Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH RISI. IA Part 3
A. J. S. C.

----------X Index Number 706691/2020

RITE-WAY INTERNAL REMOVAL, INC.,

Motion Date: November 9, 2021

Plaintiff,

-against- Motion Sequence #4

SCOTTSDALE INSURANCE COMPANY, ST. PAUL SURPLUS LINES INSURANCE COMPANY, U.S. SPECIALTY INSURANCE COMPNAY, AXIS INSURANCE COMPANY and NAVIGATORS INSURANCE COMPANY,

**DECISION/ORDER**



Defendants.

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On the following EF numbered papers, plaintiff seeks an order: (1) granting it partial summary judgment against defendants Scottsdale Insurance Company ("Scottsdale") and U.S. Specialty Insurance Company ("USS") on its first and fourth causes of action; (2) declaring that Scottsdale and USS are obligated to defend Plaintiff in the action *Elizabeth Canal, LLC, et al v. Structure Tone Global Services., et al.,* Index No. 153543/2017, and related third-party actions entitled *Cirocco & Ozzimo, Inc. v Rite-Way Demolition Inc., et al*. and *Structure Tone, Inc. v Rite-Way Demolition Inc., et al*; and (3) determining that Scottsdale and USS are liable to pay all of plaintiff's litigation expenses incurred to date and to be incurred in connection with the defense of the Underlying Action and directing an inquest be held to determine such amounts.

| | Papers numbered |
|---|---|
| Notice of Motion – Affirmations – Exhs… | E98-E115 |
| Memos in Opposition…… | E116, E119-E120, E122 |
| Memo in Reply…….…… | E121, E125 |

Upon the papers submitted, the motion is determined as follows:

Plaintiff, Rite-Way Internal Removal ("Rite-Way"), is a corporation involved in interior demolition in construction projects. Rite-Way was a subcontractor retained by General Contractor Structure Tone Global Services, Inc. ("STI"), to perform work on certain premises to be occupied by tenant First Republic Bank ("First Republic"). Thereafter, in the matter of *Elizabeth Canal, LLC, et al v. Structure Tone Global Services., et al.,* (New York County Index No. 153543/2017), (the underlying action), the owners of the premises sought damages against STI and subcontractor

Cirocco & Ozzimo Contracting, Inc. ("Cirocco"), as well as First Republic, for allegedly negligently performed construction and alterations to a building ("Building") located at 159-165 Canal Street, New York, New York (the "Premises"). On or about September 13, 2019, in the underlying action, Cirocco commenced a third-party action against Rite-Way for contribution and indemnification in connection with the underlying action (the "Third-Party Action"). On or about October 2, 2019, STI commenced a second third-party action against Rite-Way, for *inter alia*, contribution and indemnification in connection with the underlying action (the "Second Third-Party Action"). The complaint in the underlying action alleges that, as a result of the negligence of STI and Cirocco, the Building suffered damage, specifically, cracking on the second floor. Rite-way maintains that it performed interior work in the cellar of the building, but did not perform work on the foundation.

During the Rite-Way work period, being from November 21, 2013 to December 18, 2013, Rite-Way maintained a general liability policy with Scottsdale as its primary carrier, with limits of $2,000,000 per occurrence, and which contained a duty by Scottsdale to defend Rite-Way in connection with any suit seeking coverage under the policy.[1] The Scottsdale policy covered the period of April 30, 2013 to January 30, 2014. Before the expiration of the Scottsdale policy, plaintiff also maintained a general liability insurance policy with USS, with limits of $2,000,000 per occurrence, which also contained a duty by USS to defend Rite-Way in connection with any suit seeking coverage under the USS policy.[2] The USS policy covered the period of January 30, 2014 to January 30, 2015. In the underlying action, it was alleged that on December 16, 2013, an architect on the project noted that shoring and bracing had not been installed, and that the soil in the cellar had been "over-excavated." Moreover, it was alleged that the damage to the second floor of the building was first observed in June 2014. Plaintiff maintains that both of these events trigger coverage under the respective policies.

