American Empire Surplus Lines Ins. Co. v Starr Surplus Lines Ins. Co.
2018 NY Slip Op 30053(U)
January 9, 2018
Supreme Court, New York County
Docket Number: 656342/2016
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH *Justice* **PART 29**

AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY,

Plaintiff,

- v -

STARR SURPLUS LINES INSURANCE COMPANY,

Defendant.

INDEX NO. 656342/2016

MOTION DATE 9/24/17

MOTION SEQ. NO. 001

The following papers, numbered 11–35, were read on this motion and cross-motion for summary judgment.

Notice of Motion—Affirmation in Support of Motion—Exhibits 1–13—Memorandum of Law in Support of Motion	Nos. 11–26
Notice of Cross-Motion—Affirmation in Opposition to Motion and in Support of Cross-Motion—Exhibit A—Memorandum of Law in Opposition to Motion and in Support of Cross-Motion	Nos. 31–34
Memorandum of Law in Opposition to Cross-Motion and in Further Support of Motion	No. 35

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

Motion by Starr Surplus Lines Insurance Company ("Defendant" or "Starr") for an order pursuant to CPLR 3001 and 3212 dismissing the complaint of American Empire Surplus Lines Insurance Company ("Plaintiff" or "American") and a judgment declaring that Plaintiff must: (a) reimburse Starr for its equal share of the defense costs expended by Starr to date in connection with the defense of NYU Langone Medical Center ("NYU") in the underlying personal injury action pursuant to the insurance policy issued by Starr; and (b) and contribute its equal share of the defense and indemnification costs and expenses to be incurred in the underlying action in the future is denied.

Plaintiff's cross-motion for summary judgment declaring that: (i) American does not owe additional insured coverage to NYU in connection with the underlying action; or, in the alternative, if American is deemed to owe a duty to provide additional insured coverage to NYU (ii) American is obligated to provide this coverage to NYU only after the limits of Defendant's insurance policy have been exhausted is denied.

BACKGROUND

The instant insurance coverage action arises from a personal injury action brought by Efrain Alvarado ("Alvarado") and Laura Alvarado in part against NYU Langone Medical Center ("NYU") for injuries that Alvarado allegedly incurred, on or about August 14, 2015, while he was working on a construction project (the "Construction Project") located at 530-550 First Avenue (the "Premises") in New York County. The underlying action—*Alvarado v NYU Langone Medical Center*, Index No. 703714/2016—was commenced on March 29, 2016 by Mr. Alvarado and his wife filing a summons and complaint in Queens County. Said complaint alleges claims against NYU and "John Doe" Scaffold Company—among others—for common law negligence and pursuant to Labor Law §§ 200, 240 and 241. Said complaint further alleges that, on August 15, 2015, Mr. Alvarado "was an employee of one of those contractors, Pinnacle Environmental Corporation, lawfully and properly upon the premises performing construction work, alteration, renovation, removal, remediation, and/or demolition labor and/or services" and that Mr. Alvarado was "lawfully and carefully working upon said premises . . . when the scaffold equipment fell on his hand and trapped his arm, by reason of the negligence of the defendants . . . ."

When the underlying tort action was commenced naming NYU, but not ECR, as a defendant, NYU sought a defense and indemnity from ECR and American. American thereafter tendered the defense to Starr. Starr accepted the defense of NYU based upon the Pinnacle policy with Starr, but did so under a reservation of rights and demanded that the American participate in a cost-sharing arrangement.

At the time of the underlying accident, NYU retained East Coast Restoration & Construction Consulting Corp. ("ECR") as the general contractor for the Construction Project. ECR retained Pinnacle Environmental Corp. ("Pinnacle") as a subcontractor, on June 26, 2015, to perform asbestos abatement-related work for the Construction Project.

In the instant action, American alleges in its "declaratory judgment complaint" that it issued a commercial general liability insurance policy to ECR for the period from January 18, 2015 to January 18, 2016 (the "American Policy").

American further alleges that prior to Alvarado's alleged accident, NYU retained ECR as a contractor for the Construction Project and that ECR retained Pinnacle as a subcontractor for the Construction Project. American alleges that ECR entered into a contract with Pinnacle (the "ECR-Pinnacle Subcontract") whereby Pinnacle was required to defend, indemnify, and hold harmless NYU and ECR, along with other additional parties, from all claims and liabilities. American further alleges that the ECR-Pinnacle Subcontract also required Pinnacle to add NYU and ECR, among others, as additional insured parties on Pinnacle's commercial general liability policy. American further alleges that Starr issued a commercial general liability insurance policy to Pinnacle for the period from January 28, 2015 to January 28, 2016 ("Starr Policy").

