Franco Belli Plumbing & Heating and Sons, Inc. v. Liberty Mutual Insuance Company

2012 | Cited 0 times | E.D. New York | April 23, 2012

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/ UNITED STATES DISTRICT EASTERN DISTRICT NEW

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BELLI PLUMBING & HEATING AND INC.,

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Franco Belli Plumbing & Heating and Sons, Inc. v. Liberty Mutual Insuance Company

2012 | Cited 0 times | E.D. New York | April 23, 2012

&

Plaintiff, - against - LIBERTY MUTUAL INSURANCE

Appearances: For the plaintiff:

Defendant.

Terrence Terrence P.e.

Bruckner Blvd. Bronx, NY 10473 For the defendant: Marshall T. Potashner

Jaffe & Asher, LLP

Third Avenue New David Shyer Jaffe & Asher, LLP

Third Avenue New Robert Gitelman Jaffe & Asher LLP

Third Avenue New NY

12-CV-128

I

C.

State SCA Sue

SCA

10 Only

Occurrence SCA

("Bovis"), School ("SCA"),

Sons, ("Belli")

Supreme

Sons, 305323/2011 Sup 16,2011», 2011 ("Underlying Comp!.").

Franco Belli Plumbing & Heating and Sons, Inc. v. Liberty Mutual Insuance Company

2012 | Cited 0 times | E.D. New York | April 23, 2012

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I. Introduction

Bovis Lend-Lease LMB, Inc. a general contractor responsible for constructing a new school for the New York City Construction Authority contracted with plaintiff Franco Belli Plumbing and Heating and Inc. to install gas pipes in the building. After Bovis refused to pay Belli the full contract price for the work, Belli sued Bovis in the Court of New York, Bronx County. Notice of Removal 14-22 (Comp!., Franco Belli Plumbing & Heating & Inc. v. Bovis Lend Lease LMB, Inc. et ai., No. (Bronx Cnty. Ct., Nov. Doc. Entry 1, Jan 11, Bovis then counterclaimed for the cost of repairing a defective gas pipe installed by Belli. Id. 22-39 (Ans. & Counterclaim, Franco Belli Plumbing & Heating & Inc. v. Bovis Lend

2 305323/2011 Sup ").

("Liberty"),

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"pass through" SCA. PI.'s Supp. Summ. 12,2012 ("PI.'s Mem.").

Potential Since

Plaintiffs

See, Paul Paul Tender"), 20 50-52

("Liberty Tender"); Shah ofSCA ("SCA Letter")); MSNBC

104, 2010) ("In Lease LMB, Inc. et al., No. (Bronx Cnty. Ct., Nov. 16,2011)) ("Underlying Ans. and CountercI.

Belli sues its insurer, Liberty Mutual Insurance Company seeking a declaratory judgment that, as the insurer for the project, the defendant is obligated to defend Belli in the Bronx County action. 13-15. While Belli concedes that it would not be entitled to defense in an action only alleging repair of defective pipe installation, it claims that Bovis could also recover for any costs of tearing down and replacing finished walls in order to access the pipes, and could negligence claims asserted by the Reply Mem. ofL. in of Cross-Motion for J. 3-6, Doc. Entry 17, Apr. Reply

Having removed the case to this court, Liberty moves to dismiss for failure to state a claim upon which relief can be granted. Belli moves for summary judgment. Bovis' complaint only states a claim for the cost of repair of the pipes. recovery for any other damages is too hypothetical at this stage. the only damages claimed are for injury to Belli's own work, which is not covered by the policy, defendant's motion to dismiss is granted. motion for summary judgment is denied as moot. II. Facts

The numerous attachments to the complaint provide a sufficient factual record. e.g., Notice of Removal 44 (Letter from Belli to Khem Henry & Bryan of Willis of New York) ("Willis Doc. Entry I, Jan II, II; id. (Letter from Terrence J. O'Connor of Belli to Stephanie Corbin of Liberty) id. 41 (Letter from Anjay

to Edgar Vera ofBovis) see also, e.g., DiFalco v. Cable Inc., 622 F.3d 111 (2d Cir. considering a motion to dismiss for failure to state a

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I. York. 2005, SCA ("Project"). 2006 Project,

1,2008 1,2011, SCA

Policy. See Potashner I

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Policy "right

damages," Policy "occurrence" "an

V claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint.").

