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Distinguished by Travelers Property Casualty Company of America v. Harleysville Worcester Insurance Company, S.D.N.Y., August 1, 2023

67 Misc.3d 1227(A)
Unreported Disposition
(The decision is referenced in the New York Supplement.)
Supreme Court, New York County, New York.

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Plaintiff,

v.

HARLEYSVILLE INSURANCE COMPANY OF NEW YORK, Defendant.

651812/2017
|
Decided on June 5, 2020

Attorneys and Law Firms

PLAINTIFF, Kenney Shelton Liptak Nowalk, LLP, The Calumet Building, 233 Franklin Street, Buffalo, NY 14202, By: Judith T. Shelton, Esq., and Matthew C. Ronan, Esq.

DEFENDANT, Riker, Danzig, Scherer, Hyland & Perretti, LLP, 500 5th Ave, Ste 4920, New York, NY 10110, By: Peter Michael Perkowski, Esq.

Opinion

Robert R. Reed, J.

***1** The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 136, 137, 138, 139, 141 were read on this motion for PARTIAL SUMMARY JUDGMENT

Travelers Property Casualty Company of America (Travelers) seeks a declaratory judgment that Plaza-Schiavone Joint Venture (PSJV), Plaza Construction Corp. (Plaza), and Schiavone Construction Co. LLC (Schiavone), are entitled to additional insured coverage from Harleysville Insurance Company of New York (Harleysville) in the underlying action entitled *Michael Flaherty v. Plaza Constr. Corp., Plaza Schiavone Joint Venture, et al.,* Index 7697/2014 [Sup Ct. Suffolk County][Flaherty action]. Travelers and Harleysville are the only parties in this action.

Taggart Associates Corp. (Taggart) is the named insured in a policy procured from Harleysville, and PSJV is the named insured in a policy procured from Travelers. Harleysville refused Travelers's tender of defense and indemnification. Travelers moves for partial summary judgment: (1) declaring that Harleysville must defend PSJV, Plaza, and Schiavone on a primary and noncontributory basis; and (2) awarding Travelers defense costs incurred up to the time Harleysville begins defending Travelers' insureds, to be determined, if necessary, in a separate hearing; and, in addition, seeks an order staying this action pending an allocation of liability in the underlying Flaherty action. Harleysville cross-moves for partial summary judgment declaring that Harleysville has no duty to defend or indemnify Plaza and Schiavone and dismissing Travelers's complaint with prejudice as to the claims relating to Plaza and Schiavone.

Plaza and Schiavone entered into a "Joint Venture Agreement" (the joint venture agreement). The joint venture agreement states that the parties thereto have formed a joint venture for the purpose of submitting a bid to the Metropolitan Transportation Authority (MTA) regarding the Fulton Street Transit Center, that the parties desire to enter into this joint venture for the performance of the work therein, and that the venture shall be conducted under the name Plaza-Schiavone Joint Venture. Plaza and Schiavone each executed the agreement.

MTA hired PSJV to act as general contractor for the project at the transit center in New York City. PSJV entered into a subcontract with Taggart, a plumbing company. Michael Flaherty, an employee of Taggart, was injured at the transit center in May 2011. Flaherty brought a personal injury action against Plaza, Schiavone, PSJV, MTA, and others in the Suffolk County Supreme Court (the underlying action). Flaherty's complaint alleges that he was employed by Taggart, that he was injured in the course of his employment, that MTA owned the property, that Plaza, Schiavone, and PSJV were hired to perform construction services, and that defendants' recklessness and negligence brought about his accident, and asserts claims based on negligence and Labor Law violations.

***2** Plaza, Schiavone, and PSJV brought a third-party action against Taggart and another party, alleging that Taggart employed Flaherty, that on the date of the accident Taggart was on the premises, and that Taggart violated its legal duty to exercise due care in preventing harm to Flaherty. At his deposition, Flaherty testified that, before his accident, he was on the sidewalk adjacent to the ground floor of the project. He unloaded materials from a delivery truck and placed them on a nearby hoist. Then, intending to go from the sidewalk to the ground floor of the project, Flaherty stepped on the plywood ramp leading into the building. The ramp was wet and unsecured, Flaherty testified, and he slipped and fell.