Plaintiff maintains that following the commencement of the third-party actions against it, the plaintiff timely notified all of insurers of the action. However, by letter dated February 25, 2020, Scottsdale disclaimed coverage stating that the alleged property damage occurred after the cancellation of the policy. By letter dated January 10, 2020, USS disclaimed coverage stating that (1) plaintiff performed its work prior to the policy period; (2) that coverage was excluded under the Earth Movement Exclusion and (3) that coverage was excluded under the Continuous or Progressive Damage Exclusion. Plaintiff claims that not only did Scottsdale and USS disclaim coverage, but they refused to defend Rite-Way in the underlying action, even though Rite-Way purchased defense coverage in both policies, leaving Rite-Way to pay the costs of its own defense.

The Scottsdale Policy provides, in part that: "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." The policy defines "property damage," in part, as: "physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it."

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1 Rite-Way also maintained an excess insurance policy with Scottsdale and a secondary excess policy with St. Paul Insurance Company against whom this action has been discontinued.

2 Excess policy was also maintained with Axis Insurance Company and Navigators Insurance Company. The action has also been discontinued against them. (See, NYSCEF doc. # 73 as to all three carriers.)

Similarly, the USS policy provides that "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." The USS policy defines "property damage," in part, as: "physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it."

Rite-Way seeks an order compelling both insurers to defend it in relation to the underlying actions. Initially, plaintiff makes the clear distinction that the duty to defend is separate from that to indemnify. The obligation of an insurer to provide a defense is 'broader than is the duty to pay.' (*Servidone Const Corp v Security Ins. Co*, 64 NY2d 419, 424 [1985]). "The duty to defend is measured against the allegations of the pleadings, but the duty to pay is determined by the actual basis for the insured's liability to a third person." (*Id*.) By its broader nature, the duty to defend arises if the claims asserted potentially fall within the policy coverage, regardless of any ultimate liability. It is the possibility of liability that implicates the duty to defend. (*See, id*; *Frontier Insulation Contractors v Merchants Mut. Ins*., 91 NY2d 169 [1997]; *Town of Massena v Healthcare Underwriters Mut. Ins. Co.,* 98 NY2d 435 [2002]).

Here, Rite-Way maintains that the possibility of liability exists both from the actual time period of Rite-Way's work, which falls within the ambit of the Scottsdale policy, and from the actual observation of the damage, which would have occurred within the period of the USS policy. "If any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action." (*Frontier Insulation Contractors v Merchants Mut. Ins.*, 91 NY2d at 175.)

In defeating the duty to defend, the insurer bears the "heavy burden" of demonstrating that the allegations of the complaint fall wholly within a policy exclusion, that the policy exclusion is susceptible to no other interpretation, and that there is no possible factual or legal basis for a recovery that would then implicate the obligation of indemnification. (*See, id*.) Both Scottsdale and USS denied coverage on grounds that the claims did not fall within the coverage time periods of their respective policies.

In the complaint in the underlying action, plaintiffs therein alleged that the property damage was caused by over-excavated soil from the cellar of the property in that there was no proper underpinning, shoring, or bracing of the property. The complaint further alleges that this damage was "exacerbated" by the allegedly negligent concrete work conducted by subcontractor Cirocco in or about April 2014. The damage to the second floor of the building was first observed in June 2014. Nothing in the complaint asserts misconduct that would be attributable to Rite-Way after December 2013, rather the complaint alleges that the existing damage was later exacerbated by Cirocco.