A. Project Belli, aNew corporation, is a construction subcontractor specializing in plumbing and heating installations. Compl. Liberty is a Massachusetts corporation licensed to issue insurance policies in New Id. 2.

In August Bovis entered into a contract with the to perform general construction work Underlying Compl. 8. Bovis and Belli signed a subcontract in March for mechanical work on the including the installation of gas pipes. Id. 9. Belli alleges that it completed the work; fully performing its contractual obligations. Id. 10.

B. Insurance Policy From January through January Liberty insured the under a Commercial General Liability As a subcontractor, Belli is a named insured.

Aff. Ex. at 41 (Certificate ofInsurance), Doc. Entry 5, Feb. 13,2012; Def.'s Mem. of Law in of Mot. to Dismiss the Verified Compl. 5-6, Doc. Entry No.5, Feb. 13,2012.

The obliges Liberty to those sums that the insured becomes legally obligated to pay because of ... 'property damage' ... only if the ... 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory.'" §§ I-la, b. It imposes a and duty to defend the insured against any 'suit' seeking those but disclaims any duty to defend a suit to which the policy does not apply. § I-Ia. An triggering the insurer's duty is accident, including continuous or repeated exposure to substantially the same general harmful conditions." Id. § -13.

4 "'Property

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action." The Policy does not apply to damages flowing from the insured's breach of contract or a defective product or labor. It excludes the cost of restoring property damaged in repairs to defective work. Not covered are:

I. damage' for which the insured is obligated to pay damages by reason of the assumption ofliability in a contract or 2. damage' to ... [tlhat particular part of real property on which you or any subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations; or ... [tlhat particular part of any property that must be restored, repaired or replaced because work' was incorrectly peiformed on 3. "'Property' damage to 'your work' arising out of it or any part of it and included in the 'products-completed operation hazard. '" 4. "'Property damage' to 'impaired property' or property that has not been physically injured arising out of [a} defect, deficiency, inadequacy or dangerous condition in product' or work '; or [a delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its Id. §§ I-2b,j, I, m (emphasis added).

Gas Leak In June a gas leak was detected. Potashner Aff. Ex. 4 at 9 (Jobsite Incident Report), Doc. Entry 5, Feb. The representative informed Bovis of the leak. Id. at 7; Compl 9. Bovis and Belli dispatched representatives to the site for an inspection. Potashner Aff. Ex. 4 at 23-24 (Mem. of Edgar Vera), Doc. Entry 5, Feb. Leaking pipes installed by Belli were observed. Id. The then assessed a backcharge against Bovis in order to recoup expenditures incurred in fixing the defective pipes. Underlying Ans. & Countercl. 25.

Belli asserts that the counterclaim for replacement of the pipes presents a for property damage to finished surfaces that would result from possible pipe removal or other remedial Compl. 8 (emphasis added). At oral argument, both parties conceded that

5 of2011, York,

"defectively

SCA "incurred $100,000 "to

SeA Sue 20 SCA

SCA SCA they were not aware of whether and to what extent walls were opened in order to access the pIpes. Tr. ofHr'g, Apr. 19,2012.

D. State Action In June Belli sued Bovis in Supreme Court of New Bronx County claiming breach of contract. Compl. 6. Belli alleged that the contract entitled them to payments of $3,899,428.87, but that Bovis has only paid $3,743,642.71, leaving an unpaid balance of$155,786.16. Underlying Compl. 11-12.

Bovis filed an answer including six affirmative defenses. Compl. 6. In its first affirmative defense, Bovis included a counterclaim, asserting that Belli had breached the contract by failing to perform its own obligations. Compl. 6; Underlying Ans. & Countercl. 22-23. Specifically, Bovis accused the plaintiff of performing and refusing or neglecting to complete its Subcontract work." Underlying Ans. & Countercl. 23. Because the assessed a backcharge for the repair work, Bovis claims it has or will incur additional and increased costs of construction" totaling not less than repair plaintiffs defective Subcontract work or to complete plaintiffs unfinished Subcontract work," for which Belli is liable. !d. 25-27.

E. Threatens to In July II, the wrote Bovis indicating that it intended to hold Bovis and Belli liable for costs and damages related to the negligent installation of the pipes. Compl. 7. The

alleged that the gas leaks were caused by use of lampwick in the pipe joint fittings. Letter of Jul. 22,2011. Lampwick's use is prohibited by the National Fire Protection Association and Department of Buildings Codes. [d.