American alleges in the instant declaratory judgment complaint, that the additional insurance coverage provided to NYU under the Starr Policy is primary to any coverage available to NYU under the American policy. American further alleges that Starr was provided with timely notice of the occurrence, claim and/or suit in connection with Alvarado's alleged accident. American further alleges that an actual controversy exists between American and Starr with respect to the defense and indemnification of NYU in the Alvarado Action.

American asserts three causes of action against Starr:

- First cause of action: American is entitled to a declaratory judgment that Starr has, and at all relevant times had and still has, a duty to provide a defense and indemnity to NYU on a primary basis as to the Alvarado Action;

- Second cause of action: American is entitled to a declaratory judgment that Starr must defend and indemnify NYU in the Alvarado Action based upon Pinnacle's contractual obligations to defend and indemnify NYU; and

- Third cause of action: Starr is under an obligation to provide a defense and indemnity to NYU on a primary basis in connection with the Alvarado Lawsuit.

Starr now moves for summary judgment directing American (a) to reimburse Starr for American's equal share of the defense costs expended by Starr to date in connection with the defense of NYU as to the Alvarado Action, and (b) to contribute American's equal share of the defense and indemnification costs and expenses to be incurred in said action.

Starr argues that it should insure NYU on a co-primary basis with American. American argues that they do not owe NYU coverage, or, if they do, then American's policy should be deemed excess to Starr's policy.

Starr further argues that, as per the American insurance endorsements, the American policy is to share equally with other primary insurance policies such as the Starr policy. In addition, Starr argues that the issue of which policy is excess for purposes of paying a judgment must await a resolution of the underlying action—which will determine which insured (if any) was negligent and why.

In the motion before the court American cross-moves for summary judgment declaring that: (a) American does not owe additional insured coverage to NYU in connection with the Alvarado Action, thereby rendering the Starr Policy the primary additional insured coverage available to NYU; and (b) if American is deemed to owe a duty to provide additional insurance coverage to NYU, a declaration that American is obligated to provide said coverage to NYU only after the limits of the Starr Policy have been exhausted.

American further argues that the Starr policy states that all other policies available to the additional insureds shall apply as excess and not contribute as primary to the coverage afforded under the Starr policy, meaning that the insurance available to NYU under the American policy is excess over the primary insurance of Starr's policy. American further states that its policy has not been triggered, as of yet, to afford coverage for NYU as an additional insured under its policy because "[t]he facts here do not indicate that the underlying bodily injury was 'caused, in whole or in part' by ECR's 'acts or omissions.'" (American Memo at 9-10.)

DISCUSSION

The instant motion and cross-motion present two issues:

1) Does American have a duty to defend NYU?
2) If yes, is American's duty to defend co-primary with Starr's—meaning American must share equally in defense costs with Starr? Or is American's duty to defend excess over Starr's duty—meaning American's duty to cover defense costs does not come due until the limits of the Starr policy have been exhausted?

American commenced the instant declaratory judgment action before an answer was filed on behalf of NYU in the underlying action, and before Starr responded to American's tender and demand that Starr defend NYU. After commencement, Starr did assume the defense of NYU, but with a reservation rights. Such reservation would necessarily mean that Starr might at some time in the future say that there is no coverage for NYU, seek reimbursement for its costs, and refuse to pay a potential judgment rendered against NYU. At this time, the Court is unaware of any objection by NYU of this arrangement.

At oral argument, Starr argued that based upon both policies each carrier has a duty to defend NYU. However, as to who is primary for purposes of paying a judgment, Starr argued that that cannot be determined at this point and must await the resolution of the underlying action. Therefore, Starr argues that the cost of the defense of NYU should be shared by both at this time.

At oral argument Starr stated that their obligation and decision to defend NYU is based upon a reasonable analysis that the accident arose out of the work of its insured, Pinnacle. Starr admitted, at oral argument, that its duty to provide coverage was, in a sense, broader than American's because it was required to provide coverage for liability "arising out of" Pinnacle's work; but argues that, whereas American's policy "provides additional insured coverage not just when the incident is proximately caused by its own acts or omissions, but also if it's proximately caused by those of its subcontractors, it would still provide additional

insured coverage." (Oral Arg. Tr. 18:22-19:04, 26:19-26.) American admits that its coverage would be triggered if ECR or ECR's subcontractor proximately caused the underlying accident, but argues that "it's duty to defend has not been triggered" because "[t]he facts here do not indicate that the underlying bodily injury was 'caused, in whole or in part' by ECR's 'acts or omissions.'" (American Memo at 9-10; see also Oral Arg. Tr. 36:05-37:15.) In effect, American argues that without an indication that ECR or ECR's subcontractor proximately caused the underlying accident, American has no duty to defend NYU.

