National Fire Ins. Co. of Hartford v Lexington Ins. Co.
2015 NY Slip Op 31397(U)
July 24, 2015
Supreme Court, New York County
Docket Number: 150973/2012
Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 11

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NATIONAL FIRE INSURANCE COMPANY
OF HARTFORD,

Index No. 150973/2012

Plaintiff,

-against-

LEXINGTON INSURANCE COMPANY, ADCO ELECTRICAL CORPORATION, SIRINA FIRE PROTECTION CORPORATION AND OLD REPUBLIC GENERAL INSURANCE COMPANY,

Defendants.

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JOAN A. MADDEN, J.

Plaintiff National Fire Insurance Company of Hartford, ("National Fire"), moves for summary judgment seeking (1) a declaration that defendant Lexington Insurance Company ("Lexington") has a duty to defend non-party Americon Construction, Inc. ("Americon"), in an action entitled Joseph Gallinaro v. Americon Construction, Inc., Index No. 115323/09 ("the underlying action") and to reimburse National Fire for past costs incurred in defending Americon; and (2) a declaration that Lexington owes a duty to indemnify Americon in the underlying action. Lexington opposes the motion.

Background

In the underlying action, it is alleged that Joseph Gallinaro ("Gallinaro"), was injured on July 31, 2008, when he tripped and fell on debris while working as an electrician at a construction project at 299 Park Avenue ("the project"). Americon was the general contractor on the project. At the time of the incident, Gallinaro was an employee of defendant ADCO

Electrical Corporation ("ADCO"), which is named as a third-party defendant in the underlying action. ADCO was insured by Lexington at the time of the incident. National Fire insured Americon.

National Fire moves for summary judgment seeking a (1) declaration that defendant Lexington owes a duty to defend non-party Americon in the underlying action and to reimburse it for past costs in defending Americon, and (2) Lexington owes a duty to indemnify Americon in the underlying action.

In support of its motion, National Fire submits, *inter alia*, (1) a copy of the National Fire Policy G2 95944262 insuring Americon for the policy period September 1, 2007 to September 1, 2008; (2) a copy of the Lexington policy number 4547192, insuring ADCO for the policy period from August 1, 2007 to August 1, 2008 ("the Lexington policy"); (3) a purchase order between Americon and ADCO, which was signed by Americon on June 18, 2008, and by ADCO on July 28, 2008, which requires that all work be completed by July 3, 2008 (hereinafter "the original purchase order").

The original purchase order provides that "Conditions printed in the Terms and Conditions section are part of this Purchase Order." In the Terms and Conditions, Section 4 (e) states that:

> Americon shall be named as an Additional Insured on Subcontractor's (i.e. ADCO's) primary and excess liability policies to completely protect Americon from claims arising out of or resulting from Subcontractor's operations, attempted operations, or failure to perform operations under this Agreement, whether such operations are or are to be performed by Subcontractor or by any of its Subcontractors or agents or by anyone directly or indirectly employed by any of them or by anyone else for whose acts any of them may be liable. Americon's agreement with the Owner is hereby incorporated by reference and any entities that Americon is required to name

as an additional insured's are also to be named and included as additional insured's on the Subcontractor's insurance policies. The insurance coverage provided for the benefit of Americon shall be provided **on a primary and non-contributory basis by the Subcontractor and the Subcontractor shall have the necessary changes made to its insurance policies to effect said coverage. Any insurance maintained by Americon shall be maintained on an excess basis only and will not contribute with Subcontractor's insurance coverage until such time as the Subcontractor's primary and excess limits have been exhausted.**
(emphasis supplied)

The Lexington policy has policy coverage limits of $2,000,000 for each occurrence and $1,000,000 personal injury limit sustained by any one person.

The policy includes, under ENDORSEMENT # 010, an Insured" as:

ADDITIONAL INSURED REQUIRED BY WRITTEN CONTRACT

A. Section II- Who is An Insured is amended to include any person or organization you are required to include as an additional insured on this policy by a written contract or written agreement in effect during this policy period and executed prior to the "occurrence" of the "bodily injury" or "property damage."

B. The insurance provided to the above described additional insured under this endorsement is limited as follows:

2. The person or organization is only an additional insured with respect to liability arising out of "your work" or "your product" for that additional insured

6. Any coverage provided by this endorsement to an additional insured shall be excess over any other valid and collectible insurance available to the additional insured whether primary, excess, contingent or on any other basis **unless a written contract or written agreement specifically requires that this insurance apply on a primary or non-contributory basis.**

(emphasis supplied).

National Fire also submits the affidavit of Richard Cucci ("Cucci"), a principal with Americon, who states that contract between Americon and ADCO was

formed on or before July 25, 2008, and "work was begun on ADCO's part of the project on July 25, 2008." Affidavit Richard Cucci, ¶ 4. Cucci further states that "as part of the contract, ADCO agreed to procure additional insurance coverage and contractual indemnification for the benefit of Americon for liabilities arising out of ADCO's work for Americon" Id ¶ 5. He also states that the terms of the parties' contract are memorialized in the original purchase order, and that the parties agreed to be bound by the conditions of the contract before work begun under the contract. Id ¶ 6. He further states that the original purchase order contains additional terms and conditions, one of which was that ADCO would have Americon named as an additional insured on its insurance policies. Id ¶ 8.

