

MTA Bus Co. v Zurich Am. Ins. Co.

2011 NY Slip Op 31318(U)

April 29, 2011

Supreme Court, New York County

Docket Number: 402833/2009

Judge: Lucy Billings

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C.
Justice

PART 46

MTA BUS COMPANY and CLAIRMONTE PUNKH

INDEX NO. 402833/2009

MOTION DATE _____

- v -
ZURICH AMERICAN INSURANCE COMPANY,
AMERICAN HOME ASSURANCE COMPANY, and
AMERICAN BRIDGE COMPANY

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion ~~to~~ for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED
1-3

Answering Affidavits — Exhibits _____

4

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that ~~this motion~~ :

The court grants plaintiffs' cross-motion to the extent set forth, otherwise denies their cross-motion, and denies defendants' motion and cross-motion for summary judgment, pursuant to the accompanying decision. C.P.L.R. § 3212(b) and (e).

FILED

MAY 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/29/11

Lucy Billings
LUCY BILLINGS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----X

MTA BUS COMPANY and CLAIRMONTE PUNCH, Index No. 402833/2009

Plaintiffs

- against -

DECISION AND ORDER

ZURICH AMERICAN INSURANCE COMPANY,
AMERICAN HOME ASSURANCE COMPANY, and
AMERICAN BRIDGE COMPANY,

Defendants

FILED

MAY 18 2011

-----X

LUCY BILLINGS, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

This action based on breach of contract seeking a declaratory judgment for defense and indemnification stems from a series of underlying actions for personal injuries to workers from the collision of a passenger bus at a construction site. Defendants Zurich American Insurance Company and American Bridge Company move for summary judgment dismissing the claims against these defendants, but have withdrawn their request for sanctions against plaintiffs. Defendant American Home Assurance Company similarly cross-moves for summary judgment dismissing the claims against this defendant. Plaintiffs also cross-move for summary judgment. After oral argument, for the reasons explained below, the court grants plaintiffs' cross-motion in part, otherwise denies their cross-motion, and denies defendants' motion and cross-motion.

I. UNCONTESTED FACTS

Defendant American Bridge contracted with the Triborough Bridge and Tunnel Authority (TBTA) to perform repairs on the Marine Parkway Bridge between Kings and Queens Counties. The contract dated September 21, 2006, between American Bridge and TBTA required American Bridge to procure and maintain insurance naming "Triborough Bridge and Tunnel Authority (TBTA) and the Metropolitan Transportation Authority (MTA) including its subsidiaries and affiliates" as additional insureds. Aff. of Ignatius J. Melito, Ex. D, art. 6.05(1) (June 22, 2010). TBTA and plaintiff MTA Bus Company both are subsidiaries of the Metropolitan Transit Authority (MTA). Id., Ex. E. Defendant American Bridge obtained primary and excess insurance policies from defendants Zurich American Insurance and American Home Assurance respectively.

On October 12, 2007, a collision occurred involving a bus operated by plaintiff Punch, in the course of his employment by plaintiff MTA Bus, and equipment and workers in defendant American Bridge's work area on the Marine Parkway Bridge. This collision led to a series of actions by two workers for personal injuries and impleader actions: (1) Michael McKeown v. Triborough Bridge and Tunnel Authority, MTA Bus Company and Clairmonte Punch, Index No. 31291/08 (Sup. Ct. Kings Co.), and a third party action Triborough Bridge and Tunnel Authority v. American Bridge Company, Index No. 350297/08; (2) Jose Rivera v. City of New York, Metropolitan Transportation Authority, MTA Bus

Company, Manhattan and Bronx Surface Transit Operating Authority and Clairmonte RB Punch, Index No. 26135/08 (Sup. Ct. Kings Co.), a third party action Triborough Bridge and Tunnel Authority v. American Bridge Company, Index No. 75921/08, and a fourth party action Triborough Bridge and Tunnel Authority v. MTA Bus Company and Clairmonte RB Punch, Index No. 75166/09; and (3) Jose Rivera v. MTA Bus Co. and Clairmonte RB Punch, Index No. 13671/09 (Sup. Ct. Kings Co.). This action now seeks to compel Zurich American Insurance and American Home Assurance to defend and indemnify plaintiffs in the Kings County actions or to recover damages from American Bridge for failing to provide insurance in breach of its contract with TBTA.

II. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment, the moving parties must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If the moving parties satisfy this standard, the burden shifts to the opposing parties to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of the motions and cross-motions for

summary judgment by each party, the court construes the evidence in the light most favorable to the opponents. Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

III. AMERICAN BRIDGE WAS CONTRACTUALLY OBLIGATED TO PROCURE INSURANCE COVERING MTA BUS AS AN ADDITIONAL INSURED.

Contracts, for insurance or otherwise, "must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court." Vigilant Ins. Co. v Bear Stearns Cos., Inc., 10 N.Y.3d 170, 176 (2008). "The best evidence of what parties to a written agreement intend is what they say in their writing." Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (1992); Slamow v. Del Col, 79 N.Y.2d 1016, 1018 (1992); RM 14 FK Corp. v. Bank One Trust Co., N.A., 37 A.D.3d 272, 274 (1st Dep't 2007). See Weissman v. Sinorm Deli, 88 N.Y.2d at 446; Slatt v. Slatt, 64 N.Y.2d 966, 967 (1985). The contract dated September 21, 2006, between American Bridge and TBTA specifically required that American Bridge procure and maintain general liability insurance with an "Additional Insured Endorsement (latest I.S.O. Form CG 20 10 or equivalent approved by the Authority) naming Triborough Bridge and Tunnel Authority (TBTA) and the Metropolitan Transportation Authority (MTA) including its subsidiaries and affiliates." Melito Aff., Ex. D, art. 6.05(1). These terms plainly required American Bridge to insure MTA, "including its subsidiaries" such as TBTA and MTA Bus. Id., Exs. D, art. 6.05(1), and E. If MTA in the above statement meant no more than TBTA, then the phrase "including its subsidiaries" would be redundant, as TBTA already is listed as a

named insured before MTA.

The contract defines "'MTA' to mean the Metropolitan Transportation Authority, and any other board, body, commission, official or officials to which or to whom the powers now belonging to the said authority in respect to the locations, construction, equipment, maintenance and operation of TBTA facilities [sic]." Id., Ex. D, art. 1.02(29). The entities listed after "the Metropolitan Transportation Authority" are separated from it by a comma followed by "and," thus introducing separate component entities in addition to MTA as a whole. These component entities are part of the definition of "MTA," not the definition of or a limitation on MTA's subsidiaries.

Moreover, even if these component entities limit which MTA subsidiaries must be covered, MTA Bus was using the Marine Park Bridge as a route for travel and thus "in respect to the . . . operation of TBTA facilities." Therefore, because under either construction of the contract's terms MTA Bus is a subsidiary of MTA, and American Bridge contracted to provide insurance for MTA as a whole, "including its subsidiaries," id., art. 6.05(1), American Bridge was contractually obligated to provide insurance covering MTA Bus. In contrast to a recent decision that an insurance policy did not cover the City of New York's subsidiary Department of Education, because the City of New York itself was not clearly a named insured, the contract here expressly names MTA "including its subsidiaries," all as insureds. Id. See Philadelphia Indem. Ins. Co. v. City of New York, 2011 WL 1237586

at *5 (S.D.N.Y. Mar. 24, 2011).

As explained below, American Bridge did obtain insurance policies that provide MTA Bus a defense in the underlying actions. The policies do not, however, use the I.S.O. Form CG 20 10 required by the contract between TBTA and American Bridge. No party presents evidence whether the endorsements actually used in the policies are an "equivalent approved by the Authority" or even if the policies provide equivalent coverage. *Melito Aff.*, Ex. D, art. 6.05(1). As explained further, because it is possible that the policies will not indemnify MTA Bus, it is impossible now to determine as a matter of law whether American Bridge has breached its contractual duty to provide insurance naming MTA Bus as an additional insured. The court therefore denies the parties' motion and cross-motions insofar as they seek a declaration whether defendant American Bridge breached its contract with TBTA.

IV. ZURICH AMERICAN INSURANCE MUST DEFEND AND INDEMNIFY MTA BUS IN THE UNDERLYING ACTIONS.

The Zurich American Insurance policy includes "as an insured any person or organization whom you are required to add as an additional insured on this policy under a written contract or written agreement." *Id.*, Ex. F. Under the written contract between American Bridge and TBTA, MTA Bus is such an organization that American Bridge is "required to add as an additional insured." Thus, by its terms, the Zurich American Insurance policy issued to American Bridge covers MTA Bus as an additional insured.

