Bayswater Dev. LLC v Admiral Ins. Co.
2013 NY Slip Op 32573(U)
October 15, 2013
Sup Ct, New York County
Docket Number: 105001/10
Judge: Joan M. Kenney
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SCANNED ON 10/22/2013

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY, Justice — PART 8

Bayswater Development LLC et al.,

-v-

Admiral Insurance Company, et al.,

INDEX NO. 105001/10

MOTION DATE 12/12

MOTION SEQ. NO. 001

The following papers, numbered 1 to 52, were read on this motion to/for SJ motion

Notice of Motion/Order to Show Cause — Affidavits — Exhibits + memo of Law | No(s). 1-21

Answering Affidavits — Exhibits 2 x motions + memo of Law | No(s). 22-44

Replying Affidavits to Notice of Motion | No(s). 45, 46

Reply to x motion + Memo of Law | 47-52

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

In this declaratory judgment action, plaintiffs, Bayswater Brokerage Florida, LLC and Bayswater Development Florida, LLC, seek an Order, pursuant to CPLR 3212[1], granting movants judgment in their favor and against all named defendants.

Defendant, American Empire Surplus Lines Insurance Company (American Empire), cross moves for summary judgment, pursuant to CPLR 3212, declaring that

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1. The within motion was marked "submitted" by motion support on August 29, 2012. However, after the non-moving parties interposed cross motion applications, motion support refused to allow cross movants the opportunity to submit Reply papers to the cross motion(s). After a telephone conference with the parties, this Court granted cross movants leave to submit Reply papers to the cross motions. A briefing schedule was subsequently provided to all parties and these papers were marked fully submitted by this Court on December 14, 2012.

FILED
OCT 22 2013
COUNTY CLERK'S OFFICE
NEW YORK

pg 1 of 12

Dated: 10/15/13

JOAN M. KENNEY, J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

plaintiffs, Bayswater Brokerage Florida, LLC and Bayswater Development Florida, LLC are not insured under American Empire's insurance policy and therefore, American Empire has no duty to provide coverage for any claims against these plaintiffs.

Defendant, Admiral Insurance Company (Admiral), also cross moves for summary judgment, pursuant to CPLR 3212, seeking an Order: (1) denying plaintiffs' motion; (2) declaring that Florida substantive law be applied in this matter; (3) declaring that Admiral does not have a duty to defend and indemnify plaintiffs in an underlying action; (4) declaring that Admiral is not obligated to indemnify plaintiffs for any sums paid; and (5) declaring that plaintiffs, Bayswater Brokerage Florida, LLC and Bayswater Development Florida LLC are not insured under the Admiral policy and thus Admiral has no obligation to defend or indemnify these plaintiffs in connection with any claims filed against them.

FACTUAL BACKGROUND

Briefly, this is an insurance coverage dispute between plaintiffs and two of their commercial general liability insurers, Admiral and American Empire. It is asserted in the complaint that plaintiff, GH Vero Beach Development LLC engaged in the development of real property in Vero Beach, Florida, known as the Grand Harbor Project, which consisted of several homes sold to individuals who currently reside there. During construction, some subcontractors allegedly obtained drywall manufactured, sold, imported and/or distributed by one or more entities doing business in or from China

(Chinese Drywall). In 2009, some of the homeowners at the Grand Harbor Project began complaining of rotten-egg odors in their houses, corrosion-related air conditioning failures, failures of appliances and other damage to property, including health related complaints. According to plaintiffs, the source and/or cause of the odors, property damage and health problems complained of by the homeowners are alleged to be the Chinese Drywall.

The homeowners at the Grand Harbor Project have demanded that plaintiffs pay for the costs the homeowners have allegedly incurred to address the property damage and health related problems.

Admiral issued a Commercial General Liability policy to plaintiff, Bayswater Development LLC, with additional insured being plaintiff, GH Vero Beach Development LLC and Vero Beach Acquisition, LLC for the period from December 1, 2008 through December 1, 2009 (the Admiral Policy) which contains the following provisions:

> "...This insurance does not apply to: ... (f) Pollution (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemical and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

American Empire issued Excessive Liability insurance policy to Bayswater Development, LLC with the additional insured as plaintiffs, GH Vero Beach Development LLC and Vero Beach Acquisition LLC for a period commencing December 1, 2008 through

December 1, 2009 (the American Empire Policy) which provides that the American Empire Policy is subject to the conditions and terms of the Admiral Policy and further asserts that the American Empire Policy does not apply to:

> "...(1) Damages arising out of the actual, alleged or threatened discharge, seepage, migrations, dispersal, release or escape of pollutants."

The American Empire Policy defines pollutants as, "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste which includes materials to be recycles, reconditioned or reclaimed."

When plaintiffs put in claims seeking coverage under their insurance policies for the damage alleged to have resulted from the defective Chinese Drywalls, Admiral denied coverage citing the "Pollution Exclusion" provision on the Admiral Policy. American Empire denied coverage on grounds that its policy contained a "Total Pollution Exclusion." According to defendants, as these exclusion provisions are applied under Florida's state law, coverage for damages related to these defective Chinese Drywalls are precluded under the pertinent insurance policies. By contrast, New York's substantive law has a more narrow and strict application of these types of "pollution exclusion" provisions and would not necessarily permit, on public policy grounds, the exclusion of claims from the types of risks/damages experienced from these defective Chinese Drywalls.