F. Belli's Unsuccessful Tender

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SCA. Packages), "property damage"

"occurrence," "Damage Work"

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Potential SCA SCA 2009, SCA Supreme

Project. City School 023878/2009 Sup. 2009).

In August II, Belli notified Liberty that the Bovis' state counterclaim triggered Liberty's duty to defend. Liberty Tender. It claimed that the repair necessitated damage to a building element that was not Belli's work product-i.e., that walls would have to be torn down in order to get at the defective pipes. Id. In a follow-up tender package, it notified Liberty of a threatened negligence suit by the O'Connor Decl. Ex. 1-2 (Belli's August 25,2011 Tender

Doc. Entry 9, Feb. 28,2012. It also claimed that the gas leak itself could constitute

triggering the duty to defend. Id. Liberty disclaimed coverage on three grounds: I) economic loss rather than covered property damage was sought; 2) even if the loss resulted in property damage, it was not caused by an as required in the CGL; and 3) the damages fall within the to Your

exclusion of the CGL policy. Id. G. Instant Action

November 11,2011, Belli filed the instant action in the Court of New York, Kings County, seeking a declaratory judgment that Liberty I) must defend it against the counterclaim in the underlying action, and 2) is liable for attorneys fees thus far expended in that action. Compl. 13-15, 19-22. Liberty timely removed to federal court. Notice of Removal, Doc. Entry 1, Jan. 11,2011.

H. Claims Against Bovis and Belli The is not a party to the either the instant or Bronx County actions. In Bovis sued the in the Court of New York, Queens County in another matter allegedly related to the Bovis Lend Lease LMB, Inc. v. New York Auth, No.

(Queens Cnty. Ct. Belli informed the court that this Queens County action has been consolidated with the Bronx County action for trial. Tr. ofHr'g, Apr. 19,2012.

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York "[t]he theory." "Under It asserts that the SCA has stated a negligence claim relating to the gas leak in that suit. PI.'s Reply Mem. 5. The record of the Queens County action reveals that SCA has not asserted such a claim. Doc. Entry 20 Apr. 18,2012; Tr. ofHr'g, Apr. III. Jurisdiction

The parties to the present action are in complete diversity. Compl. 1-2. More than $75,000 is in controversy. Notice of Removal 5. This court has jurisdiction. 28 U.S.c. § 1332. IV. Choice of Law

A federal court sitting in diversity applies the choice-of-law rules of the state in which it sits. Klaxon Co. v. Elec. Co., 313 487, 496 (1941); Fieger v. Pitney Bowes Credit Corp., 251 F.3d 386,393 (2d Cir. 2001). In New York, the step in any case presenting a ... choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions In re Allstate Ins. Co., 613 N.E.2d 936, 938 (N.Y. 1993). Assuming that an actual conflict exists between the laws of jurisdictions with interests in having their law applied to the case, the court is to apply interest analysis to determine which jurisdiction has the greatest interest in having its law applied to the dispute. e.g., Padula v. Lilarn Props. Corp., 644 N.E.2d 1001, 1002 (N.Y. 1994). In applying interest analysis, two separate inquiries are required: (I) the determination of the significant contacts and their locations; and (2) the determination of whether the relevant law is to conduct-regulating or loss allocating. id.

In contract cases, New courts apply center of gravity or grouping of contacts choice of law Allstate, 613 N.E.2d at 939 (internal quotation marks omitted). this theory, the courts, instead of regarding as conclusive the parties' intention or the place of

8 dispute'."

See, Stone, 2009) Pac. 509, 2001)

Procedure "to granted."

150, 160 2010). "To

S. (2009) 550 U.S. 570 (2007)). "is

thereof." "The

claims." U.S. making or performance, lay emphasis rather upon the law of the place 'which has the

most significant contacts with the matter in Auten v. Auten, 124 N.E.2d 99,101 (N.Y. 1954).

New York has the most significant contacts. The policy covers New York entities performing work on a New York City school. Belli, a New York corporation, seeks indemnification and defense in a suit in New York state court. No party disputes that New York law governs this action. e.g., Arch Ins. Co. v. Precision Inc., 584 F.3d 33,39 (2d Cir.

