General Elec. Capital Corp. v Valley Forge Ins. Co.
2007 NY Slip Op 32400(U)
August 2, 2007
Supreme Court, New York County
Docket Number: 0602557/2006
Judge: Carol R. Edmead
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[* 1]

SCANNED ON 8/3/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

PART 55

Index Number : 602557/2006

GENERAL ELECTRIC CAPITAL CORP.

VS

VALLEY FORGE INS. CO.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 602557-06

MOTION DATE 5/22/07

MOTION SEQ. NO. 001

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

In accordingly with the accompanying Memorandum Decision, it is hereby ORDERED that the plaintiffs' motion is granted to the extent that it is

ORDERED and DECLARED that defendant Valley Forge Insurance Company ("Valley Forge") has a duty to defend GE and ITW for the claims against them in an underlying action entitled *Carney v Concord Pools, Ltd. et al.* (the "Carney Action"); (2) the subject Zurich Policy affords coverage to GE and ITW that is in excess to the coverage afforded to them by Valley Forge; and (3) Valley Forge is required to reimburse GE and ITW for any defense costs and/or indemnity payment incurred on behalf of GE and ITW, with statutory, pre-judgment interest pursuant to CPLR §§ 5001 and 5002. And it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry. And it is further

ORDERED that the Clerk may enter judgment accordingly.

CAROL EDMEAD
J.S.C.

This constitutes the decision and order of the Court.

Dated: 8/2/07

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

CAROL EDMEAD
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

---x

GENERAL ELECTRIC CAPITAL CORPORATION,
ITW MORTGAGE INVESTMENTS IV AND
ZURICH AMERICAN INSURANCE COMPANY,

Index No. 602557-2006

Plaintiffs,

-against-

DECISION/ORDER

VALLEY FORGE INSURANCE COMPANY
AND CONCORD POOLS, LTD.,

Defendants.

---x

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiffs General Electric Capital Corporation ("GE"), ITW Mortgage Investments IV ("ITW"), and Zurich American Insurance Company ("Zurich") (collectively "plaintiffs") move pursuant to CPLR §3212 for partial summary judgment and a declaration that (1) defendant Valley Forge Insurance Company ("Valley Forge") has a duty to defend and indemnify GE and ITW for the claims against them in an underlying action entitled *Carney v Concord Pools, Ltd. et al.* (the "Carney Action"); (2) a certain Zurich Policy affords coverage to GE and ITW that is in excess to the coverage afforded to them by Valley Forge; and (3) Valley Forge is required to reimburse GE and ITW for any defense costs and/or indemnity payment incurred on behalf of GE and ITW, with statutory, pre-judgment interest pursuant to CPLR §§ 5001 and 5002.

Background

Pursuant to a Service Contract effective October 2, 2002 ("Service Contract"), GE contracted with Concord Pools, Ltd. ("Concord Pools") for snow removal services to be performed at the Clifton Park Center Mall in NewYork. The Clifton Park Center Mall is owned

[* 3]

by ITW and managed by GE. Under the Service Contract, Concord Pools was required to maintain insurance, naming the "Owner" as "additional insureds." (¶21(b)). The Service Contract also required that Concord Pools "indemnify, defend, and hold harmless Owner . . . and Owner's Agent . . . , from and against any and all liabilities . . . directly or indirectly resulting from personal injury . . . sustained . . . in connection with the performance of the Work of this Contract by Contractor . . . ." (¶14).

Accordingly, Concord Pools obtained a one-year general liability policy from Valley Forge, effective October 8, 2002 (the "Valley Forge Policy" or "Policy"). In addition to providing coverage for Concord Pools, the Valley Forge Policy provides additional insured coverage "to any person or organization . . . whom you [Concord Pools] are required to add as an additional insured on this policy under a written contract or written agreement; but the written contract or written agreement must be: 1. Currently in effect or becoming effective during the term of this policy; and 2. Executed prior to the "bodily injury," "property damage," or "personal and advertising injury." A Certificate of Insurance was issued to Concord Pools, naming ITW and "Insignia/ESG, Inc." as additional insureds.

