

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33243
H/prt

_____AD3d_____

Argued - November 28, 2011

PETER B. SKELOS, J.P.
JOHN M. LEVENTHAL
ARIEL E. BELEN
SHERI S. ROMAN, JJ.

2010-10190

DECISION & ORDER

Yangtze Realty, LLC, et al., appellants, v Sirius
America Insurance Company, respondent.

(Index No. 2774/08)

Fogarty & Duffy, P.C., Mineola, N.Y. (Garrett Duffy of counsel), for appellants.

White, Quinlan & Staley, LLP, Garden City, N.Y. (Arthur T. McQuillan of counsel),
for respondent.

In an action for a judgment declaring that the defendant insurer is obligated to defend and indemnify the plaintiffs in an underlying property damage action entitled *Estate of Ramkissoon v Yangtze Realty, LLC*, commenced in the Supreme Court, Kings County, under Index No. 12136/05, the plaintiffs appeal from an order of the Supreme Court, Queens County (Satterfield, J.), dated August 17, 2010, which granted the defendant's motion for summary judgment, in effect, declaring that it is not obligated to defend and indemnify the plaintiffs in the underlying action, and denied the plaintiffs' cross motion for summary judgment declaring that the defendant is obligated to defend and indemnify them in the underlying action.

ORDERED that the order is affirmed, with costs, and the matter is remitted to the Supreme Court, Queens County, for the entry of a judgment declaring that the defendant is not obligated to defend and indemnify the plaintiffs in the underlying action.

An insurer's duty to defend "arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy" (*Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264, quoting *Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65; see *BPA.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714). The duty to defend is not triggered, however, "when the only interpretation of the allegations against the insured is that the factual predicate for the claim falls wholly within a policy

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exclusion” (*Global Constr. Co., LLC v Essex Ins. Co.*, 52 AD3d 655, 656; *see Richner Dev., LLC v Burlington Ins. Co.*, 81 AD3d 705, 706; *Bruckner Realty, LLC v County Oil Co., Inc.*, 40 AD3d 898, 900; *see also Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137; *Howard & Norman Baker, Ltd. v American Safety Cas. Ins. Co.*, 75 AD3d 533, 534). An exclusion from coverage “must be specific and clear in order to be enforced” (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311), “and an ambiguity in an exclusionary clause must be construed most strongly against the insurer” (*Guachichulca v Laszlo N. Tauber & Assoc., LLC*, 37 AD3d 760, 761). Nevertheless, “the plain meaning of a policy’s language may not be disregarded to find an ambiguity where none exists” (*Howard & Norman Baker, Ltd. v American Safety Cas. Ins. Co.*, 75 AD3d at 534; *see Guachichulca v Laszlo N. Tauber & Assoc., LLC*, 37 AD3d at 761).

Here, the defendant established its prima facie entitlement to judgment as a matter of law. The plain meaning of the exclusionary clause invoked by the defendant bars coverage for, inter alia, property damage arising out of work performed on behalf of the insured by a subcontractor where no prior written agreement exists indemnifying and holding harmless the insured in the event of a loss (*see Wilson v Sirius Am. Ins. Co.*, 44 AD3d 754). The defendant submitted evidence showing that the property damage in the underlying action was caused by the work of a subcontractor hired by the insured plaintiffs, and that the insured plaintiffs’ written agreement with this subcontractor did not contain the required indemnity and hold harmless language. Accordingly, the defendant established, prima facie, that it was not obligated to defend and indemnify the plaintiffs in the underlying action (*see Global Constr. Co., LLC v Essex Ins. Co.*, 52 AD3d at 656). In opposition to the defendant’s prima facie showing, the plaintiffs failed to raise a triable issue of fact.

Accordingly, the Supreme Court properly granted the defendant’s motion for summary judgment and, for the same reason, properly denied the plaintiffs’ cross motion for summary judgment.

Since this is an action for a declaratory judgment, the matter must be remitted to the Supreme Court, Queens County, for the entry of a judgment declaring that the defendant is not obligated to defend and indemnify the plaintiffs in the underlying action (*see Lanza v Wagner*, 11 NY2d 317, 334, *appeal dismissed* 371 US 74, *cert denied* 371 US 901).

SKELOS, J.P., LEVENTHAL, BELEN and ROMAN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court