Cookies on Fulton, Inc. v Aspen Specialty Ins. Co.
2019 NY Slip Op 33111(U)
October 18, 2019
Supreme Court, New York County
Docket Number: 655549/18
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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COOKIES ON FULTON, INC.,
COOKIES CHILDRENS TOGS, INC., and
COOKIES UNIFORMS, LLC,

DECISION/ORDER

Plaintiffs,

– against –

Index No.: 655549/18
Motion Seq. 001

ASPEN SPECIALTY INSURANCE COMPANY,

Defendant.

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MELISSA A. CRANE, J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in this pre-answer Notice of Motion to dismiss and Cross Motion for summary judgment: e-filed documents listed by New York State Courts Electronic Filing System (NYSCEF) numbered 1-22.

In this action, plaintiffs Cookies On Fulton, Inc., Cookies Childrens Togs, Inc., and Cookies Uniforms, LLC (Cookies) allege that defendant Aspen Specialty Insurance Company (Aspen) breached the parties' commercial general liability (CGL) policy by disclaiming its duty to defend and indemnify Cookies in a personal injury lawsuit captioned *Furkat Ibrokhimov v Cookies On Fulton, Inc. a/k/a Cookies Dept. Store, Inc., Cookies Childrens Togs, Inc., and Cookies Uniforms, LLC* (NY Sup Ct, Kings County, Index No. 519762/2017) (the Underlying Action). In addition to compensatory damages, Cookies seeks attorneys' fees and punitive damages on the ground that the insurer's unreasonable invocation of the Policy's Designated Ongoing Operations Exclusion violated the implied covenant of good faith and fair dealing.

Aspen now moves to dismiss, pursuant to CPLR 3211 (a) (7), and for a declaration that it does not have a duty to defend or indemnify Cookies in the Underlying Action. Alternatively, Aspen seeks an Order dismissing the punitive damages claim. Cookies cross moves for summary

judgment, pursuant to CPLR 3211(c) and 3212, on its claims, and for an order declaring that Aspen has a duty to defend and indemnify it in the Underlying Action.

FACTUAL AND PROCEDURAL BACKGROUND

The Policy

Aspen issued Cookies CGL policy no. CR004FA16 (the Policy) (Doc No. 4),[1] effective from June 21, 2016 to June 21, 2017. As relevant here, Coverage Part A, Paragraph 1 (a) of the Policy provides:

> "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages even if the allegations of the 'suit' are groundless, false or fraudulent. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result."

The "Exclusion—Designated Ongoing Operations" provision (Doc No. 5) of the Policy states that:

> "This insurance does not apply to 'bodily injury' or 'property damage' arising out of the ongoing operations described in the Schedule of this endorsement, regardless of whether such operations are conducted by you or on your behalf or whether the operations are conducted for yourself or for others."

The referenced schedule described the ongoing operations as "[a]ny construction or renovation-related activity except for janitorial or maintenance related work."

The Underlying Action

The complaint in the Underlying Action (the Underlying Complaint) (Doc No. 6)

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[1] References to "Doc No." followed by a number refers to documents filed in NYSCEF.

alleges that the plaintiff therein, Furkat Ibrokhimov (Ibrokhimov), was injured when he was "caused to fall and/or otherwise be precipitated" from a ladder while working at Cookies' store in Brooklyn (Underlying Complaint, ¶ 35). At the time, he was employed as an electrician by Besson Corp. (id., ¶ 26) which, pursuant to a contract with Cookies, had agreed to perform certain "construction/repair work includ[ing] the erection, laddering, demolition, repair, alteration, electrical installation" (id., ¶¶ 20-21). Ibrokhimov commenced the Underlying Action against Cookies on or about October 12, 2017, asserting a common law negligence claim (first cause of action) and claims for violations of New York Labor Law §§ 200, 241 and 241(6) (second, third and fourth causes of action, respectively).

Aspen's Disclaimer

After receiving notice of the Underlying Action, Aspen disclaimed coverage by letter dated December 6, 2017 (Disclaimer Letter) (Doc No. 7). As relevant here, the Disclaimer Letter stated:

> "Even though 'bodily injury' is alleged, there is no coverage for this matter due to the Designated Ongoing Operations Exclusion quoted above. The plaintiff alleges he was injured due to falling off a ladder, while within the course and scope of his employment, involving construction/repair work to the premises. Since the accident arose out of an activity related to construction, Aspen is disclaiming coverage based on the Designated Ongoing Operations Exclusion."