On or about March 16, 2010, a lawsuit arising from the installation of these defective

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Chinese Drywalls was commenced against plaintiffs by Barry and Ellen Van Der Meulen who resided in one of the residences at the Grand Harbor Project (the underlying action).

Thereafter, plaintiffs commenced the within action seeking an Order declaring that Admiral had a duty to defend in the underlying action (Vx cause of action); that Admiral is obligated to indemnify plaintiffs (2nd cause of action); that plaintiffs have suffered damaged from Admiral's breach of the insurance policy agreement (3rd cause of action); that it be declared that plaintiffs be named insureds under the Admiral policy (4th cause of action); and a declaration that American Empire is obligated to provide both defense and indemnity coverage to plaintiffs for the Chinese Drywall Claims on an excess basis after the Admiral Policy is exhausted (5th cause of action). Movants further assert that it should be declared that plaintiffs, Bayswater Brokerage Florida, LLC and Bayswater Development Florida, LLC are additional insured under the policies because on numerous occasions requests were made for Admiral to correct and amend the policies to include additional insured on the policy and paid respective premiums for such additional insureds. Nevertheless, plaintiffs assert that Admiral failed to add the additional insureds as requested -insinuating that there was bad faith on the part of defendants in failing to add Bayswater Brokerage Florida, LLC and Bayswater Development Florida, LLC as additional insureds. Plaintiffs refer to a letter dated December 4, 2009 as proof that said requests were made to defendants (see Exhibit "S" to moving papers).

ARGUMENTS

Plaintiffs contend that the laws of the State of New York should apply in this case because: (1) the insured, Bayswater Development LLC's place of business is located in New York; and (2) the contract (policies) were formed in New York. Plaintiffs further argue that defendants must defend and indemnify them in the underlying action, as well as any and all "Chinese Drywall" claims because the insurance policies promised to pay 'those sums that the insured becomes legally obligated to pay as damages because of' bodily injury' or 'property damage.'"

Defendant, American Empire, contends that Florida law must apply to this case because the homes, the alleged damages, resulting claims, and pending litigation(s) are all in the State of Florida, any connection to the State of New York was merely administrative in nature and plaintiffs have not provided "any information as to how much or what percentage of the construction took place in Florida and Massachusetts and/or from where the majority of their income is derived" in order to determined which State's law has the most significant relationship to the issues at hand, warranting denial of plaintiffs' summary judgment motion.

Defendant, Admiral, contends that their pollution exclusion provision should be interpreted under Florida Law because: (1) Florida is the principal location of the risk(s); (2) the Admiral policy specifically did not cover any New York risks as coverage was

limited to operations performed in designated stated of endorsement; (3) the majority of plaintiffs have their principal place of business in the State of Florida, not in the State of New York; (4) the State of Florida has the most significant contacts to this matter; (5) prior claims under prior policies are not relevant to whether or not the within applicable policies should apply Florida law or New York substantive law; and (6) plaintiffs have not presented any evidence that the Admiral policy was executed in New York. Admiral further argues that it is providing a defense to the underlying action, subject to Admiral's reservation (except for the two plaintiffs' who are not insureds under the policy), and thus plaintiffs' application for a declaration that Admiral defend in the underlying action should be denied, as moot. Lastly, Admiral contends that plaintiffs motion for summary judgment cannot be granted as plaintiffs failed to address all of the defenses raised for disclaiming coverage which not only included a pollution exclusion, but also a: microorganism exclusion, untimely notice of claim defense, the business risk exclusions and other potential defenses to coverage.

Both defendants contend that because plaintiffs Bayswater Brokerage Florida LLC and Bayswater Development Florida LLC are not named insureds, they are not required to defend and/or indemnify these named plaintiffs.

DISCUSSION

"[T]he proponent of a motion for summary judgment must demonstrate that there

are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; see also *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once this showing has been made, the burden shifts to the party opposing the motion 'to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action'" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). It is also well settled that "[a] party that is not named an insured or an additional insured on the face of the policy is not entitled to coverage," and that "[t]he party claiming insurance coverage has the burden of proving entitlement" (*Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 339 [1st Dept 2003]). Moreover, "... policies of insurance are to be construed liberally in favor of the insured and strictly against the insurer [and] where the provisions of the policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement" (*Government Empls. Ins. Co. v Kligler*, 42 NY2d 863, 864 [1977]).