(noting that implied consent is sufficient to establish the applicable choice oflaw); Golden Bancorp v. FDIC, 273 F.3d 514 n.4 (2d Cir. (same). New York law applies. V. Motion to Dismiss Standard

Rule 12(b)(6) of the Federal Rules of Civil allows dismissal of claims when the pleading party has failed state a claim upon which relief can be In ruling on a 12(b)(6) motion, a court must accept all factual allegations in the complaint as true and draw all reasonable inferences in plaintiffs favor. Hayden v. Paterson, 594 F.3d (2d Cir.

survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 Ct. 1937, 1949 (quoting Bell Atl. Corp. v. Twombly, 544, The court's task

merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support Geisler v. Petrocelli, 616 F.2d 636,639 (2d Cir. 1980). issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the Scheuer v. Rhodes, 416 232, 236 (1974). VI. Duty to Defend

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court."

10 has argued that it is entitled to defense in the underlying action on two main grounds: Bovis might recover for the cost of tearing down and replacing walls in the course of repairing the defective pipe; and 2) Bovis might negligence claims from the SCA.

A. Generally

insurer's duty to defend its insured is exceedingly Regal Constr. Corp. v. Nat!. Union Fire Ins. Co. of Pittsburgh, N.E.2d 259, 261 (N.Y. (internal citations omitted). It derives from the contractual relationship between the insurer and the insured, Fitzpatrick v. Am. Honda Motor Co., 575 N.E.2d (N.Y. 1991), and whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered

Worth Constr. Co. v. Admiral Ins. Co .. 888 N.E.2d lO43, (N.Y. (internal citations omitted). This standard applies equally to additional insureds and named insureds under CGL policies. !d. at Whether a complaint falls within a policy's coverage depends on the facts alleged in the underlying complaint rather than the conclusions drawn by the pleader or a party's characterization of a claim. Exeter Bldg. Corp. v. Scottsdale Ins. Co., 913 N.Y.S.2d 733, 735 (2d Dep't 2010). insurer is relieved of the duty to defend only if '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.'" Allianz Ins. Co. v. Lerner, 416 F.3d 115 (2d Cir. (quoting Servidone Constr. Corp. v. Ins. Co .. 477 N.E.2d 441,444 (N.Y. 1985) (alterations in original).

In interpreting the terms of an insurance policy, ambiguities are construed in favor of the insured. Id. (citing Breed v. Ins. Co. ofN. Am., 385 N.E.2d (N.Y. 1978). the policy is unambiguous, its interpretation is strictly a question oflaw for the Uniroyal, Inc. v. Home

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work." Ins. Co., F. 1368, 1374 (E.D.N.Y. 1988) (citing Caporino v. Travelers Ins. Co., 465 N.E.2d 26,27 (N.Y. 1984) (per curiam)).

B. No Duty When Property Damaged is Insured's Defective Work Product Substantial case law exists interpreting and applying the terms of defense and indemnification clauses in CGL policies. these policies largely contain the same language, a review of similar cases is useful.

CGL policies-including the policy at issue-generally do not cover breach of contract actions, since claims for bodily injury or property damage are not presented.

risk intended to be insured [by CGL insurance is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person Roger C. Henderson, Insurance Protection/or Products Liability and Completed Operations-What Every Lawyer

Know, Neb. L. Rev. 415, 441 (1971). J.z.G. Res., Inc. v. King, 987 F.2d 98, (2d Cir. 1993) (emphasis added); see also, e.g., Structural Bldg. Corp. v. Bus. Ins. Agency, Inc., 722 N.Y.S.2d 559, 562 (2d Dep't Contractors may not use a CGL policy as a means to procure defense or indemnification for their allegedly defective work product. Exeter, 913 N.Y.S.2d at 735. hold otherwise would render an insurance carrier a surety for the performance of its insured's Structural Bldg. Prods., 722 N.Y.S.2d at 562.

11 "occurrence" COL

See, Shipyard, Sur. Co.,

COL

Plaintiffs

"occurrence," "an

insured."

"accident,"

"occurrence." "accident" "continuous conditions"

"an causes."

J.Z.C.

