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Appellate Court Construes “Ongoing Operations” Provision Relating to Additional Insured Coverage

The New York Appellate Division, Third Department, recently considered an appeal involving a claim for additional insured coverage arising from the failure of the Hadlock Pond Dam, owned by the Town of Fort Ann on July 2, 2005. *Town of Fort Ann, et al. vs. Liberty Mutual Insurance Company, Steadfast Insurance Company and Kubricky Construction Corporation*, January 28, 2010.

The Town of Fort Ann contracted with Heynan Teale Engineers for services relating to the reconstruction of its dam in 2005. Kubricky was retained as general contractor for the reconstruction work. Following the dam collapse, numerous lawsuits were commenced against the Town and others. The Town and its insurer, co-plaintiff New York Municipal Insurance Reciprocal, sought defense and indemnification from Steadfast Insurance Company, the insurer of Heynan and Liberty Mutual Insurance Company, Kubricky’s insurer. Both insurers disclaimed coverage upon the grounds, among others, that the Town did not qualify as an “additional insured” under the terms of the respective policies.

Plaintiffs commenced a declaratory judgment action, and ultimately moved for summary judgment, declaring that Liberty Mutual and Steadfast were obligated to defend and indemnify the Town and, further, that Kubricky had breached its contractual obligation to procure insurance coverage for the Town.

The lower court granted the plaintiffs’ motion to the extent of finding that Steadfast was obligated to defend the Town in the property damage actions, but, also held that there were factual issues, and denied the remainder of plaintiff’s motion and defendant’s cross-motions for summary judgment.

On appeal, the Town narrowed its argument solely to the duty of the insurers to defend. The Court noted that Kubricky’s policy with Liberty Mutual provided additional insured status to any entity where Kubricky’s written contract required such coverage. The contract between Kubricky and the Town required that Kubricky maintain insurance on the project “until the Town accepted the completed project.” Liberty Mutual contended that the additional insured coverage had ceased because the coverage remained in effect “only so long as Kubricky had ongoing operations at the project.”

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The Court found that the term “ongoing operations” is interpreted broadly in New York. The Court observed:

While major construction by Kubricky had ended one to two months before the dam’s failure, inspection of the project by the engineer, which was required before Kubricky’s work was considered completed under the contract, had not yet occurred. In light of the nature of the project, such inspection was not merely a minor after the fact detail.

As a result, the Town was entitled to additional insured status for purposes of the insurer’s duty to defend the Town.

The Court then considered Steadfast’s appeal of the lower court’s finding that it had a duty to defend the Town under its policy issued to Heynan. The Steadfast policy provided that a client of Heynan would be an additional insured when “required by written contract executed and effective before the performance of ‘your work’ or ‘covered operations.’”

The contract between Heynan and the Town stated that certificates of insurance would be furnished upon request naming the Town of Fort Ann as an additional insured. However, no request was made for a certificate of insurance until after the dam failed. The Court held:

So long as a clear written intent to include an entity as an additional insured is manifested prior to the loss, the fact that certificates of insurance are not issued until after the loss does not compel the conclusion that such entity is not an additional insured ***. The fact that Heynan agreed in the contract that it was prepared to supply certificates of insurance upon request, reflects a clear intent to include the Town as an additional insured in Heynan’s work on the dam project. The status of the Town as an additional insured is not made contingent upon the request for a certificate of insurance.

Finally, the Court found that it was premature to decide the Town’s breach of contract cause of action against Kubricky, asserting that Kubricky failed to obtain a “protective liability insurance” policy for the Town, since the only issue decided by the lower court was the duty to defend under Kubricky’s policy.

This case illustrates a liberal interpretation of the duty to defend an additional insured under commercial liability insurance policies. ■

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