Cookies contested the disclaimer by letter dated September 24, 2018 (Doc No. 8). After noting that the Underlying Complaint was not based entirely upon Labor Law violations but upon common law negligence as well, Cookies asserted that there was extrinsic evidence which established that Ibrokhimov was not engaged in "construction or renovation-related activity" but rather "janitorial or maintenance work." Specifically, Cookies relied on an affidavit of merit filed

in the Underlying Action (Doc No. 9) in which Ibrokhimov represented that "while changing light fixtures I was caused to be injured by the screw gun that fell from the top of the ladder and hit me causing me to [fall] from the ladder and the ladder fell on me." Cookies further pointed to an invoice from Besson (Doc No. 10) describing the work as "electric maintenance work" to change "3rd fl. Storage lights." Reaffirming its denial by letter dated October 9, 2018 (Doc No. 11), however, Aspen maintained that "the distinction between changing a lightbulb and a light fixture is dispositive" because "hanging a lightbulb is considered routine maintenance, but changing a light fixture falls within the protection of the New York Labor Law as a construction or renovation related activity, the precise language set forth in Aspen's policy exclusion."

The Complaint

Cookies commenced this action against Aspen by filing a Summons and Complaint (the Complaint) (Doc. 12) on November 7, 2018. The Complaint asserts a single cause of action for breach of the Policy based on the insurer's refusal to defend or indemnify. That claim also includes a plea for punitive damages based on the alleged bad faith reliance on the exclusion, which Cookies asserts was a violation of the implied covenant of good faith and fair dealing.

In moving to dismiss, Aspen reiterates the arguments set forth in the Disclaimer Letter, contending that the Designated Ongoing Operations Exclusion applies because the changing of a light fixture constitutes construction rather than janitorial or maintenance work. With respect to the punitive damages claim, Aspen urges that its disclaimer was at most a breach of contract rather than a violation of an independent tort duty.

Cookies also relies on the position it took in its prelitigation correspondence, arguing that the exclusion does not apply to the negligence or Labor Law claims, and that Ibrokhimov's work was merely janitorial. Addressing its punitive damages claim, Cookies argues that it can be

supported by a breach of the covenant of good faith and fair dealing premised on an unreasonable interpretation of an unambiguous policy clause, without the necessity to plead tortious conduct. Cookies also cross-moves for an Order, pursuant to 3211 (c) and 3212, granting Cookies summary judgment on grounds that that the issue is ripe by virtue of Aspen's demand for a declaration as a matter of law.

DISCUSSION

The court grants motion to dismiss with respect to the demand for punitive damages and otherwise denies the motion. The cross motion is granted to the extent of declaring that Aspen has a duty to defend Cookies in the Underlying Action. The court holds that the Complaint, when considered in conjunction with Cookies' additional submissions, sufficiently alleges that Ibrokhimov may have been performing mere janitorial or maintenance work that falls outside of the Policy exclusion at issue. The demand for judgment on the indemnification issue is premature, and the punitive damages claim is deficient as a matter of law for failing to allege a wrong directed at the public at large.

When deciding whether a complaint should be dismissed pursuant to CPLR 3211 (a) (7), the court must construe the complaint in the light most favorable to the plaintiffs, and accept all factual allegations as true, limiting the inquiry to whether or not the complaint states a cause of action (*see World Wide Adj. Bur. v Gordon Co.*, 111 AD2d 98 [1st Dept, 1985]). In assessing the sufficiency of the complaint, this court must also consider the allegations made in both the complaint and the accompanying affidavit(s) submitted in opposition to the motion as true and resolve all inferences which reasonably flow therefrom in favor of the plaintiffs (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016], citing *Goshen v Mutual Life Ins. Co. of NY* 98 NY2d 314, 326 [2002]).

The sufficiency of a pleading to state a cause of action depends upon whether there is substantial compliance with CPLR 3013, requiring that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Here Cookies' allegations in the Complaint apprises the court and the parties of the subject matter in controversy. Plaintiff alleged that Aspen breached its duty to defend and indemnify plaintiffs in the Underlying Action in accordance with the CGL policy Coverage Part A, Paragraph 1 (a) provision. Aspen's application to dismiss plaintiffs' breach of contract claim, pursuant to CPLR 3211 (a) (7), must therefore be denied.