The subcontract between Taggart and PSJV provides that Taggart would obtain insurance with "Additional Insured Endorsement ... to be in accordance with the attached SAMPLE CERTIFICATES ... Policy to be primary and non-contributory as respects the coverage afforded the Additional Insureds..." (NY St Cts Elec Filing [NYSCEF] Doc No. 13, subcontract, exhibit E).

The sample certificate lists PSJV, Plaza, Schiavone, MTA, and others as additional insureds.

The Harleysville policy includes this additional insured endorsement.

> "ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU
>
> "A. Section II - Who Is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for 'bodily injury' ... caused in whole or in part, by:
>
> 1. Your acts or omissions; or
>
> 2. The acts or omissions of those acting on your behalf;
>
> In the performance of your ongoing operations for the additional insured"

(NYSCEF] Doc No. 27, Harleysville policy, CG 20 33 0704, page 1 of 1).

Harleysville does not dispute that PSJV qualifies as an additional insured under the endorsement or that an additional insured is entitled to primary and noncontributory coverage. Harleysville claims that Plaza and Schiavone are not additional insureds because they have no privity of contract with Taggart. While PSJV entered into a written agreement with Taggart. Harleysville argues, neither Plaza nor Schiavone did the same. Thus, the additional insured endorsement only applies to PSJV. Harleysville further argues that the joint venture agreement merely demonstrates that Plaza and Schiavone formed PSJV, and does not alter the fact that the three are separate and distinct entities, which were sued individually in the underlying action. Taggart, in response, argues that PSJV's signature on its subcontract with Taggart is a "signature of all members," and that the constituent members of the joint venture, Plaza and Schiavone, must be deemed parties to the subcontract for purposes of any contractual privity requirement.

An additional insured endorsement of the sort found in the Harleysville policy is interpreted as requiring that each entity seeking additional insured coverage must have its own direct privity of contract with the named insured to qualify as an additional insured (*see Cincinnati Ins. Co. v. Harleysville Ins. Co.,* 709 Fed Appx 71, 73 [2d Cir 2017]; *Gilbane Bldg. Co./ TDX Constr. Corp. v. St. Paul Fire & Mar. Ins. Co.*, 143 AD3d 146, 152 [1st Dept 2016], *affd* 31 NY3d 131 [2018]). Where the putative additional insured has not entered into a written agreement with the purchaser of the insurance, there is no coverage, even if the agreement provides that the putative additional insured will receive coverage (*AB Green Gansevoort, LLC v. Peter Scalamandre & Sons, Inc.*, 102 AD3d 425, 426-427 [1st Dept 2013]; *Linarello v. City Univ. of New York*, 6 AD3d 192, 195 [1st Dept 2004]).

***3** Under New York law, joint ventures are governed by the same legal rules as partnerships, because a joint venture is essentially a partnership for a limited purpose (*Scholastic, Inc. v. Harris*, 259 F3d 73, 84 [2d Cir 2001]; *Gramercy Equities Corp. v. Dumont,* 72 NY2d 560, 565 [1988]). "A joint venture is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge" (*Kaufman v. Torkan,* 51 AD3d 977, 979 [2d Dept 2008] [internal quotation marks and citation omitted]). Essential elements of a joint venture include some degree of joint proprietorship and control over the enterprise and the sharing of profits and losses (*id.*). Parties in a joint venture are so joined as to become one for the purposes of the joint

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venture (*Precision Testing Labs., Ltd. v. Kenyon Corp. of Am.*, 644 F Supp 1327, 1349 [SD NY 1986]).

A joint venture acting as a body, can buy, sell, and own property, and can enter into contracts (*see Eskenazi v. Schapiro,* 27 AD3d 312 [1st Dept 2006]; *Kirschbaum v. Merchants Bank of NY,* 272 App Div 336, 336 [1st Dept 1947]; *Credit Francais Intl., S.A. v. Sociedad Fin. de Comercio,* 128 Misc 2d 564, 579 [Sup Ct, NY County 1985]).