Initially, Scottsdale contends that, while the work may have been performed during its period of coverage,[3] it is not liable for coverage of faulty or defective work. Indeed, a claim for defective work between two parties may, more properly sound in breach of contract, which an

3 See Affidavit of Luann Piecora, an officer of plaintiff Rite-Way, at ¶9.

insurer will not be obligated to cover. (*See, George A. Fuller v United Sates Fid. & Guar Co,* 200 AD2d 255 [1st Dept 1994][the policy was never intended to provide contractual indemnification for economic loss to a contracting party because the work product contracted for is defectively produced]; *Baker Residential Ltd. Partnership v Travelers Ins. Co*., 10 AD3d 586 [2004]["a classic faulty workmanship/contract dispute"]). However, where, as here, the "claim against the insured was not simply one for faulty workmanship, but rather for consequential property damage inflicted upon a third party as a result of the insured's activity," coverage cannot be denied. (*J.Z.G. Res. Inc. v Edward E King & Shelby Ins. Co,* 987 F.2d 98, at 102 [2nd Cir 1993]).

Here, the damage was incurred by the plaintiffs in the underlying action, and the damage sued for is that to the second floor of the building, and not the cellar where Rite-Way performed work. Rite-Way is not seeking to be ultimately indemnified for its own (alleged) damage to the cellar, but for the damage caused to a third party. (*I.J. White Corp. v Columbia Cas. Co*., 105 AD3d 531 [1st Dept 2013]). As such, Scottsdale cannot deny Rite-Way coverage and defense based upon its faulty workmanship claim. (*See, id*.; *J.Z.G. Res. Inc. v Edward E King & Shelby Ins. Co.* 987 F.2d 98). Scottsdale points to no other arguable exclusion from the policy.

USS maintains that it can deny coverage based upon two policy exclusions, the Earth Movement Exclusion and the Continuous or Progressive Damage Exclusion. "In determining a dispute over insurance coverage, we first look to the language of the policy." (*Pro's Choice Beauty care v Great Northern Ins. Co.*, 190 AD3d 868 [2nd Dept 2021]). Looking first to the Continuous or Progressive Damage exclusion, the USS Policy, which covered the period of January 30, 2014 to January 30, 2015, excludes coverage for: "Bodily Injury" or "property damage" (1) Which first existed or is *alleged to have first existed,* prior to the inception date of this Policy; or (2) Which are, or are alleged to be, in the process of taking place prior to the inception date of this Policy, even if the actual or alleged "bodily injury" or "property damage" *continues* during this policy period; or (3) Which were caused, or are alleged to have been *caused*, by a condition that *first existed* prior to the inception date of this policy." [Emphasis added]).

"An insurer's duty to defend its insured arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy" (*Id,* at 870.) However, "[A]n insurance carrier can be relieved of its duty to defend if it establishes, as a matter of law, that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision. (*Rinaldi v Wakmal*, 183 AD3d 652, 653 [2nd Dept 2020] and se*e Pro's Choice Beauty Care v Great Northern Ins. Co*., 190 AD3d 868) "When an insurer seeks to disclaim coverage on the further basis of an exclusion, the insurer will be required to provide a defense unless it can demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, in toto, are subject to no other interpretation." (*Rinaldi v Wakmal*, 183 AD3d at 653). Accordingly, "[where] the existence of coverage depends entirely on the applicability of [an] exception to the exclusion, the insured has the duty of demonstrating that it has been satisfied. (*See Pro's Choice Beauty Care v Great Northern Ins. Co*., 190 AD3d at 870).

Upon a reading of the allegations in the underlying complaint, the damage to the building was initially caused by the excavation, being "a condition that first existed prior to the inception date of [the] policy." While the damage continued during the USS policy period, the exclusion

specifically disclaimed coverage under such circumstances. In reply, Rite-Way failed to raise a triable issue of fact as to any exception from the exclusion. (*See, Queens Org. LLC v First Am. Title Ins. Co.,* 172 AD3d 932 [2nd Dept 2019]). Accordingly, insofar as USS has demonstrated a viable exclusion to coverage, it cannot be obligated to defend. (*See*, *id.;* and *see Town of Massena v Healthcare Underwriters Mut. Ins. Co.,* 98 NY2d 435).

