NEW YORK STATE SUPREME COURT
NEW YORK COUNTY : IAS PART 7

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TISHMAN CONSTRUCTION CORP. OF N.Y.,

Plaintiff,

Index No. 157609/14
Motion Sequence Nos. 006 & 008

-against-

SCOTTSDALE INSURANCE COMPANY and ORNAMENTAL INSTALLATION SPECIALISTS, INC.,

Defendants.

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Recitation, as required by CPLR 2219 (a), of the papers considered in the review of the instant motions for leave to reargue and for leave to renew:

Papers	**NYSCEF Documents Numbered**
Notice of Motion in Support of Motion Sequence 006	144
Affirmation in Support of Motion Sequence 006	145 (exhibits 146-150)
Affirmation in Opposition	156
Reply Affirmation	160
Notice of Motion in Support of Motion Sequence 008	166
Affirmation in Support of Motion Sequence 008	167 (exhibits 168-171)
Affirmation in Opposition	172 (exhibits 173-175)
Reply Affirmation	176

Cornell Grace, P.C., New York, New York (Laura M. Maletta of counsel) for plaintiff Tishman Construction Corp. of N.Y.

Kennedys CMK LLP, New York, New York (Jacob J. Palefski of counsel) for defendant Scottsdale Insurance Company.

Gerald Lebovits, J.:

Motion sequence numbers 006 and 008 are consolidated for disposition.

In this insurance-coverage dispute, plaintiff Tishman Construction Corp. of N.Y. (Tishman) seeks a judgment declaring that defendant Scottsdale Insurance Company (Scottsdale) owes it and nonparty owners, a defense and indemnification in a personal-injury action captioned *Cantelmo v One Bryant Park, LLC*, Index No. 109779/09 (Sup Ct, NY County) (hereinafter, the underlying action).

Tishman now moves, pursuant to CPLR 2221 (d) (2), for leave to reargue the court's decision and order dated October 10, 2017, which granted Tishman a money judgment in the amount of $500,000, plus interest, and upon reargument, granting Tishman the remaining $500,000 sought, plus interest (motion sequence number 006).

Scottsdale moves, pursuant to CPLR 2221 (e) (2), for leave to renew the court's decision, order, and judgment dated July 12, 2016, based upon an intervening change in the law, the Court of Appeals' decision in *Burlington Ins. Co. v NYC Tr. Auth.* (29 NY3d 313 [2017]) (motion sequence number 008).[1] Upon renewal, Scottsdale seeks an order: (1) vacating the court's decision, order, and judgment dated July 12, 2016, and declaring that it is not obligated to defend or indemnify Tishman or nonparties One Bryant Park, LLC and Durst Development, LLC in the underlying action; and (2) vacating the court's decision and order dated October 10, 2017.

For the following reasons, Tishman's motion is denied, and Scottsdale's motion is granted in part.

BACKGROUND

Familiarity with the court's prior decisions and orders in this action is presumed.

In the underlying action, Richard Cantelmo alleges that he was injured on May 15, 2009, at a construction project located at One Bryant Park in Manhattan. Cantelmo alleges that his left foot and right ankle were run over by a truck operated by an employee of Cardella Trucking Co., Inc. (Cardella). It is undisputed that One Bryant Park, LLC and Durst Development, LLC (together, Owners) were the owners of the premises. Tishman was hired as the construction manager on the project. Cardella was a subcontractor hired by Tishman to perform debris and waste removal at the premises. Cantelmo was an employee of Ornamental Installation Specialists, Inc. (Ornamental), a sub-subcontractor hired by Allied Bronze, LLC and Permasteelisa North America Corp. through several purchase orders. Cantelmo seeks recovery for violations of Labor Law §§ 200, 240 (1), and 241 (6) and for common-law negligence. Ornamental was not named as a direct defendant in the underlying action, and was not impleaded as a third-party defendant. The underlying action settled before trial.

Scottsdale issued commercial general liability policy number CLS1578838 to Ornamental for the period from March 20, 2009, through March 20, 2010 (NY St Cts Elec Filing [NYSCEF] Doc No. 32). Scottsdale's policy contains the following blanket additional insured endorsement:

"BLANKET ADDITIONAL INSURED ENDORSEMENT

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"With respect to this endorsement, SECTION II- WHO IS AN INSURED is amended to include as an additional insured any person or organization whom you are required to add as an additional insured on this policy under a written contract, written agreement or written permit which must be:

[1] By decision and order dated January 30, 2018, the court denied Scottsdale's motion with leave to renew, because Scottsdale did not submit the court's orders that it sought to vacate.