In the matter before this Court, defendants, American Empire and Admiral both contend that because plaintiffs, Bayswater Brokerage Florida, LLC and Bayswater

Development Florida, LLC, are not "insureds" under cross movants' respective insurance policies, then cross movants' have no duty to provide coverage to these plaintiffs. In fact, it is undisputed that plaintiffs, Bayswater Brokerage Florida LLC and Bayswater Development Florida LLC are not named insureds under the Admiral or American Empire insurance policies. On its face, it would appear that, American Empire and Admiral need not provide coverage to Bayswater Brokerage Florida, LLC and Bayswater Development Florida, LLC, where coverage never existed in the first instance. As such, a denial of additional insured coverage for Bayswater Brokerage Florida LLC and Bayswater Development Florida LLC's claims, if it was not based on a policy exclusion, would be sound. Without a written agreement between American Empire and Admiral and Bayswater Brokerage Florida, LLC and Bayswater Development Florida, LLC with respect to the construction project, there would be no coverage in the first instance and a denial of coverage "based upon a lack of inclusion rather than by reason of exclusion" would seem appropriate (*Hargob Realty Assoc., Inc. v Fireman's Fund Ins. Co.*, 73 AD3d 856, 858 [2nd Dept 2010][internal quotation marks and citation omitted]).

However, in the matter before this Court, the denial of coverage to Bayswater Brokerage Florida, LLC and Bayswater Development Florida, LLC, does not appear to have been based upon on "lack of inclusion" but rather on a "policy exclusion" provision. Although a Admiral issued a letter date April 12, 2010 asserting that it would not defend

or indemnify movants as same were "not insureds," it s not clear to this Court that this letter was a proper "denial of claim" or merely a notice in response to letter correspondences respecting the litigation of the underlying action. Moreover, Bayswater Brokerage Florida, LLC and Bayswater Development Florida, LLC both contend that they not only made requests to defendants to add them as additional insureds, but that, in fact, premiums were paid to add them as additional insured. The duty to provide coverage, may have, therefore, been created under such circumstances. At this juncture of the litigation, where discovery has yet to commence, however, this Court cannot grant any of the movants' requested reliefs for an Order declaring that Bayswater Brokerage Florida LLC and Bayswater Development Florida LLC are additional insured under the respective policies, since a prima facie entitlement to such reliefs has not been presented here. Based on the papers submitted and lack of proof that premium payments were in fact made to be included as "additional insureds" this Court cannot grant movants' the ultimate reliefs of judgment in their favor on all the causes of action alleged against defendants absent a finding, first, that movants were "additional insured." It is additionally noted that plaintiffs did not address all of the merits, or lack thereof, of all of the affirmative defenses raised by defendants in this action.

With respect to the cross motion applications, that portion seeking a declaration that movants are not "additional insured," is similarly denied. That portion of cross movants,

Admiral and American Empire's application for an order that Florida law must be applied to this case because the homes, the alleged damages, resulting claims, and pending litigation(s) are all in the State of Florida, is granted. Even assuming, *arguendo*, that all of the plaintiffs are "directed and continued to be directed" from New York, the "center of gravity" or "grouping of contacts" test applied in the State of New York mandates that the place with the most significant contacts with the matter in dispute, is the State of Florida.

To the extent that defendant, Admiral, has agreed to defend all the plaintiffs (EXCEPT movants) in the underlying action subject to Admiral's reservations under the policy, and to the extent that these other named plaintiffs have failed to oppose Admiral's motion to dismiss this action respecting these additional plaintiffs claims against Admiral, the action is dismissed, as moot, with respect to plaintiffs, Bayswater Development, LLCm GH Vero Beach Development, and LLC, Vero Beach Acquisitions, LLC, only.

Accordingly, it is

ORDERED that plaintiffs, Bayswater Brokerage Florida, LLC and Bayswater Development Florida, LLC's motion, is denied, in its entirety; and it is further

ORDERED that defendants, , American Empire Surplus Lines Insurance Company's and Admiral Insurance Company's cross motion, is denied, in part, on the application seeking an Order declaring that movants are not "insured" under respective policy, and granted, on the issue of the application of Florida State law as the governing law in this

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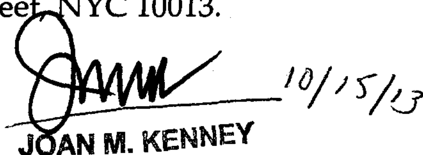
action; and it is further

ORDERED that defendant, Admiral Insurance Company's cross motion to dismiss the causes of action filed against it by plaintiffs, Bayswater Development, LLCm GH Vero Beach Development, and LLC, Vero Beach Acquisitions, LLC, is granted, on default and to the extent that the causes of action are moot in that defendant Admiral Insurance Company has agreed to defendant all the plaintiffs (EXCEPT plaintiffs, Bayswater Brokerage Florida, LLC and Bayswater Development Florida, LLC's) in the underlying action subject to Admiral's reservations under the policy; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant, Admiral Insurance Company, against plaintiffs, Bayswater Development, LLCm GH Vero Beach Development, and LLC, Vero Beach Acquisitions, LLC, ONLY, dismissing these plaintiffs' causes of action against defendant, Admiral Insurance Company, ONLY; and it is further

ORDERED that the remaining parties appear for a preliminary conference on January 30, 2014 at 9:30 a.m. in Room 304 located at 71 Thomas Street, NYC 10013.



JOAN M. KENNEY

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