With regard to USS' Earth Movement Exclusion, the policy provides as follows: The Earth Movement Exclusion in the USSIC Policy excludes coverage "in whole or in part, arising out of, resulting from, or in any matter related to 'earth movement,' meaning "earthquake, landslide, subsidence, mud flow, sinkhole, erosion, or the sinking, rising, shifting, expanding, vibrating, or contracting of earth or soil, or any other movement of land, soil or earth."

Rite-Way maintains that the policy exclusion should be subject to "strict and narrow construction." (*See, Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.,* 12 NY3d 302, 307 [2009]). The language of the exclusion must be clear and unambiguous, and have a definite and precise meaning. (*Id.*) Here, the policy lists numerous natural causes, such as earthquake, landslide, and erosion, and includes or "any other movement of land, soil or earth." However, it remains open to interpretation as to whether this implicates natural movement of earth, or as opposed to man-made earth movement. Subsequent cases have found the Earth Movement Exclusion to apply when the policy specifically lists "man-made" causes. (*See, Bentoria Holdings v Travelers Indemn. Co*., 20 NY3d 65 [2012]; *Rego Park Holdings v Aspen Specialty Ins. Co*., 140 AD2d 1147 [2nd Dept 2016][exclusion applied where policy specifically included excavation]; *3502 Partners, LLC v Great American Ins. Co*., 73 Misc 3d 523 [Sup Ct, NY County 2021][policy specifically included "man-made" loss]). An insurer must establish *prima facie* that the exclusion applied to the loss, and upon its failure to do so, it may not reply upon the exclusion. (*Vertex Restoration Corp v Catlin Ins. Co*., 156 AD3d 847 [2nd Dept 2017]).

While USS' reliance on the Earth Movement Exclusion may be unavailing, it has already been determined that the Continuous or Progressive Damage exclusion has been established, thereby negating USS' duty to defend. (*See Pro's Choice Beauty Care v Great Northern Ins. Co*., 190 AD3d 868.)

Finally, the branch of the motion seeking bad faith damages is denied as to both Scottsdale and USS. Both insurers had an arguable basis for disclaiming overage and there is no showing of a "gross disregard" for plaintiff's interests by either insurer. (*Liang v Progressive Cas. Ins. Co.* 172 AD3d 696 [2nd Dept 2019]; *S. Bros, Inc. v Leading Ins. Servs*., 124 AD3d 498 [1st Dept 2015]).

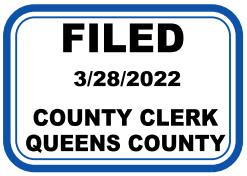
Accordingly, the motion is granted to the extent that Rite-Way shall have partial summary judgment on its first cause of action in that Scottsdale is obligated to provide a defense to Rite-way in the underlying actions, but the question of the duty to indemnify is premature. Rite-Way's motion for summary judgment on its fourth cause of action is denied and the motion is denied as to any duty to defend on the part of USS.

It is the declaration of this court that defendant Scottsdale Insurance Company is obligated to defend plaintiff in the actions entitled *Elizabeth Canal, LLC, et al v. Structure Tone Global Services., et al.,* Index No. 153543/2017, and related third-party actions entitled *Cirocco &*

*Ozzimo, Inc. v Rite-Way Demolition Inc., et al.*, and *Structure Tone, Inc. v Rite-Way Demolition Inc., et al,* and further, that defendant U.S. Specialty Insurance Company does not have a duty to defend plaintiff in the actions entitled *Elizabeth Canal, LLC, et al v. Structure Tone Global Services., et al.,* Index No. 153543/2017, and related third-party actions entitled *Cirocco & Ozzimo, Inc. v Rite-Way Demolition Inc., et al*. and *Structure Tone, Inc. v Rite-Way Demolition Inc., et al.*

This is the decision and order of the Court.

Date: March 24, 2022




HON. JOSEPH RISI, A. J. S. C.