Lexington opposes the motion, arguing that there are material issues of fact as to whether a written agreement and, in particular, the original purchase order was in effect on the date of the incident. In support of its argument, Lexington submits a purchase order between ADCO and Americon, which is dated July 28, 2008 (hereinafter "the subsequent purchase order"). The subsequent purchase order was signed Americon on July 28, 2008, but was not signed by ADCO until August 12, 2008, which is after the July 31, 2008 incident. The subsequent purchase agreement lists "Schedule: Subcontractor shall complete all work on or before 8/22/08." Lexington argues that since the subsequent purchase order was not executed by ADCO prior to the alleged incident it does not satisfy the requirements of the Lexington policy's additional insured endorsement. In addition, Lexington points to discovery responses in the underlying

action in which National Fire is defending Americon, indicating that the work on the accident date was being performed pursuant to the subsequent purchase order.

Lexington additionally argues that even if Americon were to qualify for additional insurance coverage, Lexington has no current obligation to defend or indemnify Americon since Lexington policy has a $100,000 self-insured retention that ADCO has not satisfied. In support of its position, Lexington points to a self-retention endorsement which it argues is applicable here.

It states:

COMMERCIAL GENERAL LIABILITY POLICY
PRODUCTS COMPLETED OPERATIONS LIABILITY POLICY
I. LIMITS OF INSURANCE

The LIMITS OF INSURANCE are set forth in Item 3 of the Declarations shall apply excess of a Self-Insured Retention (hereinafter referred to as the "Retained Limit") in the amount of:

$ 100,000	each "occurrence"
$	per "claim"
$	per claimant

and you agree to assume the Retained Limit. The Retained Limit, or any part of it, shall not be insured without our prior written approval.

II. DEFENSE AND SETTLEMENT – COVERAGES A AND B

The defense and settlement obligations as set forth in Section I – Coverages A and B are deleted and replaced by the following defense and settlement obligations:

A. WITHIN THE RETAINED LIMIT:

We do not have the duty to investigate or defend any "occurrence", claim or "suit unless and until the Retained Limit is exhausted with respect to that "occurrence", claim or "suit". However, we may, at our discretion and expense, participate with you in the investigation of such "occurrence: and the defense of any such claim or "suit that may result.

B. IN EXCESS OF THE RETAINED LIMIT:

1. Once the Retained Limit is exhausted, with respect to any specific "occurrence", claim or "suit" we shall thereafter have the right and duty to defend that "occurrence", claim or "suit".

2. When we have the duty to investigate and/or defend pursuant to subparagraph II. B.1. above, we may, at our sole discretion, settle any such "occurrence", claim or "suit".

Lexington argues that based on the above provisions, even if Americon were to qualify for additional insurance coverage it "does not have a duty to investigate or defend any 'occurrence' claim or 'suit' unless and until the Retained Limit of $100,000 is exhausted. Lexington further argues that it has no current obligation to defend or indemnify Americon since ADCO has not satisfied the Policy's $100,000 self-insured retention.

In reply, National Fire argues that Lexington fails to raise a triable issue of fact as to whether the original purchase order was executed prior to the work performed by ADCO, and the date Gallinaro was allegedly injured. In addition, National Fire maintains that its original discovery response identifying the subsequent purchase order as the one in effect at the time of incident, does not raise an issue of fact since original purchase order was subsequently located and the discovery responses were amended accordingly. National Fire also argues that the work completion date of July 3, 2008 indicated on the original purchase order is of no relevance, particularly as the document was not signed by ADCO until July 28, 2008.

With respect to the self-insured retention, National Fire asserts, based on invoices that its submits, that Americon's defense costs through December 12, 2014, are approximately $54,000, and that the $100,000 limit will soon be met. In any event, National Fire argues that the self-insured retention limit does not prevent the court from issuing a declaration that National Fire is entitled to a defense and indemnification once the $100,000 limit is met.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 324 (1986).

"An insurance contract is to be interpreted by the same general rules that govern the construction of any written contract and enforced in accordance with the intent of the parties as expressed in the language employed in the policy." Throgs Neck Bagels, Inc. v. G.E. Ins. Co. of New York, 241 AD2d 66, 68 (1st Dept 1998),citing Breed v. Insurance Co. of N. America, 46 NY2d 351, 355 (1978). In general, "the court will construe the limitations of an insurance contract in the light of the speech of common [people],'"quoting Gittelson v. Mut. Life Ins. Co. of NY, 266 AD 141, 145 (1st Dept 1943)(internal citation omitted). "Any ambiguities will be resolved against the insurer, as

drafter of the policy [and][t]he touchstone for interpreting insurance contracts, as with other contracts, is the reasonable expectation of the parties." Id. (citations omitted).