On February 4, 2003, Rosemary Carney (the "underlying plaintiff") slipped and fell on ice outside the entrance of the Clifton Park Center Mall. When Zurich received notice of the claim, it tendered the claim to Valley Forge, on October 8 and December 6, 2005, seeking additional insured coverage.

On or about February 1, 2006, the underlying plaintiff commenced a personal injury action against Concord Pools, ITW and GE, alleging negligent snow removal by Concord Pools.

On April 26, 2006, Valley Forge declined to accept Zurich's tender of defense and

indemnification, on the ground that the underlying complaint "alleges independent acts of negligence against your insured, which wouldn't be covered under our polic[y] for Concord Pools."

This declaratory judgment action ensued.

Motion

Plaintiffs contend that Concord's Service Contract required that Concord Pools obtain additional insured coverage for both GE and ITW. A duty to defend the additional insured arises where the complaint names as a defendant a party who is obligated to procure the additional insured coverage and alleges that the accidents or injuries arose out of that entity's work. Here, the underlying complaint pleads a negligence claim against Concord Pools, which triggers Valley Forge's obligation to defend GE and ITW. Valley Forge did not dispute the applicability of the Policy's additional insured endorsement, but denied coverage to the plaintiffs on the ground that the Policy does not cover GE and ITW for their own independent acts of negligence. Plaintiffs contend that regardless of whether Valley Forge's interpretation (that the Policy does not cover GE and ITW for their own independent acts of negligence) is correct, there is no question that Valley Forge has a present duty to defend plaintiffs based on the allegations of the underlying complaint and the language of the Valley Forge Policy. Further, plaintiffs argue that the Valley Forge Policy provides primary coverage and the Zurich Policy provides excess coverage to GE and ITW. The additional insured endorsement in the Valley Forge Policy states that it is excess over any other insurance, unless a written contract requires that the Policy be primary, and here, the Service Contract requires Concord Pools to purchase primary insurance coverage. Thus, Valley Forge should be compelled to reimburse plaintiffs for the costs incurred to date to defend

GE and ITW in the underlying action.

In opposition, defendant Valley Forge contends that its Policy declares that "no coverage applies to liability arising from the sole negligence of the additional insured." In the underlying action, there are direct claims, such as structural defects, against GE and ITW, which have nothing to do with the snow removal at the accident location. The underlying complaint does not allege that Concord Pools failed to remove snow as required, or that the area was not sanded, salted, or shoveled properly. There are also claims regarding negligently placed snow piles; however, Concord Pools had no discretion in that area, since snow piles were to be placed solely at the direction of GE and ITW. A fact finder may conclude that GE and ITW were solely responsible for the underlying plaintiff's accident, in which case, coverage under the Valley Forge Policy would not apply. Valley Forge argues that since the insurance clause of the Valley Forge Policy is tied to the indemnification clause, the determination of whether coverage is owed cannot be determined until there is a resolution as to ITW, GE, or Concord's liability in the underlying action. Further, since plaintiffs are already being defended by their own insurance carrier, and issues of indemnification and insurance coverage await resolution, caselaw indicates that there is "no practical need" for Valley Forge to contribute to the defense efforts on behalf of the plaintiffs herein.

In reply, plaintiffs clarify that they are solely seeking defense coverage, and not indemnification which would be premature at this point. Plaintiffs argue that the issue of defense coverage is not premature. Valley Forge does not dispute that its Policy provides primary blanket additional insured coverage to any person Concord Pools is required to add as an additional insured pursuant to contract. Plaintiffs are covered as additional insureds due to Concord Pool's

negligence and not for liability resulting from their own negligence. Also, the underlying complaint sufficiently alleges claims against Concord Pools, and does not allege that the accident was solely the fault of ITW and GE. The additional insured endorsement in the Valley Forge Policy provides primary additional insured coverage, and with a primary coverage obligation come an immediate defense obligation.