> "a. Currently in effect or becoming effective during the term of this policy; and
>
> "b. Executed prior to the 'bodily injury,' 'property damage,' or personal and advertising injury.'
>
> "The insurance provided to these additional insured is limited as follows:
>
> "1. That person or organization is an additional insured only with respect to liability for 'bodily injury,' 'property damage' or 'personal and advertising injury' caused, in whole or in part, by:
>
> "a. Your acts or omissions; or
>
> "b. The acts or omissions of those acting on your behalf"

(*id.* at 8).

By letter dated August 4, 2009, Tishman's self-described insurance carrier, Chartis, notified Scottsdale of the underlying action and demanded that Scottsdale provide Tishman with defense and indemnification in the underlying action. The tender indicated that Cantelmo was employed by Ornamental and that he "was unloading a curtain wall unit from a truck driven by Cardella Truckings' James Sowma. The plaintiff [Cantelmo] was kneeling when Mr. Sowma ran over his left foot and right ankle" (NYSCEF Doc No. 24 at 1).

In a letter dated September 29, 2009, Scottsdale disclaimed coverage to Tishman as an additional insured (NYSCEF Doc No. 25). Scottsdale's letter pointed out that additional insured coverage under the policy applies "only with respect to liability for 'bodily injury,' . . . caused, in whole or in part, by" Ornamental's "acts or omissions" or the "acts or omissions of those acting on your [Ornamental's] behalf" (NYSCEF Doc No. 25 at 6). Scottsdale disclaimed coverage on the ground that Chartis had not provided any evidence that Cantelmo's alleged injuries were "caused, in whole or in part" by Ornamental or others acting on its behalf (*id.* at 7).

In prior motions, Tishman moved for summary judgment declaring that Scottsdale was obligated to defend and indemnify Tishman and Owners in the underlying action. Scottsdale also cross-moved for summary judgment declaring that it was not obligated to defend or indemnify Tishman in the underlying action.

By decision, order, and judgment dated July 12, 2016, the court held that Scottsdale was obligated to defend and indemnify Tishman and Owners in the underlying action, and made a declaration to that effect. As is relevant here, in finding that Cantelmo's injuries were caused by Ornamental's acts or omissions, the court relied on First Department cases holding that the phrase "caused by" does not differ materially from the phrase "arising out of," because Cantelmo was injured in the course of his employment with Ornamental (Palefski affirmation in support, exhibit A at 8-9). Scottsdale then moved to reargue and renew,[2] and Tishman also moved for a money judgment in the amount of $1,000,000 as reimbursement for the settlement of the underlying action. On October 10, 2017, the court denied Scottsdale's motion to reargue, and granted Tishman a money judgment in the amount of $500,000, plus interest (*id.*, exhibit B). The

[2] Scottsdale's prior motion for leave to renew was based on different grounds.

court reasoned that Tishman had only shown that it paid $500,000 towards the settlement in the underlying action (*id.*).

DISCUSSION

I. Scottsdale's Motion for Leave to Renew (Motion Sequence No. 008)

Scottsdale moves for leave to renew its cross-motion for summary judgment, in light of *Burlington*. Specifically, Scottsdale argues that the court's holding in its July 12, 2016, decision is no longer valid. Upon renewal, Scottsdale seeks an order declaring that it is not obligated to defend or indemnify Tishman or Owners in the underlying action.

In opposition, Tishman contends that: (1) *Burlington* is distinguishable; (2) the language of Scottsdale's additional insured endorsement is a limitation, requiring Scottsdale to prove that it applies; and (3) Ornamental, as the named insured and Cantelmo's employer, necessarily was a proximate cause of the accident. Tishman also notes that Scottsdale's arguments are contrary to New York indemnification law, and that granting Scottsdale's motion would have an adverse impact on litigation statewide.

A motion for leave to renew a prior motion must be based upon "new facts not offered on the prior motion that would change the prior determination" or must show that "there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2]; *accord Melcher v Apollo Med. Fund Mgt. L.L.C.*, 105 AD3d 15, 23 [1st Dept 2013]; *Matter of Katz*, 63 AD3d 836, 837-838 [2d Dept 2009]).