Specifically, the Zurich American Insurance policy provides liability coverage to the additional insured only if:

1. the "bodily injury" or "property damage" results from your [American Bridge's] negligence; and
2. the "bodily injury," "property damage" or "personal and advertising injury" results directly from:
 - a. Your ongoing operations; or
 - b. "Your work" . . . performed for the additional insured

Id. The underlying claims for injuries and damages resulted from a collision involving workers and equipment at American Bridge's work site. Plainly, therefore, the injuries resulted at least in part from American Bridge's "ongoing operations."

The underlying claims also resulted from American Bridge's "work . . . performed for the additional insured." MTA as a whole is an additional insured. American Bridge performed its work for MTA when it performed work for MTA's subsidiary, TBTA. Moreover, while American Bridge did not perform its work at MTA Bus's request, it performed the work for MTA Bus insofar as MTA Bus regularly operated its vehicles over the bridge and thus would benefit from American Bridge's work. Although all the owners or operators of vehicles that use the bridge would benefit similarly, American Bridge, in distinction, contracted to procure insurance covering MTA including its subsidiary MTA Bus. These facts differ materially from Admiral Ins. Co. v. Joy Contractors, Inc., 81 A.D.3d 521, 523 (1st Dep't 2011), which rejected a claim that the lessee of equipment was working for or on behalf of the

lessor merely because the lessee was contractually obligated to obey safety rules. Here, in contrast, the named insured American Bridge specifically contracted with plaintiff's parent organization to perform work at least partly for plaintiff's use: a relationship very different from a lessee-lessor relationship.

Although the Zurich American Insurance policy covers the additional insured only if its liability arises from American Bridge's negligence, the duty to defend is broader than the duty to indemnify. The insurer must defend plaintiff MTA Bus even if the factfinder in the underlying action ultimately might find facts that would permit the insurer to deny indemnification. BP A.C. Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 714 (2007); Automobile Ins. Co. of Hartford v. Cook, 7 N.Y.3d 131, 137 (2006); General Motors Acceptance Corp. v. Nationwide Ins. Co., 4 N.Y.3d 451, 456 (2005); Town of Massena v. Healthcare Underwriters Mut. Ins. Co., 98 N.Y.2d 435, 443-44 (2002). The court must resolve any ambiguity in the insured's favor. White v. Continental Cas. Co., 9 N.Y.3d 264, 267 (2007); Nautilus Ins. Co. v. Matthew David Events, Ltd., 69 A.D.3d 457, 459 (1st Dep't 2010); Tower Ins. Co. of New York v. Diaz, 58 A.D.3d 495, 496 (1st Dep't 2009); Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co., 27 A.D.3d 84, 94 (1st Dep't 2005). Moreover, an insurer must defend an entire action even if only one claim may fall within a policy's indemnity coverage. Automobile Ins. Co. of Hartford v. Cook, 7 N.Y.3d at 137; Town of Massena v. Healthcare Underwriters Mut. Ins. Co., 98 N.Y.2d 435, 443-44

(2002); Agoado Realty Corp. v. United Intl. Ins. Co., 95 N.Y.2d 141, 145 (2000); Continental Cas. Co. v. Rapid-Am. Corp., 80 N.Y.2d 640, 648 (1993).

Consequently, Zurich American Insurance must defend plaintiff MTA Bus in the underlying actions and is obligated to reimburse MTA Bus for reasonable attorneys' fees and expenses in defending those actions. BP A.C. Corp. v. One Beacon Ins. Group, 8 N.Y.3d at 714; Automobile Ins. Co. of Hartford v. Cook, 7 N.Y.3d at 137; General Motors Acceptance Corp. v. Nationwide Ins. Co., 4 N.Y.3d at 456; Town of Massena v. Healthcare Underwriters Mut. Ins. Co., 98 N.Y.2d at 443-44. Ultimately, Zurich American Insurance also must indemnify MTA Bus for any of the underlying claims that resulted from American Bridge's negligence.