"occurrence" "the

activity"); Pavarini Constr. Co., Cant 'I Co., 2003) Breach of contract or warranty is only an covered by a policy if, as a result of the breach, the defective product damages property other than the defective product itself. e.g., Jakobson Inc. v. Aetna Cas. & 961 F.2d 387,389-90 (2d Cir. 1992). In Jakobson Shipyard, Inc., for example, the plaintiff, a tugboat manufacturer, sought a declaratory judgment stating that Aetna, their insurer, had a duty to defend in a breach of warranty suit arising out of allegedly defectively-installed steering mechanisms. Id. at 388.

insurance policies-like that at issue in this case--only required defense for damages caused by an defined as accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the Id. at 389. The Court of Appeals for the Second Circuit found that, because defective installation is not an it was not an occurrence that triggered the insurer's duty to defend:

[T]here is no pertinent ambiguity in the policies' definition of Were we to construe the words or or repeated exposure to

as encompassing damage to a product resulting from the product's failure to perform according to contract specifications, we would expand the agreed-upon coverage. An accident, given its dictionary meaning, is event or condition occurring by chance or arising from unknown or remote Webster's Third New International Dictionary 11 (1981). We might add that in common parlance an external force of some kind is usually involved. However, the [defect] was result offaulty workmanship that did not comply with the specifications ofthe contract and [the underlying] action sounded in contract. There was no chance occurrence, no unknown or remote cause, and no unexpected external force. Id. at 389; see also Res., Inc. v. King, 987 F.2d 98,102-103 (2d Cir. 1993) (analyzing New York cases and holding that an event was only an where 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 Inc. v. Ins. 759 N.Y.S.2d 56, 57-58 (1st Dep't (holding that claim for

12 "damages

components" "essentially

policies").

"damage" Shipyard, 90; "property damage" "damage"

"falls exclusions").

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"portions insured," "[w)hen

component." Sturges to waterproofing, caulking and expansion joint work were said to be caused by the 'volumetric expansion and contraction' of concrete was for breach of contract and, as we have observed, a contract default under a construction contract is not to be equated with an 'accident, including continuous or repeated exposure to substantially the same general harmful conditions' under the subject

Insurers are not obligated to defend claims where the only alleged is to the defective product installed by the insured. See, e.g., Jakobson Inc., 961 F.2d at 389-

see also Structural Bldg. Prods., 722 N.Y.S.2d at 561-62 (holding that there was no

triggering the duty to defend where the only claimed is to the defective product itself); see also Exeter, 913 N.Y.S.2d at 735-36 (finding that similar claim

solely and exclusively under the work product By contrast, where a defective product damages property other than itself, insurers are obligated to defend claims seeking compensation for damage to that other property. Apache Foam Products v. Continental Insurance Co., 528 N.Y.S.2d 448, 449 (4th Dep't 1988) (holding that an insulation manufacturer's insurer had a duty to defend its insured against the claims where the suing party sought to recover for damage to of the roofs ... involving work performed by parties other than the named as the damages did not fall under the policy's work product exclusions). Similarly, one product is integrated into a larger entity, and the component product proves defective, the harm is considered harm to the entity to the extent that the market value of the entity is reduced in excess of the value of the defective Mfg. Co. v. Utica Mut. Ins. Co., 332 N.E.2d 319,322 (N.Y. 1975) (holding that the insured manufacturer of defective straps on ski bindings was entitled to defense because the defect so impaired the value of the bindings as to

constitute property damage

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760206, ("Under Yark

"'), Samuel Sons, 400

"damages roof," "damages

C. Pipes Property

PI.'s Supp. Summ. 1. ("PI.'s Mem.").

"unspecified backcharges"

PI.'s

PI.'s "property damage" PI.'s PI.'s to the bindings themselves); see also Md. Cas. Co. v. WR. Grace & Co., 23 F.3d 617,627 (2d Cir. 1993) (stating that changes in the market value of a property caused by the need to remove asbestos constitutes property damage for the purpose of insurance claim); Chubb Ins. Co. of N.J. v. Hartford Fire Ins. Co., No. 97 Cry. 6935,1999 WL at *8 (S.D.N.Y. 1999) New case law, when an insured is unaware ... of a defect in its component of a product, which defect diminishes the value ofthe product into which it is incorporated, resulting in damage, such damage is considered to arise out of an 'occurrence. ajJ'd 229 F.3d 1135; Marine Midland v. KosojJ & Inc., N.Y.S.2d 959, 962 (4th Dep't 1977) (holding, in a case against insured contractors following installation of a defective roof, that the duty to defend was triggered where the complaint by the building owner alleged well in excess of the value of the including to the building distinct from the roof itself ... as a result of the defective roof, the value of the [building] was reduced beyond the value of the roof[;] that differential is harm not to the roof, but to the building itself').