In *Burlington, supra*, the Court of Appeals held that "where an insurance policy is restricted to liability for any bodily injury 'caused, in whole or in part,' by the 'acts or omissions' of the named insured, the coverage applies to injury proximately caused by the named insured" (*Burlington*, 29 NY3d at 317). In that case, the plaintiff insurer issued a commercial general liability policy to a named insured contractor listing the defendants New York City Transit Authority (NYCTA) and MTA New York City Transit (MTA) as additional insureds (*id.* at 317-318). In the course of a subway construction project, a NYCTA employee fell off an elevated platform while trying to avoid an explosion after the named insured contractor's machine touched a live electrical cable (*id.* at 318). The employee then brought a federal action against the City and the contractor, seeking recovery under the Labor Law, and for common-law negligence, among other things (*id.*). The City brought a third-party action against NYCTA and the MTA (*id.*). After NYCTA tendered its defense to the insurer, the insurer accepted the defense subject to a reservation of rights, but subsequently denied coverage to the putative additional insureds because NYCTA was solely responsible for the accident that caused the injury (*id.* at 319). Significantly, discovery in the federal action revealed that NYCTA had acknowledged sole responsibility for the accident (*id.*). The court in the underlying action also dismissed the claims against the named insured with prejudice (*id.*).

The *Burlington* Court found that there was no coverage under the policy for NYCTA and the MTA as additional insureds, rejecting the First Department's conclusion that the phrase "caused by" does not materially differ from the phrase "arising out of," and held that the phrase "caused by" is more restrictive than requiring "but for" causation (*id.* at 321, 323-325). Noting that the language in the endorsement was "intended to provide coverage for an additional insured's vicarious or contributory negligence, and to prevent coverage for the additional

insured's sole negligence," the court reasoned that when a policy limits coverage to an injury "caused, in whole or in part" by the "acts or omissions" of the named insured, the policy 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, 326 [emphasis supplied]).

Applying those principles, the court held that no coverage existed under the endorsement for the putative additional insureds because

> "[the named insured contractor] was not at fault. The employee's injury was due to NYCTA's [i.e., the putative additional insured's] sole negligence in failing to identify, mark, or deenergize the cable. Although but for [the named insured contractor's] machine coming into contact with the live cable, the explosion would not have occurred and the employee would not have fallen or been injured, that triggering act was not the proximate cause of the employee's injuries since [the named insured contractor] was not at fault in operating the machine in the manner that led it to touch the live cable"

(*id.* at 325).

Here, Scottsdale has demonstrated that *Burlington* represents a "change in the law that would change the prior determination" in part (CPLR 2221 [e] [2]). In the court's July 12, 2016, decision, order, and judgment, the court found that Tishman had satisfied the "caused by" language of the endorsement because Cantelmo was working for Ornamental when he was injured. In so holding, the court relied on *W & W Glass Sys., Inc. v Admiral Ins. Co.* (91 AD3d 530, 530 [1st Dept 2012]), a First Department case pre-dating *Burlington*, holding that the phrase "caused by" "does not materially differ from the general phrase, 'arising out of'" — an approach that the Court of Appeals rejected in *Burlington* (*see Burlington*, 29 NY3d at 324 ["'caused, in whole or in part,' as used in the endorsement requires the insured to be the proximate cause of the injury giving rise to liability, not merely the 'but for' cause"]). Although Tishman argues that *Burlington* is distinguishable, *Burlington* considered the same additional insured endorsement wording as in Scottsdale's policy (liability for bodily injury "caused, in whole or in part, by" the "acts or omissions" of the named insured) (*see id.* at 318). Contrary to Tishman's contention, the Court of Appeals did not indicate that its holding was limited to cases where there was a determination that the named insured did not cause the accident (*see id.* at 321).

To the extent that Scottsdale seeks to vacate the portions of the court's decision, order, and judgment dated July 12, 2016, that found that Scottsdale had a duty to defend Tishman and Owners, Scottsdale has failed to demonstrate a basis to change the court's prior determination. "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] [internal quotation marks and citation omitted]). "A declaration that an insurer is without obligation to defend a pending action could be made 'only if it could be concluded as a matter of law that there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision of the insurance policy'" (*Bovis Lend Lease LMB, Inc. v Garito*

Contr., Inc., 65 AD3d 872, 875 [1st Dept 2009], quoting *Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424 [1985]). Although Ornamental was not a party to the underlying action, Scottsdale has failed to establish that there is no possible factual or legal basis on which it might be obligated to indemnify Tishman and Owners. In its reply papers, Scottsdale acknowledges that the "the instant dispute isn't about Scottsdale's duty to *defend*, it's about Scottsdale's alleged duty to *indemnify* Tishman for the settlement payment made in the Cantelmo Action" (Palefski reply affirmation, ¶ 24).