Like partners in a partnership, members of a joint venture act as principals and as agents for each other (*In re Cohen v. Truehold Capital Group*, 422 BR 350, 366 [ED NY 2010]; *Frank v. Katz*, 145 AD2d 597, 598 [2d Dept 1989]). In a joint venture, the acts of one member within the scope of the venture are binding upon the others (*N.V. Simons' Metaalhandel v. Associated Metals & Minerals Corp. of NY,* 13 AD2d 953, 953 [1st Dept 1961]; *Hartman v. Day*, 249 App Div 786, 787 [2d Dept 1936]). Every member of a joint venture is jointly and severally liable to third persons for acts of the fellow venturers done in the course of the enterprise (*Deutsche Bank Natl. Tr. Co. v. Bills*, 37 Misc 3d 1209[A], 2012 NY Slip Op 51943[U], *4 [Sup Ct, Essex County 2012]; *County of Monroe v. Raytheon Co.,* 156 Misc 2d 445, 455 [Sup Ct, Monroe County 1991]; 1 American Law of Torts § 4:22 [Westlaw]), and for the joint venture's acts (*Cohen*, 422 BR at 366; *Amity Leather Prods. Co. v. RGA Accessories, Inc.,* 849 F Supp 871, 875 (SD NY], *affd* 22 F3d 1091 [2d Cir 1994]; 16 NY Jur 2d Business Relationships § 2054).

Each member of a joint venture has the authority to act for and bind the enterprise, absent an agreement to the contrary (*Sadelmi Joint Venture v. Dalton*, 5 F3d 510, 513 [Fed Cir 1993]). For example, one co-venturer will be bound by a lease signed by another co-venturer, even if the first neither signed nor assented to the lease (*Edison Stone Corp. v. 42nd St. Dev. Corp.*, 145 AD2d 249, 255—56 [1st Dept 1989]; *see Itel Containers Intl. Corp. v. Atlanttrafik Express Servs. Ltd.,* 909 F2d 698, 701 [2d Cir 1990]). Liability under a contract can arise in the absence of privity where it is established that the defendant is in a joint venture or partnership with a signatory to the contract (*MBIA Ins. Corp. v. Royal Bank of Canada*, 706 F Supp 2d 380, 39-398 [SD NY 2009] (*Alper Rest. Inc. v. Catamount Dev. Corp.,* 137 AD3d 1559, 1560-61 [3d Dept 2016]; *Griffith Energy, Inc. v. Evans*, 85 AD3d 1564, 1565—1566 [4th Dept 2011]).

The import of the above is that PSJV was an entity that acted through its constituent members, that each member could bind the joint venture and the other member, that the joint venture could bind the members, and that, where PSJV entered into a contract, both members are bound by the contract insofar as the subject matter of the contract subject is concerned. Thus, if PSJV is entitled to insurance coverage, Plaza and Schiavone are also entitled to such coverage with respect to acts taken as part of or on behalf of PSJV.

***4** An additional insured, like an insured, is entitled to a defense in an action in which it is uncertain whether any eventual judgment against plaintiff will be within the scope of the coverage (*BP Air Conditioning Corp. v. One Beacon Ins. Grp.*, 33 AD3d 116, 120 [1st Dept 2006]), *mod* 8 NY3d 708 [2007]). The duty to defend an insured is "exceedingly broad," broader than the duty to indemnify (*Automobile Ins. Co. of Hartford v. Cook,* 7 NY3d 131, 137 [2006]). So long as the allegations of a complaint suggest a "reasonable possibility of coverage," the insurer will be required to provide a defense (*Axis Surplus Ins. Co. v. GTJ Co.*, 139 AD3d 604, 604 [1st Dept 2016]). " 'If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be' " (*Automobile Ins. Co.,* 7 NY3d at 137, quoting *Ruder & Finn Inc. v. Seaboard Sur. Co.,* 52 NY2d 663, 670 [1981]). The duty to defend exists even though facts outside the four corners of the pleadings indicate that the claim may be meritless or not covered (*Fitzpatrick v. American Honda Motor Co., Inc.*, 78 NY2d 61, 63 [1991]).