Analysis

It is well settled that an insurer's duty to defend is exceedingly broad, and broader than its duty to indemnify (*BP Air Conditioning Corp. v One Beacon Ins. Group,* --- NY3d ----, 2007 WL 1826923 [2007]; *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640 [1993]). An insurer "will be called upon to provide a defense whenever the allegations of the complaint 'suggest ... a reasonable possibility of coverage'" (*BP Air Conditioning Corp. v One Beacon Ins. Group,* at). "The duty to defend [an] insured[ ] ... is derived from the allegations of the complaint and the terms of the policy. If [a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend" (Id.). It "is immaterial that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions" (*Town of Massena v Healthcare Underwriter Mut Ins. Co.*, 98 NY2d 435 [2002]). Thus, "an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course (*BP Air Conditioning Corp. v One Beacon Ins. Group,* --- NY3d ----, *citing Automobile Ins. Co. of Hartford v Cook,* 7 NY3d 131, 137 [2006]).

The Valley Forge Policy Valley provides additional insured coverage "to any person or organization" Concord Pools is required "to add as an additional insured on this policy under a

written contract" provided that the written contract be "[c]urrently in effect or becoming effective during the term of this policy;" and "[e]xecuted prior to the "bodily injury," "property damage," or "personal and advertising injury."

Insurance coverage afforded to the additional insureds under the Valley Forge Policy is limited, however, "for liability due to your [Concord Pool's] negligence specifically resulting from 'your work' for the additional insured which is the subject of the written contract. . . ." Further, "no coverage applies to liability resulting from the sole negligence of the additional insured."

It is uncontested that under the Service Contract, Concord Pools agreed to maintain insurance naming the Owner as an additional insured. Further, a fair reading of the underlying complaint indicates that defense coverage is implicated. The underlying complaint alleges that GE and ITW "hired and engaged" Concord Pools to "remove snow and ice" at the premises, "and otherwise maintain the walkways and parking area thereof in a safe and proper condition." (¶31). The underlying plaintiff alleges that "the defendants were charged with and subject to a specific, affirmative and foreseeable duty of . . . maintaining, caring for . . . the mall premises including the aforesaid entrance area to the premises, in a safe, proper, and prudent manner free from any and all . . .conditions . . .which would constitute a danger or hazard to the person or property of members of the general public, . . . including the plaintiff herein." (complaint, ¶37). The underlying complaint further alleges that "said mall premises" was "maintained" and "cared for" in a "defective and hazardous manner and constituted a dangerous and defective condition . . . ; that the snow was not removed from the entrance area and abutting sides and allowed melting water to flood the entrance area and refreeze; that a defective dangerous condition was created by

the lack of proper snow removal and ice abatement . . . ." (¶38).

Although the underlying complaint does not separate the allegations applicable to each named defendant, it specifically addresses "defendants," thereby including Concord Pools, GE and ITW. Thus, the underlying complaint indicates that the underlying plaintiff seeks damages resulting from Concord Pool's failure to properly remove the snow and/or ice as "hired" by GE and ITW to do. Therefore, since the underlying complaint contains allegations indicating a possibility that the underlying plaintiff's injuries resulted from Concord Pool's negligence in performing the snow removal work which is the subject of the Service Contract, Valley Forge's obligation to provide plaintiffs a defense is triggered.

Contrary to Valley Forge's contention, Policy language herein does not require that determination of defense coverage await the resolution of liability in the underlying action, and Valley Forge's reliance upon *Kajima Constr. Servs. Inc. v CATI, Inc.* (302 AD2d 228 [1st Dept]) for this proposition is misplaced.

