judgment by plaintiffs Bay Plaza Mall, LLC and Mall 1-Bay Plaza, LLC is denied as premature given that it is predicated upon the determination of the motion by defendants Argonaut Insurance Company and Colony Specialty Insurance Company; and it is further

ORDERED, that the parties shall meet and confer regarding a proposed discovery schedule by September 30, 2022 and, if they are able to agree to such a discovery schedule, they shall submit a discovery stipulation to the undersigned to be so-ordered by October 12, 2022; and it is further

ORDERED that if the parties are unable to agree to a discovery schedule, they shall contact Special Master Richard Swanson at rpswanson432@gmail.com or (201) 788-0783 on or before October 12, 2022 to schedule a discovery conference.



9/9/2022
DATE

DAVID B. COHEN, 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