"A duty to defend exists whenever the allegations in the complaint in the underlying action, construed liberally, suggest a reasonable possibility of coverage, *or* where the insurer has actual knowledge of facts establishing such a reasonable possibility" (*City of New York v Wausau Underwriters Ins. Co.*, 145 AD3d 614, 617 [1st Dept 2016] [emphasis supplied], *quoting DMP Contr. Corp. v. Essex Ins. Co.*, 76 AD3d 844, 845 [1st Dept 2010]). Accordingly, the inquiry is not limited to the four corners of the underlying complaint, but the court may also consider facts extrinsic to the pleading in determining the insurer's defense obligations (*Fitzpatrick v Am. Honda Motor Co.*, 78 NY2d 61, 66–68 [1991]). This duty may exist even "where the complaint on its face [does] not state a covered claim but the underlying facts made known to the insurer by its insured unquestionably involve[] a covered event" (*id.* at 69). Information from insured's counsel may form a basis for the duty to defend (*City of New York v Wausau Underwriters Ins. Co.*, 145 AD3d 614, 618 [1st Dept 2016] [city's law department supplied insurer's claims manager with email indicating failure to repair street light pole until weeks after accident]).

The Underlying Complaint suggests that the accident was construction-related which would bar coverage. However, the affidavit of merit and invoice Aspen Cookies supplied suggest that Ibrokhimov may have been performing routine maintenance work. Consequently, there is a "reasonable possibility of coverage" and Cookies is entitled to a declaration that Aspen must defend the Underlying Action.

Aspen's reliance on cases applying the Labor Law is misplaced. Those cases may be instructive to some degree, but they are not controlling on the question of what distinguishes construction/renovation activity from janitorial/maintenance work in this action. Rather, it is the language of the Policy that governs. In this connection, "[a]n insurance agreement is subject to principles of contract interpretation" and "as with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*Burlington Ins. Co. v NYC Transit Auth.*, 29 NY3d 313, 321 [2017] [internal quotation marks and citations omitted]). Moreover, "[w]hen it comes to exclusions from coverage, the exclusion must be specific and clear in order to be enforced" (*Seaboard Sur. Co. v Gillette Co.,* 64 NY2d 304, 311 [1984]) and "ambiguities in exclusions are to be construed most strongly against the insurer" (*Heartland Brewery, Inc. v Nova Cas. Co.*, 149 AD3d 522, 523 [1st Dept 2017]).

The Aspen policy exclusion does not specifically define what constitutes construction, renovation, janitorial or maintenance work. Construing the language against the insurer, the court finds that the changing of light fixtures may fall within the ambit of maintenance work. The ordinary meanings of "construction" and "renovation" implicate a substantially more ambitious undertakings. The distinction made between changing a lightbulb and a light fixture under the Labor Law in *Piccione v 1165 Park Ave., Inc.*, 258 AD2d 357, 358 (1st Dept 1999), upon which

Aspen heavily relies, is particularly irrelevant here insofar as the court found that the more complicated task of replacing fixtures was still merely a "repair", not construction or renovation. Similarly, while some courts have held that under the Labor Law the changing of light fixtures transcends "routine maintenance" (*Fitzpatrick v State*, 25 AD3d 755, 757 [2d Dept 2006]; *Purdie v Crestwood Lake Heights Section 4 Corp.*, 229 AD2d 523, 525 [2d Dept 1996]), those cases do not necessarily take it out of the category of maintenance (albeit complicated maintenance) or put it in the category of construction or renovation. And while Labor Law § 241(6) "is designed to provide protection to workers engaged in renovation or construction work" (*Yong Ju Kim v Herbert Const. Co.*, 275 AD2d 709, 711 [2nd Dept 2000]) its protections do not extend to all workers present at a building that "happens to be undergoing construction or renovation" (*id.* at 712). Thus, even assuming the Labor Law's provision somehow superseded the Policy's provisions, that Ibrokhimov was present while construction may have been ongoing would not mean that he was engaged in it.[2]

The court cannot, however, issue an order at this juncture declaring that Aspen has a duty to indemnify. The duty to defend is broader than the duty to indemnify, and the latter duty must await the determination of liability in the Underlying Action (*see Vargas v City of New York*, 158 AD3d 523, 525 [1st Dept 2018], *citing Burlington Ins. Co. v. NYC Tr. Auth.*, 29 NY3d 313 [2017]).