V. AMERICAN HOME ASSURANCE MUST DEFEND AND INDEMNIFY MTA BUS IN THE UNDERLYING ACTIONS.

The American Home Assurance policy includes as an insured "any person or organization, other than the Named Insured, included as an additional insured under Scheduled Underlying Insurance." Aff. of William J. Cleary, Ex. 2, § VII(M)(7). American Bridge's policy with Zurich American Insurance is listed under Scheduled Underlying Insurance. Id., Ex. 3. Because MTA Bus is an additional insured under the Zurich American Insurance policy, MTA Bus is also an insured under the American Home Assurance policy. Because the Zurich American Insurance policy only covers MTA Bus insofar as its liability results from American Bridge's negligence, the American Home Assurance policy only covers MTA Bus to the same extent.

American Home Assurance identifies no exclusion from coverage under which the underlying actions might fall. This defendant therefore must defend MTA Bus insofar as the damages in the underlying actions exceed the coverage under the Zurich American Insurance policy and is obligated to reimburse MTA Bus for reasonable attorneys' fees, and expenses in defending those actions to the same extent. Id., Ex. 2, § III(A); BP A.C. Corp. v. One Beacon Ins. Group, 8 N.Y.3d at 714; Automobile Ins. Co. of Hartford v. Cook, 7 N.Y.3d at 137; General Motors Acceptance Corp. v. Nationwide Ins. Co., 4 N.Y.3d at 456; Town of Massena v. Healthcare Underwriters Mut. Ins. Co., 98 N.Y.2d at 443-44. American Home Assurance also must indemnify MTA Bus for any of the underlying claims for which it is liable due to American Bridge's negligence, insofar as the damages in the underlying actions exceed the coverage under the Zurich American Insurance policy.

VI. CLAIRMONTE PUNCH

As set forth above, the September 2006 contract between American Bridge and TBTA requires that American Bridge's insurance name MTA as an additional insured, defined as "the Metropolitan Transportation Authority, and any other board, body, commission, official or officials to which or to whom the powers now belonging to the said authority [sic]." Melito Aff., Ex. D, art. 1.02(29). Although a bus driver may not be an official "to which or to whom the powers now belonging to the said authority" belong, no party presents any admissible evidence regarding

plaintiff Punch. Absent any admissible evidence, no party demonstrates a prima facie claim regarding American Bridge's duty or lack of duty to Punch or his coverage or lack of coverage under the insurance policies. Smalls v. AJI Indus., Inc., 10 N.Y.3d at 735; JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d at 384; Giuffrida v. Citibank Corp., 100 N.Y.2d at 81. The court therefore denies summary judgment to all parties regarding the duty of Zurich American Insurance or American Home Assurance to defend or indemnify Punch. C.P.L.R. § 3212(b).

VII. CONCLUSION

For the foregoing reasons, the court grants plaintiffs' cross-motion for summary judgment to the extent that the court declares and adjudges that:

- (1) Defendant Zurich American Insurance Company must defend plaintiff MTA Bus Company in the underlying actions, enumerated in § I of this decision, and must reimburse MTA Bus Company for its reasonable attorneys' fees and expenses in defending those actions;
- (2) Defendant American Home Assurance Company must defend plaintiff MTA Bus Company in the underlying actions and must reimburse MTA Bus Company for its reasonable attorneys' fees and expenses in defending those actions, insofar as the damages in those actions exceed the coverage under the Zurich American Insurance policy;
- (3) Defendant Zurich American Insurance Company must indemnify plaintiff MTA Bus Company insofar as its liability

results from American Bridge's negligence; and
 (4) Defendant American Home Assurance Company must indemnify MTA Bus Company insofar as its liability results from American Bridge's negligence and the damages in the underlying actions exceed the coverage under the Zurich American Insurance policy.

C.P.L.R. §§ 3001, 3212(b) and (e). The Clerk shall enter that judgment forthwith.

The court denies plaintiffs' cross-motion for summary judgment on their claims for defendant American Bridge Company's breach of contract and on plaintiff Clairmonte Punch's claims for defense and indemnification by defendants Zurich Insurance Company and American Home Assurance Company. C.P.L.R. § 3212(b). The court also denies the motion for summary judgment by defendants Zurich American Insurance Company and American Bridge Company and the cross-motion for summary judgment by defendant American Home Assurance Company. Id.

DATED: April 29, 2011

Lucy Billings

LUCY BILLINGS, J.S.C.

FILED

MAY 18 2011

NEW YORK
 COUNTY CLERK'S OFFICE

LUCY BILLINGS
 J.S.C.