But with respect to Scottsdale's duty to indemnify Tishman and Owners, Scottsdale has demonstrated that *Burlington* is a "change in the law that would change the prior determination" (CPLR 2221 [e] [2]). "[T]he duty to indemnify is . . . distinctly different" from the duty to defend because "the duty to pay is determined by the actual basis for the insured's liability to a third person" (*Bovis Lend Lease LMB, Inc.*, 65 AD3d at 875-876 [internal quotation marks and citation omitted]). It has not yet been determined that Ornamental's acts or omissions were a proximate cause of Cantelmo's injuries (*see Vargas v City of New York*, 158 AD3d 523, 525 [1st Dept 2018] [holding after *Burlington* that it was premature to declare that insurer had a duty to indemnify putative additional insureds where it had not been determined that the named insured was a proximate cause of the plaintiff's injury]). Moreover, it cannot be said that the acts or omissions of Ornamental were necessarily a proximate cause of Cantelmo's injuries, simply because Ornamental was Cantelmo's employer (*see Hanover Ins. Co. v Philadelphia Indem. Ins. Co.*, 159 AD3d 587, 588 [1st Dept 2018]; *see also* Julian D. Ehrlich, *Reaction and Overreaction to 'Burlington v. NYC Transit Auth.,'* NYLJ, Feb. 28, 2018 at 1). Unlike the facts of *Burlington*, Tishman and Owners (the putative additional insureds) did not accept sole responsibility for the accident (*see Burlington*, 29 NY3d at 319). Also, because Ornamental was not named as a party in the underlying action, there was no determination in the underlying action that Ornamental was not responsible for Cantelmo's injuries (*see id.*). Thus, Ornamental's acts or omissions may have served as a proximate cause of Cantelmo's injuries, and it is possible that Scottsdale may be obligated to indemnify Tishman and Owners.

Tishman relies on *City of New York v Liberty Mut. Ins. Co.* (2017 WL 4386363, at *9 [SD NY 2017]), for the proposition that courts subsequent to *Burlington* have not required an additional insured to prove causation in a declaratory-judgment action. This argument is without merit. The court in that case considered "whether the complaints potentially alleged that the Authority's ongoing operations were the proximate cause of the underlying plaintiffs' injuries," in determining whether the insurer had a *duty to defend* the putative additional insureds (*id.* at *7-*9). As noted by the court, "[i]f the allegations of the complaint are even *potentially* within the language of the insurance policy, there is a duty to defend" (*id.* at *7 [internal quotation marks and citation omitted]). Therefore, the court held that the insurer had a duty to defend additional insureds because the underlying complaints alleged claims "potentially within the language of the insurance policy" (*id.* at *10 [internal quotation marks and citation omitted]).

Therefore, the court's declarations that Scottsdale was obligated to indemnify Tishman and Owners in the underlying action must be vacated. Similarly, the portions of the court's decision and order dated October 10, 2017 awarding Tishman a money judgment as reimbursement for the settlement in the underlying action also cannot stand and must be vacated.

II. Tishman's Motion for Leave to Reargue (Motion Sequence No. 006)

In view of the above, Tishman's motion for leave to reargue the court's decision and order dated October 10, 2017, seeking an additional $500,000 for the settlement of the underlying action, must be denied. The court is vacating the portion of this decision and order awarding the money judgment. There has been no determination that the acts or omissions of Ornamental were a proximate cause of Cantelmo's injuries.

Accordingly, it is

ORDERED that the motion (sequence number 006) of plaintiff Tishman Construction Corp. of N.Y. for leave to reargue its motion for a money judgment is denied; and it is further

ORDERED that the motion (sequence number 008) of defendant Scottsdale Insurance Company for leave to renew its prior cross-motion for summary judgment is granted; and it is further

ORDERED that, upon renewal,

(1) the portions of the court's decision, order, and judgment dated July 12, 2016 declaring that defendant Scottsdale Insurance Company is obligated to indemnify plaintiff Tishman Construction Corp. of N.Y. and nonparties One Bryant Park, LLC and Durst Development, LLC in the underlying action *Cantelmo v One Bryant Park, LLC*, Index No. 109779/09 (Sup Ct, NY County) are vacated, and

(2) the portions of the court's decision and order dated October 10, 2017, awarding plaintiff Tishman Construction Corp. of N.Y. a money judgment are vacated;

and it is further

ORDERED that the parties appear for a preliminary conference on August 8, 2018, at 11:00 a.m., in Part 7, room 345, at 60 Centre Street; and it is further

ORDERED that defendant Scottsdale Insurance Company must serve a copy of this decision and order on the County Clerk's Office, which is directed to vacate the court's orders accordingly.

Dated: May 17, 2018

J.S.C.

HON. GERALD LEBOVITS
J.S.C.