"It is well settled that an insurer's duty to defend its insured is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage" (internal citations and quotations omitted). BP Air Conditioning Corp. v. One Beacon Ins. Group, 8 NY3d 708, 714 (2007); see also W & W Glass Systems, Inc. v. Admiral Ins. Co., 91 AD3d 530 (1st Dep't 2012) "[I]f the complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, a duty to defend exists." City of New York v. Certain Underwriters at Lloyd's of London, England, 15 AD3d 228, 230 (1st Dep't 2005)(internal citations omitted). "The duty to indemnify is...distinctly different from the [duty to defend]." Servidone Const. Corp. v. Security Ins. Co. of Hartford, 64 NY2d 419, 424 (1985). Specifically, while "the duty to defend is measured against the allegations of the pleadings, the duty to pay is determined by the actual basis for the insured's liability to a third person." Id.; see also, BP Air Conditioning Corp. v One Beacon Insurance Group, 33 AD3d 116, 124 (1st Dept 2006), modified on other grounds, 8 NY3d 708 (2007)(holding that "a duty to defend an additional insured is not contingent on there having been an adjudication of liability giving rise to a duty to indemnify the additional insured").

In this case the insurance contract at issue, the Lexington policy, defines "An Insured" as "any person or organization you [i.e. ADCO] [is] required to include as an additional insured on this policy by a written contract or written agreement in effect

during this policy period and executed prior to the 'occurrence' of the 'bodily injury' or 'property damage." In addition, the Lexington policy states that "[a]ny coverage provided by this endorsement to an additional insured shall be excess over any other valid and collectible insurance available to the additional insured whether primary, excess, contingent or on any other basis unless a written contract or written agreement specifically requires that this insurance apply on a primary or non-contributory basis."

At issue on this motion is whether the original purchase order constitutes a written agreement in effect during the policy period requiring ADCO to name Americon as an additional insured, such that Americon qualifies "an Insured" under the Lexington policy. Section 4(e) of the terms and conditions of the original purchase order requires ADCO to name Americon as an additional insured to ADCO's insurance policies and further provides that such insurance "shall be provided on a primary and non-contributory basis." In addition, as the incident in the underlying action occurred on July 31, 2008, and Americon and ADCO executed the purchase order on June 18, 2008, and July 28, 2008, respectively, the written agreement was "executed prior to 'the occurrence' or bodily injury" as required by the Lexington policy. Moreover, the original purchase agreement was entered at latest, on July 28, 2008, the date it was executed by ADCO, and thus was effective "during [the] policy period" of the Lexington policy which began on August 1, 2007 and ended on August 1, 2008.

The original purchase order, together with the Lexington policy and Mr. Cucci's affidavit, are thus sufficient to meet National Fire's burden of demonstrating that Americon is "An Insured" under the Lexington policy so that the burden now shifts to

Lexington to provide admissible evidentiary proof sufficient to raise a material issue of fact. Alvarez v. Prospect Hospital, 68 NY2d at 324.

The court finds that Lexington has failed to meet this burden. Although the subsequent purchase agreement was executed by ADCO after the underlying incident, Lexington provides no evidence that this purchase order superceded or rendered ineffective the terms of the original purchase order signed before the date of Gallinaro's alleged injuries, and during the policy period. In addition, the discovery responses relied on by Lexington are insufficient to raise an issue in this regard since such responses were subsequently amended to indicate that the original purchase agreement was the applicable agreement. Moreover, the July 3, 2008 completion date for the work in the original purchase order does not raise a factual issue as to whether the original purchase order was in effect during the policy period.

With respect to the $100,000 self-retention limit in the policy, while there is no dispute that such limit is applicable, National Fire is nonetheless entitled to a declaration as to its rights under the Lexington policy once this limit is reached. See Roman Catholic Diocese of Brooklyn v. National Fire Ins. Co. of Pittsburgh, Pa., 87 AD3d 1057, 1062 (2d Dept 2011), aff'd 21 NY3d 139 (2013)(insured was entitled to a declaration that the insurers were obligated to indemnify the insureds up to the limits of several commercial liability policies in excess of the $250,000 retention limits).

Finally, Lexington does not deny that as "An Insured' under the Lexington policy, Lexington would be required to both defend and indemnify Americon in the underlying action.

In view of the above it is

ORDERED that National Fire Insurance Company of Hartford's motion for summary judgment is granted in part and denied in part; and it is further

ADJUDGED AND DECLARED that after the exhaustion of the $100,000 self insurance retention in the Lexington policy, Lexington Insurance Company shall be obligated to defend and indemnify non-party Americon Construction, Inc in the action entitled Joseph Gallinaro v. Americon Construction, Inc., Index No. 150973/2012.

DATED: July 24, 2015

HON. JOAN A. MADDEN
J.S.C.