Harleysville argues that the evidence in the underlying case shows that Taggart was not responsible for Flaherty's accident, and that the decision in *Burlington v. NYC Tr. Auth.* (29 NY3d 313 [2017], *revg* 132 AD3d 127, 130 [1st Dept 2015], *revg* 38 Misc 3d 120[A], 2012 NY Slip Op 52370[U] [Sup Ct, NY County 2012]) controls the question of its duty to defend PSJV. In *Burlington*, the subcontractor, who was the named insured, procured insurance from Burlington. The subcontractor's policy provided that NYCTA, MTA, and the City of New York (the City) were additional insureds with respect to liability for 'bodily injury' ... "caused, in whole or in part, by ... [the named insured's] acts or omissions." Taggart's policy in this case includes the same "caused by" language.

In *Burlington*, a NYCTA employee was injured on the job and sued his employer, the subcontractor, MTA, and the City. The City brought third-party claims against NYCTA and MTA, and Burlington assumed the defense of NYCTA and MTA as putative additional insureds under the policy issued to

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the subcontractor. Burlington also assumed the defense of the City pursuant to a lease between the City and NYCTA obligating NYCTA to indemnify the City for liability arising out of NYCTA's control of the leased property (132 AD3d at 130).

Discovery revealed that the accident was solely the fault of NYCTA and that the subcontractor was not at fault. In September 2011, the court granted a motion by the employee to dismiss his own claims against the subcontractor. NYCTA and MTA, who were by then paying for their own defense, did not object to the dismissal of the subcontractor (*id.*, at 132). Burlington thereafter settled the lawsuit for $950,000 and paid the City's defense costs (29 NY3d at 319).

In March 2011, Burlington commenced an action, in which the Supreme Court determined 1) that Burlington did not owe additional insured coverage to NYCTA and MTA under the policy issued to the subcontractor, and 2) that NYCTA and MTA were not entitled to an award of defense costs and attorneys' fees as additional insureds under the Burlington Policy relative to their defense of the employee action (*Burlington,* 2012 NY Slip Op 52370[U], *8-9). The Supreme Court 1) directed a judgment in favor of Burlington against NYCTA in the amount of the settlement, based on Burlington's status as subrogee of the City and consequent right to contractual indemnification under the lease, and 2) granted Burlington summary judgment on its claim to be indemnified for the City's defense costs (*id.,* *12).

The Court of Appeals upheld the Supreme Court's decision (29 NY3d at 317, 327). The Court of Appeals ruled that the language in the additional insured provision of the subcontractor's policy, “caused, in whole or in part, by ... [the named insured's] acts or omissions,” meant proximate and not “but for” liability (*id.* at 321). This policy did not extend additional insured coverage to any injury causally linked to the named insured, that is, the subcontractor (*id.* at 317). It extends coverage to the additional insured only when the damages are the result of the named insured's “negligence or some other actionable ‘acts or omissions’ ” (*id.* at 323). The Court of Appeals discussed at length the evidence showing that NYCTA, not the subcontractor, was the sole proximate cause of the employee's injury. That being the case, the insurance company was not obligated to provide additional insured coverage for NYCTA.

***5** In this case, Harleysville states that the evidence shows that Taggart was not proximately liable for the accident. In *Burlington*, the evidence showing that the subcontractor was not liable for the injury and that NYCTA was, was conclusive enough to cause the injured party himself to seek to dismiss his claims against the subcontractor. The putative additional insureds did not object to the dismissal, and the case settled with the parties who were acknowledged to be the liable parties. The dispute regarding which party was at fault was ended. By the time that the Supreme Court decision issued, the underlying case had ended. In this case, the evidence that Taggart is not liable is much weaker, consisting of testimony by the injured party of what another party told him soon after his accident. No conclusive or even compelling evidence of liability has been produced, and there is no final determination. In this case, it cannot be yet determined whether the named insured was liable or not. To the extent that a court may rely upon evidence that is extrinsic to the underlying complaint to determine the duty to defend, that is not possible in this case. The extrinsic evidence does not enable the court to eliminate the possibility that the insured's conduct falls within the coverage of the policy (*see International Bus. Mach. v. Liberty Mut. Ins. Co.,* 363 F3d 137, 148 [2d Cir 2004]).