As taken from the First Department decision on *BP Air Conditioning Corp. v One Beacon Ins. Group* (33 AD3d 116 [1st Dept 2006]):

> In *Kajima*, unlike in this case, the additional insured endorsement of the subject liability policy (issued by the defendant insurer, Investors) "provide[d] that the additional insured coverage [would] be primary only if the underlying claim [were] determined to be solely as a result of the negligence or responsibility of the named insured" (*id.* at 229). Under this provision, we said, "it cannot be determined whether [the additional insured] is entitled to primary liability coverage under the policy issued by Investors until a determination as to liability is made in the underlying action" (*id.*). Pending such a determination, Investors was, by the terms of its additional insured endorsement, merely an excess insurer, and, as such, without any obligation to defend the additional insured prior to the exhaustion of primary coverage. Thus, we stated in *Kajima* that the "determination [of the underlying action] will also resolve the issue of primary responsibility for defense expenses." Nothing of the kind is true here, where, under the terms of the additional insured endorsement to Alfa's policy, Beacon's current status as a

primary insurer is not contingent on any future factual determination. We note that *Kajima* was distinguished on similar grounds in *Landpen Co., L.P. v Maryland Cas. Co.*). (*internal citations omitted*).

The Valley Forge Policy here provides that:

This insurance is excess over any other insurance naming the additional insured as an insured whether primary, excess, contingent or on any other basis unless a written contract or written agreement specifically requires that this insurance be either primary or primary and noncontributing.

The Service Contract specifically requires that Concord Pools obtain insurance naming the Owner as an additional insured and stating that "such policies are primary." (Service Contract ¶21(e)).

Furthermore, caselaw dictates that GE and ITW's additional insured status is not dependent upon the satisfaction of any future resolution of issues of liability. In *Pecker Iron Works of New York, Inc. v Traveler's Ins. Co.*, (99 NY2d 391, 756 NYS2d 822 [2003]), a subcontractor "agreed to furnish [a contractor] [Pecker] with Certificates of Insurance for Liability and Workers Compensation and name Pecker ... as an additional insured." The subcontractor's insurance policy provided the subcontractor with primary coverage, and also covered such "additional insureds" as the subcontractor would designate in a written contract. As in here, said policy also provided that for those "additional insureds," coverage would only be excess, unless the subcontractor "ha[d] agreed in a written contract for this insurance to apply on a primary or contributory basis." Given that "additional insureds" enjoy "the same protection as the named insured," the Court found that the insurer agreed to provide primary insurance to any party with whom insured (subcontractor) had contracted in writing for insurance to apply on a primary basis.

Similarly, since Concord Pools obtained primary coverage for itself, and named the owner of the subject premises as an additional insured pursuant to Concord Pools' written agreement with the owner, the Valley Forge Policy provides primary coverage for the additional insureds as well, unconditioned upon the satisfaction of any future occurrence.

Finally, it is undisputed that the Zurich Policy states that it is "excess over . . . [a]ny other primary insurance available to you [GE] covering liability for damages arising out of the premises or operations for which you have been added as an additional insured. . . ." (Zurich Policy, Section IV 4(b)(2)). Therefore, plaintiffs have established that the Zurich Policy is excess to the Valley Forge Policy.

Accordingly, the motion by plaintiffs is granted to the extent that it is

ORDERED and DECLARED that defendant Valley Forge Insurance Company ("Valley Forge") has a duty to defend GE and ITW for the claims against them in an underlying action entitled *Carney v Concord Pools, Ltd. et al.* (the "Carney Action"); (2) the subject Zurich Policy affords coverage to GE and ITW that is in excess to the coverage afforded to them by Valley Forge; and (3) Valley Forge is required to reimburse GE and ITW for any defense costs and/or indemnity payment incurred on behalf of GE and ITW, with statutory, pre-judgment interest pursuant to CPLR §§ 5001 and 5002.[1]

This constitutes the decision and order of the Court.

CAROL EDMEAD
J.S.C.

Dated: August 2, 2007

Hon. Carol Robinson Edmead, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B)

[1] Valley Forge's opposition papers are silent regarding the imposition of pre-judgment, statutory interest.