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[2] Cookies additionally argues that even if the Labor Law were controlling, the negligence cause of action in the Underlying complaint falls outside of its ambit. However, the assertion of the negligence claim, standing alone, does not compel coverage. Every claim covered by the Policy necessarily implicates negligence (Ibrokhimov does not claim his employer kicked the ladder from underneath him, and if he did coverage would be precluded by public policy), but the ultimate question here is whether the activity affected by the negligence falls within the exclusion.

Finally, Cookies' plea for punitive damages must be dismissed. The purpose of punitive damages is not to remedy private wrongs but to vindicate public rights (*Rocanova v Equitable Life Assur. Soc'y*, 83 NY2d 603, 613 [1994]; *see New York Univ. v. Cont'l Ins. Co.*, 87 NY2d 308, 315–16 [1995]). Cookies has not made the requisite allegations that the insurer's actions "were aimed at the public or showed the requisite moral turpitude" (*Errant Gene Therapeutics, LLC v. Sloan-Kettering Inst. for Cancer Research*, 174 AD3d 473, 476 [1st Dept 2019]). Cookies' further assertion that its "claim for punitive and extra-contractual damages is one for consequential damages for breach of contract" under the covenant of good faith and fair dealing (Plaintiff's Memorandum of Law, p. 21 fn. 5) confuses two very distinct forms of relief. Unlike punitive damages, consequential damages do not seek to right a public wrong, but are actual, compensatory damages which are available only when they have resulted from "an insurer's failure to provide coverage if such damages ('risks') were foreseen or should have been foreseen when the contract was made" (*D.K. Properties, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 168 AD3d 505, 506 [1st Dept 2019], *citing Bi–Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187 [2008]).[3] Cookies has not pled any damages other than the costs associated with Aspen's failure pay for its defense and potential indemnification. And there is no separate cause of action for bad faith claims handling, that would be duplicative of Cookies' (insufficient) claim for breach of the covenant (*see Orient Overseas Assocs. v Xl Ins. Am., Inc.*, 132 AD3d 574, 576 [1st Dept 2015]).

Accordingly, it is

[3] Cookies' contention that *Continental, supra*, was overruled relies on the dissent in *Bi-Economy*, and is erroneous in view of the reaffirmation of *Continental in D.K. Properties* and other cases.

ORDERED that the application by defendant Aspen Specialty Insurance Company to dismiss plaintiffs' breach of contract claim, pursuant to CPLR 3211 (a) (7) is denied, in its entirety; and it if further

ORDERED that the application by defendant Aspen Specialty Insurance Company to declare that it is not obligated to defend plaintiffs in the underlying personal injury action, is denied; and it is

ORDERED and ADJUDGED that defendant Aspen Specialty Insurance Company shall defend plaintiffs in the underlying personal injury action entitled *Furkat Ibrokhimov v Cookies On Fulton, Inc. a/k/a Cookies Dept. Store, Inc., Cookies Childrens Togs, Inc., and Cookies Uniforms, LLC* (NY Sup Ct, Kings County, Index No. 519762/2017); and it is further

ORDERED that the alternative application by defendant Aspen Specialty Insurance Company to dismiss plaintiffs' claim for breach of an implied covenant of good faith and fair dealing, is granted and said cause of action is dismissed; and it is further

ORDERED that the alternative application by defendant Aspen Specialty Insurance Company to dismiss plaintiffs' request for punitive damages, is also granted; and it is further

ORDERED that the cross motion application by plaintiffs Cookies On Fulton, Inc., Cookies Childrens Togs, Inc., and Cookies Uniforms, LLC, pursuant to CPLR 3211 (c) and 3212, for summary judgment on all its claims against Aspen Insurance, is denied, without prejudice to renew once discovery is completed, or as further directed to do so by this court; and it is further

ORDERED that defendant Aspen Specialty Insurance Company shall file and serve an answer to the Summons and Complaint no later than twenty (20) days from the date of entry of this Order; and it is further

ORDERED that the parties are to appear for a preliminary conference on November 25, 2019 at 2:15pm.

DATED: 10-18-2019

ENTER:

MELISSA A. CRANE, JSC

HON. MELISSA A. CRANE
J.S.C.