In *Burlington*, the insurer was able to recover the costs of defending the City and was not obligated to provide more defense for NYCTA and MTA. Whether the insurer was able recover the costs of defending the latter two is not indicated. The Court of Appeals speaks of coverage and does not dwell on defense costs. In any case, *Burlington* did not alter the duty to defend (*see Port Auth. of NY v. Brickman Group. Ltd., LLC,* 181 AD3d 1, 20 [1st Dept 2019] [irrelevant that any judgment ultimately entered against the insured might be based on claims not covered and, as such, might not be subject to the duty to indemnify]; *M & M Realty of New York, LLC v. Burlington Ins. Co.,* 170 AD3d 407, 408 [1st Dept 2019]).

To relieve itself of its duty to defend PSJV as an additional insured, Harleysville must establish “that there is no possibility” of coverage (*All State Interior Demolition, Inc. v. Scottsdale Ins. Co.*, 168 AD3d 612, 613 [1st Dept 2019]). Harleysville does not do so, and the allegations in the underlying complaint do not eliminate the possibility that Taggart was proximately liable for injuries. The allegations against Taggart are not overly vague or conclusive (*see Vargas v. City of New York,* 158 AD3d 523, 525 [1st Dept 2018] [allegation that defendants, which included the named insured, operated and controlled the job site, and were negligent was sufficient to awake duty to defend]). The third-party complaint alleges that Taggart employed the injured

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person and was on site on the day of the accident. When an employee of the named insured is injured while in the employ of the named insured, the additional insured is entitled to defense because there is a reasonable possibility that the bodily injury is proximately caused by the named insured's acts or omissions (*Regal Constr. Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 39 [2010]; *Indian Harbor Ins. Co. v. Alma Tower, LLC*, 2017 WL 3438141, *2 [Sup Ct, NY County, Aug. 9, 2017, No. 159286/14 [MJM]).

Harleysville also argues that third-party complaints cannot be relied upon to establish a duty to defend. However, a duty to defend has been based on the allegations in third party complaints alleging negligence and seeking indemnification and contribution from the named insured (*see Indian Harbor Ins. Co. v. Alma Tower, LLC,* 165 AD3d 549, 549 [1st Dept 2018]; *W & W Glass Systems, Inc. v. Admiral Ins. Co.*, 2010 NY Slip Op 32120[U] [Sup Ct, NY County 2010]).

As Travelers has been defending PSJV, it is entitled to reimbursement of defense costs from Harleysville (*see Kookmin Best Ins. Co., Ltd. v. Foremost Ins. Co.*, 2019 WL 1059973, *8 [SD NY March 5, 2019, No. 18-Civ-782 [PAE]; *Public Serv. Mut. Ins. Co. v. Nova Cas. Co.,* 177 AD3d 472, 473 [1st Dept 2019]).

Harleysville does not object to Travelers' request for a stay pending the determination of the underlying action. Harleysville's motion is denied and Travelers' motion is granted.

***6** It is hereby

ORDERED that plaintiff's motion for partial summary judgment is granted; and it is further

ORDERED that defendant's cross motion for partial summary judgment is denied; and it is further

ADJUDGED AND DECLARED that defendant Harleysville Insurance Company of America is obligated to defend Plaza Schiavone Joint Venture as an additional insured in the underlying action entitled *Michael Flaherty v. Plaza Constr. Corp., Schiavone Constr. Co., Plaza Schiavone Joint Venture, et al.,* Index No. 7697/2014 [Sup Ct, Suffolk County], that the coverage afforded to Plaza Schiavone Joint Venture is primary and non-contributory, and that Travelers Property Casualty Company of America is entitled to recoupment from Harleysville Insurance Company of America for the reasonable amount of costs and fees incurred in the defense of Plaza Schiavone Joint Venture in the underlying action, from the date of Travelers Property Casualty Company of America's tender on behalf of Plaza Schiavone Joint Venture; and it is further

ORDERED that the balance of the proceedings in this matter is stayed pending the resolution of the above-said Flaherty action.

All Citations

Slip Copy, 67 Misc.3d 1227(A), 128 N.Y.S.3d 154 (Table), 2020 WL 3089269, 2020 N.Y. Slip Op. 50658(U)

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