Upon reading of the instant complaint, there is no allegation by American that NYU is not an additional insured under their policy with ECR or that NYU is not entitled to a defense of the underlying action to be paid for by American. Per the instant complaint, American is simply asking the Court to make a declaration that Starr's policy is primary to its policy, which presumes that both have an obligation to defend. It is only now—in American's cross-motion—that American is arguing that they have no duty to defend NYU, as per the recent Court of Appeals' decision in *Burlington Ins. Co. v NYC Transit Authority*, (29 NY3d 313 [2017]).

Starr argues in its motion that American has an equal obligation to defend NYU and that the Court should declare that the cost of the defense should be split until there is a final determination as to liability of the parties. Such an argument by Starr at the time of the pleadings was reasonable to make since there was no indication that American would subsequently take the position that they have no duty to defend at all.

However, on the motion, Starr argues that the Court "may not grant Plaintiff's cross-motion on this issue because NYU is not a party to this action . . . ." (Starr Reply Memo at 1.) At oral argument, American admits that this branch of their cross-motion to find that it has no duty to defend NYU is "premature" and that "we may be missing a necessary party, and that is NYU." (Oral Arg. Tr. at 31:16-21.) As such American suggests that "in an effort to ease the Court's burden, we would be willing to just have the motion decided on the priority issue.

But I will say that the *Burlington* decision will impact the priority as well." (Oral Arg. Tr. 33:17-25.)

This Court finds American's suggestion to be problematic—notwithstanding its apparent intent to be helpful. As a matter of law and logic, there can only be a dispute about priority of coverage regarding a duty to defend if at least two insurers have a duty to defend. That is to say, if there is only one insurer with a duty to defend there is no dispute about priority of coverage.

As such, for the Court to decide priority, the Court must first decide whether American has a duty to defend NYU. If the Court were to decide that American has no duty to defend NYU, then the Court would never get to the issue of priority. NYU is not a party and what position NYU would take as to coverage with American the Court cannot assume.

Were the Court to agree with American that the Court should skip the first question and go to the second question, the Court might find itself in a position, where, after issuing a decision on the priority of coverage for defending NYU, the Court is faced with a renewed motion from American asking the Court to declare that it has no duty to defend NYU—with NYU properly joined to the case.

In addition, as the Court was made aware by letter from Starr prior to oral argument and as was discussed at oral argument, ECR has since been named a defendant in an amended complaint in the underlying action. The Court is unaware of any subsequent developments in underlying case, including whether ECR has served an answer and whether other subcontractors, including Pinnacle, have been impleaded into the underlying action. As such, it would appear that the Court is being asked to render a decision based on a complaint that is no longer operative, and where new theories of liability may have been asserted in the underlying action that bear upon the issue of priority of coverage regarding the duty to defend.

It should be clear that NYU is entitled to be defended in the underlying tort action as per the underlying construction contracts that were signed by the insureds. Whether any liability is to be placed upon NYU as per the actions of ECR or Pinnacle, that issue has yet to be determined.

Under the circumstances, Starr is providing a defense to NYU which it is required to do under its contract of insurance. At the conclusion of the underlying action, the issues of who must cover defense costs and judgment indemnification will be determined along with the priority of coverage. The issue of priority of coverage cannot be determined in the posture of this case as it stands now because NYU is not present to defend against American's assertion that it has no duty to defend NYU.

Since Starr had provided a defense following the commencement of the instant declaratory judgment action, there was no longer a controversy before the Court based upon the allegations in the instant declaratory judgment complaint. If there is still a dispute, a party may institute a new declaratory action which is to name NYU as a party to the proceeding, along with any other parties necessary to the declaration of rights between the respective parties.

Accordingly, the instant motion by Starr is denied and the cross motion by the American is denied, and the declaratory judgment action is dismissed without prejudice.

CONCLUSION

Accordingly, it is hereby

ORDERED that the instant motion by Starr Surplus Lines Insurance Company ("Defendant" or "Starr") for an order pursuant to CPLR 3001 and 3212 dismissing the complaint of American Empire Surplus Lines Insurance Company ("Plaintiff" or "American") and a judgment declaring that Plaintiff must: (a) reimburse Starr for its equal share of the defense costs expended by Starr to date in connection with the defense of NYU Langone Medical Center ("NYU") in the underlying personal injury action pursuant to the insurance policy issued by Starr; and (b) and contribute its equal share of the defense and indemnification costs and expenses to be incurred in the underlying action in the future is denied; and it is further

ORDERED that the instant-cross motion by American for summary judgment declaring that: (i) American does not owe additional insured coverage to NYU in connection with the underlying action; or, in the alternative, if American is deemed to owe a duty to provide additional insured coverage to NYU (ii) American is obligated to provide this coverage to NYU only after the limits of Defendant's insurance policy have been exhausted is denied; and it is further

ORDERED that the instant action is dismissed without prejudice.

Dated: January 9, 2018
New York, New York

, J.S.C.
HON. ROBERT D. KALISH

1. Check one:.....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....

☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE