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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30

HRH CONSTRUCTION INTERIORS, INC. and
NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH PENNSYLVANIA,

Index No. 122243101

Plaintiffs,

DECISION AND ORDER

- against -

ROYAL SURPLUS LINES INSURANCE COMPANY
and ROYAL INSURANCE COMPANY OF AMERICA,

Defendants.

ROYAL SURPLUS LINES INSURANCE COMPANY
and ROYAL INSURANCE COMPANY OF AMERICA,

Third-party Plaintiffs,

-against-

HILLSIDE IRON WORKS,

Third-party Defendant.

SHERRY KLEIN HEITLER, J.:

The plaintiffs HRH Construction Interiors, Inc. (HRH) and National Union Fire Insurance Company of Pittsburgh Pennsylvania (National Union) move, pursuant to CPLR 3001 and 3212, for an order declaring that the defendants Royal Surplus Lines Insurance Company (Royal Surplus) and Royal Insurance Company of America (Royal Insurance) are obligated to immediately defend and indemnify the plaintiff HRH in the underlying lawsuit; and declaring that Royal Surplus and Royal Insurance are obligated to reimburse the plaintiffs for all legal fees expended in the defense of the underlying lawsuit from December 30, 1999 to the present.

The defendants Royal Surplus and Royal Insurance cross-move, pursuant to CPLR 3001 and 3212, for an order: (1) denying the plaintiffs' motion for *summary* judgment; (2) declaring that

National Union has a duty to defend HRH in the underlying action; ***(3)*** declaring that HRH is an additional insured under the Royal Surplus policy; (4) declaring that National Union and Royal Surplus are co-primary insurers of HRH; ***(5)*** declaring that National Union and Royal Surplus are required to share equally all costs of defending HRH in the underlying action; (6) declaring that Royal Surplus is required to reimburse National Union for only 50% of **all** reasonable costs of defending HRH in the underlying action from November 28, 2000; (7) declaring that Royal Insurance has no current duty to indemnify HRH in the underlying action; (8) dismissing that portion of the complaint that seeks a declaration that Royal Surplus has an obligation to indemnify HRH in the underlying action; (9) declaring that Royal Insurance has no current duty to defend or indemnify HRH in the underlying action; (10) declaring that under Royal Insurance's umbrella policy, it has no obligation to reimburse National Union for defending HRH in the underlying action; and (11) dismissing that portion of the complaint that seeks a declaration that Royal Insurance has a duty to defend and indemnify HRH in the underlying action.

This action seeks a declaration of the rights and obligations of the various parties to three insurance policies, in relation to an underlying personal injury action that arose from a worker's fatal fall on the stairs at a construction project. HRH was the general contractor of the project. National Union was HRH's general liability insurer. The third-party defendant, Hillside Iron Works (Hillside), supplied the stairs and railings for the project. Non-parties Helmark Steel Inc., and its affiliate Falcon Steel Co. (collectively Hellmark), were the structural steel sub-contractors for the project. The defendant Royal Surplus was Helmark's and Hillside's general liability insurer. The defendant Royal Insurance was Helmark's and Hillside's umbrella insurer.

The contract between HRH and Helmark required that Helmark maintain insurance naming HRH as an additional insured. Paragraph 13.2(2) provides that "[a]ll policies to name Contractor,

Owner, Property Owner, A/E, any other parties set forth in the Prime Contract as additional insureds on a primary basis".

Both the general liability policy procured by Helmark from Royal Surplus, and the umbrella policy obtained by Helmark from Royal Insurance, did in fact name HRH as an additional insured.

The National Union policy issued to HRH, provides that it is "primary," except in certain circumstances which are inapplicable here. The policy also provides for a flexible method of sharing the loss with other policies that are not "Excess" (insurance policy § 4 [a], [b] and [c]; Exhibit 3 to cross motion).

An undated endorsement change attached to the Royal Surplus policy issued to Hellmark, entitled "ADDITIONAL. INSURED (BLANKET PRIMARY)" provides that:

> If you are required by a written contract to provide primary insurance this policy shall be primary as respects your negligence and Condition **4.** Other Insurance does not apply, but only with respect to coverage provided by this policy."

In support of their motion for summary judgment, HRH and National Union argue that the defendants are obligated to defend **and** indemnify HRH in the underlying action.

In support of their cross motion for summary judgment the defendants Royal Surplus and Royal Insurance make the following arguments. Both National Union and Royal Surplus have a duty to defend HRH. National Union and Royal Surplus are co-insurers of HRH with respect to the underlying action. Pursuant to the other insurance provisions of the respective policies, both National Union and Royal Surplus are required to share equally all costs of defending HRH. Royal Surplus is required to reimburse National Union for 50% of the reasonable and necessary costs of defending HRH in the underlying action only from the date of tender of the summons and complaint, November 28, 2000. That portion of the plaintiffs' motion for summary judgment which seeks a declaration that Royal Surplus is required to indemnify HRH in the underlying action must be denied

and the complaint dismissed because: there has been no finding of liability; HRH's liability may not have arisen out of Helmark's or Falcon's ongoing operations, as is required to trigger an indemnity obligation under the endorsement; and plaintiffs cannot meet their burden of proof. Finally, that portion of the plaintiffs' motion for summary judgment which seeks a declaration that Royal Insurance, pursuant to the umbrella policy, is required to defend and indemnify HRH in the underlying action, and reimburse National Union for defense costs incurred in the underlying action, must be denied and the complaint dismissed.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [19571). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposingpapers (Winearad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summaryjudgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v Citv of New York, 49 NY2d 557 [1980]).

Where the terms of an insurance policy are clear and unambiguous, interpretation of those terms is a matter of law for the court (Hartford Acc. & Indem. Co. v Wesolowski, 33 NY2d 169 [19731). An 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 (Spoor-Lasher Co. v Aetna Cas. & Sur. Co. 39 NY2d 875 [1976]).

Here, the plaintiffs, by citing both HRH's contract with Helmark, and the insurance contract between Helmark and Royal Surplus, satisfied its burden of producing evidence which, if uncontroverted, is sufficient to warrant judgment in their favor as a matter of law. The defendants, on the other hand, have not met their burden of demonstrating the existence of a material triable issue of fact.

The policy obtained by Helmark from Royal Surplus, includes an additional insured endorsement, providing primary coverage to any entity that Helmark was contractually required to primarily insure for liability arising out of Helmark's work. Royal Surplus' contention, that it should not be held on this endorsement, tortures the language of the additional insureds endorsement.

Royal Surplus and Royal Insurance's precise arguments were made, and rejected, in Pecker Iron Works of New York, Inc. v Traveler's Insurance Co. (99 NY2d 391 [2003]). The court was called upon to interpret a virtually identical additional insured endorsement contained in a subcontractor's policy. The court found that the subcontractor's policy clearly named the general contractor as an additional insured and provided coverage to the general contractor that was primary. The coverage was primary because: an additional insured enjoys the same protection as the named insured; the subcontractor agreed, in writing, both to name the general contractor as an additional insured and to provide the general contractor with coverage that was primary; and the policy obtained by the subcontractor agreed to provide primary insurance to any party with whom the subcontractor had contracted in writing for insurance to apply on a primary basis.

Here, since the complaint in the underlying personal injury action contains allegations against HRH, and the Royal Surplus policy names HRH as an additional insured and provides coverage that is primary, Royal Surplus has a duty to defend as a matter of law. The underlying complaint, which alleges bodily injury sustained by the primary insured's employee when he fell down a stairway,

clearly falls within the general scope of the policy's coverage for bodily injury arising out of the primary insured's work for the additional insureds.

However, a declaration that the defendants have a duty to indemnify HRH requires a determination that the underlying accident arose out of Helmark's performance of the work under its subcontract with HRH, which must await a determination of liability in the underlying personal injury action (79" Realtv Co. v X.L.O. Concrete Corp., 247 AD2d 256 [1st Dept 1998]).

Finally, since Royal Surplus' coverage is primary, and there is no issue concerning HRH giving timely notice to Royal Surplus of the underlying personal injury lawsuit, defense costs will have to be paid by Royal Surplus from December 30, 1999, the date the underlying suit commenced.

Accordingly, it is

ORDERED that the plaintiffs' motion is granted, and the defendants' cross motion is denied; and is

ADJUDGED AND DECLARED that the defendant Royal Surplus Lines Insurance Company is obligated to immediately defend the plaintiff HRH in the underlying lawsuit; and that Royal Surplus is obligated to reimburse the plaintiffs for all legal fees expended in the defense of the underlying lawsuit from December 30, 1999 to the present.

Dated: JANUARY 29 ,2004

Enter:

SHERRY KLEIN HEITLER
J.S.C.