Defective Not an Occurrence Causing Damage Belli concedes that the cost of repairing or replacing its defective gas pipes constitutes damage to its own work that does not trigger Liberty's duty to defend. Reply Mem. ofL. in

of Cross-Motion for 1, Doc. Entry 17, Apr. 12,2012 Reply Instead it argues that Bovis' counterclaim for permits Bovis to recover both for completed and future repairs to the defective gas pipes. Mem. 1-2. These repairs, Belli alleges, might include charges for tearing down walls in order to access the pipes, as well as for replacing those walls once the repairs are complete. Id. 3-4; Reply Mem. 1-2. It claims that potential damage to these finished surfaces constitutes triggering Liberty's duty to defend under the insurance policy. Mem. 3-4; Reply

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"property damage." Pl.'s

See

"defectively Project pipes;" "has

Subcontract Subcontract work."

"occurrence" Policy,

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"pass through" SCA's SCA's

"an Mem. 1-2. Belli also alleges that the leaking of gas into the building is itself

Mem. 3-4.

Belli concedes that is has no knowledge of the exact location and nature of the gas leak. Tr. ofHr'g, Apr. 19,2012. It has no evidence that the leaking gas damaged any property. It is unaware of what actions were required in order to repair the pipes. [d. It does not know what, if any, damage was done to the building's walls in repairing in the pipes.

The counterclaims alleged by Bovis do not trigger Liberty's duty to defend Belli. Bovis claims that the plaintiff installed certain gas pipes at the and that gas had and was leaking from said it seeks to recover only the costs it incurred or will incur ... to repair plaintiffs defective work or to complete plaintiffs unfinished

Underlying Ans. and Countercl. 25-26. The claim, as pled, is a claim for economic loss resulting from breach of contract.

The gas leak is not an independent accident triggering coverage; its cause was the alleged defect in the pipes installed by Belli. This defect is not an as defined by the since there is no evidence that it damaged elements other than the defective product. e.g., Jakobson, 961 F.2d at 389. Belli does not know the extent of any opening of the walls that took place, ifany. any property damage to building

elements other than plaintiff's own defective product is speculative, Liberty's duty to defend is not triggered.

D. Speculative Claims Not Considered Belli also claims that Bovis might use its counterclaim to non-contractual damages, such as damages to the premises. It asks the court to read the threatened negligence suit and its potential claims against Belli and Bovis, such as impaired value claim

15 etc.,"

"Bovis' Bovis" "Bovis'

defend."

Only

"pass through" consisting of administrative costs of past or future inspections, future monitoring costs, loss of use of the building, into Bovis' counterclaim. PI. Mem. at 7-8.

As noted above, see Part II(H), supra, the SCA has not yet sued Belli, but has been sued by Bovis in a separate action. Plaintiff argues that counterclaim is in the nature of a pass-through ofthe SCA's claims against and that counterclaim should be construed to include the SCA's negligence claim [including its allegations and theories of recovery] for purposes of triggering the duty to PI. 's Reply Mem. 5-6. In essence, plaintiff argues that the duty is triggered because Bovis might seek to use its counterclaim to indemnify itself against the SCA's claims. Belli's position is that while Bovis' claim may appear to be a contract claim for economic loss, it is in fact a negligence claim for losses covered by the Policy.

the allegations in the four comers ofBovis' underlying counterclaim will be considered. That was the only live suit against Belli when tender was made, and remains the only claim against it. The SCA has yet to file an answer in the action with Bovis. While Liberty is aware of the possibility of an SCA suit against both Bovis and Belli, the SCA has not yet filed any claims against either company.

In determining whether to defend its insured, Liberty is not required to anticipate speculative and uncertain possible future claims against Belli. Since the SCA has yet to file an answer in the action against Bovis, of any negligence claims is purely hypothetical. VII. Conclusion

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Franco Belli Plumbing & Heating and Sons, Inc. v. Liberty Mutual Insuance Company

2012 | Cited 0 times | E.D. New York | April 23, 2012

United Because Belli has failed to state a claim upon which relief can be granted, Liberty's motion to dismiss is granted; the action is premature. Belli's motion for summary judgment is denied as moot. No costs or disbursements.

Dated: April 19,

Brooklyn, New

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ORDERED.

ck B. Weinstein enior States District Judge